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No. S257844

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE, Plaintiffs and Respondents, v. KOPP, Defendants and Petitioners.	Ct. of Appeal No. D072464 Sup. Ct. No. SCN327213

After Decision by the Court of Appeal, Fourth Appellate District

APPLICATION TO FILE AMICI CURIAE BRIEF and PROPOSED BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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Legal Services for Prisoners with Children (LSPC)
Legal Services of Northern California (LSNC)
Justice2Jobs Coalition (J2J)
National Association for the Advancement of Colored People (NAACP)
Western Regional Advocacy Project (WRAP)
GLIDE

APPLICATION TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to the California Rules of Court, Rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as *amici curiae* in support of Appellant Christi Kopp. This application is made pursuant to Rule 8.200(c) of the California Rules of Court. No party or counsel for any party in the pending appeal authored the proposed *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation of submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation of submission of the brief, other than the *amicus curiae*, their members, or their counsel in the pending appeal.

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Timeliness of Application

Rule 8.882(d)(1) requires that an amicus brief be filed within 14 days after the appellant's reply brief. Appellant's reply brief was filed on January 28, 2021. *Amici* now file this motion and the attached brief within the time period specified in Rule 8.882(d)(1).

Background of *Amici Curiae*

The University of California, Irvine School of Law Consumer Law Clinic provides advocacy to low-income consumers affected by burdensome debt and loans through litigation, policy analysis, and community education and outreach. Students and faculty collaborate to bring consumer protection claims and provide direct representation in state and federal court to improve financial stability for vulnerable Californians.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF) works to advance, protect and promote the legal rights of communities of color, and low-income persons, immigrants, and refugees. Assisted by pro bono attorneys, LCCRSF provides free legal assistance and representation to individuals on legal matters through direct services, impact litigation, and policy advocacy. A substantial portion of LCCRSF's racial and economic justice work focuses on protecting the rights and wealth of unhoused, low-income, and communities of color who often are subject to

court-imposed debt. LCCRSF has represented and advocated for people with traffic and criminal debt since for over 15 years and has been instrumental in much of the litigation, documentation, and legislative advocacy on these issues.

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

The United CORE Alliance (UCA) is an organization created by social equity advocates for the advancement of social equity in the cannabis industry. The UCA assists individuals within historically underserved communities by assisting community members with job training, personal development and equipping them with resources. Our Organization engages

populations and communities most harmed by the War on Drugs to create pathways for job placement in emerging markets, facilitates educational opportunities to increase economic mobility, and organizes legal support to formerly incarcerated individuals. Khalil Ferguson, currently the president for the UCA centers his studies and advocacy around the intersections of economic development, the criminal justice system, and their impact on low income communities which are also drug war impacted communities.

All of Us or None is a grassroots civil and human rights organization fighting for the rights of formerly-and currently-incarcerated people and our families. We are fighting against the discrimination that people face every day because of arrest or conviction history. The goal of All of Us or None is to strengthen the voices of people most affected by mass incarceration and the growth of the prison-industrial complex. Through our grassroots organizing, we are building a powerful political movement to win full restoration of our human and civil rights.

Legal Services for Prisoners with Children (LSPC) organizes communities impacted by the criminal justice system and advocates to release incarcerated people, to restore human and civil rights, and to reunify families and communities. We build public awareness of structural racism in policing, the courts, and the prison system, and we advance racial and gender justice in all our work.

Justice2Jobs Coalition (J2J) is a community power-building project that rejects criminal punishment bureaucracy and advocates for the creation of humane systems. We catalyze Sacramento region's criminal legal, economic and anti-criminalizing policy reform. We believe in forgiving fines and fees, advocating for criminal records repair and other restorative practices that advance pathways for economic opportunity. We recognize that criminally impacted people have traumatic lived experience, including from sustained, structured social oppression. We look at justice systemically—excavate and report facts, interrogate processes, and create solutions for healthy, equitable, and inclusive neighborhoods.

Legal Services of Northern California (LSNC) is a non-profit legal aid organization, which provides free legal services to thousands of clients annually. LSNC has seen first-hand the particular burdens that court debt imposes on its clients through individual representation, legal clinics, community legal education, and policy advocacy. LSNC's low-income clients often face a cascading series of challenges that result from court debt, including loss of driver's license, loss of employment, difficulty in obtaining criminal record remedies, inaccessibility of health care in rural areas, lost housing opportunities due to damaged credit, and loss of educational opportunity. Court debt both creates and compounds numerous obstacles facing our clients with criminal records.

National Association for the Advancement of Colored People (NAACP) is the largest and most pre-eminent civil rights organization in the nation. We have over 2,200 units and branches across the nation, along with well over 2M activists. Our mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons. Since its inception in 1915, the Greater Sacramento NAACP has advocated for fair criminal justice laws and procedures to protect communities of color and other vulnerable communities. The Greater Sacramento NAACP is actively working to address the barriers that stems from historic racial injustice. Fines and fees are among the most significant barriers impacting Black people and disinvested neighborhoods.

Western Regional Advocacy Project (WRAP) was founded in 2005 by local social justice organizations across the West Coast to expose and eliminate the root causes of homelessness and poverty, empower communities to demand protection of civil and human rights, and advocate for restoring federal funding for affordable housing. As such, WRAP is committed to ending predatory and oppressive practices that impact low-income and communities of color, including the elimination of criminal fines, fees, and assessments.

GLIDE is a leading social service provider and nationally recognized center for social justice, dedicated to fighting systemic injustices, creating pathways out of poverty and crisis, and transforming lives. Through our integrated comprehensive services, advocacy initiatives, and inclusive community, we empower individuals, families, and youth to achieve stability and thrive. GLIDE is on the forefront of addressing some of society's most pressing issues, including poverty, housing and homelessness, and racial and social justice. Government reliance on financial penalties remains flawed and inequitable, and fines and fees continue to be harmful, costly, and counterproductive, burdening our most vulnerable neighbors and loved ones with system-imposed debt, much of which is uncollectable. We cannot afford to continue exacting fines and fees from those struggling to meet their own basic needs.

Interest of *Amici Curiae*

Amici seek to add to this case the perspective of low-income Californians affected by court debt, so that the Court may take into account the broader consequences of a system that imposes court financial obligations that defendants cannot afford to pay, with procedural barriers to relief. The issues presented in this case implicate the interests of thousands of Californians, including *amici* organizations' California clients, who are unfairly punished because of their poverty when assessed court fines and fees. Given the high

percentage of people in criminal trials who do not have enough money for basic life necessities, the practice of routinely imposing substantial revenue-generating fees on convicted people traps families in a cycle of poverty and entanglement with the criminal justice system. Viewed in the broader social context, these practices serve to entrench poverty and social disadvantage in low-income communities of color, without any countervailing societal benefit.

Need for Further Briefing

Amici's proposed brief will provide the Court with important perspectives not yet offered in the parties' briefing but helpful to the Court's assessment of the requirement that courts assess a person's ability to pay when imposing fines and fees, and the importance of placing the burden of proof on the government. We submit this *amicus* brief to (1) provide the Court with real-world stories that show the collateral consequences of court-ordered debt on individuals, families, and communities of color; and (2) demonstrate ways in which the current court-funding scheme has become inefficient and harmful, particularly as courts impose fines and fees on people who cannot afford to pay them.

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Conclusion

For the foregoing reasons, *amici curiae* respectfully request that they be granted leave to file the accompanying proposed brief for filing in this case.

November 23, 2021

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INTRODUCTION

Amici submit this brief to bring the Court's attention to the real-life experiences of people impacted by fines, fees, and assessments imposed by court systems in California and to demonstrate how the court-funding system relates to and perpetuates the racism embedded within the state's criminal justice system.

Amici also submit this brief to support Jason Samuel Hernandez and Christi J. Kopp's position that a court must not impose or execute legal financial obligations on people who cannot pay, and that the government, if it wishes to impose such financial obligations, should bear the burden of proving that a person can pay any proscribed fines, fees, and assessments. Appellant's Reply Brief on the Merits, People v. Kopp, (2020) (No. S257844); *see also* Appellant's Opening Brief at 16, People v. Kopp (2019) (No. S257844).

In Section I, *amici* provide evidence of the discrimination that precipitated today's iteration of California's court-funding scheme. In Section II, *amici* present stories of people who are impacted by fines, fees, and assessments to demonstrate how court-debt creates insurmountable barriers to safe and successful community integration. Regardless of a person's criminal offense, no one should be subject to further punishment by the state simply as a result of their poverty. *Amici* then explain why ensuring that courts do not impose financial obligations onto people who cannot pay will reduce harms and discrimination in the sentencing and post-conviction experiences of poor people in California.

Finally, *Amici* urge the Court to waive outstanding court-imposed debt of people who cannot pay, without placing an unreasonable burden on such

people. Because California's current court-funding scheme unnecessarily causes harm and exacerbates disparities, *Amici* submit this brief on behalf of people with the least financial means, those who most need this Court to prohibit the imposition and execution of unpayable legal financial obligations.

ARGUMENT

I. The right to an ability-to-pay determination must be understood within the context and history of California's court-funding system.

California's current court-funding model burdens people with the least political power—individuals and families of color who are impacted by the carceral system—with demands to finance the court system. This model developed with its roots in centuries-old race discrimination and in such a way that harms hundreds of thousands of families in California today.

A. The Rise of Mass Incarceration Has Overburdened California's Court System.

The Civil Rights Movement, marked by the passing of major civil rights legislation, at great cost to Black Americans, generated backlash from state legislatures throughout the United States. Lawrence Glickman, *How White Backlash Controls American Progress*, The Atlantic, May 2020. ("The 'white backlash'…produced a politics of displacement, shifting the focus from those denied equality under the law and demanding justice to those who imagined threat or inconvenience in the possibility of social change."). Lawmakers moved in tandem to enact laws and adopt policies designed to undermine the victories of the Movement. See Michelle Alexander, *The New Jim Crow: Mass Incarceration In The Age of Colorblindness* 40-57 (2012). This process of destabilizing the social progress of Black Americans acted as an impetus for the tactical criminalization of Black Americans, creating a

phenomenon that is now widely understood as mass incarceration. *Id*. at 43 ("After the passage of the Civil Rights Act, the public debate shifted focus from segregation to crime. The battle lines, however, remained largely the same. Positions taken on crime policies typically cohered along lines of racial ideology.").

California succumbed to the same political pressures. The state adopted policies and enacted laws that would target and incarcerate its communities of color at staggeringly high rates. *See e.g.*, Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* 107-113 (2007) (describing California legislative initiatives that "produced a remarkable racial and ethnic shift in the prison population."). One such initiative was the Three Strikes Law, which significantly increased the length of sentences for people who were convicted of multiple offenses. Brian Brown & Greg Jolivette, Cal. Legis. Analyst's Off., A Primer: Three Strikes - The Impact after More than a Decade (Oct. 2005). Between 1994 and 2004, California sent "80,000 second strikers and 7,500 third strikers to state prison" with disproportionate representations of Black people. *Id*. (In California, Black people "make up 45 percent of the third striker population, which is 15 percent higher than in the total prison population."). Thus, over the course of forty years, the number of people in California prisons jumped 700 percent, during a time when "crime rates in America were actually stabilizing or going down not up." David Schultz, *No Joy in Mudville Tonight: The Impact of Three Strike Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 Cornell J.L. & Pub. Pol'y 557, 558 (2000); *cf*. Gilmore, *supra* at 7 (explaining that crime rates in California "peaked in 1980 and declined, unevenly but decisively, thereafter." And yet, "[s]ince 1984, California has [constructed] twenty-three major prisons" compared to "only twelve prisons between 1852 and 1964.").

Mass incarceration is very costly for courts. *See e.g.*, Peter Wagner & Bernadette Rabuy, *Prison Policy Initiative, Following the Money of Mass Incarceration* (Jan. 25, 2017), *available at* https://www.prisonpolicy.org/reports/money.html ("[M]ass incarceration costs the government and families of justice-involved people at least $182 billion every year."). The criminalization policies that have followed the Civil Rights Movement have placed enormous financial pressure on California courts, which were already made vulnerable by the state's tumultuous economy. Judicial Council of California, Legislative Briefing on Trial Court Funding (1997) ("In addition to the *quantitative* growth in demand for trial court services, three strikes law, increased prosecution of felonies, increased caseloads in juvenile and family law, and ever-greater complexity in civil cases… have caused a significant *qualitative* growth in demand for court services.").

B. California's Criminal Fines, Fees, and Assessments Evolved as a Fragmented Response to Fiscal Needs, Precipitating an Irrational and Harmful System.

1. California courts have experienced dramatic shifts in capacity, resources, and funding schemes in recent decades.

Until 1985, California's trial courts were funded by their respective county governments. Elizabeth G. Hill, Legis. Analyst's Office, Trial Court Funding "Realignment," 1992-93 Budget: Perspectives and Issues Legis. Analyst's Office Report (February 1992).

> Supplemented by extremely limited state funding, the counties had primary responsibility for major costs of the court system: salaries for municipal and justice court judges; retirement benefits for justice court judges; expenses related to all non-judicial court personnel; and all operational and facilities costs of the superior, municipal, and justice courts.

Claudia Ortega, *The Long Journey to State Funding*, Cal. Cts. Rev., The Road to Independence: A History of Trial Court Funding 7-8 (2009). After California voters passed Propositions 13 and 4 in 1978 and 1979, which dramatically cut and effectively stagnated local property and other taxes, each county's ability to raise taxes for its revenue needs was significantly restricted. Colin H. McCubbins & Mathew D. McCubbins, *Proposition 13 and the California Fiscal Shell Game*, 2 Cal. J. Pol. & Pol'y 1,3 (2010).

The state judiciary called attention to "problems [with funding] so severe" as to repeatedly require "emergency funding from the Legislature to assist several courts facing imminent closure, a breakdown in basic services to the public, and severe layoffs of employees," and implored the state to transition from a county-funded system to a state-funded system. *See* Chief Justice Ronald M. George, Cal. Cts. Rev., The Road to Independence: A History of Trial Court Funding 4, *supra,* (2009). In 1997, the Legislature embarked on a journey of a series of statutory changes that "realigned" funding responsibilities from counties to the state. Mac Taylor, Legis. Analyst Office, *Completing the Goals of Trial Court Realignment* Legis. Analyst's Office Report (September 28, 2011).

The state then faced a revenue gap from the courts, and the Legislature (fruitlessly) positioned legal financial obligations more prominently into the court funding scheme to fill it. See Ortega, *supra* at 7; Alexes Harris, *The Cruel Poverty of Monetary Sanctions*, The Society Pages (March 4, 2014) ("Ironically, as a result of mass conviction and incarceration, jurisdictions cannot afford criminal justice costs. They are attempting to literally transfer these expenses to defendants."). *See also People v. Castellanos*, 175 Cal. Ct. App. 4th 1524, 1533-34 (2009) (Kriegler, J., concurring) ("As the Legislature grapples with the budget deficit, there is talk of new and additional fines, fees, and assessments in criminal cases. The system, as it exists, is likely to

only become more complicated in the immediate future.") McCubbins & McCubbins, *supra* at 32 ("Charges and fees have become an integral part of the California budgetary landscape, especially in the wake of the [Proposition 4] … Fees give the government a revenue stream that is not subject to limitation and hard for voters to track."); John K. Hudzik, *Financing and Managing the Finances of the California Court System: Alternative Future*s, 66 S. Cal. L. Rev. 1813, 1816–18, 1838 (1993).

2. The amount of court-imposed debt leveraged against a person is determined in large part by revenue needs and not the crime committed.

Over fifty state funds, and many local funds, are eligible for the revenue generated from court-imposed debt. Mac Taylor, Legis. Analyst's Off., *The 2017-18 Budget: Governor's Criminal Fine and Fee Proposals* 8 Legis. Analyst's Office Report (2017). The Legislature sets the amount of a fine for each criminal offense, called a base fine. *Id*. at 5. California courts must add on specific charges to the base fine, such as "other fines, fees, forfeitures, penalty surcharges, assessments, and restitution orders." *Id*. And, depending on the specific violation, courts may levy even more than that sum. *Id*. The add-ons "can be many times greater" than the statutory base fine. [1]

The cost to people of discretionary add-ons varies widely county-to-county for the same offense. *Id.* at 7. For example, in 2019, Los Angeles County charged between $696 and $796 for a pre-sentence investigative report. Contra Costa County charged $176 for the same report. Sandra Blanco et al.,

[1] After the passage of the 2020 Families over Fees Act, which eliminated 23 fees 70+ fines and fees remain. *Uniform Bail and Penalty Schedule*, *supra*; TAYLOR, *supra*. For a table list of the 23 fees eliminated by AB 1869 and their associated fee types, see *Families Over Fees – Debt Free Justice Adult CJ Fee Repeal in the FY 2020-21 Budget*, *available at* https://finesandfeesjusticecenter.org/content/uploads/2020/10/List_Of_Fees_FamiliesOverFeesTBL1.docx.

ACLU S. Cal., *Costs of Injustice: How Criminal System Fees Are Hustling Los Angeles County Families*, 10 (2019). Los Angeles County also charged $155 per month in probation supervision fees, while Santa Barbara charged $90 per month. *Id.* at 10.

Even court debt purportedly grounded in a rationale of proportionality to the offense, such as the restitution fine, which the State asserts is distinguishable from other court-debt, is subject to increases disconnected from the severity of the offense. Answering Brief on the Merits for California et al. at 12, *California v. Kopp*, 451 P.3d 776 (2019) (No. S257844) (hereinafter "RABM") at 21–22; Cal. Penal Code §1202.4. For example, California increased its restitution fine minimum by 50% in 2011, from $100 to $150. *See*, *e.g.*, Staff of S. Appropriations Comm., Fiscal Summary on A.B. 898, at 1 (2011-12) ("By increasing the minimum fines by 50 percent, the maximum potential increase in revenue would be up to $28 million per year if collections at the increased rates continued at the same level. However, some level of attrition is expected in the collection of the higher fine as offenders typically have limited funds.").

Restitution fines are subject to a county-by-county and judge-by-judge divergent and discretionary application. *See* §§ 1202.4(b), 1202.45 (in addition to victim restitution, "the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record" and the "additional parole revocation restitution fine [shall be] in the same amount as that imposed pursuant subdivision (b) of Section 1202.4."). The result is that the total imposed charge often significantly exceeds the base fine, sometimes more than quadrupling it. In fact, restitution fines have accounted for the bulk of uncollectable debt. Douglas N. Evans, *The Debt Penalty — Exposing the Financial Barriers to Offender Reintegration*, Res. &

Evaluation Ctr., John Jay Coll. Crim. Just. 1, 11 (2014) ("Restitution usually comprises the largest proportion of criminal debt for individual offenders. In total, offenders in the United States owe more than $50 billion in criminal justice debt, and in 2007, total restitution debt was nearly $40 billion."). The State's assertion that an unpayable restitution fine "may still serve the [government's] goals of punishment" fails to appreciate this reality, and that a person with sufficient financial means can escape it absolutely. RABM at 30. *See e.g.*, Matthew Dickman*, Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687 (2009) (describing similar failures of federal restitution, "low collection rates have impeded the goal of enhancing victim compensation, and unfulfilled restitution judgments have decreased victim satisfaction. …[T]he burden of mandatory restitution has hindered offender rehabilitation, which likely increases recidivism rates and results in new victims of crime.").

II. Ensuring that people who are poor in California do not have to pay court-imposed fines, fees, and assessments will reduce harm and mitigate discriminatory effects.

Up to 90 percent of people with criminal cases qualify for a public defender, because of their indigency. Janet Reno et al., *Contracting for Indigent Services, Special Report*, Bureau of Just. Assistance 3 fn. 1 (Apr. 2000). Though a government agency has already found indigency, California has no statute, rule, regulation or widely-known judicial practice that prevents state courts from imposing financial obligations under these circumstances. *See*, *e.g.,* Cal. Penal Code §§ 987, 987.5 (requiring financial examination to qualify for public defender); *see also*, Cal. Veh. Code, § 23649 (ability to pay statute with no mention of public defender determination). As a result, people who have confirmed their indigency are straddled with court debt that often leads to spiraling financial, psychological, and familial harms. *Amici* affirm that, as the State acknowledges, many legal financial obligations "may

be impossible for [a] defendant to ever satisfy; and some defendants may be able to pay off such debts but only with great personal and familial sacrifice." RABM at 12.

A. The Impacts on People Who Cannot Afford to Pay Court-Imposed Fines, Fees, and Assessments Are Devastating and Far-Reaching.

As the Court determines the proper process for ensuring that any imposed debt is constitutional, it must consider the financial realities of the people affected. On remand from the United States Supreme Court's decision in *Timbs v. Indiana*, Indiana's highest court held that to ignore people's finances in this type of constitutional inquiry "would generate a new fiction: that taking away the same ... property from a billionaire and from someone who owns nothing else punishes each person equally." *State v. Timbs,* 134 N.E.3d 12, 36 (Ind. 2019).

Many people have been harmed by the courts' current system of imposing and executing legal financial obligations. This section details stories of the real people in California who have experienced such harm. And none distinguished between so-called "user fees" and punitive fees—the impact of being saddled with debt you cannot afford to pay is the same no matter what the State names it. The vast majority of people identified below did not have legal counsel when trying to manage court-ordered debt and had little ability to navigate a complex court system.[2]

[2] All original interviews cited in this *amicus curie* brief were conducted by the University of California, Irvine School of Law Consumer Law Clinic between April 17, 2020 and February 20, 2021. Interviews were conducted in California remotely by telephone and videoconferencing. Written summaries of interviews have been reviewed and approved by interviewees, and consent obtained for the use of stories and names in this brief. Interview notes are on file with the UCI Consumer Law Clinic.

1. People who are previously incarcerated face many barriers to finding employment.

Many, if not most, people have a very difficult or nearly impossible experience searching for work after their incarceration. *See* Lucius Couloutte & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, Prison Pol'y Initiative (July 2018), https://www.prisonpolicy.org/reports/outofwork.html. The unemployment rate for people who were previously incarcerated is "nearly *five times higher* than the unemployment rate for the general United States population, and substantially higher than even the worst years of the Great Depression." *Id.* (emphasis in original). In January 2021, the Congressional Research Service published a report describing that the economic downturn related to the COVID-19 Pandemic brought the "quickest month-over-month increase in unemployment rates and the highest overall unemployment rate since the CPS data started being collected in 1948." Gene Falk et al., Cong. Rsch. Serv., R46554, *Unemployment Rates During the COVID-19 Pandemic: In Brief* 2 (2021). This catastrophic impact is still not as high as the unemployment rate of previously incarcerated people during a healthy economy. Couloutte & Kopf, *supra* ("Among working-age individuals [25-44 in this dataset], the unemployment rate for formerly incarcerated people was 27.3%, compared with just 5.2% unemployment for their general public peers.").

Incarceration stigmatizes individuals in hiring processes, prevents access to job training, and results in the loss of networks for employment opportunities; "together . . . [this] can have negative impacts on an ex-offender's employment opportunities upon release." Evans, *supra*, at 11.

These negative impacts and high unemployment rates disproportionately impact Black people, because "[Black] Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences." The Sentencing Project, Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System (2018). Thus, Black people bear the burden of the multiple and overlapping impacts incarceration has on employment opportunities.

For people who are able to find work after incarceration, "the only employment options available tend to be low-paying and unstable" with limited opportunities for increase in pay or other upward mobility. Saneta deVuono-powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Ctr. 20–21 (2015). Gabriel Johnson, who lives in low-income housing in Humboldt County, dreams of one day securing a professional job above minimum wage so that he can eventually pay the tens of thousands of dollars he owes in court-imposed debt. Telephone Interview with Gabriel Johnson (Feb. 8, 2021). Mr. Johnson reports that he owes 50 to 100 dollars per day for each day he was held in jail in Sacramento County. *Id.*

2. People who were previously incarcerated and struggling with court-imposed debt often do not earn enough to live independently; wage garnishment and bank levies further reduce their income.

When courts impose debt on low-income people, it aggravates job insecurity, can result in wage garnishment, and pushes families further into poverty. For example, in order to pay his court-imposed debt, Joe Williams managed to

find multiple part-time jobs after being released from San Francisco County Jail. Fin. Just. Project, Criminal Justice Administrative Fees: High Pain for People, Low Gain for Government 6 (2018) (citing Evan Sernoffsky, *S.F. Ordinance Targets Fees Faced by Poor Defendants*, S.F. Chron. (Feb. 5, 2018, 6:34 PM), https://www.sfchronicle.com/crime/article/S-F-ordinance-targets-fees-faced-by-poor-12553613.php. However, after missing some payments, the state began to garnish his wages: "they're taking out more than I can [afford]…. I want to support my children and I don't have the money." *Id.* This is the same for many others, including Gabriel Johnson, who struggles as a college student, because most cash or check deposits to his bank account are subject to levy for court-ordered debt, including student loan deposits: "There are no protections from the county if I were to deposit the [federal student] loan instead of cashing it." Telephone Interview with Gabriel Johnson (Feb. 8, 2021).

Susan Owens faced similar obstacles. For years, she was unable to find stable work. Telephone Interview with Susan Owens (Nov. 20, 2020). However, once Owens found a job and began to make payments on her court-imposed debt, the California Franchise Tax Board garnished her paycheck. *Id*. She cannot live independently as a result of the continuous wage garnishment and must rotate living arrangements with friends and family: "Paying off the debt is not feasible for me; doing time is more feasible." *Id*.

Court-imposed debt on people who cannot afford to pay also makes other financial obligations unmanageable. Evans, *supra*, at 7 ("The majority of offenders may never be able to pay off their criminal debt because they are poor both before and after their incarceration.").

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Likewise, C.M. cannot keep sustainable finances as a result of court debt. Telephone Interview with C.M. (Apr. 17, 2020). He is so scared of being reincarcerated for his outstanding debt, he avoids having any financial transactions on paper such as purchasing property, applying for financial assistance, or filing taxes. *Id*.

To make matters worse, people who are able to the make minimum payments find that they are paying the interest or penalty fees rather the principal balance. *See* Cal. Penal Code § 1202.4(f)(3)(G) (West 2019) (accrual of ten percent per annum interest of restitution amount); *People v. Cowan,* 47 Cal. App. 5th 32 (2020) (holding section 1202.4(c) fees to be unconstitutional as applied). Courts may impose "up to" a three-hundred-dollar penalty for a defendant who misses a single payment or fails to appear; nearly every court routinely charges the full $300. Cal Penal Code § 1214.1(a) (West 2015); Lawyers' Committee for Civil Rights of the San Francisco Bay Area, *Paying More for Being Poor: Bias and Disparity in California's Traffic Court System* 7 (May 2017).

The interest and penalties associated with court-ordered debt leave poor people in unending restricted liberty. For example, David Henschel of Los Angeles was placed on five years of probation and entered into a $25 per month payment plan for his $4,400 balance. Blanco et al., *supra*, at 20. After three years of paying, he still owed approximately $4,300, which would make it impossible for him to pay off before his probation period was scheduled to end. *Id*. ("I asked my probation officer exactly how much more time I faced. He replied that the time period of five years was misleading. He said that as soon as I paid the $4000-plus amount of fees and fines in full, my probation would terminate."). Restitution and restitution fines have the same

effect.

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3. People who were previously incarcerated and now struggle with court-imposed debt live with no or poor credit.

Outstanding debt can negatively impact a person's credit score, especially if the person is unable to pay the debt on its monthly due date. People with poor credit encounter a number of issues that, when paired with the barriers inherent to reentry, are immobilizing. Evans, *supra*, at 9 ("[Debt] hobbles existing credit, which makes it even more difficult to get a job, to receive approval to rent an apartment, and to apply for loans."). For example, people with poor credit "only qualify for the highest interest-rate loans" which creates unending unmanageable debt. Diana Elliott & Ricki Granetz Lowitz, *What is the Cost of Poor Credit?,* Urb. Inst. 1 (2018) ("People with poor credit . . . have limited options for financial products, are charged the highest rates when they borrow money, and may be limited in where they live or work.").

> [A borrower] may only be able to get financing from a "buy here, pay here" car dealership that charges exorbitant interest rates (think 25 percent and up). . . . "They wanted $1,900 for that car ... and wouldn't take cash for any of their vehicles," said one low-income customer . . . . "They wanted us to put $1,000 down and pay $89 a week for two years" — which amounted to more than $10,000 for a $1,900 car.

Karen Weese, *Why It Costs So Much to Be Poor in America*, Wash. Post (Jan. 25, 2018, 8:50 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/01/25/why-it-costs-so-much-to-be-poor-in-

america/ (quoting Howard Karger, Shortchanged: Life and Debt in the Fringe Economy 157 (2005)).

The search for a safe and healthy living arrangement is also impaired by poor credit. In California, property owners may disqualify people with lower credit scores from leasing housing. Cal. Civ. Code § 1950.6(a) (West 2021) ("The information requested and obtained by the landlord or his or her agent may include, but is not limited to, personal reference checks and consumer credit reports produced by consumer credit reporting agencies"); Andrew Khouri, *Depleted savings, ruined credit: What happens when all the rent comes due?,* LA Times (Feb. 2, 2021) ("'Absent an eviction on a person's record, debt and poor credit scores can impede the ability to find housing, often leaving people to live in lower-quality conditions,' said Ariel Nelson, an attorney with the National Consumer Law Center."). Jeronimo Aguilar's court debt has greatly impacted his credit score since he was eighteen and convicted for his original "wet and reckless" offense. Telephone Interview with Jeronimo Aguilar (Feb. 20, 2021). His poor credit has made it very difficult to find stable, comfortable housing for nearly a decade, "My credit is ruined. I can't live most places." *Id.* Aguilar calculates that he owes more than $8,000 in court-imposed debt, and though he has demonstrated he does not have an ability to pay, the is lack of payment is considered a violation of his probation. Telephone Interview with Aguilar, *supra.* Aguilar is currently negotiating "more fines or jail time" with the superior court. *Id.*

Poor credit will also inhibit a person or families' access to emergency credit services for medical care, dental care, or car repairs. This was the case for N.C., who has not been able to invest in any dental care for her children or herself, because she doesn't have sufficient credit. Telephone Interview with N.C. (Nov. 23, 2020).

4. Court-imposed debt unfairly burdens families and is disproportionately paid by women.

The discrimination experienced by indigent people holding court-ordered debt is felt most poignantly by their families. Through a year-long national survey, sixty-three percent of people indicated their family members are primarily responsible for covering the costs associated with convictions and incarceration. deVuono-powell et al., *supra,* at 9. Half of those respondents reported that their families could not afford the court-ordered debt and sacrificed stable housing, food, and other necessities to make payments. *See id.* at 26; Fin. Just. Project, *supra* at 26 ("Court debt drives whole families to spend years trying to dig themselves out from under mountains of bills. It means garnished wages, a deepening poverty divide, and financial desperation that leads to more property crime."). In California, twenty percent of families who participated in the survey took out high-interest loans to make payments on their loved one's court-ordered debt, and nine percent of families "had wages garnished or state of California tax refunds seized." deVuono-powell et al., *supra,* at 15.

When Kingdawud Burgess was released from incarceration, he had to rely on his sister and aunt for all of his needs, including $300 for a drivers' license and costs associated with getting a copy of his social security card and birth certificate, which he had to pay along with his court-imposed debt. Telephone Interview with Kingdawud Burgess (July 13, 2020). As is the case with Burgess' family, the financial burden of court debt falls disproportionately on women, and particularly on matriarchs: mothers and grandmothers. deVuono-powell et al., *supra*, at 14 ("Almost half of the family members primarily responsible for paying court-related costs were mothers, and one in ten were grandmothers.")). And because, "[a] lmost one in every four women and two of five Black women are related to someone

who is incarcerated," the impacts of court-debt devastate "women of color and their families more substantially than others, deepening inequities and societal divides that have pushed many into the criminal justice system in the first place." *Id*. at 9.

Shamika Wilson, of Redwood City, feels like she, too, is doing time with her incarcerated loved ones: "Incarceration has always been a part of my life—from brothers, to uncles, to cousins and my husband, who has been incarcerated for almost 30 years." *Id*. at 26. She is managing over $45,000 in court fines and fees, college loans, rent, and child support. *Id*. at 27. Wilson works very hard to provide for her family, despite the obstacles, but "[o]ften times [she] feel[s] alone and incomplete, living inside of two separate worlds." *Id*. at 26.

5. Unmanageable court-imposed debt has a tremendous psychological impact on people.

People who cannot afford their court imposed-debt experience dangerous psychological strains which compounds the debt's discriminatory effects. Evans, *supra*, at 9. Studies demonstrate that people carrying the burden of unmanageable debt have higher experiences of anxiety, anger, and hopelessness. *Id*. At least one study found that the weight of the psychological burden actually decreases the likelihood of payment. *Id*.

D.B., of Los Angeles, owed thousands of dollars in court-imposed debt. Blanco et al*., supra*, at 12. This financial burden—the choice of paying his debt or paying for groceries—kept him awake at night. *Id*. N.C. and Gabriel Johnson both described feeling humiliation as their employer and families had to share the burden of their inability to pay the court-debt. Telephone Interview with N.C. (Nov. 23, 2020); Telephone Interview with Gabriel Johnson (Dec. 1, 2020). For Johnson, collection agencies contacted his

mother and employer, which frightened his family and cost him his job. Telephone Interview Gabriel Johnson (Dec. 1, 2020). For N.C., the juggle between child support, car payments, rent, and court-debt is impossible to manage: "It is embarrassing. I do not know what tomorrow holds." Telephone Interview with N.C., (Nov. 23, 2020). M.G.'s mental health also deteriorated as a result of his court-imposed debt. Telephone Interview with M.G. (Feb. 18, 2021). Like many others, M.G. did not receive any supports or services for employment or housing from probation: "This situation made me feel financially insecure, anxious, and less friendly because I had to look out for myself. I felt selfish." *Id.*

6. People with unmanageable court-debt have an increased risk of re-incarceration.

"An important consequence of financial burdens is that they increase the likelihood of recidivism, particularly when offenders are unable to pay." Evans, *supra*, at 9; *cf.* Council Econ. Advisers, Issue Brief No. 031394, Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor 4 (2015) ("Unsustainable debt coupled with the threat of incarceration may even encourage some formerly incarcerated individuals to return to criminal activity to pay off their debts, perversely increasing recidivism.").

Anthony Robles, a Los Angeles County resident, who found that securing a job with his criminal record was seemingly impossible, sold cannabis to pay for his court-imposed debt. Once he was discovered by "authorities," "Los Angeles County [placed] him on probation for two additional years, which meant more money he'd have to pay in probation fees." Brentin Mock and Laura Bliss, *An Effort to Abolish Court Fees Grows in California*, Bloomberg CityLab (July 29, 2020) *available at*

https://www.bloomberg.com/news/articles/2020-07-29/los-angeles-leads-latest-push-to-end-court-fees.

Cade Lambeth was released from prison at twenty-five years-old, and his experience was made worse by the COVID-19 Pandemic. Cade Lambeth, Interview: Leaving Prison in the Covid-19 Economy, National Public Radio (July 13, 2020) (transcript available at https://www.npr.org/transcripts/890454408). Lambeth could not find work or even shelter anywhere: "From the homeless shelters to the programs that they had, like, there - the waiting lists were months long - months long - like, 90 days at the least." *Id*. Like Robles, Lambeth contemplated whether his only option was to return to criminal activity for survival and to pay his debts. *Id*.

B. The Current Processes Courts and Other Agencies Use to Determine a Person's Ability-to-Pay Are Problematic.

1. Ability-to-pay processes are inconsistent within and across jurisdictions.

The process by which courts impose debt is "inconsistent and hard to monitor." Theresa Zhen, *(Color)Blind Reform: How Ability-To-Pay Determinations are Inadequate to Transform A Racialized System of Penal Debt*, 43 N.Y.U. Rev. L. & Soc. Change 175, 193 (2019). The sanctions for nonpayment also vary, even within the same jurisdiction. Harris, *supra*, at 4, 23-25. This inconsistency has been characterized as a "punishment continuum." Zhen, *supra*, at 204-05 ("The lack of consistency is so stark that people who have penal debt in neighboring jurisdictions can be concurrently navigating between different punishment continuums and different bureaucratic court hierarchies."). The continuous punishment renders people "vulnerable to a great deal of discretion at various decision points by a number of decision-makers." *Id.*

In Orange County, the Office of the Public Defender has decried the inconsistency as unrealistic and unjust: "I just want to stress it's … dependent on which judge you get and that's unfair. *Duenas* is applicable throughout the state, yet county versus county, courthouse versus courthouse, it's different." Telephone Interview with Alison Chabot, Orange County Public Defender (July 23, 2020). "Some judges say if you do some jail time, I'll waive the fines and fees. A lot of clients do take this deal because they know they'll never be able to pay. Poorer and homeless people always take this deal." Telephone Interview with Alex Bartel, Deputy Public Defender III, Orange County, CA (July 24, 2020).

The experiences of people with court debt align with this Court's observation that, "[t]he "choice" of paying [a] $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor," *In re Antazo*, 3 Cal.3d. 100, 108 (1970). "[A]lthough a direction for confinement for default in payment of a fine may appear to apply equally to both the rich offender and the poor one, actually the former has the opportunity to escape his confinement while the right of the latter to pay what he cannot, is a hollow one." *Id*. at 103-104.

A statewide solution to the unjust imposition and collection of fines, fees, and assessments is necessary, as the patchwork of county-level advocacy in California has resulted in additional disparity as counties implement local reforms. Four counties—Contra Costa, Alameda, San Francisco, and Los Angeles—have now halted the imposition and collection of criminal court debt that is imposed by the discretion of the county. Jackie Botts, *Los Angeles County Eliminates Criminal Fees. Will California Follow?,* Cal

Matters (Feb. 19, 2020), *available at* https://calmatters.org/california-divide/2020/02/los-angeles-county-eliminates-criminal-fees/.

For criminal cases heard in traffic court, there are several datasets showing a wide disparity in how different counties assess ability to pay, and which financial legal obligations courts impose once someone is found unable to pay. In January 2021, the Judicial Council released data from its traffic ability-to-pay pilot counties showing that though 86.5% of applicants were below the poverty line, only 76.5% received any reduction in court-imposed debt. Judicial Council of Cal., Online Traffic Adjudication and Ability-to-Pay Annual Report 4 (2021). And even for people below the poverty line, who were adjudicated as unable to pay, the reductions in debt owed varied widely, from 41.29% in Ventura County to 76.67% in San Francisco County. E-mail from Maya Ingram, Legis. Att'y, ACLU of Cal. Ctr. for Advoc. and Pol'y, to Wade Askew, Managing Att'y, Legal Serv. of Northern Cal. (Jan. 21, 2021 2:44 PM PST) (figures derived from raw numbers in Judicial Council of Cal., Online Traffic Adjudication and Ability-to-Pay Annual Report (2021)) (on file with author).

A similar review of the ability-to-pay process in Solano County traffic courts showed that only 64% of people on public benefits received any fee reduction, while 65% of people who were not on public benefits had their court debt reduced, including several who the court found were not indigent. Letter from Elisa Della-Piana, Legal Dir., Lawyers' Comm. for C. R. of the S.F. Bay Area, to Nathaniel Garrett, Partner, Jones Day (Feb. 4, 2019) (detailing analysis of documents produced in monitored settlement) (on file with author). Only 58% of homeless people who requested a fee reduction received any relief, and only 3% of people who were found to be unable to pay received any reduction in their civil assessments, the $300 penalty fee that usually goes into local courts' budgets rather than to the state. *Id.* It is

illogical to find someone does not have the ability to pay and then impose court-debt, but courts consistently do just that.

Furthermore, relying on payment plans instead of waiving fees "disregard[s] people's individual financial circumstances." Zhen, *supra,* at 214 ("Although hailed as a viable alternative, payment plans offer an illusory assurance of due process.") For example, a California court imposed nearly $5,000 in fines, fees, and assessments on S.H., who left the courtroom without income, without a high school diploma, and without family support. Sandra Blanco et al., *supra* at 12. She could not afford "any portion of that amount," as she did not have the means to afford food, a place to live, or other basic necessities. *Id.* Ultimately, the assessment of S.H.'s ability to pay was wholly out of step with her material well-being and basic needs, setting her up to fail before she even left the courtroom. *Id*.

The following case also shows how hard it is to seek relief from court-imposed debt. Even when a person has an attorney and a demonstrated inability to pay, they may still end up owing money to the court. With assistance of counsel, Michael Paine of Orange County filed a motion to ask the court for a determination that he was unable to pay his fines and fees. At his hearing, the court placed the burden on Mr. Paine to establish his ability to pay and found he had no ability to pay:

> He is currently disabled, has suffered an incredibly tragic accident that has rendered him wheelchair bound for, based on his testimony, most of the day. He has no source of income other than government benefits and to call that income would be generous.
>
> So, I'm going make the finding that Mr. Paine does not have an ability to pay…
>
> So each of the cases that include a $150 restitution fine- that restitution fine, as I understand the law, I'm not to consider an

> ability to pay as it relates to the restitution fine; however, what I am can consider is whether or not there are compelling and extraordinary circumstances that would allow the Court to waive that particular fine.
>
> That said, I believe that certain particular fines and fees that are at issue here do allow the Court to consider ability to pay. So, as it relates to the $50 controlled substance lab fee..., I'm going to find that you do not have the ability to pay those $50 in each of those cases. Those are stayed [permanently] ....
>
> [I]'m going to find compelling and extraordinary circumstances separate and apart from an ability to pay based on Mr. Paine's physical condition and his continuing and ongoing physical and mental distress that renders this a compelling and extraordinary circumstances for the $150 restitution fine for each of the cases would be stayed permanently ....

People v. Michael Paine, Orange County Sup. Ct. Case No. 18WM17050 (Aug. 15, 2019), Trial Court Transcript, upheld on appeal to Orange County Appellate Div. Case No. 30-2019-01099843 (Nov. 6, 2020).

Instead of waiving the remainder of Mr. Paine's fees, the court stayed $40 court operation fee and $30 criminal conviction assessment fee for six months. Orange County Sup. Ct. Case No. 18WM17050 (Aug. 15, 2019). Mr. Paine lost his appeal to have his fines and fees waived. Orange County Appellate Div. Case No. 30-2019-01099843 (Nov. 6, 2020) Minute Order. Mr. Paine remains unable to pay his court fees and, given his disability, it is particularly difficult for him to return to court every six months to seek a further extension of time to pay. Mr. Paine's experience further demonstrates that State's attempt to draw a bright line distinguishing punitive fines from administrative fees is arbitrary. Taylor, *supra*, at 6.

Public defenders report the same frustrations. In describing the current criminal justice approach to fines and fees, Orange County Public Defender

Alison Chabot states "judges will allow defendants to enter into a payment plan, but "$10 per month for a $1,000 fine takes a long time to pay off. Some judges say pay for 3 years, then come back to court and perhaps it will get waived. Clients aren't legally sophisticated enough to do this." Telephone Interview with Alison Chabot, Orange County Public Defender (July 23, 2020).

2. Ability-to-pay processes replicate known discriminatory patterns within the criminal justice system.

The lack of consistency across courts and various agencies that administer and monitor court debt has a discriminatory impact and results in further harm. Ability-to-pay neither accounts nor corrects for (1) "racialized policing patterns," (2) "racial stratifications in wealth accumulation and a deepening racial economic divide," and (3) "the compounding effects that derive from inability to pay fines and fees from prior violations." Zhen, *supra,* 184, 193.

Black communities have and continue to be disproportionately hurt by counties and courts relying on collection of their court-debt for revenue. Blanco, *supra*, at 12. Data from a 2017 Pennsylvania study shows, "families of color were nearly twice as likely to have debt than white families" related to court fines and fees. Jackie Botts, *California stopped charging parents for kids' incarceration. So why are some still stuck owing thousands of dollars?,* Cal Matters (Feb. 10, 2020), https://calmatters.org/projects/california-counties-still-collecting-juvenile-justice-fee-debt-from-parents/. Black communities and other marginalized communities are significantly affected by these court debts when counties continually rely on them to fund the court system. The functioning of our court system should never be on the backs of marginalized communities.

An ability-to-pay determination that fails to acknowledge the racial economic divide "exacerbates economic disparities[,] reproduc[ing] a troubling pattern of racial stratification" between Black and white families. Zhen, *supra*, at 198. Black and Latinx households have a "sizable disadvantage" in comparison to white families when it comes to income. *Id.* at 196. According to the theory of diminishing marginal utility of income, the financial burden of an equal amount fine is greater on families whose marginal dollars are spent on necessary survival expenses. An implementation of a generic one-size-fits-all ability-to-pay determination without the consideration of this racial economic divide would not cure the problem we intend to solve. These issues compound "negative effects that derive from inability to pay, which disproportionately affects people of color." Zhen, *supra*, at 198.

C. The Court Should Not Adopt the Civil Fee Waiver System for Criminal Proceedings.

The State has proposed that the Court "import into the criminal fee context the basic structure of civil fee waiver decisions." RABM at 51. This proposal fails to recognize that the civil system has the same issues of divergent, discretionary, and highly localized outcomes as ability-to-pay hearings.

The current definition of indigency is under-inclusive, does not capture or address the material well-being of poor people, and does not recognize the circumstances that drive and sustain poverty. Rourke L. O'Brien & David S. Pedulla, *Beyond the Poverty Line*, Stanford Soc. Innovation Rev., (2010). The federal standard of indigency, the poverty line, was developed nearly sixty years ago. *Id*. Although it is updated each year to account for inflation, it does not reflect the many factors of today's cost of living which would measure to "more than three times higher than it is currently." *Id*. Yet, for many low-income Californians in civil court, the civil fee waiver provisions

under the Government Code rely upon this standard. Gov. Code, § 68632, subd. (a)-(b).

The California civil fee waiver has three sections. Gov. Code § 68632. A litigant who receives needs-based benefits such as CalWORKs or CalFresh may mark the first box, commiserate with section (a). *Id.* Those who receive benefits that are not needs-based, such as Social Security or unemployment benefits, and low-income wage earners who fall below the federal poverty level for family size, mark box (b). *Id.* A litigant whose income exceeds that limit must be evaluated under section (c). *Id.* When a litigant requests a civil fee waiver based on section 68632(c), she is asserting that she cannot both pay for the "necessaries of life" and the court fees and must often request a hearing before a judge to have a determination on her inability to pay. Gov. Code § 68634(e) (3-4). Particularly in high-cost-of-living areas of California, the fee waiver hearing process is burdensome and results in unjust outcomes for poor people whose wages are just a bit too high to qualify for indigency under the federal standard.

The right to proceed in civil court *in forma pauperis* is well established in California, but significant barriers still exist for litigants who have earned income. *Martin v. Superior Court*, 176 Cal. 289 (1917); *Cruz v. Superior Court*, 120 Cal. App. 4th 175, 185 (2004); *Isrin v. Superior Court*, 63 Cal. 2d 153, 165 (1965). *Cruz* addressed the cases of 19 low-income litigants whose fee waiver applications were denied without a hearing and without considering relevant criteria. *Cruz v. Superior Court*, 120 Cal. App. 4th 175, 185 (2004). The court held that "neither a monthly income that exceeds all monthly expenses by a small amount, nor the existence of a modest savings account, whether considered alone or in combinations, constitutes such compelling evidence of an applicant's ability to pay court fees and costs without sacrificing the necessities of life that denial of such an application

without a hearing is justified." *Id.* at 189. Instead of perpetuating these inequities, *amici* encourage the Court to make clear that the government has the burden of proof and look beyond the civil fee waiver.

For clients who are represented by counsel, legal aid attorneys represent clients in civil fee waiver hearings before judges who make arbitrary value judgments about whether low-income wage earners' expenses are actually "necessaries of life." In some instances, courts even deny fee waivers for people who receive public benefits, despite the fact that "nothing suggests the Legislature intended to grant trial courts discretion to deny the fee waiver application of an applicant who is receiving public benefits." *C.S. v. W.O.*, 230 Cal. App. 4th 23, 30 (2014). Such denials require legal aid resources to be diverted for costly appeals on the issue of waiver of fees.

For those who are unrepresented, the right to a hearing is rarely exercised. If the Court were to adopt a similar fee waiver structure for criminal and traffic fees, the burden of fees would fall hardest on those struggling to support their families; the low-income working poor, unable to meet the procedural burden of appearing in court to prove their inability to pay.

Furthermore, the hearing process permitted under Gov. Code section 68632(c) creates a burden on the courts. Senate Appropriations Analysis on Assembly Bill 927 (Jones-Sawyer) estimates that conducting ability to pay hearings for all criminal and juvenile proceedings alone would cost $43 million annually. A.B. 927 Sen. Appropriations Analysis (Aug. 30, 2019), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml? bill_id=201920200AB927#. Accordingly, as it is the State's burden to prove ability to pay, any system created by the Court should not impose an undue, inaccessible, and unjust procedural burden on the low-income working poor, as the current civil fee waiver structure does.

III. The court should waive outstanding court-imposed debt without placing an unreasonable burden on people to assert their inability to pay.

Revenue from court-ordered debt comes at a substantial cost. "Counties generally maintain or outsource significant staffing and infrastructure to assess and collect fees, which entails fiscal obligations such as salaries, benefits, and non-personnel costs." Debt Free Just. Cal. Coal., Impact Analysis of SB 144 – Families Over Fees Act 2 (2020). For example, the County of Los Angles has thirteen fulltime staff dedicated to probation collection efforts alone. *See* County of Los Angeles, Probation Department, Collections Unit Cost Out Summary (on file with authors). If counties instead outsource their collection efforts to third–party debt collectors, the cost of collections is deducted from what is collected. *See e.g.*, Master Agreement for Collection Services, Master Agreement No. MA-201306 with Linebarger Goggan Blair & Sampson, LLP 2 (2015) (indicating, in Exhibit B, that some commissions take as much as 25 percent of what is collected in fines and fees) (on file with authors).

It can also take years to collect outstanding debts. A 2018 study by the San Francisco Public Defender's Office, the San Francisco Financial Justice Project, and the San Francisco Mayor's Office of Public Policy and Finance found more than eighty percent of administrative fees were not collected within six years. Fin. Just. Project, *supra*, at 6. Because of high collection costs and low collection rates, "these debts can actually cost more to collect than they bring in revenue." *Id*. at 10. Public Defender Alex Bartel described the grim reality faced by poor people: "For a lot of my clients, they know they're never going to pay it. They put it off until they're back in custody and they get it off their backs. The judge and everyone in the courtroom know

the client will never pay it. It does not serve its real purpose." Telephone Interview with Alex Bartel (July 24, 2020). The Court should waive this uncollectible outstanding debt rather than place the burden on poor people to seek individualized relief.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to hold that courts must not impose or execute fines, fees, and assessments onto a person who cannot afford to pay. In the interest of justice, any ability-to-pay determination must adequately assess a person's financial needs to mitigate discriminatory effects of court-imposed debt.

Respectfully submitted,

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Under Rule 8.204 and 8.504 of the California Rules of Court, I hereby certify that this brief contains 8,197 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

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Stacey L. Tutt

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