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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.

Case No. S257844

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

ANSWERING BRIEF ON THE MERITS

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ISSUES PRESENTED

This Court's November 13, 2019, order granted review on two issues:

Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments?

If so, which party bears the burden of proof regarding defendant's inability to pay?

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants convicted of a crime may face a variety of court-imposed financial obligations. Those obligations can have very different consequences for defendants of different means. An obligation that can be quickly and easily paid off by a defendant who is gainfully employed or has money in the bank may be impossible for another defendant to ever satisfy; and some defendants may be able to pay off such debts but only with great personal and familial sacrifice. The constitutional implications of that discrepancy have received significant scrutiny in recent years—and deservedly so.

As explained below, the constitutional analysis of a criminal payment order depends on the function that the order serves as a matter of design and legislative intent. For financial orders that *punish*—which this brief will refer to generally as fines—well-established precedents under the excessive fines and due process clauses require that courts must consider a defendant's ability to pay as part of determining whether the punishment aspect of the fine is grossly disproportionate. A court's refusal to consider the effect of a defendant's purported ability to pay a fine in a case where that issue has been appropriately raised violates the defendant's constitutional rights. The same body of precedent, however, states that an inability to pay does not, by itself, bar imposition of a fine if other relevant factors show the fine to be constitutional. Any harsh consequences that the fine poses to that individual defendant are evaluated as part of considering whether the punishment is justified in light of the offense and offender. The equal protection and due process clauses generally prohibit the State from imprisoning a person for nonpayment of the fine; beyond that, however, those clauses do not additionally

constrain the imposition of an unaffordable fine beyond what the Eighth Amendment commands.

The constitutional analysis is different for payment orders whose primary function is to *raise money* to pay for the criminal-justice processes used in the convicted defendant's case—which can generally be thought of as user fees. Such fees are not tied to the gravity of the offense or the culpability of the defendant, and are not legislatively intended as punishment. Just as this Court has held that such fees are not subject to the ex post facto clause and double jeopardy clause, so too they should not be subject to the excessive fines clause: Constitutional restrictions addressed to punishment do not apply to user fees.

That does not, however, mean that user fees imposed on criminal defendants are immune from constitutional scrutiny. And California's existing system for imposing such fees on defendants who cannot pay them does not meet standards of even basic rationality under the equal protection and due process clauses. Given their exemption from the constitutional requirements that apply only to punishment, such fees must be justified solely as a means to fulfill their non-punishment goal—fundraising. That goal is not served by California's system of imposing unpayable fees. If defendants cannot afford to pay their fees, then they will not pay them, and the imposition of the fees on those defendants will raise no funds. Worse yet, unpayable user fees can have unintended and often harsh consequences on individuals, families, and society. In recognition of that, the State exempts those who cannot pay from paying the similar fees imposed on civil litigants to support the court system. There appears to be no rational reason for not extending some sort of similar treatment to those in criminal cases.

In the absence of direction in statute or rule, the courts must construct a procedure for asserting and establishing whether a defendant can pay fines and fees. For fees or fines that the Legislature has expressly conditioned on the defendant's ability to pay, the analysis is simple: This Court's precedent requires that the prosecution bear the burden of proof. For fines and fees that the Legislature did not so condition, however, a variety of approaches may be

constitutionally permissible. But allowing for widely diverging approaches from courtroom to courtroom and county to county seems far from ideal. This case offers the Court an opportunity to provide guidance to the trial courts and intermediate appellate courts on best practices that will conform with constitutional requirements. And the most appropriate interim remedy depends, once again, on the nature of the court-ordered payment at issue.

For fines serving as punishment, defendants are the proper party to raise a purported inability to pay in the first instance, and to support it with evidence about their income, expenses and assets sufficient to allow the court to take any economic hardship into account in determining whether the fine is constitutionally disproportionate.

Because the main constitutional flaw in California's existing system as to user fees is the failure to accord to criminal defendants some counterpart to the fee-waiver system in civil cases, a reasonable interim remedy would be to import into the criminal system the existing waiver-approach from civil cases. Under that approach, defendants must establish their inability to pay the fee. That burden, however, should be a modest one, and many defendants should be able to establish fee-waiver eligibility by, for example, stating under oath that they receive the same public benefits that would entitle them to a civil-fee waiver.

Such a combination of procedures would protect the rights described above until the Legislature or Judicial Council implements a different procedure, if they choose to do so.

STATEMENT OF THE CASE

A. Hernandez's Crime and Trial

Defendant Jason Hernandez was a leader of the Varrio Fallbrook Locos gang and the Mexican Mafia. (Slip opn. 5.) Along with codefendant Christi Kopp, he attended a meeting between U.P. (a Mexican Mafia affiliate) and A.C. (*Ibid.*) Hernandez, who had recently been released from prison, introduced Kopp as a secretary—that is, someone who transmits information and money to Mexican Mafia members in prison. (*Id.* & fn. 3.) Hernandez told A.C. that A.C. owed money to the Mexican Mafia, and that he had their approval to kill or

assault her. (*Id.* at 5.) Hernandez and another gang affiliate stabbed A.C. repeatedly, and Hernandez punched and kicked her. (*Ibid.*) U.P. thought A.C. was going to die, and called 911. (*Id.* at 5-6.) Later, in a recorded conversation with E.P., who Hernandez did not realize was an informant, Hernandez bragged about the attack. (*Id.* at 6.) Hernandez was arrested for assaulting A.C. (*Ibid.*)

While Hernandez was in custody, he used Kopp as an intermediary to instruct E.P. about how to prevent U.P. and A.C. from testifying. (Slip opn. 7.) When Kopp visited Hernandez in jail, he told her that U.P. should be killed and that A.C. should be dissuaded from testifying. (*Ibid.*) Acting on that instruction, Kopp told E.P. that A.C.'s debts would be forgiven if she agreed not to testify, but that U.P. should be killed. (*Id.* at 7-8.) Kopp subsequently gave drugs as payment to a person she thought was a hit-man, in exchange for the person's agreeing to kill U.P. (*Id.* at 9.) In fact, the "hit-man" was an undercover officer. (*Ibid.*) When the undercover officer reported (falsely) that U.P. had been killed, Kopp relayed that fact to Hernandez in jail, and Hernandez expressed his approval. (*Ibid.*)

The jury convicted Hernandez of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1); assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 2); conspiracy to commit murder (§§ 182, subd. (a)(1), 187; count 3); conspiracy to dissuade a witness (§§ 136.1, 182, subd. (a)(1); count 4), and furnishing a controlled substance (Health & Saf. Code, § 11379, subd. (a); count 5). (Slip opn. 2.)[1] As to counts 1 and 2, the jury found true the allegations that Hernandez personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). (*Ibid.*) In addition, the jury found true the allegations that Hernandez committed counts 1 through 3 for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). (*Ibid.*) Before sentencing, Hernandez admitted that he was previously convicted of a violent and serious felony within the meaning of sections 667.5,

[1] All further statutory references are to the Penal Code unless otherwise stated.

subdivision (a)(1), 668, and 1192.7, subdivision (c) and that he had a qualifying prison prior for purposes of section 667.5, subdivision (b). (*Ibid.*)

B. Sentencing

The sentencing proceeding featured relatively little discussion of fines and fees, or Hernandez's economic situation. The probation report recommended imposition of several fines and fees, including the $10,000 maximum restitution fine, but did not address Hernandez's economic situation. (4 CT 844.) Hernandez's attorney filed a memorandum that, while mainly addressing other issues, also asked the court to "stay all fees and fines due to Mr. Hernandez's inability to pay." (4 CT 854, capitalization altered.) The memorandum stated: "The court must impose a restitution fine unless it finds 'compelling and extraordinary reasons' for not doing so. [Citations.] We intend to present that evidence at the hearing and will ask this court to stay all fines and fees." (*Ibid.*)

At sentencing, however, Hernandez's attorney asked instead that the restitution fine be imposed in the "minimum [amount] of $200." (Slip opn. 59.) He requested that the court stay "the additional fines for Mr. Hernandez due to his inability to pay." (*Ibid.*) Finally, he asked the court to "find the requisite extraordinary circumstances that require a stay." The trial court rejected defense counsel's argument, stating: "My general understanding is the determination of inability to pay occurs not necessarily on the date of sentencing but at a later date when the fine is or may be imposed. There is a possibility that the defendant may be able to earn funds while he is incarcerated, so I'm going to decline to make that finding at this time." (*Ibid.*)

The trial court sentenced Hernandez to a custodial term of 81 years to life imprisonment. (Slip opn. 2.) The court also imposed seven financial obligations as part of the sentence: a restitution fine of $10,000 under section 1202.4, subdivision (b); a court security fee of $120 under section 1465.8; an immediate critical needs account fee of $90 under Government Code section 70373; a criminal justice administrative fee of $154 under Government Code section 29550.1; a drug program fee of $615 under Health and Safety Code section 11372.7; a lab analysis fee of $205 under Health and Safety Code section

11372.5; and a parole revocation restitution fee of $10,000 under section 1202.45. (Slip opn. 59-60.)[2] The last of these was stayed, as section 1202.45 requires. (*Id.* at 60.) The court also ordered victim restitution, leaving the amount to be subsequently determined. (*Id.* at 60, fn. 22.)[3]

C. The Court of Appeal's Opinion

The Court of Appeal affirmed most aspects of the judgment, but reversed the convictions for conspiracy to dissuade a witness because of instructional error. (Slip opn. 3-4.) As a result, the court remanded for resentencing.

Hernandez and Kopp had also argued that the assessments and restitution fines imposed as part of their sentences should be stricken under an intervening precedent, *People v. Dueñas* (2019) 30 Cal.App.5th 1157. (Slip opn. 59.) The defendant in *Dueñas* was a disabled, unemployed, and homeless mother of two, convicted of driving on a suspended license. She was assessed court operations fees, court security fees, and a statutory minimum restitution fine, despite having submitted detailed evidence showing her total inability to pay them. (*Dueñas*, 30 Cal.App.5th at pp. 1160-1161, 1163.) *Dueñas* held that the due process and equal protection requirements were violated by the imposition of the fees in that circumstance, and held further that, to avoid similar constitutional issues with respect to the restitution fine, the restitution fine should be stayed unless and until the prosecution showed that the defendant had a present ability to pay it. (*Id.* at p. 1172.)

Hernandez and Kopp argued that, under *Dueñas*, the Court of Appeal should remand their cases for a hearing on whether they had the ability to pay the

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[2] The Court of Appeal's opinion states that a $10,000 parole revocation "fee" was imposed under section 1202.45. (Slip opn. 60.) That statute actually establishes a parole revocation "fine." (§ 1202.45, subd. (a).) The opinion also states that the drug program fee was imposed under Health & Safety Code § 11372.5; the statute was actually Health & Safety Code § 11372.7. (4 CT 866.)

[3] Kopp was likewise convicted of conspiracy to commit murder, conspiracy to dissuade a witness, and furnishing a controlled substance, and the jury found that she had committed the last crime for the benefit of a criminal street gang. (Slip opn. 2.) She received a sentence of four years plus 25 years to life, with similar fines and assessments. (*Id.* at 2, 58-59.)

fees and fines in their case. The court responded by noting areas of agreement with *Dueñas* and some of disagreement: "Although we do not reject *Dueñas* outright," the court explained, it "urge[d] caution in following that case and announcing a significant constitutional rule without regard to the extreme facts *Dueñas* presented." (Slip opn. 60.) The court found "no indication that either Hernandez or Kopp are anything like the defendant in *Dueñas*." (*Id.* at 62; *see ibid.* ["The record does not indicate that either appellant is indigent or a parent living on public assistance, who is trapped in a cycle of debt originating in driving citations and a suspended license and whose woeful financial situation is exacerbated by misdemeanors and further fines"].)

Nevertheless, the court agreed "to some extent" with the *Dueñas* opinion's conclusion that "due process requires the trial court to conduct an ability to pay hearing and ascertain a defendant's ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373, if the defendant requests such a hearing." (Slip opn. 62.) The court added that such a hearing would also be required for the criminal justice administration fee imposed under Government Code section 29550.1. (*Ibid.*) "These assessments are not punitive in nature, and, we agree that 'imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive.'" (Slip opn. 62, quoting *Dueñas*, *supra*, 30 Cal.App.5th at p. 1167.) "Accordingly, it was error not to hold an ability to pay hearing after Hernandez explicitly raised the issue below." (*Ibid.*)

Although the court thus agreed that defendants were entitled to an ability to pay hearing for these assessments on remand, the court parted from *Dueñas* as to how that hearing should be conducted in two ways. First, it disagreed with *Dueñas*'s implication that "it is the prosecution's burden to prove that a defendant can pay an assessment." (Slip opn. 63.) Instead, the court held "[i]t is the defendant who bears the burden of proving an inability to pay." (*Ibid.*) Second, the court emphasized that "the trial court should not limit itself to considering only whether Appellants have the ability to pay at the time of the sentencing

hearing." (*Ibid.*) Instead, "it is appropriate for the court to consider the wages that [Appellants] may earn in prison." (*Ibid.*)

The court also differed from *Dueñas*'s approach with respect to the restitution fines under section 1202.4, subdivision (b). The court reasoned that that fine—as well as the drug program and lab analysis fees under Health and Safety Code sections 11372.7 and 11372.5—were "punitive," in that they were "intended to punish." (Slip opn. 64 & fn. 24.) As a result, defendants should "challenge such fines under the excessive fines clause of the Eighth Amendment of the federal constitution and article I, section 17 of the California Constitution," and there was no separate "due process requirement that the court hold an ability to pay hearing before imposing a punitive fine and only impose the fine if it determines the defendant can afford to pay it." (Slip opn. 64.) Under *United States v. Bajakajian* (1998) 524 U.S. 321, and *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, the court continued, ability to pay was "one factor to consider" in the excessive fines analysis, but "not the only factor." (*Id.* at 65-66.)

Acting Presiding Justice Benke, concurring in part, stated that *Dueñas* was incorrect to derive a due process and equal protection right against unpayable fines and fees based on "authorities that involved access to the courts and the judicial system." (Slip opn. 68, citing *People v. Gutierrez* (2019) 35 Cal.App.5th 1027 (dissenting opn. of Benke, P.J.).) Because access to court was not at issue in cases such as this, she thought that all challenges should proceed under the excessive fines provisions of the state and federal constitutions. (*Id.* at 69.)

This Court granted Hernandez's petition for review. Kopp's petition for review was denied.

ARGUMENT

I. COURTS MUST CONSIDER DEFENDANTS' ABILITY TO PAY WHEN SETTING FINES AND FEES

When a defendant claims that she would be unable to pay a given amount, a court must consider that contention before imposing or executing fines or fees.

But the nature and details of that consideration depend on the function that the particular payment order serves.[4]

A. The Difference Between Punitive Fines and User Fees

Certain constitutional restrictions apply only to "punishment." (See, e.g., *Austin v. United States* (1993) 509 U.S. 602, 609-610 [excessive fines clause]; *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 823 [double jeopardy clause]; *People v. Picklesimer* (2010) 48 Cal.4th 330, 344 [ex post facto clause].) Courts have long been required and are thus well equipped to determine whether a particular obligation in the criminal justice system—including an order requiring payment—should be classified as primarily serving a punishment function or primarily serving other functions.

"[T]he method courts use to determine what constitutes punishment varies depending upon the context in which the question arises." (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1108, internal quotation marks omitted.) In general, courts consider "'whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent.' [Citation.]" (*Ibid.*) Where the Legislature did not intend a requirement to serve as punishment, the fact that it may be highly undesirable to the individual does not necessarily mean that it is so punitive in nature or effect as to transform it into punishment for constitutional purposes. (See *People v. Alford* (2007) 42 Cal.4th 749, 757 [listing, as "nonexclusive factors governing this determination," whether the regulatory scheme "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive

[4] A third category of financial orders in criminal cases is direct restitution to victims for the losses they have suffered. (See § 1202.4, subd. (f).) Such restitution differs from punitive fines and user fees, in that the recipient of restitution has his or her own constitutional entitlement to that restitution. (See Cal Const. art. I, § 28.) No restitution amount was ordered against Hernandez, and this Court's specification of the issues presented does not include consideration of victim restitution. (See *supra* p. 17.)

purpose; or is excessive with respect to this purpose," citation and internal quotation marks omitted]; cf. *ibid.* ["Only the 'clearest proof' will suffice to override the Legislature's intent and transform a civil remedy into a criminal punishment. [Citation.]"]; *In re Alva* (2004) 33 Cal.4th 254, 286 [when determining whether cruel and unusual punishments clause applies, "'a statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment [for the sole reason that] its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions . . . . [Citation.]'"].)

Under these standards and this Court's precedents, four of the payment orders imposed on Hernandez are punishment: The restitution fine, the parole restitution fine, the laboratory analysis order, and the drug program order. The other three—the fees and assessments to pay for court operations, court facilities, and booking-related costs—are not.

1. Hernandez's Punitive Fines Serve as Punishment for His Crimes

A key objective of criminal sentencing is punishment. (See Cal. Const. art I, § 28(a)(4) [a "goal of highest importance" is that "persons who commit felonious acts causing injury to innocent victims will be . . . sufficiently punished so that the public safety is protected and encouraged"]; Cal. Rules of Ct., rule 4.410(a) ["[g]eneral objectives of sentencing" include "[p]unishing the defendant"; "[e]ncouraging the defendant to lead a law-abiding life in the future"; and "[d]eterring others from criminal conduct by demonstrating its consequences"].) One common and longstanding form of punishment is the imposition of monetary exactions, in the form of fines. (See generally *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc*. (1989) 492 U.S. 257, 265 ["at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense"].) Indeed, in California, fines are presumed to be an available punishment for a criminal violation, unless the Legislature has otherwise

specified. (See § 672 [permitting fines of up to $10,000 for a felony conviction and up to $1,000 for a misdemeanor, where not otherwise specified].) Four of the financial orders in Hernandez's case served this punishment function and should be categorized as fines for constitutional purposes.

Restitution fine and parole restitution fine. Under section 1202.4, subdivision (b), the trial court ordered Hernandez to pay, as punishment in the form of a restitution fine, the maximum amount allowed by the statute: $10,000. (See *supra* p. 16.) The court imposed but stayed an additional parole restitution fine in an identical amount. (*Ibid.*)

In almost every criminal case, section 1202.4, subdivision (b) provides that a "restitution fine" be imposed. For a misdemeanor, the restitution fine must be between $150 and $1,000. (§ 1202.4, subd. (b)(1).) For a felony, it may range from $300 to $10,000. (*Ibid.*) Once the restitution fine amount is set, section 1202.45 requires that, for defendants whose sentence includes parole, an additional parole restitution fine must be set in the same amount but suspended. (§ 1202.45.) If the defendant successfully completes parole, then the suspension is never lifted and the additional fine is essentially without effect. If parole is revoked, however, then the suspension is lifted and the defendant becomes liable for the fine.[5]

This Court has determined that "the Legislature intended restitution fines as punishment." (*People v. Hanson* (2000) 23 Cal.4th 355, 361.) Several attributes of the fines confirm their punishment function. First, while not dispositive, the Legislature chose to name them "fines," which the Penal Code more generally considers a form of "'punishment[]'" (*Id.* at pp. 361-362 [quoting § 15].) Second, the range of permissible fine amounts is higher for felony convictions than for misdemeanor convictions—a method of roughly calibrating the fine to the seriousness of the offense. Third, within those ranges, judges are commanded to set the fine "commensurate with the seriousness of the offense" (§ 1202.4,

[5] For defendants whose sentence includes probation, section 1202.44 similarly requires that a probation restitution fine equal to the restitution fine be imposed but suspended.

subd. (b)(1)), and to consider factors such as "the seriousness and gravity of the offense and the circumstances of its commission, any economic gain [to] the defendant as a result of the crime," tangible and intangible losses suffered by any other person, and the number of victims involved. (§ 1202.4, subd. (d).)[6] These instructions further connect the fine in an individual case to traditional punishment considerations. Consistent with those features, in determining the applicability of various constitutional protections relating to punishment, this Court has repeatedly held that restitution fines are punishment. (See *People v. Hanson*, *supra*, 23 Cal.4th at pp. 361-363) [double jeopardy]; *People v. Walker* (1991) 54 Cal.3d 1013, 1024 [right to enforce a plea bargain].)

Laboratory analysis fee and drug program fee. Under Health and Safety Code sections 11372.7 and 11372.5, Hernandez was ordered to pay drug program and lab analysis penalties of $615 and $205 respectively, as further punishment for his drug offense.

Section 11372.5 of the Health & Safety Code provides that "[e]very person who is convicted of a violation of" specified drug offenses shall pay a "criminal laboratory analysis fee in the amount of $50" per such offense, with the court "increas[ing] the total *fine* necessary to include this increment." (Italics added; see also Health & Saf. Code, § 11372.5, subd. (a) [for offenses where no fine is otherwise applicable, the court shall "impose a fine" of up to $50 "in addition to any other penalty prescribed by law"].) The money is used to fund crime-lab equipment and activities. (Health & Saf. Code, § 11372.5, subd. (b).)

Health and Safety Code section 11372.7 provides that convictions for the same offenses shall result in a "drug program fee" of $50 per offense, with the court similarly "increas[ing] the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law." (Health & Saf. Code, § 11372.7, subd. (a).) The money is used to fund drug-abuse prevention programs. (Health & Saf. Code, § 11372.7, subd. (c).)

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[6] In felony cases, the statute also gives courts the option of calculating the restitution fine by multiplying the $300 minimum by the number of offenses of conviction and the number of years of imprisonment. (§ 1202.4, subd. (b)(2).)

In *People v. Ruiz*, *supra*, 4 Cal.5th at p. 1103, this Court determined that orders to pay the laboratory analysis and drug program fees are part of the defendant's "punishment" for drug crimes. The defendant in *Ruiz* had been convicted of conspiracy (under § 182) to commit the offense of transporting a controlled substance. The conspiracy statute states that conspiring to commit a felony shall be "punishable in the same manner and to the same extent as is provided for the *punishment* of that felony." (§ 182, subd. (a), italics added.) As a result, the laboratory analysis and drug program assessments could be imposed on the defendant only if they were part of the "punishment" for the drug offense that he had conspired to violate. This Court concluded that they were. Although the Legislature in some places referred to amounts imposed under Health and Safety Code sections 11372.5 and 11372.7 as "fee[s]," the statute also repeatedly described those amounts as a "penalty," and as part of the total "*fine*." (*Ruiz*, 4 Cal.5th at p. 1109 [quoting Health & Saf. Code, § 11372.5, subd. (a)].) The Court's review of the legislative record revealed that in imposing the cost, the Legislature had an "'intent to punish.'" (*Id.* at p. 1110; *see id.* at pp. 1110-1119.) Moreover, unlike the court security fee and facilities fee discussed below, the drug fees had no counterpart in civil cases and were "not enacted as part of an emergency budgetary measure in order to exactly offset a reduction in General Fund financing for trial courts." (*Id.* at p. 1122.) *Ruiz* accordingly concluded that the laboratory analysis and drug program fees under Health and Safety Code sections 11372.5 and 11372.7 were punishments for the drug crimes specified in the statutes.

2. Hernandez's User Fee Assessments Are Designed to Raise Money for Judicial Processes

Fees are distinguishable from fines in that they are not designed to serve a similar punishment function, but instead serve other purposes. Three of the payment orders in Hernandez's case function essentially as user fees, to fund the processes involved in Hernandez's prosecution and conviction.

Court operations fees. Section 1465.8 imposes "an assessment of forty dollars" per count of conviction, "[t]o assist in funding court operations." The

assessment is the same whether the conviction is for a misdemeanor or a felony offense, and the statute provides for no adjustment based on the severity of the offense, the harm the offense caused, or the offender's history. Money collected from this assessment is deposited in the statewide Trial Court Trust Fund (§ 1465.8, subd. (d)), which the Judicial Council administers to "fund the costs of operating . . . trial courts" (Gov. Code, § 68085, subd. (a)(2)(A)). The fee was established as "part of an emergency budgetary measure" (*People v. Ruiz*, *supra*, 4 Cal.5th at p. 1121) that enacted and raised various judicial fees—primarily in civil cases (see Stats. 2003, ch. 159; *id.* § 25)—to "exactly offset a reduction in General Fund financing for trial courts" (*Ruiz*, 4 Cal.5th at p. 1122; see generally Dept. of Finance, Enrolled Bill Report on AB 1759, Aug. 1, 2003). At its original enactment, the fee was designed to assist in funding court security. The statute was later amended to fund "court operations" more broadly, when responsibility for court security costs was transferred from the state to counties. (See Stats. 2011, ch. 40, § 6, p. 96; Assem. Floor Analysis of AB 118, as amended June 28, 2011, at p. 3.)

In *People v. Alford* (2007) 42 Cal.4th 749, this Court reviewed the fee as originally enacted to determine whether it was punishment that, under the ex post facto clause, could not be imposed on a conviction stemming from crimes committed before its enactment. The Court determined that the fee was not punishment, and that the ex post facto clause therefore did not apply. The fee was not intended as punishment; instead, it was "enacted as part of an emergency budgetary measure for the nonpunitive purpose of funding court security." (*Id.* at p. 756.) Nor was the fee "so punitive in nature or effect that it constitutes punishment." (*Id.* at p. 757.) And as the Court noted, "[t]he amount of the fee" was "not dependent on the seriousness of the offense." (*Id.* at p. 759.)

Those factors are equally applicable to the current iteration of the fee, which now funds court operations beyond court security. The amount of the fee is not tied to the seriousness of the offense. (Indeed, the same amount is imposed for minor misdemeanors as for the most serious felonies.) The fee funds an aspect of the court that would otherwise be funded through appropriations. And the fee has

counterparts that are charged to civil litigants. (See Gov. Code, § 70602.5, subds. (a) & (b) [$40 supplemental fee in civil and probate cases, directed to trial court trust fund and assorted court operations costs].) The fact that the user fee is imposed only upon conviction does not convert it to a punishment, where the fee has no other penological attributes. (See *Alford*, *supra*, 42 Cal.4th at pp. 757-758 [discussing "countervailing considerations" that "undermine a punitive characterization"].) And, by way of comparison, in civil proceedings, filing fees are effectively paid by the losing party at the end of the case, because any prevailing party who previously paid the fee itself is entitled to recover those paid fees as costs. (Code Civ. Proc., §§ 1032, 1033.5, subd. (a)(1).) In a criminal case, the opposing party to a criminal defendant is the State; where a criminal defendant prevails, either through acquittal or dismissal, the State effectively pays all costs of the proceeding, through General Fund appropriations or some other state-provided funding. The court operations fee functions, in short, as a user fee through which a convicted defendant covers some of the marginal costs of related court proceedings—not as punishment for the underlying crime.

Court facilities fees. Government Code section 70373 imposes an "assessment" of $30 per criminal conviction, "[t]o ensure and maintain adequate funding for court facilities." (Gov. Code, § 70373.) Money is deposited into a special "[c]ritical [n]eeds [a]ccount" (*id*. at subd. (d)), to be be spent on "planning, design, construction, rehabilitation, renovation, replacement, or acquisition of court facilities," and "lease or rental of court facilities." (Gov. Code, § 70371.5, subd. (a)). The fund also may be used for "trial court operations" (*ibid.*), which include salaries for judges and court staff, court security, and court-appointed counsel (Gov. Code, § 77003, subd. (a)). The legislation responded to reports of dilapidated, unsecure, and seismically unsafe court facilities, requiring major capital investment. (See generally AOC, Fact Sheet: SB 1407 (Perata)—Courthouse Construction, Apr. 2008.) The fee was established in 2008 as part of an overall funding arrangement for court capital needs (see 2008 Stats. Ch. 311) when the State was assuming responsibility for

court facilities from counties. (See Sen. Comm. Public Safety Report on SB 1407, at p. 11.)

Once again, the fee's features show it to be a user fee, rather than a mechanism of punishment. As with the fee considered in *Alford*, it was enacted to make up for a withdrawal of governmental support to the courts—not because of any perceived need to further punish defendants. The fee is not calibrated in any way to the severity of an offender's crime: Those convicted of a felony pay the same as those convicted of a misdemeanor, and judges do not adjust the fee based on the gravity of or harm caused by a particular defendant's conduct.

Criminal justice administration fee. Government Code section 29550.1 allows certain California governments to enact a "criminal justice administration fee" and to "recover" that fee when a person arrested by that government's law enforcement agents is convicted. The fee reimburses a county charge that may not exceed "the actual administrative costs, including applicable overhead costs . . . incurred in booking or otherwise processing arrested persons." (Gov. Code, § 29550.) The provision was enacted in 1991 in response to the Legislature's finding that the State faced "an unprecedented fiscal crisis" requiring responses from "every branch of government." (Stats. 1991, ch. 331, § 1, subd. (a).)

Here, too, the structure of the fee reveals that it is "not punitive in nature." (Slip opn. 62.) Its amount is tied not to the seriousness of the crime at issue or to the defendant's culpability, but instead to actual costs incurred in the processing of the defendant's case. Unlike the other fees described in this section, the criminal justice administration fee does not fund courts. But it funds a portion of the criminal justice system that is intimately connected to and part of the court process—the booking and processing of an arrested defendant, which begins judicial processes such as the setting of bail or own-recognizance release, and presentation to a magistrate. Most importantly, in *People v. McCullough* (2013) 56 Cal.4th 589, this Court determined that the analogous fee imposed under Government Code section 29550.2, under which other governmental entities can recover booking and arrest fees under similar terms, "is not 'punishment' for

constitutional purposes." (*Id.* at p. 598.) There is no relevant distinction that would cause the similar fee in Government Code section 29550.1 to be treated differently.

B. For Fines that Punish, Courts Must Consider Ability to Pay as One of Many Factors Affecting Whether the Fine Is Unconstitutionally Disproportionate

1. Ability to Pay Is Relevant to a Punitive Fine's Constitutionality Under the Excessive Fines Clause

The Eighth Amendment of the U.S. Constitution "prohibits '[e]xcessive' sanctions." (*Atkins v. Virginia* (2002) 536 U.S. 304, 311.) With respect to monetary sanctions in particular, that provision and Article I, section 17 of the California Constitution bar "excessive fines." "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality . . . ." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) A fine is constitutionally excessive if the amount is "grossly disproportional to the gravity of [the] defendant's offense." (*Ibid.*) This Court has identified four factors relevant to the determination: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728, citing *Bajakajian*, *supra*, 524 U.S. at pp. 337-338 and *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1320-1322.)[7]

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[7] The due process clause imposes a similar restraint, by barring monetary punishments that are "arbitrar[y]." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568; accord *Hale v. Morgan* (1978) 22 Cal.3d 388, 399 [examining whether statutory penalties were "arbitrary and oppressive"].) Notwithstanding the different formulations, this Court has explained that determinations of whether a monetary punishment is arbitrary under the due process or excessive under the excessive fines clause entail "similar" considerations. (*Lockyer*, *supra*, 37 Cal.4th at pp. 728-729.) Accordingly, this brief will not engage in a separate due process analysis.

Under this Court's precedent, therefore, when a defendant claims an inability to pay a given punitive fine, the court must consider whether such inability makes the fine excessive. To the extent the trial court failed to do so when Hernandez raised his asserted inability to pay, that was error.[8] The Court of Appeal appropriately instructed the trial court to consider Hernandez's ability to pay the restitution fine and drug fees when resentencing him on remand. (Slip opn. 66, fn. 25.)

As the Court of Appeal recognized, however, ability to pay a criminal fine is just "one factor" in determining excessiveness; it is not "the only factor." (Slip opn. 65-66.) In Hernandez's case, for instance, the trial court, on remand, will need to consider whether any purported shortfall in Hernandez's ability to pay a given fine would be outweighed by other factors. And certain relevant considerations tip toward requiring Hernandez to pay a high fine. He committed a vicious assault during which he personally inflicted great bodily injury. To evade responsibility for that assault, he conspired to kill one witness, and attempted to dissuade another witness from testifying against him. He committed all these crimes to benefit a criminal gang, and he had a long history of prior serious offenses. (See 4 CT 836-839.) The defendant's "culpability" (*Lockyer*, *supra*, at p. 728), was thus high, and the significant fines imposed relate "to the gravity of the offense that [they were] designed to punish." (*Bajakajian*, *supra*, 524 U.S. at p. 334). Although Hernandez's restitution fine was at the top of the statutory range, it was not irrationally high compared to fines for other offenses. (See, e.g., § 186.11, subd. (c) [fines of $100,000 or more for conviction on multiple fraud offenses]; § 456 [fine of up to $50,000 for arson]; § 4600 [fine of up to $10,000 for destruction of public property in jail or prison]; Health & Saf. Code, § 11372 [maximum fines of $20,000 to $8 million for various drug offenses].) And

[8] The trial court's refusal to consider ability to pay was also error because the Legislature made inability to pay an express condition for imposition of Hernandez's drug program fee (Health & Saf. Code, § 11372.7, subd. (b)), and a relevant consideration for the portion of the restitution fine that was above the statutory minimum (see § 1202.4, subd. (d)).

conspiracies to commit murder are especially serious among the possible offenses to which the restitution fine statute applies.

For fines intended to punish, ability to pay will not always be dispositive, because a fine that may appear to be unpayable at the time of sentencing may still serve the goals of punishment. Criminal law punishes not only to "deter the individual from committing acts that injure society" but also to "express society's condemnation of such acts." (*People v. Roberts* (1992) 2 Cal.4th 271, 316.) A high fine sends a powerful message about the seriousness of a crime. (See Cal. Rules of Court, rule 4.410(a)(4) [noting sentencing objective of "[d]eterring others from criminal conduct by demonstrating its consequences"].) It ensures that, if the defendant's financial circumstances later improve, he will be liable for the amount that the court deemed appropriate punishment, rather than enjoy the windfall of exemption from such sanction. A financial component may sometimes be necessary to serve the State's "fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws." (*Bearden v. Georgia* (1983) 461 U.S. 660, 669.) And while fairness demands taking account of individual circumstances, it also counsels for a degree of "uniformity in sentencing." (Cal. Rules of Ct., rule 4.410(a)(7); cf. *Williams v. Illinois* (1970) 399 U.S. 235, 244 [warning that "enabl[ing] an indigent" defendant "to avoid" punishment that "other defendants" must "suffer," "would amount to inverse discrimination"].)

Nevertheless, there will certainly be cases where a defendant's inability to pay is decisive of a fine's constitutionality. For instance, where a fine exceeds not only the defendant's currently available resources but also any plausible future resources, it is likely that there will be no point at which the defendant will be considered to have paid his or her debt to society and to have no remaining obligations. The proportionality of such an outcome to the particular offense at issue will look far different for a defendant like Hernandez, whose crimes were serious and caused serious harm, than for a defendant such as that in *Dueñas*, who committed minor offenses. (See *supra* p. 17.) Where a defendant shows that

inability to pay makes a fine disproportionate under the applicable multi-factor test, the constitution demands that the fine be reduced or eliminated.

2. Equal Protection and Due Process Do Not Pose an Additional Bar Against Imposing Fines a Defendant Cannot Pay

In the face of clear authority that inability to pay a fine, standing alone, is not dispositive of its constitutionality, Hernandez advances a novel argument, primarily grounded in concepts of equal protection. (OBM 33-40, 51-63.) He argues that because the burden imposed by a given fine may as a practical matter be more onerous on an indigent defendant than on a defendant with means, it effectively punishes the poor and the rich unequally.[9] The argument is unsupported.

Hernandez's argument lacks "the first prerequisite" to an equal protection claim: "a showing that the state has adopted a *classification* that affects two or more similarly situated groups in an unequal manner." (*People v. Valencia* (2017) 3 Cal.5th 347, 376, italics added, quoting *People v. Brown* (2012) 54 Cal.4th 314, 328.) Hernandez's complaint is that the State imposes the same fines on various people rather than different fines. That does not amount to discrimination. (See, e.g., *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 891 [collecting fees from "all" developers who entered into secured agreements presented "no discrimination at all"].) "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages' [citation], nor does it require the State to 'equalize economic conditions [citation]." (*Ross v. Moffitt* (1974) 417 U.S. 600, 612.)

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[9] Hernandez also raises arguments under the state constitution's article IV, section 16 guarantee of privileges and immunities and uniform application of the law. (OBM 51.) This court has stated, however, that article IV, section 16(a), and other equal protection provisions in the California Constitution "have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571 (2002), as modified Apr. 17, 2002.) The analysis in this section thus disposes of that claim as well.

Moreover, Hernandez does not contend that the facially equal statutes under which he was sentenced were designed with the intent to specially harm any class of defendant. (See generally *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 834 [equal protection guarantee "simply prohibits. . . *purposeful*[ ] *and intentional*[ ]" discrimination].) Nor do unpaid fines result in the withdrawal of fundamental rights, such as a defendants' ability to vote, make reproductive and familial decisions, or remain free from incarceration.

Hernandez instead argues that facially equal monetary sanctions "have a disparate impact on the poor." (OBM 53.) Hernandez maintains (*ibid.*) that a disparate-impact claim under equal protection was recognized in the Court of Appeal's opinion in *Vergara v. State of California* (2016) 246 Cal.App.4th 619. But *Vergara* concerned education—whose "uniqueness among public activities" was crucial to this Court's rule that the relative wealth of school districts may not determine educational quality. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 614.) In other contexts, the equal protection clause guarantees equal treatment of those who are similarly situated; it does not generally require the government to engage in *different* treatment of classes or groups. (Cf. *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 162 [no discrimination where statutory limitation on medical malpractice damages "falls more heavily on those with the most serious injuries"]; *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7 [disproportionate impact of physical agility test for city police officer applicants did not constitute sex discrimination under state constitution].)

The constitution does not "require that the consequence of punishment be comparable for all individuals." (*Williams*, *supra*, 399 U.S. at p. 261 (conc. opn. of Harlan, J.).) Not just monetary punishment, but all punishment, affects some defendants more harshly than others. A given term of incarceration affects people differently depending on factors such as age, health, gang membership, psychological outlook, and the availability and willingness of family and friends to visit, accept phone calls, and write letters. Personal and familial wealth also affects the experience of incarceration: The absence of a wage-earner matters less to families with alternative sources of income, and personal and familial resources

affect the prisoner's access to amenities such as canteen items and phone calls. It is hard to imagine how sentencing courts could implement a command to equalize punishment across such varied circumstances. Constitutional principles, reasonably, do not require this. (Cf. *Ross*, *supra*, 417 U.S. at p. 612.)

Moreover, Hernandez's proposed rule could result in far harsher punishments, by depriving judges of the "flexibility" to "choos[e] the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of [the] state criminal justice system[ ]." (*Kelly v. Robinson* (1986) 479 U.S. 36, 49.) A high fine may sometimes allow judges to impose a sentence that reflects a crime's seriousness without relying on incarceration alone. Without that capability, judges might need to rely more on custodial sentencing elements, which have their own unequal aspects (as noted above), and which generally inflict greater deprivation on defendants. Equal protection does not require that judges' "wide" authority to set an initial punishment (*In re Antazo* (1970) 3 Cal.3d 100, 116) be circumscribed in that manner.

Hernandez's equal protection-based challenge to his fines must therefore be assessed under rationality review—under which Hernandez could prevail only if there is no reasonably conceivable state of facts that could justify the governmental decision at issue. (*People v. Turnage* (2012) 55 Cal.4th 62, 74-75.) Where a fine meets the proportionality standards of the excessive fines clause, however, that in itself shows that the fine serves proper punishment purposes. (See *supra* pp. 28-30.). The fine would therefore meet the requirements of rationality under the equal protection and due process clauses as well.

3. The Fundamental-Rights and Access-to-Court Cases Do Not Apply Here

Hernandez asserts that, under the equal protection and due process principles of cases such as *Griffin v. Illinois* (1956) 351 U.S. 12 and *Bearden v. Georgia*, *supra*, 461 U.S. 660, punitive fines can never be levied in an amount that exceeds the defendant's ability to pay. (OBM 19-32.) Those cases establish two principles: First, that a defendant cannot be deprived of access to court

proceedings because of inability to pay fees; and second, that a defendant cannot be incarcerated based solely on an inability to pay a fine. Neither principle applies to the fines at issue here.

Griffin held that, when a State provides convicted defendants with a right to appeal, the State must subsidize the preparation of transcripts or some "other means of affording adequate and effective appellate review to indigent defendants." (*Griffin v. Illinois*, *supra*, 351 U.S. at pp. 19-20.) Just as a State cannot "provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court," the Court reasoned, neither could it "effectively den[y] the poor [the] adequate appellate review accorded to all who have money enough to pay the costs in advance." (*Id.* at pp. 17-18.) "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Id.* at p. 19; see also *Douglas v. California* (1963) 372 U.S. 353, 358 [indigent defendants must be provided with counsel on their first appeal as of right, so as to not be consigned "to a meaningless ritual, while the rich man has a meaningful appeal"].)[10] Those precedents do not apply here. Failure to pay a punitive fine does not deprive the defendant of the ability to make use of court proceedings on an equal basis with other litigants.

Bearden held that the constitution generally forbids a State from revoking probation and committing an indigent defendant to custody based on the nonpayment of a fine or restitution. (*Bearden v. Georgia*, *supra*, 461 U.S. at p. 662.) "[I]f [a] State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." (*Id.* at pp. 667-668.) Instead, such probation may be converted to imprisonment only where a probationer has the means to pay the fine but willfully refuses to do so, or where she fails to make

[10] There is also "a narrow category of civil cases" involving governmental "intrusions upon family relationships," in which the State "must provide access to its judicial processes without regard to a party's ability to pay court fees." (*M.L.B. v. S.J.* (1996) 519 U.S. 102, 113.)

sufficient efforts to seek funds through employment or other means, or where no "adequate alternative methods of punishing the defendant are available." (*Id.* at pp. 668-669.)

Bearden reflects the longstanding principle that the State cannot deprive a defendant of bodily liberty "'solely because the defendant is indigent and cannot forthwith pay [a] fine in full.'" (*Bearden*, *supra*, 461 U.S. at p. 667, citation omitted; see also, e.g., *Williams v. Illinois*, *supra*, 399 U.S. 235 [inability to pay fine or court costs cannot serve as basis for State to imprison defendant beyond the statutory maximum prescribed for the crime]; *In re Antazo*, *supra*, 3 Cal.3d 100 [holding that equal protection was violated when defendant was taken into custody for inability to pay fines that were a condition of his probation].) Because California defendants do not face additional custody if they are unable to pay their fines, California's punitive fines do not implicate the evil that the *Bearden* line of cases aimed to avoid. In barring imprisonment for nonpayment, those cases did not cast doubt on courts' ability to impose any particular fine in the first place. (See *Williams*, *supra*, 399 U.S. at p. 243 ["nothing . . . precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law"]; *Antazo,* 3 Cal.3d at p. 116 ["the imposition upon an indigent offender of a fine and penalty assessment" he cannot pay does not "constitute[] of necessity in all instances a violation of the equal protection clause"].)[11]

Hernandez notes that unpaid debt may cause consequences such as poor credit ratings and difficulties finding employment or shelter. (OBM 24, 34-35; see also *Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.) Although such consequences are serious, they differ fundamentally from the type and degree of deprivation at issue in *Bearden*. As an initial matter, the Fourteenth Amendment restricts only government deprivations; in *Bearden*, for instance, the State took the defendant

[11] Indeed, in ordering that the petitioner in *Antazo* be released from custody for his nonpayment of fines, this Court made clear that it was not discharging him from the fines themselves. (*Antazo*, 3 Cal.3d at p. 117 [granting writ of habeas corpus "only to discharge petitioner from . . . his imprisonment . . . but not to discharge or relieve him from any other . . . obligation"].)

into custody. (*Bearden*, *supra*, 461 U.S. at p. 663.) Most of the consequences Hernandez complains of, in contrast, are actions by private actors.[12] Beyond that, the U.S. Supreme Court and this Court have drawn a sharp distinction between enforcing criminal justice debts through imprisonment and enforcing them through the means ordinarily used to enforce civil judgments. (See *Williams*, *supra*, 399 U.S. at p. 244 [State may "enforc[e] judgments against those financially unable to pay a fine"]; accord *Bearden*, *supra*, 461 U.S. at p. 672; see also *People v. Amor* (1974) 12 Cal.3d 20, 26 [no constitutional problem where "execution" of ordered payment "was issuable only as on a judgment in a civil action" and defendant "could not have been imprisoned for nonpayment"].) So long as imprisonment is not threatened, the State can "choose from among [a] variety of solutions" to collect the full fine. (*Williams*, *supra*, at pp. 244-245 & fn. 21; see also *Bearden*, *supra*, at pp. 671-672.)[13]

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[12] The one direct consequence of unpaid fines that *Dueñas* noted is that nonpayment may alter the defendant's entitlement to post-probation erasure of the conviction where all other conditions of probation have been fulfilled. (Compare § 1203.4, subd. (a)(1) [most defendants who have "fulfilled the conditions of probation for the entire period of probation" are entitled to have conviction withdrawn or set aside], with *ibid.* [others may have convictions set aside only when the "court, in its discretion and the interests of justice," determines such relief appropriate].) That issue is not before this Court, because Hernandez is not on probation.

[13] Hernandez argues that, under *Mayer v. Chicago* (1971) 404 U.S. 189, a defendant's entitlement to relief from unaffordable obligations is independent from whether imprisonment could result. (OBM 30.) But that conflates two lines of cases. In *Mayer*, *Griffin*, and other access-to-court cases, indigent defendants were being denied access to meaningful court processes on an equal basis. (See, e.g., *Mayer v. Chicago*, *supra*, 404 U.S. at p. 195 [holding that State must provide indigent defendant with transcript for appeal "where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way"].) Such a denial of access to court is unconstitutional regardless of the punishment imposed. Here, however, there is no allegation that Hernandez's financial circumstances prevented him from accessing the judicial system. Instead, Hernandez argues that he should be exempt from imposition of an otherwise applicable financial punishment, even if the fine at issue was not "excessive." Neither this Court nor the U.S. Supreme Court has ever recognized such a claim; instead, precedent recognizes only a right not to be incarcerated for nonpayment of an unaffordable fine.

C. California's System of Imposing Unaffordable User Fees Fails Rational Basis Scrutiny Under the Equal Protection Clause

Because the three user fees in this case are not punishment (see *supra* pp. 24-28), they are not subject to the excessive fines clause. However, the absence of a punishment function also limits the bases on which the government may justify the user fees in response to equal protection and due process challenges. They cannot be justified as a method of "protect[ing]" the "public safety" (Cal. Const. art I, § 28(a)(4)), or "[e]ncouraging the defendant to lead a law-abiding life in the future" and "[d]eterring others from criminal conduct by demonstrating its consequences" (Cal. Rules of Ct., rule 4.410(a)). Otherwise, the user fees would be subject to constitutional restrictions on punishments, which this Court has held do not apply. (See *supra* pp. 24-28.) Instead, such fees must be justified solely by how they serve their non-punishment purpose of raising money. Viewed against that purpose, the current California criminal justice user fee system is constitutionally deficient.

Even under basic standards of rationality, some skepticism may be warranted toward a statute that is designed to raise money through the mandatory imposition of fees that criminal defendants have no realistic prospect of paying. The assessment of a fee does not by itself bolster court security, subsidize court operations, or improve court facilities. Such goals are advanced only when a person actually pays some amount that can then be transferred to the relevant account and used by the State for the designated purpose. Imposing the debt against those unable to pay creates a disconnect between the governmental end and the means chosen to fulfill it. (Cf. Sen. Comm. on Budget & Fiscal Rev., Rep. on A.B. 1869 (2019-2020 Reg Sess.), at p. 1 ["research on criminal administrative fee collection across California shows that some counties spend equal to or more [on collection efforts for fees] than they actually collect"].)

Moreover, given that fees imposed on criminal defendants are not designed to punish crime, California's system draws an unjustified distinction between civil and criminal court users with regard to user fees and fee waivers. California law

relieves civil litigants of responsibility for fees that the litigants cannot afford. Some such litigants are completely exempted from court fees. (See Gov. Code, § 68632, subd. (a) [waiver for those receiving public benefits]); *id.* § 68632, subd. (b) [waiver for those with monthly income below 125% of federal poverty guidelines].) Others are entitled to have their fees reduced, to the extent that they cannot pay the entire fee "without using moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family." (*Id.* § 68632, subd. (c).) To qualify for such a waiver, the litigant signs a form under penalty of perjury, and submits information pertinent to the waiver sought—such as "the type of public benefits that he or she is receiving," the applicant's "occupation" and "employer," and a statement of the applicant's "monthly or yearly income and expenses and a summary of assets and liabilities." (Gov. Code, § 68633; see Judicial Council Form FW-001 [Request to Waive Court Fees].)

In contrast, there is no mechanism in statute or rule for relieving a criminal defendant of fees assessed to fund the court system, such as the fees Hernandez was ordered to pay here. Instead, criminal-case user fees are assessed in full regardless of the defendant's present or future ability to pay. Considering only fund-raising purposes, as we must for fees, there is no apparent justification for the State to effectively "singl[e] out criminal defendants from among all litigants who are required to pay fees devoted to court funding and subject[] them, and them alone, to harsher treatment." (*People v. Cowan* (2020) 47 Cal.App.5th 32, 55 (conc. opn. of Streeter, J.).) All litigants—civil or criminal—use court resources. Indeed, civil plaintiffs *choose* to use the court's resources, whereas criminal defendants are unwilling participants in cases initiated by the State. And while civil litigants have ways to settle disputes without a lawsuit, criminal defendants generally do not. Because the only way for a prosecutor to gain criminal remedies is through a judicial proceeding, criminal defendants who wish to settle their disputes with the government generally must do so through guilty pleas, which involve court proceedings and result in the imposition of the user fees. Although convicted defendants do differ from civil litigants because they

have committed criminal conduct, the punishment and deterrence of criminal conduct must occur through a legislative decision to impose punitive fines, not user fees.

Granted, government action rarely fails rational basis scrutiny under the due process or equal protection clauses. "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1140, citation and internal quotation marks omitted.) But "judicial review under that standard, though limited, is not toothless." (*Young v. Haines* (1986) 41 Cal.3d 883, 899.) The State may not selectively disadvantage people based on distinctions that do not in any conceivable way promote legitimate governmental goals. (See, e.g., *Hollman v. Warren* (1948) 32 Cal.2d 351.)

The distinction here, with its result that criminal defendants have no opportunity to assert inability to pay user fees, fails to further any goal but the one goal—punishment—that the statutes disclaim. No state resources are conserved when money is sought from those unable to pay. (See *supra* p. 38.) Nor does administrative convenience result from withholding from criminal defendants the sort of relief from fees that civil litigants enjoy. Sentencing for a criminal defendant already involves a court proceeding, with an assigned judicial officer and counsel for the People and (generally) the defendant. In most cases, there will be little if any additional cost to adding the defendant's ability to pay to the topics that courts must already resolve in that context. Any hypothetical saving of resources by denying to criminal defendants the opportunity to seek reduction or waiver of user fees is so small as to be unable to save the statute under even the most forgiving level of scrutiny. (See *People v. Chatman* (2018) 4 Cal.5th 277, 291 ["an entirely arbitrary decision to withhold a benefit from one subset of people, devoid of any conceivable degree of coherent justification, might not pass rational basis review merely because it decreases the expenditure of resources"].)

That is particularly so because of the harsh consequences that, due to the existing system, fall only on those indigent court users who are criminal defendants. Such defendants may suffer, in effect, from a lifelong, undischargeable debt. In *James v. Strange* (1972) 407 U.S. 128, the U.S. Supreme Court held an analogous disadvantaging of criminal defendants unconstitutional. Under the Kansas statute at issue in that case, criminal defendants were obligated to repay the entire amount that the State expended for their appointed counsel. (*Id.* at pp. 129-130.) With respect to enforcement of that debt, the criminal defendant had no protection for "the means needed to keep himself and his family afloat"—even though such protection was extended to those whose debts stemmed from other sources. (*Id.* at p. 136.) The Court held that such disparate treatment violated the equal protection clause's requirement of "'rationality in the nature of the class singled out.'" (*Id.* at p. 140.) "[T]o impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes." (*Id.* at pp. 140-141.)

Similar reasoning applies here. Civil litigants who would otherwise have to subsidize the cost of their court proceedings are relieved from doing so if they "cannot pay court fees without using moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family." (Gov. Code § 68632, subd. (c).) A criminal defendant, however, may be assessed obligations that could be satisfied only at the cost of what he needs to "keep himself and his family afloat." (*James*, *supra*, 407 U.S. at p. 136.) No cognizable state aim—except the disclaimed goal of punishment—is served by exposing criminal defendants to "harsh conditions" that other litigants avoid, for a debt that, in the unlikely event of its collection, would pay for court processes "required by the Constitution." (*Id.* at pp. 140-141.)

The harsh consequences of unpaid court fees are not only financial. In the context of a criminal conviction, they reflect another concern. When all but the most culpable criminals are sentenced, there is a point at which they are expected to have fulfilled their obligations to society—and to be released, as a result, from

restraints such as imprisonment or parole. But unpayable user fees are an obligation without end, subjecting indigent defendants to the unique harm of an unsatisfied criminal obligation, without any relationship to culpability or the goals of punishment. That effect, moreover, is attributable only to the defendant's use of a judicial process that the constitution not only encourages, but requires. This heightens the irrational nature of the existing California system, pushing it beyond even the lenient bounds of rationality review. The constitution does not allow courts to simply ignore a defendant's claim of inability to pay the user fee in a criminal case.

II. ABSENT GUIDANCE IN STATUTE OR RULE, BURDENS OF PROOF SHOULD REFLECT THE ROLE OF ABILITY-TO-PAY IN EACH FEE'S OR FINE'S CONSTITUTIONAL ANALYSIS

There are a range of procedures that the Legislature or Judicial Council could institute to ensure consideration of a defendant's ability to pay fines and fees as constitutionally required. Until those institutions have a chance to respond to this case with such guidance, however, this Court may properly prescribe procedures to ensure that the rights at issue are not undermined, that neither courts nor parties face an unadministrable burden, and that there is some minimal degree of uniform application across the State. The appropriate result, we submit, is not a one-size-fits-all procedure, but rather one calibrated to address the role that ability-to-pay plays in the constitutional analysis of the particular fine or fee.

A. Where the Legislature Has Conditioned a Fine or Fee on the Defendant's Ability to Pay, the State Bears the Burden of Proof

Where the Legislature makes the defendant's ability to pay a condition of imposing a fine or fee, that ability to pay is essential to the government's claim, and the government therefore bears the burden of proof. (*People v. McCullough* (2013) 56 Cal.4th 589, 590-591, 598; see also Evid. Code, § 500 [setting the default rule for burden of proof that governs, "[e]xcept as otherwise provided by law"].) To be clear, we use the term "burden of proof" here to refer to the ultimate burden of persuasion—"the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." (*Metropolitan Water Dist. of So. Cal. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 969, internal citation omitted.) In *People v. McCullough*, for example, this Court considered Government Code section 29550.2, subdivision (a), which states that "'[i]f the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration [booking] fee by the convicted person . . . .'" (*People v. McCullough, supra,* 56 Cal.4th at pp. 590-591.) That language, the Court held, "places on the People the burden of proving a defendant's ability to pay a booking fee." (*Id.* at p. 598.) For fees and fines that expressly require that the defendant be able to pay, the prosecution's failure to prove that ability effectively results in a finding that the defendant cannot pay and is not liable for the fee.[14]

The fines and fees imposed on Hernandez, however, were subject to no similar statutory condition. As a result, the *McCullough* rule does not apply. Instead, as explained below, the implementation of burden-of-proof concepts in

[14] However, as *McCullough* also held, "a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal[.]" (See *id.* at pp. 598-599.) *McCullough* forecloses Hernandez's argument that a defendant's failure to raise inability to pay results in an "unauthorized sentence" (OBM 77) exempt from ordinary rules of forfeiture.

this case depends on the nature of each payment requirement at issue—in particular, whether it is a punitive fine or a non-punitive user fee.[15]

B. Defendants Bear the Burden of Proof as to a Fine's Excessiveness, Including as to Any Contention Regarding Inability to Pay

This Court has not previously determined how burdens of proof should be allocated when defendants challenge, under the excessive fines clause, the application to their particular cases of the fines that the Legislature prescribed for their criminal conduct. But "[a]s a general rule statutes are presumed to be constitutional." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 192.) This Court has accordingly stated that, in determining whether "a legislatively prescribed punishment is constitutionally excessive" under the cruel and unusual punishments clause, "'[m]ere doubt does not afford sufficient reason for a judicial declaration of invalidity.'" (*In re Lynch* (1972) 8 Cal.3d 410, 414-415.) Defendants accordingly must overcome "a considerable burden" when "challenging a penalty as cruel or unusual." (*People v. Wingo* (1975) 14 Cal.3d

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[15] Hernandez argues that because the Legislature has made ability to pay a condition for the imposition of *some* monetary requirements in criminal cases, it must have generally intended to "assign[] the burden of proof to the state" for *all* such payments. (OBM 68-70 & fn. 17.) But some statutes state that it is the inability to pay, rather than ability to pay, that must be proven. (E.g., Gov. Code, § 29550, subd. (f) ["the court may determine a lesser fee than otherwise provided in this subdivision upon a showing that the defendant is unable to pay the full amount], italics added; see also *People v. Avila* (2009) 46 Cal.4th 680, 729 ["a defendant bears the burden of demonstrating his inability to pay" an above-minimum restitution fine under section 1202.4, subds. (b), (d)].) And most statutes say nothing about ability to pay—underscoring that inability to pay is a constitutional defense to an otherwise applicable requirement, and as such, something on which the defendant would bear the burden. (See *infra* pp. 45-46.)

Hernandez further argues that the prosecution should have the burden of proof because it has the burden to prove the appropriate amount of victim restitution in cases where restitution is sought. (OBM 65.) But the prosecution's burden with respect to restitution does not involve proving ability to pay—because ability to pay is entirely irrelevant to restitution. (See § 1202.4, subd. (g).) Instead, the prosecution's burden is as to particular losses that the victim has suffered—a subject on which the prosecution is likely to have more information than the defendant. (§ 1202.4, subd. (f)(3).)

169, 174.) Similarly, when the civil fines prescribed by a "penal statute" may be "subject to both constitutional and unconstitutional applications," and require courts to "evaluate the propriety of the sanction on a case-by-case basis," this court has applied the rule that the "statute is presumed to be constitutional and . . . must be upheld unless its unconstitutionality 'clearly, positively and unmistakably appears.'" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404.) Consistent with those principles, monetary punishments assessed as fines in criminal cases should be presumed constitutional, with the challenger required to prove that the statute's application to his or her circumstance is disproportionate enough to require relief from the statute's effect. In other words, the person who challenges the statute's application under the excessive fines clause should bear the burden to establish excessiveness.

Such a rule would be consistent with the holdings of federal courts and other states' high courts. (See, e.g., *United States v. Castello* (2d Cir. 2010) 611 F.3d 116, 120 ["[t]he burden rests on the defendant to show the unconstitutionality of [a] forfeiture" under the excessive fines clause]; *United States v. Cheeseman* (3d Cir. 2010) 600 F.3d 270, 283 [similar]; see also *People ex rel. Hartrich v. 2010 Harley-Davidson* (Ill. 2018) 104 N.E.3d 1179, 1187 [requiring "the party challenging the constitutionality of the forfeiture statute" to "shoulder the heavy burden of rebutting the strong judicial presumption of the statute's validity and establishing the alleged as-applied constitutional violation"]; *Pub. Employee Ret. Admin. Comm. v. Bettencourt* (2016) 474 Mass. 60, 72 [party challenging the constitutionality of a forfeiture "bears the burden of demonstrating that the forfeiture is excessive"].) It would also be consistent with the general principle of California law embodied in section 500 of the Evidence Code, which provides that, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, §500.)[16]

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[16] Evidence Code section 500 does not bar courts from adopting a rule that differs from this default position. (See Evid. Code, § 160 ["'Law' includes

To be clear, it is not quite accurate to refer to the defendant's burden here as a burden of proof on *inability to pay*, because that factor alone is not dispositive of whether a fine is constitutionally excessive. (See *supra* pp. 28-30) The defendant's financial means is just one of many factors bearing on constitutionality. (*Ibid.*) Indeed, in many cases the other factors may effectively settle questions about the fine's permissibility or excessiveness, regardless of what a court might determine about the defendant's ability to pay. Still, in an individual defendant's case, ability to pay may be relevant—perhaps highly relevant—and could cause a court to reduce or eliminate a fine. Because the defendant bears the burden of proof on the ultimate legal issue of excessiveness, the defendant necessarily bears the subordinate burden of introducing evidence necessary for any factual findings supporting his or her claim for relief.

There is no basis to Hernandez's argument that placing the burden on the defendant would create an unconstitutional "presumption that all defendants are able to pay monetary sanctions." (OBM 72.) Due process requires the prosecution to prove beyond a reasonable doubt any fact that increases the penalty for a crime beyond the statutorily prescribed maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.) But unless the Legislature so specifies, ability to pay a fine is not an "element" of the "offense" as to which presumptions are prohibited.

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constitutional, statutory, and decisional law."].) But there is no reason to deviate here. "In determining whether the normal allocation of the burden of proof should be altered, the courts consider [four] factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." (*Lakin v. Watkins Assoc. Indus*. (1993) 6 Cal.4th 648, 660-661.) The most pertinent of those factors here is that defendants themselves will almost certainly have more knowledge and access to information concerning their assets, income, and expenses than the prosecution will. Although Hernandez asserts that the State will control a prisoner's ability to earn wages in prison (OBM 75-76), the issues presented in this Court's grant of review do not encompass whether particular types of possible future income should be considered in an ability-to-pay analysis. This case therefore will not decide whether prison income is cognizable for such purposes in the first place, making it premature to determine which party would bear the burden of proof on that unique item.

(*Francis v. Franklin* (1985) 471 U.S. 307, 316.) Rather, a requested reduction of or exemption from a fine is a defense, and the burden to establish a defense may be placed on the defendant. (See *Apprendi*, 530 U.S. at p. 490, fn. 16 ["If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating . . . burden-of-proof requirements are thus absent . . . ."]; see also LaFave et al., 6 Criminal Procedure § 26.4(h) (4th ed. & 2020 Supp.) ["the burden of proving a fact that may prompt a more *lenient* sentence is often placed on the defendant rather than the government"].) There is thus no bar to defendants bearing the burden of asserting inability to pay a fine and presenting evidence to support that assertion. (See e.g., *People v. Ary* (2011) 51 Cal.4th 510, 518 [upholding requirement that criminal defendant bear burden to prove incompetence to stand trial]; *Patterson v. New York* (1977) 432 U.S. 197 [upholding requirement that defendant bear burden of proof for affirmative defense of extreme emotional distress].)

Adams v. Murakami (1991) 54 Cal.3d 105, which Hernandez does not cite, does not point to a contrary result. That case held that in a civil suit seeking punitive damages, the plaintiff bears the burden of proving the defendant's financial condition, as part of showing that the damages award is supported. But that holding rested in part on the exceptional nature of punitive damages, which are "'a windfall'" or "boon for the plaintiff." (*Id.* at p. 120.) The Court reasoned that "'[i]t is not too much to ask of a plaintiff seeking such a windfall to require that he or she introduce evidence that will allow a jury and a reviewing court to determine whether the amount of the award is appropriate, and in particular, whether it is excessive in light of the central goal of deterrence.'" (*Ibid.*) In contrast, a criminal fine is not a windfall for any private party; it is a core method for imposing the punishment that is central to the criminal justice system. Nor is it an exceptional remedy; restitution fines are mandatory, except where they are

constitutionally prohibited. Moreover, *Adams* reasoned, civil plaintiffs can obtain financial information about their adversary through pre-trial proceedings and by subpoenaing representatives of the defendant itself to testify at trial. (*Id*. at p. 122 [discussing Civ. Code, § 3295, subd. (c)].) The prosecution generally will not have equivalent abilities in criminal cases. Defendants cannot be made into prosecution witnesses at sentencing, because of the Fifth Amendment. (See *Mitchell v. United States* (1999) 526 U.S. 314, 322.) And providing the prosecution fair access to documentary evidence would require allowing the prosecution to subpoena tax information, employer records, family records, and medical records—which, to be useful at misdemeanor sentencing, would have to be sought and received even in advance of conviction. That could lead to invasive prosecutorial examination of defendant finances even in cases where the defendant would prefer not to contest the fee. Any comparison to the rules of evidence for punitive damages is inapt.[17]

Allocating this burden to the defense presents no due process concerns. Due process is a flexible concept. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) The procedural protections it requires generally depend on consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Mathews*, *supra*, 424 U.S. at p. 335; see also *People v. Gonzalez* (2003) 31 Cal.4th 745, 753-754.) In cases affecting natural persons, the California Constitution also requires courts to consider a fourth factor: "the dignitary interest in informing individuals of the nature, grounds, and

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[17] *Adams* also reasoned that a civil plaintiff should not be required to undercut its presentation to the jury by arguing inconsistently that its behavior did not deserve punitive damages and that the punitive damages should be limited because of its financial condition. (54 Cal.3d at pp. 120-121.) Criminal fines, however, are decided by a judge, and only after the guilty verdict has been pronounced.

consequences of the action and in enabling them to present their side of the story before a responsible government official." (*People v. Allen* (2008) 44 Cal.4th 843, 862-863.)

These factors do not require that the prosecution produce evidence about, and affirmatively establish, the defendant's ability to pay a fine. With respect to the private interest affected and the risk of an erroneous deprivation, the most notable feature is that fines (and fees) are enforceable only as civil judgments, and their nonpayment cannot result in imprisonment. (§ 1214; cf. *Van Atta v. Scott* (1980) 27 Cal.3d 424, 440 [requiring prosecution to bear burden of persuasion as to ineligibility for own-recognizance release, because "[i]f an adverse ruling is made at the [own recognizance] hearing," a defendant who cannot afford bail "is incarcerated"].)

The value of the proposed "additional procedural safeguard" of shifting the burden to the government to prove ability to pay is limited and questionable, as the defendant is in the best position to know his or her own income, assets, and financial responsibilities. The defendant will almost certainly know more than the prosecution about his income from employment and other sources; his property; his outstanding debts; and his familial obligations.[18] Indeed, defendants with a plausible inability-to-pay claim usually will already have provided much of this information to the court for other purposes.[19] Defendants, with their attorneys'

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[18] Cf. *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1193-1194 [burden of proof to establish that pollution was "sudden and accidental," so as to be exempted from insurance-coverage exclusion, rests on insured, who will have "'greater information and knowledge about [its own] property and/or operations'" than the insurer would have]; cf. *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 153 ["Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim," citation and internal quotation marks omitted].

[19] Defendants may be required to provide financial information to have counsel appointed. (§ 987, subd. (c); see Judicial Council Form CR-105.) Where charges could lead to restitution, defendants must also disclose financial

assistance, can review the forms that they already completed, and resubmit that information.[20] The prosecution, in contrast, would face substantial difficulties in accessing and gathering that information. (§ 987, subd. (c) [prosecutors generally may not access information defendant submitted for appointment of counsel]; cf. *Van Atta v. Scott*, *supra*, 27 Cal.3d at p. 438 [defendant who seeks own-recognizance release should bear burden to produce information on community ties because defendant "is clearly the best source for this information"].) The burden thus belongs on the defendant claiming indigence for the same reason that civil contemnors must prove inability to pay to avoid a contempt charge. (See *Moss v. Superior Court (Ortiz)* (1998) 17 Cal.4th 396, 427.)

The government's interest here—in punishment—is important, and the Legislature has already made a judgment that a fine for a particular crime is warranted. Moreover, shifting the burden to the prosecution to prove a

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information before sentencing. (§ 1202.4, subd. (f)(5); see Judicial Council Form CR-115.)

[20] Hernandez argues that defendants who have received appointed counsel should also be presumed unable to pay fines because they enjoy a presumption of indigency for "most purposes." (OBM 78.) But the precedents he cites (except for the lower-court opinions adopting the same *Dueñas* principals that this Court is deciding here) establish such a presumption only for the purpose of determining whether a defendant should receive a trial transcript without charge to support an appeal. (*People v. Vaughn* (1981) 124 Cal.App.3d 1041, 1046, citing *Shuford v. Superior Court* (1974) 11 Cal.3d 903, 906.) Like the appointment of counsel, the furnishing of a trial transcript prevents a defendant from being deprived of "basic tools for an adequate defense," thus lessening the risk that an innocent person will be convicted. (*People v. Reese* (2017) 2 Cal.5th 660, 663.) No such concerns are raised by requiring a defendant to raise and support his assertion that he is unable to pay after he has been convicted. Nor will an inability to afford counsel necessarily mean the defendant cannot afford to pay all or part of a fine. In some cases, attorney fees may far exceed imposed fines, and many attorneys require payment in advance. Fines, in contrast, can be paid over time after conviction. (*Williams*, *supra*, 399 U.S. at pp. 244-245.) Moreover, initial determinations about a defendant's ability to pay for counsel may be incorrect, or the defendant's ability to pay may change during the course of the case; that is why the Legislature allows counties to later recoup such costs if the court determines the defendant was in fact able to pay. (§ 987.8, subd. (b)-(c).) Still, appointment of counsel may be some evidence relevant to defendant's ability to pay a fine—particularly a very high fine—and courts should consider it.

defendant's ability to pay a fine could result in significant fiscal and administrative costs, placing an obligation on the government to investigate the financial status of every defendant facing a fine. Such a shift might also result in other administrative problems, disrupting the efficient determination of cases in the State's criminal courts. The defense has a statutory right to speedy sentencing—particularly for misdemeanors. (See § 1449 [absent waiver, misdemeanor sentencing generally must occur "not less than six hours, nor more than five days, after the verdict or plea of guilty"]; cf. § 1191 [absent waiver, felony sentencing generally must occur "within 20 judicial days after the verdict, finding, or plea of guilty"].) If placing the burden of proof on the prosecution would require an adjustment of those deadlines so that prosecutors could obtain financial information on defendants, that is a choice that the Legislature should consider in the first instance.

The last potential factor in a general due process inquiry—the "dignitary interest" in informing individuals of the nature, grounds, and consequences of the fine and "enabling them to present their side of the story" (*People v. Allen*, *supra*, 44 Cal.4th at p. 862)—is of limited relevance to questions about burdens of proof. It is concerned with safeguarding an individual's ability to personally participate in a hearing before being subjected to adverse governmental action. (See, e.g., *id.* at pp. 868-869.) Those protections are already robust in criminal cases, where defendants usually have the right to testify (see § 1204), the assistance of counsel, and other procedural protections. That said, it would be a best practice for courts to clearly inform defendants facing substantial criminal fines that their ability to pay is a relevant consideration in determining whether the fine is constitutional, and that defendants may assert and prove that they cannot pay the fine based on lack of income, lack of assets, and necessary expenses and obligations.

C. Criminal Defendants Seeking Fee Waivers Should Bear the Same Modest Duty to Support That Claim as Civil Litigants

When a statute prescribes a fee and does not expressly condition the imposition of that amount on the defendant's ability to pay, a defendant who

seeks an exemption from compliance with the statute should have the burden to raise and prove an inability to pay. That is the correct result under section 500 of the Evidence Code, since inability to pay is a "fact the existence . . . of which is essential to the . . . defense that [such a defendant] is asserting." (Evid. Code, § 500; see also *supra* pp. 47-50 [discussing lack of due process concerns with such an allocation].)

As a practical matter, however, the burden on such defendants will be modest if this Court adheres to the principle that "'remedies should be tailored to the injury suffered from [a] constitutional violation.'" (*People v. Lightsey* (2012) 54 Cal.4th 668, 702 [discussing remedies for Sixth Amendment violations].) With respect to user fees, the constitutional problem with California's existing system is essentially that the State has treated dissimilarly two groups of people who consume court resources—criminal defendants and civil plaintiffs—by extending to the latter but not the former a process for receiving waivers from applicable court costs. (See *supra* pp. 37-40.) The most obvious means to remedy that problem, until a legislative solution arrives, would be to import into the criminal fee context the basic structure of civil fee waiver decisions.

That structure has several features, as discussed above. (See *supra* p. 38.) The receipt of certain public benefits entitles a civil litigant to an automatic exemption from specified civil litigation fees (Gov. Code, § 68632, subd. (a)), as does an income below 125% of federal poverty guidelines (*id*. § 68632, subd. (b)). Other plaintiffs may have their fees reduced to an amount that they can pay "without using moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family." (*Id.* § 68632, subd. (c).) The person seeking a waiver bears the burden to produce pertinent information; that burden, however, is minimized by the existence of standard Judicial Council forms implementing the Government Code civil fee waiver provisions. In the civil context, litigants have access to a fee waiver packet, consisting of short

forms.[21] These plain-language forms request basic information about income, assets, and expenses. The form to seek waiver of common civil litigation fees is one page for persons who are on an array of public benefits, and two pages for all others. A civil fee waiver is obtained simply by signing a form under penalty of perjury detailing information pertinent to the waiver sought—such as "the type of public benefits that [the applicant] is receiving," the applicant's "occupation[ ] and employer," and "monthly or yearly income and expenses and a summary of assets and liabilities." (Gov. Code, § 68633.) For civil litigants who are not also current inmates (cf. Gov. Code, § 68635), the waiver inquiry focuses on the individual's current ability to pay.

That procedure could be easily adapted to the criminal context by providing convicted defendants facing user fees with the same or similar waiver forms. Criminal defendants would receive the additional benefits of Government Code section 27755, which applies "[a]t any hearing required by law to determine a person's ability to pay court-related costs." (See Gov. Code, § 27755 [providing for notice, assistance of appointed counsel, and the right to present and confront witnesses and other evidence].) For defendants who receive the statutorily specified public benefits, an exemption from criminal user fees would be automatic. Others would have their current ability to pay determined by the court—with courts drawing realistic conclusions from previous evaluations of the defendant's financial capabilities in the case. For instance, where a court previously determined under section 987.5, subdivision (a) that the defendant was "financially unable to pay" the $50 registration fee that the law prescribes for those seeking publicly funded defense counsel, court costs of any amount presumably should be deemed unaffordable as well. In a large number of cases, there would also seem to be no reason to doubt the inability to pay court costs for defendants who were able to pay the registration fee but were deemed "unable to

[21] See generally Gov. Code, § 68641; Cal. Rules of Ct., rule 3.51(a); e.g., <http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/FORMS/CRIMINALFORMS/PKT010.PDF> (as of Dec. 8, 2020) [San Diego Superior Court example].

employ counsel" at the rates required for their case (see §§ 987, 987.2, subd. (a); cf. § 987.3, subd. (a))—although particular cases may present special issues. (See, e.g., § 987.8, subd. (a) [recognizing possibility that person could be "unable to employ counsel" yet hold real property or other assets on which court may impose a lien].) Absent reason to suspect fraud on the defendants' part, and absent contrary evidence from the prosecution, defendants' sworn statements about their financial circumstances will generally serve as a sufficient basis to waive user fees. The result would be an administrable interim solution, which resolves the constitutional infirmity unless and until a different process is set out in statute or rule.

CONCLUSION

This Court should vacate the opinion below and remand for further proceedings.

Dated: December 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answering Brief on the Merits uses a 12 point Times New Roman font and contains 15,249 words.

Dated: December 9, 2020

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DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: **People v. Kopp, et al.**
Case No.: **S257844**

We declare:

We are employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. We are 18 years of age or older and not a party to this matter. We are familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business by Debra Baldwin.

On December 9, 2020, A. Cerussi served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy via electronic mail (TrueFiling).

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In addition, Debra Baldwin placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, 1515 Clay Street, Suite 2000, Oakland, CA 94612-0550, addressed as follows:

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Imperial, CA 95521

We declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 9, 2020, at Sacramento, California and Oakland, California.

A. Cerussi	*/s/ A. Cerussi*
Declarant for Service by E-Mail	Signature
Debra Baldwin	Debra Baldwin
Declarant for Service by U.S. Mail	Signature