S257844

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

The People of the State of California

Plaintiff and Respondent,

vs.

Christi Kopp, et al.

Defendants and Appellants.

On Review From The Court Of Appeal For the Second Appellate District,
Division One, 2nd Civil No. D072464

After An Appeal From the Superior Court For The State of California,
County of San Diego, Case Number SCN327213, Hon. Harry M. Elias

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT; AMICUS CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Defendant Jason Hernandez is unable to pay "user fees," restitution and fines levied against him. Despite his uncontested inability to afford these fees and fines, the trial court ruled that Defendant's financial circumstances did not warrant having the court provide him with an "ability to pay" hearing. The Court of Appeal affirmed in part and reversed in part, holding that "it was error not to hold an ability to pay hearing after Hernandez explicitly raised the issue … [but that] we agree with the People that a defendant should challenge such fines under the excessive fines clauses of the [federal] and California constitutions." *People v. Kopp*, 38 Cal.App.5th 47, 96-97 (2019).

This Court granted review on two issues. The first is "must a court consider a defendant's ability to pay before imposing or executing fines, fees and

assessments?" This *amicus* brief addresses only that issue, not the second issue concerning the burden of proof.

The answering brief filed by Plaintiff and Respondent The People of the State of California appears to concede that at least as to punitive fines and users' fees, a court does have the duty to conduct such a hearing. For example, the State states at page 12,

> 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 State's apparent concession is not confined to just fines, however. At page 19 of its brief, the first argument the State proffers is entitled "COURTS MUST CONSIDER DEFENDANTS' ABILITY TO PAY WHEN SETTING FINES AND FEES." (Emphasis added.)

These concessions are merely "apparent" and not necessarily dispositive, because the State later qualifies them in potentially material ways. Thus, the State argues, "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." [*Id.,* p. 30]. Later, the State qualifies this proposition even further by arguing that a fine may be unconstitutional if it exceeds

not only the defendant's *current* inability to pay, but also "any plausible future resources." [*Id.*] On its face this latter qualification is amorphous. And yet the State muddies it yet further by stating that "proportionality" should be taken into account to ensure that a fine is commensurate with the defendant's wrongful conduct. [*Id.*]

This amicus brief argues that regardless of the form or classification that a court-ordered legal financial obligation **(**"LFO"**)** is given, trial courts must always consider the defendant's financial circumstances and ability to pay before issuing such LFOs. Otherwise, courts risk losing the public's trust and faith in the fairness of our legal system. For the judiciary to achieve its purpose and carry out its duties fully, it must not jeopardize such confidence. For these reasons, the following *amici curiae* respectfully request leave to file the accompanying brief.

The Los Angeles County Bar Association (LACBA) is one of the largest local voluntary bar associations in the country. In addition to promoting the professional interests of its members, who include both lawyers and non-lawyers, LACBA actively promotes the administration of justice, access to the legal system, and the role of lawyers in facilitating both.

The Beverly Hills Bar Association (BHBA) is a voluntary bar association with more than 2,000 members, many of whom live or work in the Beverly Hills and Century City areas of Los Angeles County. BHBA is dedicated to improving the administration of justice, meeting the professional needs of Los Angeles lawyers, and serving the public. Its core mission includes facilitating access to legal

services. BHBA has often appeared as *amicus curiae* to address important questions before this court.

The Bar Association of San Francisco (BASF) is a non-profit voluntary membership association of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, committees, volunteer legal services programs, and other community efforts, BASF works to advance the professional interests of its members and the interest of the public in effective, ethical legal representation and access to justice.

No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Other than the *amici curiae*, their members, or their counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

DATED: March 1, 2021

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

I. INTRODUCTION

There is nothing controversial or new about the principle that a sound and enduring system of law requires public confidence in the capacity of courts to treat individuals fairly. Before the United States Constitution was adopted, Alexander Hamilton wrote in *Federalist Paper* No. 17:

> There is one transcendent advantage belonging to the province of the State governments . . . – I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, . . . more than any other circumstance . . . impress[es] upon the minds of the people, affection, esteem, and reverence towards the government. *This [is the] great cement of society* . . . . (emphasis added).

Hamilton, The Federalist Papers, No. 17.

The "great cement" that is essential to maintaining our nation's confidence in the administration of justice develops glaring cracks and risks crumbling when courts order poor people to pay fines, even after determining that these people are likely to *never* be able to pay. But that is the risk the State's position asks this Court to allow.

On behalf of Defendant-Appellant, the *amici curiae* parties respectfully ask this Court to invalidate the practices that he challenges, not merely because they are unconstitutional but also because imposing fines or fees on indigent defendants who cannot pay them, and the devastating implications of such LFOs on indigents' lives, is so palpably unfair that it undermines the public's confidence in the judicial system.

II. ARGUMENT

A. Courts Have a Vital Interest in Safeguarding Public Confidence in the Justice System.

The authority of courts hinges on the public's belief that the justice system is fair. *See* NAT'L CTR. FOR STATE COURTS, *Public Trust and Confidence: Resource Guide*, Summary, https://tinyurl.com/7mt7tam (last visited Jan. 17, 2018) ("Because the judicial branch relies heavily on public support to perform its role in our system of government, public trust and confidence is a precious commodity for the courts."). "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." *People ex rel. Younger v. Super. Ct.*, 86 Cal. App. 3d 180, 199 (1978) (recusal decision).

"[T]he sense that decisions have been made through processes that are fair . . . is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts. . . . Public confidence in the courts depends more on whether people perceive court procedures to be fair than on the specific legal outcome of individual cases." JUDICIAL COUNCIL OF CALIF., *Trust and Confidence in the California Courts: Phase II*, 3 (2006), https://tinyurl.com/y8fj8e34.

As the Supreme Court has explained:

> The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary has no influence over either the sword or the purse . . . The judiciary's authority therefore depends

> in large measure on the public's willingness to respect and follow its decisions.

Williams-Yulee v. The Florida Bar, 135 S. Ct. 1656, 1666-67 (2015) (internal citation and quotation marks omitted).

Courts in California and elsewhere have repeatedly held that the public's confidence and trust in our legal system is of paramount importance, and that even the appearance of unfairness could jeopardize the public's faith in the integrity of the judiciary and in the legal profession as a whole. *See Guerrero v. Hestrin*, 56 Cal. App. 5th 172, 199 (2020) ("Even the appearance of . . . impropriety could operate to weaken the public's confidence in the system of criminal justice." (quoting *People v. Rhodes*, 12 Cal. 3d 180, 186 (1974) (emphasis in original)); *Fiduciary Tr. Int'l of Calif. v. Super. Ct.*, 218 Cal. App. 4th 465, 478 (2013) (holding that, in disqualifying attorneys due to conflict of interest, the "paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar"). *See also People ex rel. Clancy v. Super. Ct.*, 39 Cal. 3d 740, 746 (1985) ("Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive."); *People ex rel. Younger v. Super. Ct.* 86 Cal. App. 3d 180, 215 (1978) ("It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also avoid, as much as is possible, the appearance of impropriety.")

These common-sense strictures require courts to make every effort to avoid engaging in practices that erode the public's trust. Thus, "the impartiality of the Court is the *sine qua non* of our justice system." *United States v. Voccola*, 99 F.3d 37, 40 (1st Cir. 1996) (internal quotation marks omitted). And courts must view the "maintenance of public trust in the legal profession and the judicial process" as a "decisive consideration." *See Zewadski v. Johnston, Lemon & Co.*, No. 75-0764, 1975 WL 431, at *1 (D.D.C. Nov. 4, 1975); *see also Perillo v. Advisory Committee on Professional Ethics*, 83 N.J. 366, 373 (1980) ("Integrity is the very breath of justice. Confidence in our law, our courts and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites toward the administration of justice a doubt or distrust of its integrity.")

The imposition of fees and fines on indigent parties unable to pay them not only damages public trust in the Judiciary, it violates what the State Bar describes as its mission on its website: "to protect the public … includ[ing] the advancement of the ethical … practice of law. …" STATE BAR OF CALIFORNIA, *Mission Statement*, www.calbar.ca.gov/AboutUs (last visited Mar. 1, 2021).

Recent years have seen the growth and proliferation of Access to Justice Commissions throughout the country. The rapid spread of these Commissions has been one of the most striking and consequential justice-related developments of the past decade. These Commissions have arisen from the growing awareness and acceptance of the reality that poor people are disproportionately ignored or disadvantaged by our

Judicial system and consequently have little faith that they will receive fairness or justice once caught in its trammels.

The State Bar of California has recognized its obligation to mitigate this situation by working to improve delivery of legal services to low income Californians. In 2020 it delivered $78 million in legal aid grants and supporting projects that promote access to justice. STATE BAR OF CALIFORNIA, *Access to Justice*, www.calbar.ca.gov/Access-to-Justice (last visited Feb. 25, 2021). This work is directly undermined by imposing fines and fees on the very citizens needing protection from a system that has traditionally marginalized them.

California Rule of Professional Conduct Rule 1.0 Comment [5] reminds lawyers "to be aware of deficiencies in the administration of justice" and encourages us to "to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers" cannot afford it. STATE BAR OF CALIFORNIA, *Rules of Professional Conduct*, www.calbar.ca.gov/Attorneys (last visited Mar. 1, 2021).

Amici Bar Associations believe that the concept of "access to justice" requires far more than merely the right to "have your day in court" and to have a lawyer appointed to represent you in certain kinds of cases. Meaningful "access to justice" also requires that courts hold ability to pay hearings for all criminal defendants facing court-ordered "LFOs." Conversely, imposing such LFOs without such hearings (or findings) betrays the judiciary's interest in achieving fairness and equality in its administration of justice.

B. Imposing Mandatory Fines on Indigent Defendants Erodes Public Trust and Confidence in the Judiciary.

Imposing fines on indigent defendants despite their inability to pay undermines the public trust and confidence that, as described above, are central to our judicial system.

Mandatory fines and fees jeopardize the public's confidence in our judiciary because the fines and fees disproportionately affect the poor by thrusting them into debt that they will likely never be able to re-pay. This is true despite the State's modest concessions, because the State does not consider "ability to pay" to be "dispositive" of a court's ability to impose these fines. [State's Br. at p. 30.] Instead, the State would permit courts to impose fines on a defendant who is currently unable to pay them, and is likely *never* to be able to pay, as long as the court accounts for "any *plausible* future resources." [*Id.*, emphasis added.] Furthermore, the State's position would permit courts to disregard a defendant's inability to pay if the court considers imposition of a given fine "proportionate[]" with the defendant's wrongdoing. [*Id.*]

This Court has rejected the idea that indigent litigants can be assessed fees based on speculation that they might acquire funds in the future. In *Earls v. Superior Court*, 6 Cal.3d 109 (1971), the Court rejected an argument that a civil litigant's filing fee need not be waived because she would only need to set aside $10 a month for four or five months to pay the fee. The Court reaffirmed that "a litigant [is] not required to allege that he would contribute the last dollar he has or can acquire in order to be considered indigent." *Id.* at 117.

The Ninth Circuit in *Rivera v. Orange County Probation Department*, 832 F.3d 1103, 1112 (9th Cir. 2016), addressed head-on the "recurring problem of public entities imposing fiscal burdens on those who can least afford them." There, Orange County had relied on self-generated revenue from fines on probationers to fund more than 40% of its probation department, even after individuals declared bankruptcy. *Id.* The Ninth Circuit prohibited Orange County from collecting fines from a bankrupted woman, declaring that "[s]eeking to obtain that revenue by unremittingly pursuing legal actions against disadvantaged individuals . . . *undermines the credibility of government and the perceived integrity of the legal process*." *Id.* (emphasis added). *Rivera*'s reasoning supports reversal here.

The State mistakenly claims that the hybrid due process/equal protection analysis that defendant advocates has no bearing here because many of the adverse consequences of unpayable LFO's – such as homelessness, inability to safeguard one's family, unemployment – are not imposed by the State, but by private actors. (*See* Appellant's Reply Brief at p. 19.) The State's argument is plainly misguided. It ignores the very real likelihood that indigent defendants will face future arrest should they fail to pay their fines. Penal Code section 1205(b) provides that "the court shall, upon any default in payment, immediately order the arrest of the defendant and order him or her to show cause why he or she should not be imprisoned."

In a recent report, the Brennan Center found that:

> Arrests lead not only to an initial loss of freedom but in many cases to days in jail prior to a court appearance and an ability to pay determination. . . . [and] in many instances indigence is the underlying

> *cause* of the failure to appear . . . [since] aggressive collection tactics . . . deter poor people from showing up . . . . As a result, – "sending debtors to overcrowded prisons and jails for failing to follow a court order – is costly to states, harmful to public safety, and unfairly burdensome to debtors whose failure to appear is often rooted in poverty."

Alicia Bannon, Mitali Nagrecha & Rebekah Diller, BRENNAN CTR. FOR JUSTICE, *Criminal Justice Debt: A Barrier to Reentry* 23-24 (2010), https://tinyurl.com/axcscpg [hereinafter Brennan Report].

Further, the interests at stake for individuals like Mr. Hernandez are far broader than the right to be free from incarceration. "From seeking and maintaining employment and housing, to obtaining public benefits, to meeting financial obligations such as child support, to exercising the right to vote, criminal justice debt is a barrier to individuals seeking to rebuild their lives after a criminal conviction. In the rush to raise revenue, states have not considered whether turning defendants into debtors is consistent with the need to reduce recidivism, reduce over-incarceration, and promote reentry." Brennan Report at 27. The consequences of LFOs on indigent defendants is particularly troubling, because it is a truism that a disproportionate percentage of indigent defendants in California are persons of color.

Even fines that seem relatively small may be devastating to a party who cannot pay. As *Rivera* stated, "Raising money for government through law enforcement whatever the source—parking tickets, police-issued citations, court-imposed fees, bills for court appointed attorneys, punitive fines, incarceration charges, supervision fees, and more—can lay a debt trap for the poor." *Rivera*, 832 F.3d at 1112 n.7. *See also*

People v. Cota, 45 Cal. App. 5th 786, 798 (2020) (citing with approval the remark of the Administrative Director of the California Judicial Council "that fines and fees create a 'destitution pipeline'") (conc. & dis. opn. of Data, J).

These fines and fees invite public mistrust of the courts to the extent that the judiciary appears to benefit directly from subjecting indigent defendants to mandatory fines that they cannot escape.

A federal court in Louisiana acknowledged that the court has "a constitutional obligation to inquire into criminal defendants' ability to pay court debts." *Cain v. City of New Orleans*, No. CV 15-4479, 2017 WL 6372836, at *23-24 (E.D. La. Dec. 13, 2017). The judge noted that the court's "power over fines and fees revenue creates a conflict of interest" because the court's "dual role . . . offer[s] a possible temptation to find that indigent criminal defendants are able to pay their court debts. This 'inherent defect in the legislative framework' arises not from the bias of any particular Judge, but 'from the vulnerability of the average man—as the system works in practice and as it appears to defendants and to the public.'" *Id.* (quoting *Brown v. Vance*, 637 F.2d 272, 284 (5th Cir. 1981)) (noting that the "practice of failing to inquire into ability to pay is itself indicative of [a] conflict of interest"); *see also* LAWYERS' COMM. FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, *Paying More for Being Poor* 3 (May 2017), https://tinyurl.com/kl388y2 ("[I]t is a conflict of interest for courts to regularly assess the maximum fees permitted by law to support court funding, rather than adjust those fees based on an individual's ability to pay or proportionate consequences."). Such a self-benefiting practice that inherently disadvantages the poor "betray[s] a misguided

sense of values." *Rivera*, 832 F.3d at 1112 (quoting *In re Jerald C.*, 36 Cal.3d 1, 10 (1984)).

Reliance on fees "to fund court operations raises significant concerns" about the judiciary's independence and "undermines the traditional functions of the courts," especially when courts levy those fees against individuals regardless of their inability to pay. Moreover, this reliance is, ironically, misplaced since it is beyond dispute that the fines and fees imposed on indigents will seldom be paid. *Cf.* Brennan Report at 30 n.221 (quoting Robert Tobin, NAT'L CTR. FOR STATE COURTS, *Funding the State Courts: Issues and Approaches* 50 (1996) (stating that "[i]t is beyond dispute that [the concept of self-supporting courts] is not consistent with judicial ethics or the demands of due process")); ABA COMM'N ON STATE COURT FUNDING, *Black Letter Recommendations of the ABA Commission on State Court Funding: Report* 7 (Aug. 2004) (stating that courts should have "a predictable general funding stream that is not tied to fee generation"); CONFERENCE OF STATE COURT ADM'RS, *Position Paper on State Judicial Branch Budgets in Times of Fiscal Crisis* 14 (2003), https://tinyurl.com/y9fqgaxr ("The judiciary must guard against sending the message that courts are somehow responsible for funding themselves.").

In short, imposing LFOs without a finding of ability to pay them, or after disregarding a defendant's likely inability to pay, does more than erode public trust and confidence in the courts; it creates immense fear in defendants and those dependent on them. Indigent defendants in California surely are fearful about whether their failure to pay court fines and fees will lead to arrest or incarceration, which will ultimately

result in further fear and distrust in the legal system. *See e.g.*, Leah Donnella, *How A Traffic Fine Can Lead To Jail Time In California*, NPR (May 4, 2017), https://tinyurl.com/y7cn743f; Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), https://tinyurl.com/ycks7kzu.

It is a sad and telling commentary on our judicial system when poor litigants are afraid to step foot into the courthouse because their poverty invites further hardship.

III. CONCLUSION

Our court system is, as Alexander Hamilton foretold, the "great cement" of our society, but only if it enjoys broad public trust. Assessing mandatory fees or fines on indigent individuals without consideration of their ability to pay, or assessing fines despite finding that an individual will likely or certainly be unable to pay, is irrational and counterproductive because it erodes the public's confidence in the judiciary. As such, the *amici curiae* respectfully request this Court to grant to Defendant the full relief he seeks.

DATED: March 1, 2021

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court, Rule 8.1012(d)(2), I certify that according to Microsoft word the attached brief is proportionally spaced, has a typeface of 13 points, and contains 3,028 words.

DATED: March 1, 2021

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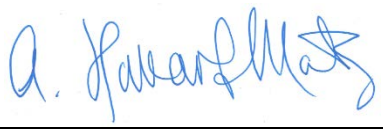
By: 

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PROOF OF SERVICE

People v. Christi Kopp, et al.
Case No. S257844

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1875 Century Park East, 23rd Floor, Los Angeles, CA 90067-2561.

On March 1, 2021, I served the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF** on the interested parties in this action as follows:

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

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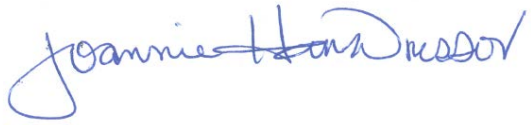

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