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Supreme Court No. 101247-1*
COA No. 82900-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES TATUM,

Petitioner.

AMICI CURIAE MEMORANDUM OF CIVIL SURVIVAL
PROJECT, WASHINGTON DEFENDER ASSOCIATION,
AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON, FRED T. KOREMATSU CENTER FOR
LAW AND EQUALITY, WASHINGTON ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS, PUBLIC
DEFENDER ASSOCIATION, NATIONAL ALLIANCE ON
MENTAL ILLNESS WASHINGTON, DEPARTMENT OF
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POLICY CENTER, COLUMBIA LEGAL SERVICES,
CENTER FOR CHILDREN & YOUTH JUSTICE,
NORTHWEST JUSTICE PROJECT, THE WAY TO
JUSTICE, FINES AND FEES JUSTICE CENTER, I DID THE

TIME, AND REVIVE CENTER FOR RETURNING
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* The constitutionality of mandatory LFOs has been raised in two other cases pending before the Court: *State v. Clement*, No. 100858-9 (Wash. Apr. 21, 2022) and *State v. Widmer*, No. 100857-1 (Wash. Apr. 21, 2022). These cases are scheduled for consideration by the Court on October 13, 2022.

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I. INTRODUCTION

The decision below fails to appropriately consider how the excessive fines clause applies to mandatory legal financial obligations (“LFOs”) and exposes indigent Washingtonians to disproportionate penalties. As this Court has long recognized, these penalties weigh most heavily on diverse communities facing systemic oppression. The decision conflicts with *City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94 (2021), and it fails to meaningfully consider Mr. Tatum’s *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis. Amici urge this Court to accept review under RAP 13.4(b)(1), (3), and (4).

Mr. Tatum was assessed a single \$100 DNA fee and five separate \$500 Victim Penalty Assessments (“VPAs”), one for each of five cases, totaling \$2,600. After considering his ability to pay, the trial court ordered Mr. Tatum to pay ten dollars per month on each case. The Court of Appeals held the trial court to be without discretion to waive them despite Mr. Tatum’s indigency.

In doing so, the Court of Appeals disregarded this Court's decision in *Long*, which makes clear that a court must consider a person's ability to pay in determining whether imposition of an LFO survives scrutiny under the excessive fines clause. *See* 198 Wn.2d at 173. This Court should accept review to resolve that conflict. RAP 13.4(b)(1).

If Mr. Tatum is able to make each payment on time as ordered by the trial court, it will take him more than four years after his release to pay off his legal debt. During that time and long after he has served his time, his debt and convictions will have significant, far-reaching implications for him. If Mr. Tatum is unable to make each payment as ordered by the trial court, he will face other hardships. The Court of Appeals' decision upholding the mandatory imposition of these fines divides those who have the means to pay from those who do not, perpetuating the disparate impact of LFOs. Given the wide-ranging implications of that decision, this case involves issues

of substantial public interest and raises significant questions of constitutional law. RAP 13.4(b)(3), (4).

In *Long*, this Court declined to consider whether the Washington Constitution provides greater protection against excessive fines than does the U.S. Constitution because petitioner Long did not sufficiently brief the issue. 198 Wn.2d at 159. By contrast, Mr. Tatum has extensively briefed his *Gunwall* argument. Mr. Tatum's petition therefore presents a significant question under the Washington and U.S. constitutions impacting an issue of substantial public interest that this Court should decide. RAP 13.4(b)(3), (4).

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in their Motion for Leave to File.

III. STATEMENT OF THE CASE

Amici adopt and incorporate by reference Mr. Tatum's Statement of the Case.

IV. ARGUMENT

A. The Court Should Accept Review to Resolve a Conflict with *Long*.

In evaluating a claim under the excessive fines clause, a court must determine whether the fine at issue is “at least partially punitive,” *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019), and if so, whether it is excessive. *See United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); *Long*, 198 Wn.2d at 163. Not only did the Court of Appeals fail to meaningfully consider whether the VPA and DNA fee were punitive, but, of particular concern to amici, it failed to address whether those LFOs were excessive as applied to Mr. Tatum. Left intact, the decision of the court below will affect every person who, like Mr. Tatum, is unable to pay.

“The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.” *Bajakajian*, 524 U.S. at 334. This Court has made clear that, in

Washington, the proportionality inquiry must include consideration of a person's ability to pay. *See Long*, 198 Wn.2d at 168, 173. When a fine or fee is deemed mandatory, a court is improperly stripped of its constitutional duty to engage in the ability-to-pay analysis.

Under the Court of Appeals' analysis, Mr. Tatum stands in the same shoes, for excessive fines clause purposes, as a wealthy individual with the same convictions even though the impact on the two is vastly different. As this Court has noted, ““what is ruin to one man's fortune, may be a matter of indifference to another's.”” *Long*, 198 Wn.2d at 171 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (O'Connor, J. concurring in part and dissenting in part)).

For a person of means, \$2,600 may mean foregoing a vacation; for an indigent person, the consequences are much graver. When a person is unable to retire their LFO debt, they are ineligible to vacate their convictions. Practically, this means

individuals with wealth can quickly pay off LFO debt and vacate their convictions after the statutory waiting period.

In finding Mr. Tatum indigent, the trial court necessarily recognized his inability to pay. The likelihood of Mr. Tatum making a \$50 payment every month for more than four years is low. If he misses a payment, he will have to wait longer to vacate his convictions solely because of his indigency. Individuals subsisting on SSI or SSDI are likely to wait even longer.

If Mr. Tatum misses a payment, he is subject to wage garnishment, RCW 9.94A.760(4), and referral to collections with the associated fees, RCW 36.18.190; RCW 19.16.500.¹ In this way, LFO debt can increase exponentially for a person who is unable to pay from the start. Perhaps of greatest consequence, a warrant for arrest can issue when a person fails to pay. RCW

¹ Collection agencies may charge a fee of up to fifty percent of the first one hundred thousand dollars of unpaid debt per account. RCW 19.16.500.

9.94A.6333(3)(a). This subjects indigent people to imprisonment² and all of the attendant consequences, not the least of which is the potential for missing work.

LFO debt and ineligibility to vacate one's criminal record have other far-reaching consequences, including negatively impacting access to housing, employment, and eligibility for public benefits and financial aid.³ Long term LFO debt increases the likelihood of reoffending.⁴

When LFOs are deemed mandatory, a court imposes them regardless of ability to pay. Imposing LFOs in this manner is necessarily disproportionate and excessive for indigent people. Putting Mr. Tatum on a years-long payment schedule

² While the court would have to find a failure to pay willful to impose a sanction, Mr. Tatum could nonetheless remain in jail pending that determination. *See* RCW 9.94A.6333(3)(c).

³ *See* Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J.F. 759, 761 (2019).

⁴ *See* Nathan W Link, *Criminal Justice Debt During the Prisoner Reintegration Process: Who Has It and How Much?*, 46 CRIM. JUST. & BEHAV. 154, 155 (2018).

may appear responsive to his financial situation, but it ignores the real-world impact on Mr. Tatum and others like him. The potentially crushing repercussions of LFO debt for Mr. Tatum illustrate why proportionality is the touchstone of the excessive fines clause analysis and why ability to pay must be considered and not just in setting payment schedules. *See generally Long*, 198 Wn.2d at 166-73. The Court should grant review to resolve the conflict between the decision below and *Long*.

B. Imposition of Mandatory LFOs on Indigent People to Fund the Criminal Legal System Presents Significant Questions of Constitutional Law that this Court Should Resolve.

In *Timbs*, the U.S. Supreme Court held that the Fourteenth Amendment incorporates the protection of the excessive fines clause. 139 S. Ct. at 687. In *Long*, this Court considered the Eighth Amendment excessive fines clause and articulated a test to carry out its proportionality inquiry, which plainly includes consideration of ability to pay. *Long*, 198 Wn.2d at 173. Nonetheless, the Court of Appeals held itself

bound by this Court's opinion over thirty years ago in *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166, 169 (1992), which held the VPA constitutional on its face and as applied to indigent people. While *Curry*'s constitutional grounds are murky, it is clear that *Curry* did not consider whether holding an LFO to be mandatory regardless of ability pay violates the excessive fines clause.

The court below held the DNA fee imposed on Mr. Tatum not excessive "because its purpose is monetary, rather than punitive." *State v. Tatum*, No. 82900-9-I, 2022 Wash. App. LEXIS 1609, *8-9 (Ct. App. Aug. 8, 2022) (citing *State v. Brewster*, 152 Wn. App. 856, 861, 218 P.3d 249 (2009)). The court reasoned that this fee funds the use of DNA in criminal investigation related functions. *Id.* The court's consideration of the VPA was even more cursory.

The reality that these LFOs fund the criminal legal system makes them all the more suspect. LFOs fund this system on the backs of the poorest residents of our state who are least

able to pay. This Court has recognized the inherent conflict in this method of funding and instructed that “close scrutiny” is warranted “when the State stands to benefit” as it does here. *See Long*, 198 Wn.2d at 172; *see also Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680, 115 L. Ed. 2d (1991); *State v. Grocery Mfrs. Ass’n*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020) (punitive fines should not be imposed as a revenue source). As this Court has explained, “[i]ncluding an ability to pay inquiry for an excessive fines claim allows courts [to engage in that scrutiny].” *Long*, 198 Wn.2d at 172.

The Court of Appeals’ consideration of whether the DNA fee was excessive in this case started and ended with its determination that the fee’s purpose is monetary rather than punitive. Its consideration of whether the VPA was constitutional as imposed on Mr. Tatum started and ended with its reliance on *Curry*, a case that nowhere addressed the excessive fines clause and that, by the Court of Appeals’ own admission is “vague” in its reasoning. *Tatum*, 2022 Wash. App.

LEXIS at *7. Unreviewed, the decision leaves trial courts on constitutionally unsound and suspect ground when imposing LFOs on indigent people.

C. This Case Reveals How LFOs Amplify Inequities, an Issue of Substantial Public Interest that this Court Should Consider.

The VPA and DNA fee are imposed against every person convicted of a felony in Washington regardless of the person's ability to pay. The average VPA debt owed in Washington is \$854.32.⁵ For felony convictions, the average amount owed in LFOs is \$2,540.⁶ Courts' long-term involvement in the lives of people who cannot afford to pay their LFOs inhibits reentry and

⁵ Naomi Ishisaka, *New Bill Could Provide Help for Washington Residents Struggling with Legal Debt*, SEATTLE TIMES (Mar. 8, 2021, 12:02 PM), <https://www.seattletimes.com/seattle-news/insurmountable-legal-debt-should-not-make-you-irredeemable/>. The average amount is higher than the victim penalty assessment fee amount because people can be assessed the fee for multiple counts.

⁶ ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors' Prisons*, ACLU of Washington, 3 (2014), <https://www.aclu-wa.org/docs/modern-day-debtors-prisons-washington>.

increases the risk of recidivism. *See State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015).

The ripple effect of fines and fees is felt most deeply for people and communities represented by amici, including people with low incomes, people with disabilities, and BIPOC communities. Ninety percent of Washingtonians convicted of a felony and sixty percent of those convicted of a misdemeanor cannot afford to pay the fines and fees assessed at sentencing.⁷ As a result, neighborhoods with higher rates of poverty also have disproportionately higher rates of LFO debt per person.⁸

⁷ Washington State Office of Public Defense, *2018 Status Report on Public Defense in Washington State*, Washington State Office of Public Defense, 14 (2019),

www.opd.wa.gov/documents/00732-2019_StatusReport.pdf.

Here, public defender representation is a proxy for someone with no ability to hire a lawyer for court representation and most likely to have limited financial means.

⁸ Task Force 2.0 Race and Washington's Criminal Justice System Research Working Group, *2021 Report to the Washington Supreme Court*, Fred T. Korematsu Center for Law and Equality, Appendix F, F-6 (2021),

https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=korematsu_center.

Compounding the issue, Black, Indigenous, and Latinx communities face LFOs more frequently and at higher rates than White people.⁹

Washington residents with disabilities are also disproportionately harmed by LFOs. In 2016, incarcerated people were almost three times as likely to report a disability than the general population.¹⁰ Under current law, courts may impose the VPA or DNA¹¹ fees on people with disabilities whose main source of income is social security benefits.¹²

⁹ Alexes Harris & Frank Edwards, *Legal Debt, Monetary Sanctions and Inequality*, OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (2017). Insufficient information exists regarding disparities in LFOs among disaggregated Asian groups.

¹⁰ Rebecca Vallas, *Disabled Behind Bars The Mass Incarceration of People With Disabilities in America's Jails and Prisons*, Center For American Progress, 1-2 (2016), www.americanprogress.org/wp-content/uploads/2016/07/2CriminalJusticeDisability-report.pdf.

¹¹ *But cf.* RCW 9.94A.777. Before imposing LFOs other than restitution or the VPA, courts must assess ability to pay for individuals with mental health conditions as defined by the statute.

¹² *See State v. Catling*, 193 Wn.2d 252, 266, 438 P.3d 1174 (2019) (affirming “imposition of the \$500 crime victim fund

These Washingtonians are put in the perilous position of having to choose whether to make LFO payments so that they can eventually seek to vacate their convictions or pay for housing and other basic needs.¹³ The grossly inequitable impact of LFOs on the people and communities represented by amici is an issue of substantial public interest.

D. Mr. Tatum’s Petition Presents the Court with the Opportunity to Resolve Whether Our State Constitution Provides Greater Protection Against Excessive Fines than Does the U.S. Constitution.

Long did not examine whether our state constitution provides greater protection against excessive fines than does the Eighth Amendment to the U.S. Constitution because petitioner *Long* did not brief the issue. *See* 198 Wn.2d at 159. Here, the

assessment but remand[ing] to the trial court to . . . indicate that this LFO may not be satisfied out of any funds subject to the Social Security Act’s antiattachment statute, 42 U.S.C. § 407(a).”).

¹³*Catling*, 193 Wn.2d at 267 (Gonzalez, J. dissenting) (“[f]or individuals whose sole income is SSDI, the burdensome and coercive effects of LFOs will all too often result in SSDI being used to satisfy them”).

petitioner has provided an extensive and compelling *Gunwall* analysis. Mr. Tatum's petition describes the numerous ways the Washington Legislature and this Court have expressed concern with the burden legal debt has on indigent Washingtonians. *See* Pet. at 19-22.

Amici share those concerns. We see firsthand the destruction wrought by LFO debt. Amici urge this Court to accept review to resolve this significant constitutional question, particularly in light of its substantial public interest.

V. CONCLUSION

For the foregoing reasons, amici urge the Court to accept review of this case pursuant to RAP 13.4.

RAP 18.17 Certification

Pursuant to RAP 18.17, the undersigned certifies the number of words contained in this document, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, is 2,479.

Respectfully submitted this 7th day of October, 2022

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