Case No. S257844

SUPREME COURT OF CALIFORNIA

The People of the State of California,

Plaintiff and Respondent,

v.

Christi J. Kopp, et al.,

Defendant and Appellants.

After a Published Opinion of the Fourth Appellate District, Division One
Case No. D073464

On Appeal from San Diego County Superior Court
Honorable Harry M. Elias
Case No. SCN327213

APPLICATION TO FILE AMICUS BRIEF

[PROPOSED] AMICUS BRIEF OF PROFESSOR BETH A. COLGAN IN SUPPORT OF NEITHER PARTY

And

DECLARATION OF CARRIE AKINAKA IN SUPPORT OF AMICUS BRIEF OF PROFESSOR BETH A. COLGAN

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CERTIFICATE OF INTERESTED PARTY

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court ("Rule"), Amicus Professor Beth A. Colgan certifies that she knows of no other person or entity that has a financial or other interest in this case.

March 1, 2021

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APPLICATION TO FILE AN AMICUS BRIEF IN SUPPORT OF NEITHER PARTY

Pursuant to California Rule of Court 8.200(c), UCLA School of Law Professor Beth A. Colgan ("the Amicus"), respectfully requests permission to file the attached brief as amici curiae in support of neither party. Undersigned counsel certifies that this brief was not authored, in whole or in part, by any party or any counsel for a party in the pending appeal and that no person or entity other than amici made any monetary contributions intended to fund the preparation or submission of this brief.

INTEREST OF THE AMICUS

Beth A. Colgan is Professor of Law at UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of economic sanctions as punishment, and particularly on the Eighth Amendment's excessive fines clause. She has published dozens of works, several of which are relevant to the issues in this amicus brief: *Beyond Graduation: Economic Sanctions and Structural Reform* (2020) 69 Duke L.J. 1529; *Nor Excessive Fines Imposed* in The Eighth Amendment and Its Future in a New Age of Punishment (Berry & Ryan, edits., 2020); *Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay* (2019) Brookings Inst.; *The Excessive Fines Clause: Challenging the Modern Debtors' Prison* (2018) 65 UCLA L.Rev. 2; *Graduating Economic Sanctions According to Ability to Pay* (2017) 103 Iowa L.Rev. 53; *Reviving the Excessive Fines Clause* (2014) 102 Cal. L.Rev. 277; and *The Burdens of the Excessive Fines Clause* (forthcoming).

This brief is offered to provide the Court with a recommended framework for deciding two key issues in this litigation: (1) whether the fees in dispute constitute fines for purposes of the excessive fines clause and (2) which party has the burden to raise an excessive fines claim, to

produce evidence related to that claim, and to persuade by a particular standard. Amicus' extensive scholarship in this area allows for an additional perspective beyond those offered by the Parties, and will assist the Court in adopting rules that are Constitutionally compliant and readily administrable by trial courts.

DATED: March 1, 2021

Respectfully submitted,

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I. INTRODUCTION

This Court asked the Parties to address two questions: (1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay? As to the first question, the Parties have agreed that courts must consider a defendant's ability to pay fines and some assessments, but the State has dissented as to three of the fees in Mr. Kopp's case. As Proposed Amicus, Professor Beth A. Colgan, too, agrees that a court must consider a defendant's ability to pay, but disagrees with the State in a critical respect: the State unduly narrowed the definition of "fine" for purposes of the excessive fines clause, failing to recognize that economic sanctions that are only partially punitive are subject to the clause.

As to the second question, U.S. Supreme Court jurisprudence instructs that the assignment of burdens of proof must comport with fundamental fairness under the due process clause. Though the doctrine is muddy, an appropriate framework for addressing this question may be derived from federal and California constitutional doctrine. The explication of that issue proceeds in three parts: (1) setting out the structure for determining whether an economic sanction is excessive, within which an assignment of burdens is needed for the ability to pay determination as well as the ultimate determination of proportionality; (2) explicating the framework offered by the federal and state due process doctrines; and (3) suggesting how the burdens of proof should fall between a defendant and the State: namely, the burden of persuasion for both the question of financial effect and the ultimate question of disproportionality should be to the government. In addition, the baseline should be a clear and convincing evidence standard of proof that would be raised further if warranted as

follows: once the defendant provides a colorable claim of his or her inability to pay, or if the government fails to provide evidence necessary to understand the downstream consequences of ongoing debt and of conviction for the offense, the standard of persuasion should increase. This framework comports with Constitutional jurisprudence and is readily administrable by trial courts while furthering the ends of justice.

II. ARGUMENT

A. Fees Need Only Be Partially Punitive to Constitute "Fines."

The Court first asked whether "a court must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments." The Parties agree that the answer is yes as it relates to fines and certain of the assessments imposed in Mr. Kopp's case. The State asserts, however, that three of the fees imposed—tied to court operations, court facilities, and booking-related costs—do not constitute fines for purposes of the excessive fines clause because they are not "punishment." (Answering Brief on the Merits "ABM" at p. 19-28.) The State's approach here, however, is in error. Fees are properly treated as fines under the excessive fines clause so long as they are at least partially punitive. U.S. Supreme Court precedent in this area suggests strongly that each of the fees at issue meet that standard and are thus subject to an excessiveness inquiry.

In *Austin v. United States*, the Supreme Court held that to constitute a fine, an economic sanction need only be partially punitive. ((1993) 509 U.S. 602, 610.) At issue in the case was a civil forfeiture. (*Id.* at p. 604.) Prior to *Austin*, the Court had held that certain civil forfeitures were not sufficiently punitive to trigger the protections of the double jeopardy clause because they were not so punitive as to overwhelm legislative intent that the sanction be treated as remedial. (*See, e.g., United States v. One*

Assortment of 89 Firearms (1984) 465 U.S. 354, 364.) In the double jeopardy context—as is also true in the ex post facto context, (*see Smith v. Doe* (2002) 538 U.S. 84, 97)—that analysis requires application of a multi-factor inquiry set out in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 and *United States v. Ward* (1980) 448 U.S. 242.

In holding that civil forfeitures are subject to the excessive fines clause, the Court explicitly rejected the application of the more stringent tests laid out in *Mendoza-Martinez* and *Ward*. (*Austin*, *supra*, 509 U.S. at p. 607-10 & fns. 4, 6.) Subsequently, the Court affirmed that the excessive fines inquiry and the double jeopardy inquiry are "wholly distinct" because the two clauses have different structures. (*United States v. Ursery* (1996) 518 U.S. 267, 287.) Unlike the double jeopardy and ex post facto inquiries, "[i]t is unnecessary in a case under the Excessive Fines Clause to inquire at a preliminary stage whether the civil sanction imposed in that particular case is totally inconsistent with any remedial goal. Because the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be 'excessive.'" (*Ibid.*) Therefore, "a preliminary-stage inquiry that focused on the disproportionality of a particular sanction would be duplicative of the excessiveness analysis that would follow." (*Ibid.*; *see also People v. Ruiz* (2018) 4 Cal.5th 1100, 1108 [distinguishing between the less stringent excessive fines test in which an economic sanction is a fine even if remedial "if it *also* serves either retributive or deterrent purposes," and the more stringent frame of "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"] [emphasis in original].)

In other words, the test for whether an economic sanction constitutes a fine is more capacious in the excessive fines context than in other settings because it is merely a threshold to the excessiveness inquiry. For example, the fact that an economic sanction is imposed with or without consideration of the seriousness of the underlying offense is relevant to the question of whether it is so punitive as to outweigh evidence of legislative intent that it be purely remedial for double jeopardy purposes. (*See People v. Hanson* (2000) 23 Cal.4th 355, 362.) But it is not determinative of whether that same sanction constitutes a fine, because it would improperly conflate the threshold determination of whether it is a fine with the ultimate question of whether it is excessive. (*Contra* ABM at p. 22-23.) This is why the *Austin* Court rejected the government's contention that a civil forfeiture—the value of which is not calibrated to the seriousness of the offense but rather dependent on the cash or property's relationship to that offense—could not be a fine; the Court looked instead to historical and contemporary evidence that indicated civil forfeitures were at least partially punitive. (*Austin*, *supra*, 509 U.S. at p. 621-22.)

The importance of applying the right test is exemplified by the U.S. Supreme Court's excessive fines jurisprudence, in which it has made clear that it adopted the more capacious test for what constitutes a fine in order to ensure that the clause can serve as a "constant shield" against the risk that the government will impose economic sanctions for the purpose of generating revenue "in a measure out of accord with the penal goals of retribution and deterrence." (*Timbs v. Indiana* (2019) 139 S.Ct. 682, 689 [quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 979, fn.9]; *see also infra* p. 33-34, 55-57.) The fact that the California Legislature adopted a fee or assessment in order to generate revenue may mean that any punitive aspects of the penalty are insufficient to overwhelm lawmakers non-

punitive aim of fulfilling a budgetary need. (*See People v. Alford* (2007) 42 Cal.4th 749, 756-59; *see also* ABM at p. 25-27.) And the extent to which it actually remediates system costs incurred in relation to a particular case may speak to whether it is excessive. (*See United States v. Bajakajian* (1998) 524 U.S. 321, 340 [holding that a forfeiture was excessive in part because it bore "no articulable correlation to any injury suffered by the Government"].) But it cannot preclude the treatment of a sanction as a fine without eviscerating the primary purpose of the excessive fines clause itself.

California's use of fines, fees, and assessments to provide revenue for governmental services that would otherwise require expenditures of tax revenue provides a perfect example of the risk of abuse that the Supreme Court intends the Clause to protect against. California's reliance on economic sanctions as tax-avoidance tools dates back to at least the early 1960s, when lawmakers added a $1 assessment for every $20 in base fines imposed for many traffic violations for the purpose of funding driver education programs in local school districts.[1] But the now expansive use of economic sanctions for this purpose gained new traction after the passage of Proposition 13 in 1978. Prior to that time, California's court systems were locally funded, with cities and counties relying in part on local tax dollars, as well as revenues from fines and forfeitures, to fund court operations.[2] When Proposition 13 constrained local governments' ability to raise revenue through property

[1] *See* Cal. Research Bureau, Who Pays for Penalty Programs in California? (Feb. 2006) p. 4-5, https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1306&context=caldocs_agencies (all online sources are as of March 1, 2021).

[2] *See* Ortega, *The Long Journey to State Funding*, Cal. Courts Rev. 7-11 (Winter 2009), https://www.courts.ca.gov/documents/CCR_09Winter.pdf.

taxes, a push to fund courts at the state level gained momentum, ultimately resulting in a series of bills passed between 1985 and 1997 that created a structure through which the State would provide block grants for local court funding in exchange for counties sending a significant portion of revenue from economic sanctions to state coffers.[3]

At the same time state lawmakers took on the burden of funding local court systems, they also began a project of expanding the use of economic sanctions to allow the state and local governments to finance those systems—as well as the criminal justice system more broadly and a wide variety of only tangentially related public projects without a need to rely on tax dollars. This included, for example, the adoption of additional penalty assessments in 1980 that today are deposited in the State Penalty Fund (Pen. Code, § 1464, subd. (a)), which is used to finance projects as diverse as bus driver training, motorcycle safety courses, and the State's Traumatic Brain Injury Program.[4] It also includes increased reliance on fees to address the budgetary shortfalls caused by the fiscal crisis of the early 1990s, including the passage, in 1991, of the criminal justice administrative fee at issue in this case, which allows cities, school districts, and other agencies to impose a fee to subsidize the costs of arrests. (Gov. Code, § 29550.1; ABM at p. 27.) And it includes a sharp uptick in the use of fees and assessments beginning in 2005,[5] including the adoption of the court

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[3] *Id.*

[4] Cal. Legislative Analyst's Office, *The 2017-18 Budget: Governor's Criminal Fine and Fee Proposals* 8-10 (Mar. 3, 2017), https://lao.ca.gov/reports/2017/3600/Criminal-Fine-Fee-030317.pdf.

[5] Cal. Legislative Analyst's Office, Overview of State Criminal Fines and Fees and Probation Fees (Feb. 5, 2019) (hereinafter "Overview") p. 3, https://lao.ca.gov/handouts/crimjust/2019/State-Fines-and-fees-Overview-020519.pdf.

operations and court facilities fees at issue here—which lawmakers use as revenue streams to fulfill its obligation to fund local courts, again, without reliance on increased taxation. (Pen. Code, § 1465.8; Gov. Code, § 70373; ABM at p. 24-27.) The use of fees and assessments has become so prevalent that in many cases they now significantly outpace base fines.[6]

With the core purpose of the excessive fines clause implicated, the question, then, is whether or not the contested fees in this case are at least partially punitive and, thus, within the scope of the protections afforded by the clause. *Austin* provides relevant guidance on that question.

One indication that an economic sanction is at least partially punitive is whether it is imposed only upon a determination that the person has engaged in prohibited conduct. (*Austin*, *supra*, 509 U.S. at p. 616-22; *see also Alford*, *supra*, 42 Cal.4th at p. 757 ["Fines arising from convictions are generally considered punishment."]; *People ex rel. Warfield v. Sutter St. Ry. Co.* (1900) 129 Cal. 545, 548 [explaining that because a fine "could be inflicted upon defendant only on its being 'adjudged guilty'" indicates its penal nature].) The criminal justice administration fee obviously fits within this consideration, as it may only be imposed upon conviction. (Gov. Code, § 29550.1, subd. (a).)

The court operations and facilities fees appear at first glance to be on different footing because they may be imposed upon conviction *or* upon

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[6] *See, e.g.*, Herrera et al., *Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles* (Oct. 2019) p. 11, https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_CommunityServiceReport_Final_1016.pdf (examining 5,000 cases from Los Angeles Superior Court from 2013 to 2014 and finding that 80% of imposed debt came from additional fees); Overview, *supra* note 5, at p. 2 (providing examples of fees and assessments that significantly increase the dollar amount imposed).

dismissal of a traffic violation on "the condition that the defendant attend a court-ordered traffic violator school." (*See* Gov. Code, § 70373, subds. (a)(1)-(2); Pen. Code, § 1465.8, subds. (a)(1)-(2).) But *Austin* found that civil forfeitures were at least partially punitive, not due to the fact of Mr. Austin's prior conviction, but because the civil forfeiture scheme allowed for a deprivation of property on the fiction that the property owner was complicit in criminal conduct. (*Austin*, *supra*, 509 U.S. at p. 616-22.) For the government to obtain a civil forfeiture it need not even charge a person with an offense; instead, it may employ a civil proceeding in which it is only required to prove a relationship between the property and criminal activity by a preponderance of the evidence, at which point the burden shifts to the owner to prove his or her innocence. (18 U.S.C. § 983(c).[7])

The court operations and facilities fees are arguably more indicative of punitive intent than the civil forfeiture determined to be a fine in *Austin* because they are at least triggered by the charging of an offense, resolved through conviction or an agreement to attend traffic school, which effectively constitutes a guilty plea. While attending traffic school may improve driving, and thus promote public safety, the payment of these fees remains the actual "price to be paid" for a past violation. (*See In re Alva* (2004) 33 Cal.4th 254, 287-88 [holding sex offender registration was not punishment subject to the cruel and unusual punishments clause reasoning that it was entirely forward looking rather than responsive to a past offense].)

Another indication that an economic sanction is at least partially punitive may be drawn from historical practice. In *Austin*, the Court interrogated the historical use of civil *in rem* forfeitures dating back to the

[7] Previously 21 U.S.C. §§ 881(a)(4) and (a)(7).

English common law era. (*Austin*, *supra*, 509 U.S. at p. 611-18.) Though the three fees at issue here have much shallower roots, their structure—the imposition of a sanction, the revenues of which are used to finance courts and related processes—has a long pedigree. In the colonies and early American states, for example, fines and forfeitures were used to finance "court costs, costs related to law enforcement activities and incarceration," and sanctions used for such purposes were in some cases the sole punishment imposed for an offense.[8] Therefore, at a minimum, the fact that California's lawmakers have chosen to use these modern fees for similar purposes does not render them purely remedial.

The partially punitive nature of an economic sanction may also be seen in its relationship to other recognized forms of punishment. The *Austin* Court, for example, noted that forfeitures were "listed alongside the other provisions for punishment" in an early American customs statute, and that the legislative history surrounding the modern forfeiture statute evinced Congress's recognition that forfeitures would supplement fines and incarceration as a means of punishment. (*Austin*, *supra*, 509 U.S. at p. 614, 620.)

The relationship between the fees at issue here and other recognized forms of punishment arises in three different ways, including, first, that these fees are treated like punitive fines and assessments for collections purposes. Debts from fines, fees, and assessments may be subject to a comprehensive collection program in which delinquent debts may be subject to tax intercepts, private debt collection, wage garnishments, property liens, and more. (Pen. Code, § 1463.007, subd. (a); Rev. & Tax.

[8] Colgan, *Reviving the Excessive Fines Clause* (2014) 102 Cal. L.Rev. 277, 310-17.

Code, § 19280, subd. (a)(1)(A).) California lawmakers could have chosen to treat fees differently, but instead explicitly directed that "court-ordered fees" be treated like "fines, forfeitures, penalties, restitutions, and assessments" in the collections process. (Pen. Code, § 1463.010; *see also* Rev. & Tax. Code, § 19280, subds. (a)(1)(A), (a)(2)(A) [subjecting delinquent "fines… or any other amounts imposed by a juvenile or superior court" to collections by the Franchise Tax Board, including any administrative fees].) Further, lawmakers have chosen to exempt court-ordered fees from time limitations on enforcement afforded to those imposed in civil actions. (Pen. Code, § 1214, subd. (e)(1).)

Second, lawmakers have chosen to allow people to opt into other forms of punishment as a substitute if they are unable to pay economic sanctions. While "working off" debt by serving a jail term is limited to fines and most penalty assessments, (*see infra* p. 40), community service can substitute for payment for any form of economic sanction imposed in criminal cases in which probation is imposed or for any infraction. (Pen. Code, §§ 1205.3; 1209.5, subds. (a)-(b).) This includes the fees at issue here.[9]

Third, the payment of these fees may be intertwined with other punishments when they are made a condition of probation or parole. Courts are required to make payment of the criminal justice administrative fee a condition of probation. (Gov. Code, § 29550.1, subd. (a).) Even without that statutory requirement, because courts routinely make economic sanctions conditions of probation,[10] these fees are inexplicably intertwined

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[9] *See* Herrera et al., *supra*, at p. 10-14.

[10] *See, e.g.*, Decl. of C. Akinaka in Support of Amicus Brief of Prof. Beth A. Colgan, *infra*, p. 69-70 (Santa Clara County Probation – Adult Division Information for Probationer: Standard Terms and Conditions (rev.

with a recognized form of punishment. (*See Hanson, supra,* 23 Cal.4th at p. 362 [holding that restitution fines constitute punishment in part because they "must be made a condition of probation"].)

In short, like the civil forfeiture in *Austin,* the three fees at issue here are (1) triggered by a determination that a person engaged in prohibited conduct, (2) consistent with the use of fines dating back to the American colonies, and (3) intertwined with other recognized forms of punishment. All of this suggests that they are at least partially punitive, and thus fines within the scope of the excessive fines clause.

It is, however, important to note that even if these three fees are deemed to be fines for purposes of the excessive fines clause, that does not mean that they or other such fines are not subject to other constitutional protections, including those afforded by the due process and equal protection clauses. *Austin* makes clear the need to consider what work each given constitutional provision is to do when assessing its applicability to a particular punishment. (*Austin, supra,* 509 U.S. at p. 607-08 & n.4.) The due process clause is concerned with "fairness in all relations between the criminal defendant and the State," thus prohibiting arbitrary treatment. (*Bearden v. Georgia* (1983) 461 U.S. 660, 655.) The equal protection clause offers protection where "the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants" due to their financial condition. (*Ibid.*) In combination, they create a "flat prohibition against pricing indigent defendants out of" fair treatment in the criminal justice system. (*Mayer v. City of Chicago* (1971) 404 U.S. 189, 196-97.) A particular economic sanction may not survive a due process-

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June 2016) ¶ 7 requiring people on probation to report within three days to establish a payment schedule with the Department of Revenue if ordered by the court "to pay fine, restitution, *or other*]" [emphasis supplied]).

equal protection analysis if it is effectively "arbitrary in violation of due process because it creates a wealth-based inequality in contradiction to the principles of equal protection[.]"[11] If that economic sanction were to survive Fourteenth Amendment review, however, it may still fail to meet the requirements of the excessive fines clause, which does different work, mandating an examination of whether the economic sanctions to be imposed would be disproportionate to the underlying offense. (*See infra* Part B.1.)

B. The Assignment of Burdens Under the Excessive Fines Clause Must Comport with Notions of Fundamental Fairness Mandated by the Due Process Clause.

The U.S. Supreme Court has held that the assignment of burdens of proof is subject to the fundamental fairness requirement of the due process clause. Before addressing the question from that perspective, Subpart 1 below discusses the excessive fines clause's excessiveness inquiry and how that issue relates to the assignment of burdens generally. Subpart 2 then discusses the due process doctrines of the U.S. Supreme Court and this Court, offering a framework for assigning burdens of proof. Subpart 3 applies that framework to the question at hand.

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[11] Colgan, *Wealth-Based Penal Disenfranchisement* (2019) 72 Vand. L.Rev. 55, 104. Professor Colgan would provide further briefing on the *Griffin-Bearden* line of cases at the Court's request. For further discussions of how the due process and equal protection clauses reinforce each other to provide greater protection than they would individually, *see, e.g.*, Abrams and Garrett, *Cumulative Constitutional Rights* (2017) 97 B.U. L.Rev. 1309 and Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment* (2002) 33 McGeorge L.Rev. 473.

1. This Court Must Determine Who Has the Burden of Proof as to Inability to Pay and as to Overall Disproportionality.

This Court's question on the assignment of the burdens proof was directed specifically to the issue of a defendant's financial ability to pay. That question, however, cannot be divorced from an overarching consideration of which party bears the related burden of showing whether or not the fine imposed is "excessive." (ABM at p. 45.)

In *Bajakajian*, the Supreme Court adopted the gross disproportionality test for measuring whether economic sanctions are excessive, which requires weighing offense seriousness and punishment severity. (*Bajakajian, supra*, 524 U.S. 321 at 336-37.) On one side of the scale, offense seriousness comprises crime and culpability facts. (*Ibid.*) The prosecution bears the burden of proving facts establishing guilt for the crime beyond a reasonable doubt at trial, or it must be established via guilty plea. (*In re Winship* (1970), 397 U.S. 358, 364; *see also Blakely v. Washington* (2004) 542 U.S. 296.) Sentencing factors that relate to culpability, such as a person's criminal history, may be shown by a preponderance. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239.)

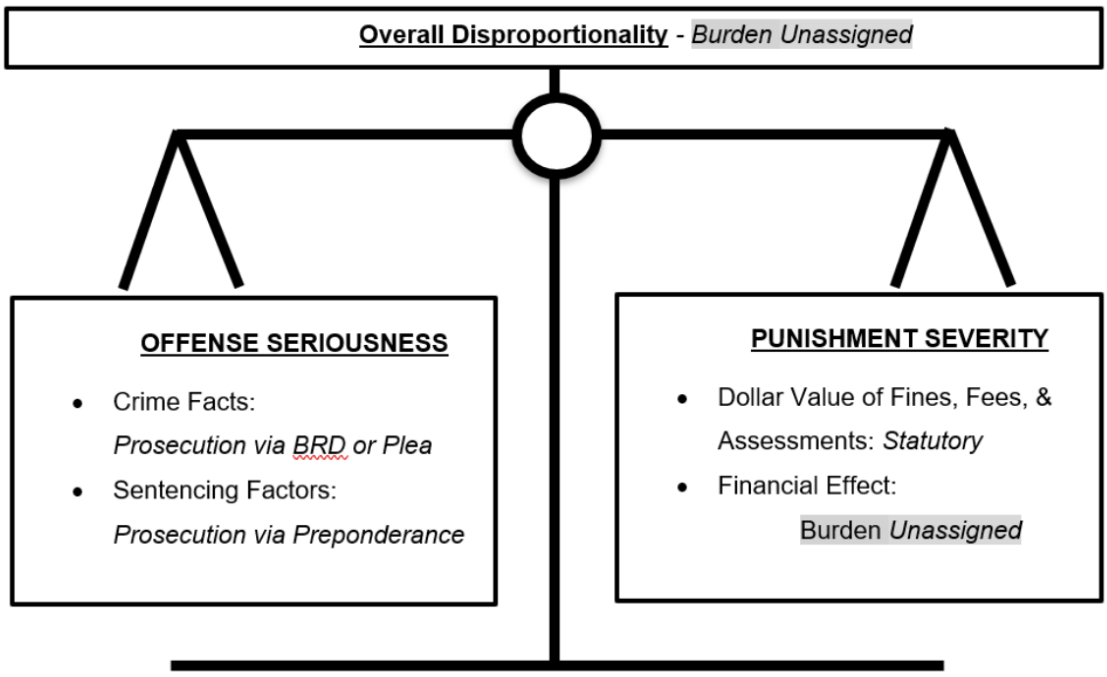
On the other side of the scale, this Court has held that punishment severity comprises the dollar value of the economic sanction and the financial effect of that sanction on the defendant and his or her family. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *City & County of San Francisco v. Sainez* (2000) 77 Cl.App.4th 1302, 1320-1322.) For fines, fees, and assessments, the allowable dollar

value in California is often set out in statute.[12] That leaves the determination of financial effect (*i.e.*, one's ability to pay), for which the assignment of the burden of proof is an open question.

Once the component parts of offense seriousness and punishment severity are established, a court may engage in the excessiveness inquiry by discerning whether the punishment severity out-weighs offense seriousness to such an extent that it is rendered grossly disproportionate. (*Bajakajian*, *supra*, 524 U.S. at p. 336-37.) But as with financial effect, who has the burden of establishing overall gross disproportionality also remains unassigned.

In sum, the burdens and standards of persuasion with respect to the component parts of offense seriousness and punishment severity—as well as the open questions regarding financial effect and overall disproportionality—could be portrayed as follows:

[12] *See* Central Cal. Appellate Program, Fines Chart Page, *https://www.capcentral.org/criminal/crim_fines.asp* (nonexhaustive summary of statutory fines and fees).



2. The *Mathews/Medina/Ramirez* Due Process Framework.

The assignment of the burdens of proof—whether for ascertaining financial effect or overall disproportionality—must comport with the fundamental fairness requirement of the due process clause.[13]

Since deciding *Mathews v. Eldridge* ((1976) 424 U.S. 319), the U.S. Supreme Court has typically approached the fundamental fairness of both criminal and civil procedural rules under a three-factor test, considering: (1) governmental interests, (2) private interests, and (3) the risk the procedure will result in an erroneous decision. (*See, e.g.*, *Ake v. Oklahoma* (1984) 470 U.S. 68, 77-85.) Shortly thereafter, in *People v. Ramirez* (1979) 25 Cal.3d 260, this Court adopted a fourth consideration, recognizing that "even in

[13] For a more robust examination of the Supreme Court's jurisprudence in this area, *see* Colgan, *The Burdens of the Excessive Fines Clause* (forthcoming) Part I.B, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791826.

cases in which the decision-making procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values," including an opportunity to be heard and "treated with understanding, respect, and even compassion." (*Id.* at p. 267-68.)

Nearly two decades later, however, the U.S. Supreme Court mandated a more restrictive test, centered on historical practice, for use in criminal cases. In *Medina v. California* (1992) 505 U.S. 437, the Court required such an examination to determine if a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Id.* at p. 445.)

The *Medina* opinion, however, left the role the now-mandated historical inquiry is to play unresolved. Though it articulated the test as if history served a gatekeeping function, whereby a procedure must be left untouched unless it contradicted a longstanding practice, (*Medina*, *supra*, 505 U.S. at p. 445-46), in *Medina* itself the Court found no such historical practice and then proceeded to engage in a *Mathews*-like inquiry. (*Id.* at p. 446-51). As Justice Blackmun noted, "it is clear that the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the *Mathews v. Eldridge* test it earlier appears to foreswear." (*Id.* at p. 462 (dissenting opinion of Blackmun, J.).) The Court has left the terrain muddy in later cases, treating the historical inquiry at various times as a "primary guide," (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43-44 (plurality)), irrelevant if there could be no possible historical counterpart, (*District Atty's Office for the Third Judicial Dist. v. Osborne* (2009) 557 U.S. 52, 69), or merely probative. (*See, e.g.*, *Cooper v. Oklahoma* (1996) 517 U.S. 348, 356-66.)

While an historical inquiry may be useful for ascertaining fundamental fairness, its application in the excessive fines context exemplifies why an overreliance on historical practice is unwarranted. First, surviving historical materials often focus on substantive criminal laws such as treason or on punishments such as execution and transportation, and are also limited by alterations in litigation practices over time.[14] Second, a proper examination of historical evidence frequently reveals that historical practices were seldom uniform, undermining the idea that the record will provide a determinative answer to any precise question.[15]

Perhaps most importantly, the historical record as it relates to the excessive fines clause is undoubtedly distorted by governmental abuses dating back a millennium. The *Medina* Court adopted the historical inquiry out of deference to lawmaker decision-making as it relates to criminal law and punishment. (*Medina*, *supra*, 505 U.S. at p. 444-46.) But as the Supreme Court has recognized in its excessive fines jurisprudence, the historical record is replete with episodes in which lawmakers have abused the prosecutorial power by using economic sanctions for their revenue generating power as a form of tax-avoidance. (*See Timbs*, *supra*, 139 S. Ct. at p. 688-89.) Dating back at least to Magna Carta, English monarchs ignored constitutional restrictions on the use of fines, most notoriously through the Star Chamber, which employed extraordinary fines to drain power from Parliament by creating a source of revenue that undermined its taxing authority while severely punishing those who spoke out against the crown. (*Ibid.*; *id.* at p. 693-98 (opinion concurring in judgment by Thomas, J.).) Such abuses continued on American soil, again, most notoriously

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[14] *See* Colgan, *Burdens*, *supra*, at Part I.B.

[15] *See generally* Meyler, *Towards a Common Law Originalism* (2006) 59 Stan. L.Rev. 551.

through the use of the Black Codes, a series of law applicable explicitly or through practice only to Black people.[16] When fines were imposed, the debts were sold to private parties who then extracted labor from Black people in practices that mirrored enslavement. (*Id*. at p. 688-69.) It would be surprising if the historical record of systems designed to extract wealth and labor *without* meaningful process were to include procedural rules that would undercut those efforts.

This does not mean, however, that the historical record is irrelevant to the inquiry, but rather that it must be approached with a degree of humility toward its limitations. We might think of this as a question of weight rather than admissibility. Where the historical record is suspect, silent, or inconsistent, history should fade into the background letting modern considerations of fundamental fairness offered through the *Mathews* and *Ramirez* inquiries to take center stage. As the historical evidence becomes clearer, more reliable, and more relevant, it can play a larger role. If the historical record tells us something about the governmental or private interests at stake, or the risk that an assignment of burdens will result in an erroneous determination, it may be treated as probative, working together with contemporary considerations to find the best route to fundamental fairness.

3. Applying the *Mathews/Medina/Ramirez* Framework.

As an initial matter, the question presented speaks of who has the "burden of the proof" in the singular. But the idea of a "burden of proof" is a misnomer; it is not one, but *four* burdens: (1) the burden to raise the

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[16] *See generally* Blackmon, Slavery by Another Name: The Re-Enslavement of Black People in America from the Civil War to World War II (2008).

claim; (2) the burden of production; (3) the burden of persuasion and; (4) the standard of persuasion.[17] The standard of persuasion "refers to the quality of convincingness," and thus serves "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." (*In re Winship*, *supra*, 397 U.S. at p. 370 (concurring opinion of Harlan, J.).)[18] All four burdens described above share the same governmental and private interests when it comes to imposition of economic sanctions, and so those interests are addressed collectively below. The factors that raise a risk that the assignment of burdens will result in an erroneous imposition of excessive fines, as well as the dignitary interest at stake, differ across the burdens, however, and so those factors are addressed in turn.

a. Governmental Interests.

One factor in the *Mathews/Medina/Ramirez* framework is the consideration of the governmental interests in play. The U.S. Supreme Court has recognized that the "State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws." (*Bearden*, *supra*, 461 U.S. at 669.) That interest may involve the pursuit of either utilitarian goals, such as deterrence, or retributive aims. (*See Harmelin*, *supra*, 501 U.S. at p. 998-99 (plurality opinion of Kennedy, J.).) There is mixed evidence as to whether economic sanctions actually deter unlawful behavior, and increasing evidence that

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[17] Appellant's brief refers to two of these four burdens. (Opening Brief on the Merits "OBM" at p. 63 ["The burden of proof argument encompasses two questions: (1) which party bears the burden of persuasion or presenting evidence to prove ability to pay."].)

[18] For a more detailed discussion of the *Mathews/Medina* framework as it relates to the assignment of burdens for excessive fines clause purposes see Colgan, *Burdens*, *supra*, at Part II.

unmanageable economic sanctions actually motivate unlawful behavior,[19] so the deterrent quality of economic sanctions is less than certain. Similarly, the government's retributive interests would be undermined by economic sanctions that are excessive in comparison to person's culpability, and because it is often innocent family members who directly pay those sanctions.[20]

Beyond its interest in responding to offenses, the government also has interests related to the nature of the excessive fines proceeding. In particular, those interests include both "securing an accurate factual determination concerning" the issue at hand, and in administrative efficiency. (*People v. Allen* (2008) 44 Cal.4th 843, 866-67.) An assignment of burdens that ensures factual accuracy—for example, by aiding in the ascertainment that a person has limited means—may increase administrative costs as the number of excessive fines claims increases. On the other hand, the State expends significant resources chasing after unpaid

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[19] *Compare, e.g.*, Cherry, *Financial Penalties as An Alternative Criminal Sanction: Evidence from Panel Data* (2001) 29 Atlantic Econ. J. 450-58 (finding that fines had a general deterrent effect when applied to seven serious felonies); *with* Cook, The Burden of Criminal Justice Debt in Alabama: 2014 Participant Self Report Survey (2014) (finding that 17 percent of survey respondents had committed offenses such as drug sales, sex work, or property offenses in order to obtain money to pay economic sanctions); *see also* Colgan, Addressing Modern Debtor's Prisons with Graduated Economic Sanctions that Depend on Ability to Pay (2019) Brookings Inst., at p. 9-11 (discussing additional studies related to the deterrent effect of economic sanctions).

[20] *See* deVuono-powell et al., Who Pays? The True Cost of Incarceration on Families (2015) Ella Baker Center, at p. 13-15, http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf. For a discussion of the incompatibility of excessive sanctions with utilitarian and retributive interests, see Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison* (2018) 65 UCLA L.Rev. 2, 46-76.

economic sanctions through state- and county-run programs. In fiscal year 2015-16 alone, the State funneled $114 million into county collection programs,[21] a figure that does not capture a wide array of expenditures, such as the costs incurred through the use of arrest warrants for collections purposes or for collections processes pursued at the state level. (*See supra* p. 25-26, *infra* p. 39.)

Finally, no matter the administrative cost, the government has no valid interest in the strategic advantage a favorable assignment of burdens would provide if it interfered with the full realization of the excessive fines clause's protections. (*See Ake*, *supra*, 470 U.S. at p. 79 ["The State's interest in prevailing at trial … is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."]; *see also* ABM at p. 41 ["this Court may properly prescribe procedures to ensure that the rights at issue are not undermined"].) Its interests are satisfied, then, by an assignment of burdens that "exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." (*Weems v. United States* (1910) 217 U.S. 349, 381.)

b. Private Interests

Another *Mathews/Medina/Ramirez* factor is the consideration of the private interest in avoiding the erroneous imposition of excessive economic sanctions. While any person has an interest in avoiding unconstitutional deprivations, the risks are particularly fraught for those with limited means to pay excessive sanctions. Two recent events have reduced that risk slightly: California lawmakers have eliminated public defender and

[21] Overview, *supra*, at p. 6.

probation supervisor fees (Pen. Code, § 1203.1d, subd. (a) (eff. July 2021)), and a California Court of Appeals ruling has required the Department of Motor Vehicles to reinstate more than 400,000 driver's licenses lost for nonpayment (*Hernandez v. Dep't of Motor Vehicles* (2020) 49 Cal. App. 5th 928). But the risks to people who have limited means to absorb the financial losses stemming from fines, fees, and assessments remain substantial.

A deprivation of financial resources due to the imposition of excessive economic sanctions can interfere with meeting basic needs, including access to food, stable housing, childcare, medical care, and more. This is true even when people can pay in full immediately, because that money is siphoned away from those other needs.[22] When immediate payment in full is impossible, the ongoing debt can result in even greater financial precarity. As one Los Angeleno has explained, "fines and fees 'were taking food out of our mouths[.]'"[23] The implications of unmanageable economic sanctions are so great that the Federal Reserve is now including the fiscal impact of economic sanctions in its Survey of Household Economics and Decisionmaking.[24] In short, economic sanctions

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[22] *See, e.g.*, Mello, *Speed Trap or Poverty Trap? Fines, Fees, and Financial Wellbeing* (forthcoming), https://mello.github.io/files/jmp.pdf.

[23] Harris et al., *United States Systems of Justice, Poverty and the Consequences of Non-Payment of Monetary Sanctions: Interviews from California, Georgia, Illinois, Minnesota, Missouri, Texas, New York, and Washington* (Nov. 8, 2017), at p. 28 http://www.monetarysanctions.org/wp-content/uploads/2018/01/Monetary-Sanctions-2nd-Year-Report.pdf.

[24] Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2019, Featuring Supplemental Data from April 2020 (May 2020), at p. 9-10, https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf.

can cause or aggravate financial instability for people and their families. (*See* Amici Curiae ACLU et al. Brief "ACLU Brief" at p. 28-32.)

In California, the risks created by the initial imposition are exacerbated by downstream practices. As detailed above, counties are authorized to engage in aggressive collections practices (*supra* p. 25-26). For example, while interest does not accrue on unpaid debt generally (*see People ex rel. Warfield*, *supra*, 129 Cal. at p. 549), delinquent debt may be referred to the Franchise Tax Board, which has the authority to impose interest, thus increasing the debt load. (Rev. & Tax. Code, § 19280, subds. (a), (f).) Further, collections practices may lead to declining credit scores,[25] which are increasingly used by prospective landlords and employers to screen applicants.[26] That risk is heightened for people of color, people with physical disabilities, people with mental health or chemical dependencies, and those who were formerly incarcerated, as it adds to preexisting structural barriers to housing and employment. (*See, e.g.*, ACLU Brief at p. 24-28.) Courts may even issue an arrest warrant if a person falls behind on payments, resulting in interruptions to employment, childcare, and the like that such deprivations of liberty carry.[27]

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[25] Evans, The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration (2014) John Jay College of Criminal Justice, at p. 9, https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf.

[26] *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California* (2015) Lawyers Committee for Civil Rights of the San Francisco Bay Area et al., at p. 17, https://lccrsf.org/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf.

[27] The State argues that private risk is low because sanctions are enforced as money judgments and nonpayment cannot result in incarceration. (AMB at p. 48.) But courts can, and do, issue arrest warrants for nonpayment. (*See* Superior Court of Cal., County of Orange, Failure to Go to Court or Pay, https://www.occourts.org/self-

The inability to promptly pay debt also may increase other aspects of punishment. The payment of economic sanctions may be made a term of probation (*see infra*, p. 26-27.) If a person pays economic sanctions in full, they may be released from probation early, a reduction in punishment that is illusory for those who cannot pay. (Pen. Code, § 1203.1, subd. (j).) People also bear the risk that probation officials will deem a missed payment to be willful, which can result in the imposition of even stricter probation terms or revocation. (*Id.*, § 1214.2, subd. (b)(1).) And whether a person is on probation or not, defendants may be pressured to opt for community service in lieu of paying an economic sanction, discussed *supra*. Although the hourly rate is double the minimum wage, (*Id.* § 1209.5, subd. (c)(1)), community service is not subject to labor protections and displaces paid labor for both the individual and in the community.[28] California lawmakers also have allowed people to serve a period of incarceration as a way of working off debt from fines and most assessments. (*Id.* §§ 1205, 2900.5.) There is a dearth of data on how frequently people take up this option, but in response to a survey conducted by the California Research Bureau, two counties indicated that in fiscal year 2004-2005 over 1,000 people opted for jail in lieu of fines.[29]

These private risks are disproportionately borne by heavily policed communities of color. First, communities of color are disproportionately subject to policing overall (*see* ACLU Brief at p. 15-17), and in particular for offenses that result in the imposition of economic sanctions, including

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help/traffic/failuretoappearandwarrants.html; *see also Not Just a Ferguson Problem*, *supra*, p. 15.)

[28] *See generally* Herrera et al., *supra*.

[29] Cal. Research Bureau, *supra*, at p. 25-26.

even traffic and parking enforcement.[30] Second, recent studies show that lawmakers are more likely to rely on revenue from fines and fees as the percentage of Black people in the community increases.[31] A 2019 study based on a stratified random sample of 93 California municipalities found that, while increased reliance was not associated with the percentage of the community made up by Hispanic/Latinx members, California "communities with larger Black and Asian populations are more reliant upon fines."[32] Third, not only are these revenues often used to fund the over-policing of those communities, the pressure to generate revenue may also leave them in peril. One recent study, for example, has shown that the more a government depends on revenues from economic sanctions, the more law enforcement focuses on sanctions-generating crimes to the detriment of solving violent and property crime.[33] An example of that

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[30] Brazil, *The Unequal Spatial Distribution of City Government Fines: The Case of Parking Tickets in Los Angeles*, (June 2018) 56 Urb. Aff. Rev., at p. 19–26 (finding that neighborhoods with Black residents receive a higher number of parking tickets); Lofstrum et. al, Racial Disparities in California Law Enforcement Stops, Public Policy Institute of California (Dec. 3, 2020), https://www.ppic.org/blog/racial-disparities-in-california-law-enforcement-stops/ (finding that "racial differences are evident in the reason for a [traffic] stop").

[31] *See, e.g.*, Sances and You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources* (2017) 79 J. Pol. 1090, 1091-92 (assessing data from 9,000 cities).

[32] Singla et al, *Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments* (2019) 56 Urban Affairs Review, 1132, 1151.

[33] Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service* (2020) 56 Urb. Aff. Rev. 5, 8, 17, 21–22 (finding that a one percent increase in the portion of municipal budgets funded through economic sanctions "is associated with a statistically and substantively significant 6.1 percentage point decrease in the violent crime clearance rate and 8.3 percentage point decrease in the property crime clearance rate.").

phenomenon may have occurred here in California: in 2014 the Oakland Police Department reported that it made no attempt to investigate 80 percent of reported robberies and 97 percent of reported burglaries, but the department designates significant resources to traffic enforcement,[34] which in California carries significant fines, fees, and assessments.[35]

Meanwhile, the State's reliance on economic sanctions to generate revenue increases the risk to individuals that excessive economic sanctions will be imposed. As detailed above, not only have governments abused the revenue-generating power of economic sanctions dating back to Magna Carta, in modern times, California lawmakers have become increasingly reliant on fines, fees, and assessments. (*See supra* p. 20-23.) While exact figures are difficult to ascertain, California state and local governments take in roughly $1.7 billion dollars annually in revenue from those sanctions.[36] Lawmakers have come to depend on those revenues to fund all manner of public projects, including the operation of courts, law enforcement, prosecution, indigent defense, probation, incarceration, and a variety of public services that would otherwise be funded through tax dollars, many of which have tangential, if any, ties to the underlying offense. (*See*, *e.g.*,

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[34] Gammon, *Why Oakland Police Can't Solve Crime*, E. Bay Express (May 20, 2015), https://eastbayexpress.com/why-oakland-police-cant-solve-crime-2-1/.

[35] *See* Overview, *supra*, at p. 2.

[36] *Id.* at 5. As noted by amici, a significant portion of the economic sanctions imposed remain in arrears. (ACLU Brief at p. 20-21.) There is increasing recognition that reliance on fines, fees, and assessments as a source of revenue makes for bad fiscal policy. (*See*, *e.g.*, Cal. State Auditor, Penalty Assessment Funds, Report 2017-126 (April 2018), https://www.auditor.ca.gov/pdfs/reports/2017-126.pdf.) But lawmaker myopia with respect to whether this revenue source is cost effective does not detract from the ongoing push to increase the scope and variety of economic sanctions as a means of tax-avoidance.

supra, p. 22-23; *see also* Penal Code, § 1463.04 [funding "snow removal, maintenance, and development of designated parking areas"]; *id.* § 1463.20 [funding for ADA compliant parking]; *id.* § 1463.26 [funding traffic flow and operations on state highway systems].) While these programs serve important public functions, the fact that lawmakers are financing them through economic sanctions rather than taxes shows that the risk of government abuse of its prosecutorial power is very real.

Finally, once imposed, the private interest in avoiding excessive economic sanctions is increased because opportunities for post-imposition relief are scarce. (*See Ramirez, supra*, 25 Cal.3d at p. 274 [considering the availability of judicial review in assessing private interests].) The threat of incarceration or other non-economic punishments pressures people to plead guilty to offenses that, in many cases, still carry significant economic sanctions—thus waiving the ability to raise or appeal excessive fines claims.[37] Even where not waived, appeals are unlikely. A recent study determined that appellate courts review only eight out of 10,000 misdemeanor cases on any issue, let alone excessive fines claims.[38] Further, because the U.S. Supreme Court has limited the right to counsel to cases in which incarceration is imposed (*Scott v. Illinois* (1979), 440 U.S. 367), in many cases punished through fines, fees, and assessments a person will be left to identify and preserve excessive fines claims on their own,

[37] Harris et al., *supra* note 23, at 39-40 (stating that several respondents in California reported "that during their sentencing, they had been focused on so many other things, such as the length of time they were going to be incarcerated, that they didn't fully comprehend the burden of the fines and fees being imposed until after they were released and had to start making payments").

[38] *See generally* King and Heise, *Misdemeanor Appeals* (2019) 99 B.U. L.Rev. 1933.

rendering the possibility of appeal mere illusion. (*Cf. Powell v. State of Ala.* (1932) 287 U.S. 45, 68-69 ["Even the intelligent and educated layman has small and sometimes no skill in the science of law."].) And although California offered a brief amnesty period from 2015 to 2017 to forgive unpaid traffic tickets and reinstate suspended driver's licenses,[39] that is not the kind of sustained and meaningful opportunities for relief that might warrant a less protective assignment of the burdens and standards of persuasion. (*See Addington v. Texas* (1979) 441 U.S. 418, 428-29 [mandating that the standard for civil commitment be clear and convincing evidence, reasoning in part that it need not be as high as a beyond a reasonable doubt standard because the person would be subject to ongoing treatment and thus have repeated opportunities to seek release from an erroneous commitment].)

c. Risk of Erroneous Determinations & Dignitary Interests

The two remaining factors for determining whether the assignment of burdens meets the fundamental fairness requirement are whether it would increase the risk of an erroneous imposition of excessive fines and the dignitary interests of the person against whom economic sanctions may be imposed. (*See supra* at p. 31-32.) Because these issues vary according to the nature of the burden at issue, they are addressed by burden-type below.

(i) Burden to Raise a Claim

The Parties agree that the burden of raising a claim is on the party that would benefit from its resolution, but disagree as to whether that

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[39] Case and Bhattacharya, *Driving Into Debt: The Need for Traffic Ticket Fee Reform*, Insight Center for Community Economic Development (May 2017), https://insightcced.org/wp-content/uploads/2017/07/May2017_DrivingintoDebt-Final.pdf.

benefit accrues to the person against whom economic sanctions are imposed due to the possible reduction in amount an excessive fines claim might provide or to the state that stands to generate revenue from sanctions imposed. (*Compare* ABM at p. 44 *with* OBM at p. 64-67.)

And the State concedes that "best practice" would include notice to people facing economic sanctions "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." (ABM at p. 50.)

The Supreme Court's treatment of the *Mathews* factor regarding the risk of an erroneous determination suggests that the absence of counsel in many cases in which economic sanctions are imposed would support even more substantial notice. (*See Ohio v. Akron Center for Reproductive Health* (1990) 497 U.S. 502, 516 [upholding a parental notification statute placing the burden of proof on minors seeking abortions by clear and convincing evidence, in part because "the minor is assisted in the courtroom by an attorney as well as a guardian ad litem"].) As noted above, in many cases in which economic sanctions are imposed there is no constitutional or statutory right to counsel. (*See supra* p. 43-44.) In such cases, even with the notice on ability to pay proposed by the State, it is highly unlikely that—without additional guidance—people without access to a lawyer would be aware of the nature of the gross disproportionality test and how financial effect fits within the broader excessiveness inquiry. (*See supra* Part III.B.1.)

The administrative burden of providing notice of both the ability to pay determination and the nature of the disproportionality test is de minimis. As the State notes, existing forms used in civil litigation waiver hearings could be adapted to inform people facing economic sanctions of

the types of information they could marshal to support an excessive fines claim, (ABM at p. 51-52), or forms could be based on those already in use. As of November 2020, six counties currently offer an online tool where drivers can request an "ability to pay" reduction for traffic infraction violations,[40] and the Legislative Analyst's Office review of the Governor's 2021-22 budget recommends continuing use of those tools.[41] The addition of an explanation of the basic structure of and arguments related to the disproportionality test could easily be added, with attention paid to ensuring the language used is adjusted to account for a lack of familiarity with legal concepts.[42]

Administrative considerations would support a placement of the burden of raising excessive fines claims on the person upon whom they will be imposed so long as such notice is provided. While in felony and misdemeanor cases the vast majority of people who are sentenced have limited means (*see* ACLU Brief at p. 17-19), at least in some subset of cases involving traffic and parking offenses a substantial number of people would have no claim as to financial effect, reducing the likelihood of a valid excessive fines claim—at least so long as lawmakers have not added so many fees and assessments that the sanctions become disproportionate to the offense in any case. (*See Pimentel v. City of Los Angeles* (9th Cir.

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[40] Petek, Cal. Legis. Analyst's Office, *The 2021-22 Budget: Trial Court Operations Proposals* (Feb. 2021) p. 6-9, https://lao.ca.gov/reports/2021/4362/Trial-Court-Operations-021121.pdf; Center for Court Innovation, California's 'Ability-to-Pay' Calculator Reduces Burden of High Fines and Fees on Drivers (Nov. 15, 2019), https://www.courtinnovation.org/articles/california-ability-pay-calculator.

[41] Petek, *supra*, at 6-9.

[42] *See generally* Greiner et al., *Self-Help, Reimagined* (2017) 92 Ind. L.J. 1119.

2020), 974 F.3d 917, 925 [holding that a genuine issue of material fact existed as to whether late fees imposed on Los Angeles parking tickets constituted excessive fines].)

Beyond the *Mathews* consideration of risk, it is important to note that the historical inquiry pursuant to *Medina* offers little guidance on this question due to anachronisms in historical practice and because the evidence that does exist is at times contradictory. A more detailed explanation of the historical record is available for the court's reference at Colgan, *Burdens*, *supra*, at Part I.B.2.

In contrast, the *Ramirez* consideration of dignitary interests does support notice requirements as to both ability to pay and disproportionality as indicated above. The dignitary factor was designed to ensure that people have an opportunity to fully participate in court processes in a meaningful way. (*Ramirez*, *supra*, 25 Cal.3d at p. 267-68.) Notice of the nature of the gross disproportionality test, including the consideration of financial effect, directly aligns with that goal.

(ii) Burden of Production

For the burden of production, both the U.S. Supreme Court and this Court have looked to who has "superior access" to the relevant evidence and how burdens may be used to incentivize the parties to provide such evidence. (*Medina*, *supra*, 505 U.S. at p. 455 (opinion concurring in judgment by O'Connor, J.) ["In determining whether the placement of the burden of proof is fundamentally unfair, relevant considerations include: whether the government has superior access to evidence; [and] whether the defendant is capable of aiding in the garnering and evaluation of evidence on the matter to be proved"]); *Ramirez*, *supra*, 25 Cal.3d at p. 273-75 [regarding the importance of ensuring determinations are made on relevant

facts because of the due process interest "in the promotion of accuracy and reliability" of determinations].)

At first glance, it may appear that as to the issue of financial effect, the person who would bear the burden of economic sanctions would have superior access to all relevant evidence. And, of course, people will in fact have superior information related to their income and expenses, dependents, and other personal information. (ABM at p. 48 & fn.19.)

But the government has more and better access to information that plays a significant role in determining financial effect. For people who are incarcerated, the government knows one's likelihood of employment and what wages for such employment, if any, will be. (*See, e.g.*, OBM at p. 75-77; ACLU Brief at p. 23.) The government has better access to information regarding how it deducts monies to pay economic sanctions from both those wages and monies sent in from family or friends. (*See, e.g.*, Pen. Code, § 2085.5.) The government also has greater access to information about other expenses that may be incurred during a period of incarceration, such as the rate for making phone calls to family,[43] or purchasing food and hygiene items from the canteen, made all the more necessary in the COVID-era. (*See* ACLU Brief at p. 23-24.)

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[43] *See Stand Up for Phone Justice*, Lawyer's Committee for Civil Rights of the San Francisco Bay Area (reporting that "California has the 7th highest county jail phone rates in the country," including in one county rates set at "$17.80 for a 15-minute call"), https://lccrsf.org/phone-justice/#:~:text=Phone%20Justice%20in%20California&text=California%20has%20the%207th%20highest,phone%20calls%20and%20visits%20alone The choice to impose exorbitant rates are, of course, within the government's control. *See San Francisco Announces All Phone Calls from County Jails Are Now Free*, The Financial Justice Project San Francisco (Aug. 10, 2020), https://sfgov.org/financialjustice/newsletters/san-francisco-announces-all-phone-calls-county-jails-are-now-free.

Whether a person is incarcerated or not, the government has superior information about its collection methods, including the use of procedures such as wage garnishment and tax-intercepts that may have significant implications for a person's financial circumstances. (*See supra* p. 25-26.) And the government has superior access to information about a vast web of collateral consequences tied to particular convictions that may further impede ability to pay, including restrictions on occupational licensing or public benefits eligibility. One attempt to inventory such consequences in California identified over 1100 such restrictions.[44] All of these data points impact a person's ability to pay sanctions and it is the government that has superior access to information about the systems it has chosen to create.

The administrative cost of placing a burden of production on the government to provide evidence in its control is reasonable. There undoubtedly would need to be an initial investment of resources to create general materials setting out the relevant county or state practices. Once that is done, however, those standard materials would need only be refined to meet the circumstances of a particular case (e.g., whether a person would be subject to incarceration, making information related to incarceration-based employment and collections relevant). Further, the administrative complexity of this information is within the government's control. If it were, for example, to reduce the number of collateral consequences attaching to conviction that implicate ability to pay, that would reduce the obligation to produce evidence related to those consequences.

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[44] *See National Inventory of Collateral Consequences of Conviction*, https://niccc.nationalreentryresourcecenter.org/consequences (sorted by jurisdiction: California, and offense type: any felony; any misdemeanor; controlled substances offenses; crimes of moral turpitude; and crimes involving fraud, dishonesty, misrepresentation or money-laundering).

Turning now to the *Medina* inquiry, an examination of the historical record, while limited, supports the notion that both parties would have an obligation to produce evidence within their control. A particularly useful source of information on the question of production can be found in Professor Kevin Arylck's study of customs forfeiture remissions undertaken between 1789 and 1806.[45] The 1790 Remission Act created a procedure through which people subject to forfeitures could provide mitigating evidence to the court, which the judge summarized and forwarded on to the Treasury Department, at which point the Secretaries often sought out additional evidence from the customs officer who made the seizure.[46] As Treasury Secretary Alexander Hamilton explained, he was "unwilling … to precipitate a forfeiture as long as there is a chance of new light to evince innocence."[47] This suggests that while the production of mitigating evidence within the claimant's control did rest with the claimant, government officials felt an obligation not only to produce any relevant information in their control, but also to help claimants make the strongest case possible in favor of remission.

Additionally, historical treatises also exhibit attention to access to relevant evidence. Early treatises note that in the guilt phase of the trial, in circumstances where the party with the ultimate burden of persuasion would have to prove a negative to succeed—for example, that a person is not insane to ward off an insanity defense—a general principle arose that the burden of persuasion on that point of fact should shift to the party with

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[45] Arlyck, *The Founders' Forfeiture* (2019) 119 Colum. L.Rev. 1449.

[46] *Id.* at p. 1490-91.

[47] *Ibid.*

"peculiar knowledge" on the question.[48] Though the discussion of the peculiar knowledge principle in the historical record relates to determinations of guilt rather than sentencing and speaks in terms of burdens of persuasion, this supports the modern Court's interest in using the assignment of burdens to promote the production of relevant evidence by the party with superior access. (*See Medina*, *supra*, 505 U.S. at p. 455 (opinion concurring in judgment by O'Connor, J.).)

Finally, the *Ramirez* dignitary factor also supports the imposition of a burden of production on the parties depending on their access to evidence. The dignitary interest makes certain "that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability…." (*Ramirez*, *supra*, 25 Cal.3d at p. 268 (internal quotations and citation omitted).) The government has chosen to create complex systems for collections that cut across county and state agencies including court officials, probation departments, other correctional agencies, and the Franchise Tax Board. (*See supra* at p. 25-26.) The government has also chosen to devise an array of collateral consequences that may stifle the ability to pay. (*Id*. at p. 49.) A requirement that the government supply information about how those systems operate in ways that are central to understanding the financial effect of economic sanctions in a given case is a means of bringing political accountability to bear in a manner that respects "the dignity and worth of the individual." (*Ramirez*, *supra*, at p. 268.)

Collectively, these considerations support an application of the burden of production to the person raising the excessive fines claim with respect to their personal financial circumstances, but on the government

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[48] *See, e.g.* Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) p. 359; Wigmore, A Treatise on the System of Evidence in Trials at Common Law (1904) § 2486, p. 3524-25.

with respect to how the systems it has created implicate a person's ability to pay. To promote production on both sides, this Court could adopt the following rule: once the defendant provides a colorable claim of his or her inability to pay,[49] if the government then fails to provide evidence necessary to understand the downstream consequences of ongoing debt and the collateral consequences of conviction for the specific offense, the standard of persuasion—discussed further in the next section—should increase.[50] The opportunity to raise the standard of proof may incentivize the defense to produce mitigating evidence and the opportunity to avoid that heightened standard should incentivize the government to produce evidence uniquely within its control.

(iii) Burden of Persuasion and Standard of Persuasion

The burden of persuasion—whether it be as to financial effect or disproportionately—is an assignment of risk to a party, whereas the standard of persuasion establishes the degree by which the party with that burden must persuade the finder of fact. (*See supra* p. 35.) While separate

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[49] Procedural efficiencies could be generated if a colorable claim were deemed to have been established in any case in which a person qualified for indigent defense representation or received means-based public benefits. (*See* ACLU Brief at p. 32-35; "City & County of San Francisco, Can't Afford to Pay," https://www.sfsuperiorcourt.org/divisions/traffic/cant-afford-pay.)

[50] Typically, the imposition of a rebuttable presumption regarding financial effect and disproportionality would suffice. (*See* Solum, *You Prove It! Why Should I?* (1994) 17 Harv. J.L. & Pub. Pol'y 691, 700-02.) It is, however, insufficient in this context because a presumption merely serves to shift the burden of persuasion to the government and, for reasons set out in Part III.B.3(c)(iii), the *Mathews/Medina/Ramirez* inquiry supports placement of that burden on the government already, and so the addition of a rebuttable presumption would have no effect.

concepts, the *Mathews/Medina/Ramirez* considerations largely overlap so this subsection addresses them together.

Beginning with *Mathews*, in addition to the governmental and private interests detailed above, there are two factors that increase the risk of an erroneous decision in assigning the burdens and standards of persuasion: the imprecision of the question at issue and the potential that bias will infect the determination. Both are present here.

First, when assigning standards of proof, the Supreme Court has recognized that imprecision inherent to an inquiry should be taken into consideration. (*See Addington, supra*, 441 U.S. at p. 429 [requiring the prosecution show a need for civil commitment by clear and convincing evidence in part due to the "lack of certainty and fallibility" of the evidence].) By its very design, the ultimate question of disproportionality is imprecise. With respect to offense seriousness, as the Court has explained, "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." (*Bajakajian, supra*, 524 U.S. at p. 336.) Exacerbating that imprecision is the fact that the Court has never fully elucidated what it means to be grossly disproportionate—just how far off the punishment's severity must be. In the excessive fines context, the Court has only weighed in on excessiveness once, striking down a mandatory criminal forfeiture for a customs violation. (*Ibid.*) While that decision is useful in that it reaffirms the types of information courts may look to in assessing disproportionality—the nature of the offense and the amount of harm caused by it, for example—it does little to establish where the line between proportionate and grossly disproportionate punishments lies. (*Id.* at 337-41.)

Similar to the question of overall disproportionality, the question of financial effect is necessarily imprecise and made more so by the web of

policies detailed above. While it may be more quantifiable than, for example, a person's competency, (*see Cooper*, *supra*, 517 U.S. at p. 355), any deprivation that would result in ongoing debt requires a forward-looking calculation into an uncertain future, made even more uncertain by the byzantine array of downstream consequences lawmakers have crafted when people prove unable to pay as well as the collateral consequences of conviction. Even evidence that the government would be required to supply to avoid a presumption that the economic sanction would prevent the person from meeting basic needs—for example, likelihood of employment during incarceration—is also necessarily speculative. And in any case, judges may quite reasonably fail to anticipate economic crises, including that caused by the ongoing COVID-19 pandemic, which has been particularly calamitous for people of color, and those who work in low-wage, service sector employment who would already struggle with ongoing debt from economic sanctions. (*See* ACLU Brief at p. 17.)

Second, the Supreme Court has raised particular concerns when the question to be ascertained may be complicated by bias. For example, it has recognized the need for heightened standards of proof when the assessment at hand is "vulnerable to judgments based on cultural or class bias," which it has explained can be expected in circumstances where the people subject to the possible deprivation are "poor, uneducated, or members of minority groups," as is true for many of people against whom economic sanctions are imposed. (*Santosky v. Kramer* (1982) 455 U.S. 745, 762-63 [requiring at least a clear and convincing evidence standard be employed in hearings to terminate parental rights].) Sentencing judges may, for example, insufficiently account for structural issues of race and class that restrict

access to employment, childcare, health care, and other basic needs.[51] Inattention to those issues increases the risk that an erroneous determination to impose excessive economic sanctions will occur.

Turning to the *Medina* inquiry, the historical evidence for this fourth and final factor is the most robust and useful. As noted above, there is a longstanding pattern of governmental abuse, dating back to Magna Carta, that undergirds the Supreme Court's determination that the excessive fines clause must stand as a bulwark against the perverse incentives created by the revenue generating capacity of economic sanctions. (*See supra* p. 33-34.)

This is particularly critical because this history of abuse indicates that the perverse incentives caused by the revenue-generating capacity of economic sanctions sets the excessive fines clause apart from its cruel and unusual punishments counterpart. Both the U.S. Supreme Court and this Court have determined that the burden of persuasion for a cruel and unusual punishments claim lies with the person subjected to the punishment. (*See Gregg v. Georgia* (1976), 428 U.S. 153, 174-75; *People v. Wingo*, (1975) 14 Cal.3d 169, 174; *In re Lynch* (1972) 8 Cal.3d 410, 414-15.[52]) In doing

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[51] *See* Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt* (2019) 43 N.Y.U. L.Rev. of Law & Soc. Change 175, 189-200, 209-11.

[52] The State cites to holdings from other jurisdictions that have concluded that the burden of persuasion for excessive fines claims lies with the person upon whom the sanctions would be imposed. (*See* ABM at p. 43-44.) None of those cases engage in a *Mathews/Medina/Ramirez*-like inquiry to reach that determination or consider the distinctions between the cruel and unusual punishments and excessive fines clauses. Rather, both *United States v. Castello* ([2d Cir. 2010], 611 F.3d 116, 120) and *United States v. Cheeseman* ([3d Cir. 2010] 600 F.3d 270, 283) simply summarily state that the burden is on the defendant, citing to *United States v. Jose* ([1st Cir. 2007] 499 F.3d 105). *Jose* in turn cites to *United States v. Ortiz-*

so, both courts have rested that assignment on significant deference to lawmakers' ability to devise appropriate punishments for people found to have committed crimes. (*See Gregg, supra*, 428 U.S. at p. 174-75; *Wingo, supra*, 14 Cal.3d at p. 174; *Lynch, supra*, 8 Cal.3d at p. 414-15.) While in adopting a gross, rather than strict, disproportionality test, the *Bajakajian* Court showed deference to lawmakers, (*Bajakajian, supra*, 524 U.S. at p. 336), throughout its excessive fines jurisprudence, the Court has repeatedly called into question whether lawmakers will actually set financial punishments in accord with penal principles or will rather act to secure tax-avoidance. (*See, e.g., Timbs, supra*, 139 S. Ct. at p. 687-89.) As Justice Scalia explained:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense

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Cintron (1st Cir. 2006) 461 F.3d 78, 81-82 and *United States v. Heldeman* (1st Cir. 2005) 402 F.3d 220, 223, both of which speak only about deference to a district court's factual findings during *de novo* review. Similarly, *Public Emp. Retirement Admin. Com'n. v. Bettencourt* (2016) 474 Mass. 60, 72 summarily concludes that the burden is on the defendant, relying on *Maher v. Retirement Bd. of Quincy* (2008) 452 Mass. 517, 523, which relies upon *United States v. Ahmad* (4th Cir. 2000) 213 F.3d 805, 816, which cites to a statement made by Justice Kennedy in his *Bajakajian* dissent that "[a] defendant must prove a gross disproportion," (*Bajakajian, supra*, 524 U.S. at p. 348), something never addressed by the majority opinion. The final case cited by the State is *People ex rel. Hartrich v. 2010 Harley-Davidson* (Ill. 2018) 104 N.E.3d 1179, 1187 cites to *People v. Rizzo* (Ill. 2016) 61 N.E.3d 92, which speaks only of burdens in constitutional cases generally, without consideration of how deference to lawmakers may be different in an excessive fines setting.

> to scrutinize governmental action more closely when the State stands to benefit.

(*Harmelin*, *supra*, 501 U.S. at p. 978 fn.9.) In other words, because the assignment of burdens in the cruel and unusual punishments context is grounded in the notion that lawmakers will set punishments in accord with penal interests, that determination cannot control the assignment in the excessive fines context when the clause is designed to address the risk that lawmakers will set economic sanctions beyond those interests in order to generate revenue.

Further, and despite a longstanding pattern of abuse, the historical record does show that the guarantees of proportionality and attention to protecting a defendant's ability to meet basic needs established in Magna Carta and ultimately in the excessive fines clause itself were understood to be important, as is evident in caselaw,[53] statutes,[54] and treatises[55] from the 17th century forward. The record even indicates that when taken seriously,

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[53] *See, e.g.*, *Jones v. Commonwealth* (1799) 5 Va. 555, 556-57 (opinion of Roane, J.) (explaining that fines must "be imposed *secundum quantitatem delicit salvo contenemento*" and, referring to the excessive fines clause, that "the fine or amercement ought to be according to the degree of the fault and the estate of the defendant"); *The Case of William Earl of Devonshire* (Pari. 1689) 11 How. St. Tr. 1353 (striking down a £30,000 fine as "excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land").

[54] *See, e.g.*, 1787 N.Y. Laws 344-45 (requiring that any "fine or amerciament shall always be according to the quantity of his or her trespass or offence and saving to him or her, his or her contenement…"); 1786 Va. Acts 41-42 ("the amercement which ought to be according to degree of the fault, and saving to the offender his contenement").

[55] *See, e.g.*, 4 W. Blackstone, Commentaries on the Laws of England 378 (describing proportionality as requiring consideration of "the aggravations … of the offence," and "the quality and condition of the parties").

remission of economic sanctions was common, suggesting that the burden of persuasion was either on the claimant at a low standard or instead rested with the government to justify that the punishment was not excessive. This is not to say that all attempts at seeking relief were successful; in the few as-applied challenges in the early American appellate record, there were both wins and losses. (*Compare Bullock v. Goodall* (1801) 7 Va. 44, 49-50 ["No man can doubt, but that a fine of 264£ 8s. 9d. imposed on an officer who has committed no fault, for the benefit of a creditor who has sustained no injury, is superlatively excessive, unconstitutional, oppressive, and against conscience."] *with Ex parte Keeler* (1896) 45 S.C. 537 [holding that a fine imposed for a dispensary act violation was not excessive].) But other records suggest that at the trial stage and in other processes of remission, reductions in fines were relatively routine. For example, a tract contrasting the 17th century judicial practices of Archbishop of Canterbury John Whitgift to other judges sitting in the Star Chamber, reported that he "did constantly in this Court maintain the liberty of the *Free Charter* that none ought to be fined but *salvo contenimento*. He seldom gave any sentence but therein did mitigate in something the acrimony of those that spake before him[.]"[56] Likewise, in his study of the 1790 Remission Act proceedings noted above, Professor Arlyk found that the Treasury Secretaries granted 91 percent of all remission petitions, nearly three-quarters of which were granted in full, with the remaining grants significantly reducing the penalty.[57]

In addition to the frequency of remission, another historical practice—jury nullification—provides some insight regarding burdens and

[56] *A Discourse Concerning the High Court of Star Chamber* (1637), in The Star Chamber 4, (Burn edit. 1870) p. 4, 10.

[57] Arlyk, *supra,* at p. 1488-97.

standards of persuasion. Jury nullification occurred when jurors refused to convict despite evidence of guilt beyond a reasonable doubt because they understood that the punishment that would follow would be disproportionate to the offense. (*See Jones v. United States* (1999) 526 U.S. 227, 245.) While jury nullification necessarily means that a case never reached the sentencing stage, because jurors were reacting in whole or in part to the severity of the punishment that would be imposed upon conviction, and its disproportionality to the alleged offense, this practice effectively placed the burden of proving proportionality on the prosecution beyond a reasonable doubt.

Finally, the *Ramirez* dignitary consideration provides an important frame. In establishing the dignitary factor, this Court understood that procedural rules can "express a collective judgment that human beings are important in their own right[.]" (*Ramirez*, *supra*, 25 Cal.3d at p. 268.) Similarly, in its Eighth Amendment jurisprudence, the U.S. Supreme Court has considered the expressive function of punishment, looking to both whether the punishment accurately expresses the community's condemnation for the underlying offense. (*See Kennedy v. Louisiana* (2008) 554 U.S. 407, 442), and to the message sent to the person being punished (*see Ford v. Wainwright* (1986) 477 U.S. 399, 409-10.[58]) The imposition of excessive sanctions may overstate the community's condemnation for the offense. As an expressive symbol it goes too far to put people and their families in circumstances where they cannot meet basic human needs. (*See supra* p. 38-39.) At the same time, the imposition of excessive fines risks sending the message to people upon whom they are imposed that the legal

[58] For a more detailed examination of the Court's attention to the expressive value of punishment, *see* 65 UCLA L.Rev, *supra,* at p. 57-61.

system is designed to value money over fairness. As one Californian struggling to pay economic sanctions has explained:

> [T]he criminal justice system is a cash cow for the government. [… I]t's profit; they're profiting off of their citizens, and that's where I feel like there's a disconnect and distrust created between, uh, anywhere from, you know, the streets to the police.[59]

In combination, the *Mathews/Medina/Ramirez* factors support an assignment of the burden of persuasion for both the question of financial effect and the ultimate question of disproportionality to the government. Although the State has an interest in responding to offenses, it has no interest in disproportionate punishment. Further, excessive fines result in significant financial precarity for people and their families, with ripple effects felt by entire communities, particularly communities of color. Add to this the imprecision inherent to determining disproportionality and financial effect, and the risk of bias infecting such determinations, both of which increase the risk that excessive economic sanctions will be imposed. Further, over the course of history, we have seen governments use and abuse economic sanctions as revenue generating, tax-avoiding mechanisms when left without a meaningful check, undercutting the deference that may otherwise be afforded to the Legislature. And setting the burden must account for the dignitary concerns that are undermined by systems that defendants and the community as a whole may perceive as prizing revenue over justice. Collectively, these considerations suggest that to meet the

[59] Harris et al., *supra*, at p. 42-43.

requirement of fundamental fairness, the burden of persuasion must be assigned to the government.[60]

With the burdens of persuasion assigned, the question becomes, what standard of proof should apply? In light of the significant risk of governmental abuse—including the build-up in reliance of economic sanction revenues here in California (*see supra* p. 21-23, 42-43), the significant risks excessive sanctions pose for people with no meaningful ability to pay them and their families, and the inherent imprecision and risk of bias in the determinations themselves, a clear and convincing evidence standard is warranted.[61] To be sure, the Supreme Court has previously

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[60] The fact that the government does not retain revenues imposed in cases involving restitution payable to non-governmental victims, along with the additional governmental interest in making victims whole, would support the placement of the burden of proof with respect to the disproportionality of restitution on the person against whom it is imposed, rather than the government. (*See* Colgan, *Burdens*, *supra*, at Parts II.A.1 & II.D.3.a.) In contrast, the even greater risk of governmental abuse and greater imprecision regarding the proportionality analysis that arises in the context of civil forfeitures would support the placement of a burden of proof on the government to establish proportionality by a beyond a reasonable doubt standard. (*See id.* at Parts II.D.) Appellant has suggested that differing standards of proof would be too complicated for courts to employ. (*See* Appellant's Reply Brief on the Merits at p. 36-37.) That issue is addressed in Professor Colgan's work, which provides a mechanism for addressing varying burdens of proof in evaluating excessive fines claims. (*See* Colgan, *Burdens*, *supra*, at Part III.) Because neither victim restitution nor civil forfeiture are at issue in this case, the specific concerns those forms of economic sanction raise are not addressed in this brief, though Professor Colgan is happy to provide additional briefing if it would be of use to the Court.

[61] That standard would be raised further, however, if (1) the person upon whom the sanction would be imposed raises a colorable claim that the proposed sanctions would preclude that person or his or her family from meeting basic needs or would interrupt activities that support that end and (2) the government in turn fails to produce evidence uniquely in its control

mandated a clear and convincing standard in cases where the question at hand involves significant deprivations, such as denaturalization, (*Schneiderman v. United States* (1943) 320 U.S. 118, 122), termination of parental rights, (*Santosky*, *supra*, 455 U.S. at p. 758-59), and the loss of liberty due to civil commitment (*Addington*, *supra*, 441 U.S. at p. 424), in part because those deprivations were more significant than a "mere loss of money." As detailed above, however, what is at stake goes beyond a mere loss of money. It is the potential deprivation of food, housing, health care, and employment opportunities; it is the deprivation of liberty through arrest; it is the extension of probation or substitution of other forms of punishment, not due to culpability for an offense but due to one's poverty; and it is the risk that these outcomes will be driven by the government's desire for revenue. (*See supra* pp. 21, 25, 38-44.) A heightened standard of review is warranted.

Of course, placing the burden of proof on the government by a clear and convincing standard may result in an uptick in excessive fines challenges. Therefore, a concern might be that such claims could tie up the courts' dockets, rendering the standard unworkable. *Cf. Pimentel*, *supra*, 974 F.3d at p. 928 n.8 (opinion concurring in judgment by Bennet, J.) [expressing a concern that individual excessiveness determinations for parking tickets would be administratively infeasible].) But, even if there was an uptick in hearings related to such challenges, the resulting imposition of fewer unmanageable economic sanctions could lessen the

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regarding the downstream implications of systems it has created that may interfere with payment. *See supra* p. 51-52 & fn. 50.

reliance on the administrative apparatuses created to collect and enforce those debts that go unpaid.[62]

Importantly, the government's fate is in its own hands, and the clear-and-convincing assignment need not be set in stone. The assignment of the burden of persuasion on the government should be kept constant in light of the long history of government fallibility with respect to such sanctions. But the government could significantly reduce the quantity and severity of the various fines, fees, and assessments it has created. It could fundamentally reform its systems of collection and collateral consequences. And it could create meaningful, ongoing opportunities for post-imposition remission to address situations in which a person's financial circumstances unexpectedly change, due, for example, to medical emergencies or other unexpected events—including events like the current pandemic. With those reforms in hand, the State could return to this Court to request a reduction of the standard of proof to a preponderance of the evidence.

III. CONCLUSION

This brief provides frameworks for deciding issues central to the case. The analysis provided supports a conclusion that the contested fees constitute fines for purposes of the excessive fines clause. It also supports the adoption of a rule requiring notice regarding the availability of and arguments relevant to excessive fines claims, a rule requiring both parties to produce evidence in their control, and (so long as the burden of production is met) a rule assigning the burden of persuasion for both the question of financial effect and the ultimate question of disproportionality to the government by a clear and convincing evidence standard. These

[62] *See, e.g.*, Colgan, *Graduating Economic Sanctions According to Ability to Pay* (2017) 103 Iowa L.Rev. 53, 69-73.

assignments would be both Constitutionally compliant and readily administrable by trial courts while furthering the ends of justice.

DATED: March 1, 2021

Respectfully submitted,

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**Pro Hac Vice pending*

CERTIFICATE OF COMPLIANCE

I certify that this brief, exclusive of this certificate, the cover, the signature block, and the tables of contents and authorities, contains 13,714 words according to the word count function of the word-processing program used to produce the brief. The number of words in this brief complies with the requirements of Rule 8.204(c)(1) of the California Rules of Court.

DATED: March 1, 2021

Respectfully submitted,

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Attorneys for Amicus Curiae

**Pro Hac Vice application pending*

DECLARATION OF CARRIE AKINAKA IN SUPPORT OF AMICUS BRIEF OF PROFESSOR BETH A. COLGAN

I, Carrie Akinaka, declare as follows:

1. I am an attorney at law, duly licensed to practice before all courts in the State of California. I am an attorney at Perkins Coie LLP, and counsel for Amicus Professor Beth A. Colgan a licensed attorney in California and am an active member in good standing of the California Bar. I am an attorney at the law firm Perkins Coie, L.L.P.

2. I submit this declaration in support of the attached Amicus Brief of Professor Beth A. Colgan.

3. I make this declaration based upon my personal knowledge, and I am competent to testify if called upon as a witness.

4. Attached as Exhibit A to this Declaration is a true and correct copy of Santa Clara County Probation - Adult Division Information for Probationer, which is titled: "Standard Terms and Conditions."

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

/s/ Carrie Akinaka
Carrie Akinaka

EXHIBIT A

SANTA CLARA COUNTY PROBATION – ADULT DIVISION
INFORMATION FOR PROBATIONER

STANDARD TERMS AND CONDITIONS

NAME: _____ PFN: _____

The following conditions of probation are listed so that you may understand what is required of you:

1. *You must report to this department* as directed by your Probation Officer.
2. Notify this office *immediately* if you have a change of address.
3. Obtain permission before leaving the County of Santa Clara.
4. Do not use intoxicating liquor to excess. If your Court order prohibits use of alcohol, do not use any (this includes beer and wine).
5. Remain employed or engaged in a useful activity. If unemployed, you must diligently seek employment. You must report immediately to this department any change of employment.
6. You are required to obey all laws (City, County, State, or Federal). If you violate any of these laws, you must report this violation to your Probation Officer.
7. If the Court has ordered you to pay fine, restitution, or other, payment must be made as promptly as possible and as directed by the Department of Revenue (1555 Berger Drive, Building #2, San Jose, California, 95112). Report immediately to set a payment schedule.
   All payments are to be mailed to:

   "The Department of Revenue, P.O. Box 1897, San Jose, CA, 95109"

   Payments can also be made online at: https://www.sccgov.org/sites/dor/payonline/Pages/home.aspx
8. You must comply with any special conditions of your Probation order.
9. You are prohibited from owning, using, or possessing *any* firearm for life if you were convicted of a felony, or for ten years if convicted of a designated misdemeanor.

The conditions of your Probation are contained in an official "Order for Probation." A copy of this order has been given to you. If you have not received your copy, please ask for one.

You were granted probation primarily to give you the opportunity to prove that you can be a good citizen and that you can live within the law. The extent to which you cooperate and apply yourself will determine your success. But remember, if you fail to obey the conditions of your probation, your case may be returned to Court.

> However, if you complete your probation satisfactorily, you are entitled to have the record of your sentence or conviction cleared under the condition prescribed by the California Penal Code 1203.4.

I understand I must report to my Probation Officer upon my release from custody. Failure to do so will constitute a failure to report and result in the issuance of a warrant for your arrest.

_____ _____

Signature Date

My address and phone upon release will be:

_____

County of Santa Clara
Probation Department

Adult Division
2314 North First Street
San Jose, California 95131
(408) 435-2100

Adult Division-South County
17275 Butterfield Blvd., Ste. C
Morgan Hill, California 95037
(408) 201-0600

Adult Division-North County
270 Grant Avenue
Palo Alto, California 94306
(650) 324-6500

Laura Garnette
Chief Probation Officer

DEPARTMENT OF REVENUE (DOR) PAYMENT SCHEDULE REQUIREMENT

* Every defendant must contact (via telephone or in person) DOR within three (3) business days of an assessment or upon a Deputy Probation Officer's order.

*The defendant shall FIND OUT THE GRAND TOTAL THEY OWE and AGREE TO A PAYMENT SCHEDULE.

*If required by DOR, the defendant must provide appropriate court documentation to activate an account.

DOR CONTACT INFORMATION:
MON 7:30am – 5:00pm **TUES - FRI**: 7:30am – 7:00pm
County Service Center
1555 Berger Drive, Bldg. #2
San Jose, CA 95112
(408) 282-3200 or 1-877-729-477
www.sccdor.com
A variable fee will be added for all Internet/Phone payments

Driving Directions (from Santa Clara County Probation Department)

1. Turn RIGHT on Component Drive
2. Turn RIGHT on Zanker Road
3. Turn LEFT on E. Brokaw Road
4. Turn RIGHT on Oakland Road
5. Turn RIGHT on Berger Drive – arrive at DOR/County Services Center, 1555 Berger Drive

VTA Directions (from Santa Clara County Probation Department)

1. Proceed to VTA Bus Stop at North First Street
2. Take Bus Line #66 Northbound (towards Milpitas)
3. Depart Bus at Oakland/Berger Street Bus Stop
4. Proceed to DOR/ County Services Center, 1555 Berger Drive

Signature:_____ Date:_____

CERTIFICATE OF SERVICE

I, Jenna DeRosier, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1888 Century Park East Suite 1700, Los Angeles, CA 90067-1721.

On March 1, 2021, I electronically filed via my electronic service address (jderosier@perkinscoie.com) the attached documents:

- **APPLICATION TO FILE AMICUS BRIEF OF PROFESSOR BETH A. COLGAN**
- **AMICUS BRIEF OF PROFESSOR BETH A. COLGAN**
- **DECLARATION OF CARRIE AKINAKA IN SUPPORT OF AMICUS BRIEF OF PROFESSOR BETH A. COLGAN**

with the Clerk of the court using the TrueFiling system which will then send a notification of such filing to the following:

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

Executed on March 1, 2021, at Los Angeles, California.

/s/ Jenna DeRosier
Jenna DeRosier