No. 101188-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JACK POTTER,

Plaintiff/Appellant,

v.

CITY OF LACEY,

Defendant/Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

Appellant Jack Potter has shown that the City of Lacey's parking ordinance, Lacey Municipal Code ("LMC") 10.14.020 violates his state constitutional right to intrastate travel and inflicts cruel punishment under Article I, § 14 of the Washington Constitution by effectively banishing him from Lacey. We agree with those claims and also show that the City of Lacey ordinance at issue imposes other state constitutional and statutory flaws that we urge the Court to address. After requesting that the Court consider the broad impacts of the Lacey ordinance on the right to travel and other important rights, we show that the Lacey ordinance as applied violates the excessive fines clause of Article I, § 14 of the Washington Constitution and also violates Article I, § 12's prohibitions on discrimination, including discrimination against people because they are poor.[1]

[1]Amicus agrees with, but does not want to repeat, all of the points put forward in the amicus brief to be submitted by the National Homelessness Law Center, et. al., regarding causes of homelessness; the harm of the Lacey ordinance to communities of color, people with disabilities, and other communities; the

II. IDENTITY AND INTEREST OF AMICUS

The identity and interest of Amicus are set forth in the Motion for Leave to File Brief of Amicus Curiae.

III. STATEMENT OF THE CASE

Amicus adopt Mr. Potter's Statement of the Case.

IV. ARGUMENT

1. The Court should consider the drastic impact on the right to travel and other important rights if cities are allowed to do what the City of Lacey is doing.

The City of Lacey has sought to move houseless people out of the city through enacting the parking ordinance at issue and other ordinances enacted at nearly the same time.[2] If these attempts at banishment of people whom Lacey public officials

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history of ordinances seeking to control mobility of those viewed as "undesirable;" and the harm of criminalizing the use of vehicles as residences of last resort.

[2] *See* the Lacey anti-camping ordinance, LMC Chapter 8.10, making unlawful camping a misdemeanor that carries penalties of up to a $1,000 fine and 90 days in jail. This ordinance was enacted just three months before the parking ordinance. *See* the sequence of the enactment of the ordinances in Brief of Appellant at 11-14.

deem undesirable is permitted to stand, other cities, even entire counties, could do the same thing. If many or most jurisdictions did this, it would drastically limit where houseless persons could travel and would also force many of them to travel against their will, repeatedly going from city to city until the new city bans them as well. This could even force people to move out-of-state, thus implicating not only the right to intrastate travel, but indeed the right to be free from even greater banishment through forced interstate travel.

The right to travel includes the right to reside, to stay where one is. Brief of Appellant at 23. Cities preventing people, through devices such as parking ordinances, from living in a chosen place also interrupts or ends access to a myriad of important personal activities including medical and mental health care, employment, education, needed social services, and more. The City of Lacey's actions also detrimentally impact other important rights and fundamental activities of living. Banishment negatively impacts participation in elections and

other civic activities and the related right of association protected by the First Amendment and Wash. Const. art. I, § 5. *See, e.g., Pilloud v. King County Republican Central Committee*, 189 Wn.2d 599, 603, 404 P.3d 500 (2017).

Contrary to the City's contentions that the Lacey ordinance does not implicate access to services and activities to which others have access, the parking ordinance ban does limit access in all of these important ways because it is a city-wide ban on parking for more than four hours. While it may be true that Mr. Potter could visit Lacey and park for some activities, he cannot live in Lacey and conduct normal daily activities there so long as—due to his limited means and the high cost of housing—he must live in his vehicle. Lacey likely could constitutionally limit parking of vehicles that can be used as homes in some parts of the city in a way that applies to all. But the ordinance, by imposing the four-hour limit throughout the city, is not a reasonable parking limit but rather a form of banishment directly aimed at Mr. Potter and other people who are houseless.

These clear effects of the Lacey ordinance do directly impact the right to intrastate travel of only those people who do not have a place to live other than their vehicle. And as is next shown, it also violates other state constitutional rights of those same people.

2. The Lacey parking ordinance violates the Washington Constitution's excessive fines clause.

a. Washington's excessive fines clause requires consideration of ability to pay.

In *City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94 (2021), this Court examined the implications for constitutional excessive fines analysis of parking fines and impoundment fees regarding Long's vehicle that was his home. Wash. Const. art. I, § 14; U.S. Const. amend 8. The Court determined that, in the absence of a separate analysis of how Washington's excessive fines provision should be interpreted differently from the federal one, the state and federal excessive fines clauses would be treated as co-extensive. The Court should now find that Washington's excessive fines clause may well be more protective than the

federal clause and should determine that no matter the future direction of federal analysis, the Washington clause independently demands a robust ability to pay process before fines can be imposed.

It is axiomatic that the Washington clause is at least as protective as the federal one. It is also true that when a state constitutional issue is raised, the Court generally determines the scope of the state provision first. *Matter of Williams*, 198 Wn.2d 342, 353, 496 P.3d 289 (2021). Consideration of the state provision in light of what the Court actually concluded in *Long* demonstrates that determination of ability to pay should be found to be a key component of the state clause, whether or not the U.S. Supreme Court ultimately requires an ability to pay component as part of federal excessive fines analysis.

In *Long*, this Court noted that the United States Supreme Court had not addressed whether the means of the person fined must be considered when determining what is "excessive." So this Court conducted its own direct and extensive analysis of

state and federal constitutional history and cases from other jurisdictions, and found that ability to pay must be considered in the excessive fines clause determination of whether a fine is disproportionate to the offense. 198 Wn.2d at 168-173. This Court examined, *inter alia*, the "weight of history," the present-day impact of fines on poor communities and communities of color, and the need for special scrutiny when the government relies on fines as a source of revenue. This Court recognized that fines that would deprive a person of the means to live have always been of special concern in the genesis of excessive fines doctrine:

> The excessive fines clause descended from English law that sought to protect individuals from fines that would deprive them of their ability to live. This concern is directly related to an offender's circumstances—in this case, homelessness and the circumstances forcing individuals into it.

Id. at 172. And the Court emphatically embraced this history and the requirement that a person's circumstances be fully considered:

> We pay more than "lip service" to the excessive fines clause and instead hew to its history. We conclude, as did the Colorado Supreme Court, that courts considering whether a fine is constitutionally excessive should also consider a person's ability to pay.

Id. at 173 (citation omitted).

This extensive analysis in the absence of U.S. Supreme Court precedent shows that this Court in *Long* was not determining whether a state constitutional analysis should *deviate* from U.S. Supreme Court precedent on this point, which is the purpose of analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Instead, this Court in *Long* engaged directly with the long history of the meaning and analysis of excessive fines provisions and the current context including the crisis of homelessness. The *Long* Court determined that the lengthy history of the prohibition on excessive fines fully incorporated the need to determine if a fine would be so onerous as to deprive the person of the necessities of life. In other words, the factors this Court analyzed in detail demand that ability to pay must be considered.

In these circumstances, a *Gunwall* analysis as such is not necessary for the Court to find that the state excessive fines clause requires inquiry into ability to pay. In the absence of U.S. Supreme Court precedent addressing the ability to pay question, this Court's analysis is already independent of the U.S. Supreme Court's treatment of excessive fines and has effectively found that ability to pay must be part of the state constitutional analysis whether or not it becomes part of the federal test.

And even if reference to the *Gunwall* factors is necessary, even though the U.S. Supreme Court has not decided the ability to pay question, application of the *Gunwall* factors would also counsel an independent state interpretation. Factors 1 and 2 query differences in language between the state and federal clauses. There are no linguistic differences between the state and federal clauses, but this does not end the inquiry. *See Long*, 198 Wn.2d at 159 (expressing desire for *Gunwall* analysis in order to decide whether the state clause is more protective given the identical language).

This Court in *Long* has already comprehensively considered *Gunwall* factor 3—state constitutional and common law history, as detailed above—and concluded that ability to pay is integral to excessive fines analysis. In addition to the factors found persuasive in *Long*, there is Wash. Const. art. I, § 17 that evinces Washington's constitutional commitment to refrain from punishing people just because they are poor: "There shall be no imprisonment for debt, except in cases of absconding debtors." The history all points toward protection of people who are poor, as does factor 5, structural differences between the state and federal constitutions, which always counsels independent interpretation (*Williams,* 198 Wn.2d at 360-61).

Factors 4 and 6, preexisting state law and matters of local concern, also point to independent interpretation. Both this Court and the Legislature have required robust ability to pay inquiries involving court fees and fines. The Legislature long ago prohibited courts from imposing costs on persons convicted of crimes "unless the defendant is or will be able to pay them…"

Laws of 1975-76 2nd Ex. Sess., Chapter 96, section (3), later amended to the same effect but focusing on whether the defendant has been determined to be indigent, *see* RCW 10.01.160(3). The 1975-76 session law also provided in section (4) for application for remission of the payment of costs upon a showing that "payment of the amount due will impose manifest hardship on the defendant or his immediate family…," a provision now slightly modified and codified as RCW 10.01.160(4). This Court in *State v. Blazina* reviewed the many problems Washington defendants face in paying legal financial obligations that can become excessively punitive, and determined that under the statutory language originating in 1975, "The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." 182 Wn.2d 827, 838, 344 P.3d 680 (2015). In *Blazina* this Court cited, among other sources, Katherine Beckett & Alexes Harris, State Minority & Justice Comm'n, *The Assessment & Consequences of Legal Financial Obligations in*

Washington State (2008), available at https://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf , which discusses among other aspects, how fines disproportionately impact communities of color and reinforce systemic inequalities.

One year later this Court held that a defendant's disabilities and homelessness and ability to meet basic needs had to be considered in applying the "manifest hardship" provision of the remission statute. *City of Richland v. Wakefield*, 186 Wn.2d 596, 605-07, 380 P.3d 459 (2016). In both *Blazina and Wakefield*, the Court cited GR 34, which addresses alleviation of the burden of court filing fees and court costs on people without means. And the Legislature has continued to address the burden of fees and fines on people who cannot pay them by, for example, striking accrual of interest on most court-imposed legal financial obligations. Laws of 2018, ch. 269, § 1, 2.

In sum, for decades, and continuing to the present, both this Court and the Legislature have shown intense legal interest

in and activity on the "ability to pay" question and the impact of fees and fines on people without means in Washington. *See* Cynthia Delostrinos, Michelle Bellmer, & Joel McAllister, State Minority & Justice Comm'n, *The Price of Justice: Legal Financial Obligations in Washington State*, 5, 10 (2022), available at https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf.

Moreover, these laws and court decisions are quintessentially local in character and focus. Every state has particular and differing laws on the subject of fees and fines, and how they are administered. There is no national consensus and no need for nationwide uniformity on this subject. *See State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018) (holding Washington's particular state concerns outweigh national standards governing juvenile sentencing).

Under both the *Long* analysis and reference to the *Gunwall* factors, this Court should recognize that the Washington

excessive fines clause does contain a mandate to consider ability to pay even if the federal clause is someday held not to include this. The Court should examine the Lacey ordinance through this lens, and elaborate on how ability to pay should apply to people who are in poverty and forced to live in their vehicles.

b. The Lacey ordinance contains no ability to pay mechanism.

Long held that the excessive fines analysis requires individual consideration of ability to pay. The Lacey ordinance specifies a $35 fine and also provides for impoundment of a vehicular home. LMC 10.14.040. Impoundment specifically is allowed to include taking the vehicle to "the business location of a registered towing operator," which will further entail per state statute an automatic lien representing a debt owing to the towing operator. RCW 46.55.140.[3] The Court held in *Long* that

[3] RCW 46.55.130 also allows for auction of a towed vehicle if not claimed within 15 days, but *Long* holds that as to a vehicle that is a primary residence, the Homestead Act would prevent such an auction, though this objection could be asserted only at the point of attempted enforcement of the debt. 198 Wn.2d at 155. *But see Long* at 177-79 (Gonzalez, C.J., concurring)

impoundment fees are punitive within the meaning of the excessive fines clause, but that the City of Seattle did provide a forum for determining the required ability to pay issue through a hearing mechanism specified in its municipal code. 198 Wn.2d at 177 (citing SMC 11.30.120(D)).

Lacey has no known mechanism to determine ability to pay. The parking ordinance provides none and yet allows towing to a registered towing company, which will automatically incur substantial costs per state law. Unless some mechanism is available for an ability to pay determination—certainly regarding towing fees but even with respect to the $35 fine—the ordinance may not be enforced consistently with the excessive fines clause.

Importantly, the Court should also consider whether the deprivation of a person's home that is also a vehicle is itself constitutionally excessive, assuming nothing more serious than

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(arguing Homestead Act prohibits towing a primary residence in the first place).

parking on a public street is involved. A loss of property for any amount of time is subject to excessive fines analysis if it is in any way punitive and if it is grossly disproportionate to the harm caused. *Long*, 198 Wn. 2d at 166 (even under U.S. Supreme Court precedent, though the seizure was likely temporary, "the impoundment of Long's truck was partially punitive and constitutes a fine").

The government's seizure of one's only home for any amount of time is punitive as it works a deprivation of shelter from the elements as well as access to one's clothing, food, work equipment, etc.[4] The deprivation of one's home for days or even

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[4] *See* Washington State University Division of Governmental Studies and Services, "Identifying, Towing, and Impounding Vehicle Residences: An Assessment and Recommendations Post *City of Seattle v. Long*" (2022) (assessment required by ESSB 5689) at 5 ("impounding vehicle residences greatly disrupts the lives of people who occupy them (they immediately lose access to nearly all personal possessions as well as their only shelter")). This report is available at https://app.leg.wa.gov/committeeschedules/Home/Document/247217#toolbar=0&navpanes=0.

hours is grossly disproportionate to the harm of parking for more than four hours on a public street in the City of Lacey.

3. The Lacey parking ordinance unconstitutionally discriminates against people who are unhoused.

The Lacey parking ordinance was intended to target houseless people who are forced to live in their vehicles. *See* Appellant's Brief at 10-15. As applied, the ordinance directly discriminates against people who have no permanent address, in other words the houseless poor.

The ordinance prohibits recreational vehicle parking for more than four hours in any twenty-four-hour period, except that a vehicle can be parked temporarily for loading or unloading, or it can be parked with a displayed permit issued per rules established by the City Manager. LMC 10.14.020B and .045. The City Manager promulgated rules that allow issuance of a permit to those who have a permanent address but *not* to anyone who does not have such an address. Brief of Appellant at 14 n.5, citing *Potter v. City of Lacey*, 46 F.4th 787, 789-90 (9th Cir. 2022). This

is discrimination against people because they are poor and is forbidden by Article I, §12 of the Washington Constitution.

This Court has repeatedly determined that, in the context of application of Article I, §12's privileges and immunities clause and its implied equal protection component, the status of being poor invokes heightened scrutiny of punitive actions by the government and must be justified by more than a purported rational basis. *State v. Phelan*, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983); *Matter of Mota*, 114 Wn.2d 465, 474, 788 P.2d 538 (1990) (both requiring intermediate scrutiny under equal protection analysis). *See Martinez-Cuevas v. DeRuyter Bros.*, 196 Wn.2d 506, 527-28, 475 P.3d 164 (2020) at 527-28 (Gonzalez, J. concurring) and 553-54 (Stephens, C.J., dissenting), both referencing the requirement of heightened scrutiny for wealth-based classifications.

People who are houseless are obviously a large subset of people without means and the status of being houseless is equally not a matter of choice but of necessity for thousands of people.

State v. Pippin, 200 Wn. App 826, 845, 403 P.3d 907 (Div. 2, 2017). *See also Long*, 198 Wn.2d at 171-72 (discussing the impacts of the societal causes of homelessness as they affect excessive fines analysis); *Pippin*, 200 Wn. App. at 837-38 (citing RCW 43.185C.005, containing state legislative findings about systemic causes of homelessness).[5] The need for heightened scrutiny of wealth classifications established in *Phelan, et al.*, thus applies directly to people who are houseless.

Intermediate scrutiny, which applies to people punished because they are poor, requires that Lacey "must prove the law furthers a substantial [governmental] interest." *Mota*, 114 Wn. 2d at 474. The blatant discrimination against the poor stemming from the Lacey ordinance as applied cannot come close to meeting this standard. The City of Lacey's obvious purpose is to drive those who must live in their vehicles out of the City, which is not a valid public purpose in the first place. Indeed, this aspect

[5] The record in the present case demonstrates the extremely limited resources of people who have no choice but to live in their vehicles. E.g., ER 29-31; ER 51, paragraphs 30 and 31.

of the administration of the ordinance carrying so blatant a discriminatory motive would be unlikely even to pass even the most forgiving rational basis review, let alone heightened scrutiny.

This is equally true when analyzed under the alternate, "privileges and immunities" prong of Article I, Section 12 jurisprudence. Under that prong, burdens on fundamental rights must be justified by a "reasonable ground," an analysis that is "more exacting than rational basis review." *Martinez-Cuevas*, 196 Wn.2d at 523. The parking ordinance's profound impact on the fundamental right to intrastate travel amounting to banishment cannot be justified. People living at permanent addresses in Lacey are granted a privilege to park that is denied to people without such an address, resulting in an unconstitutional curtailment of the fundamental rights of those who must live in their vehicles.

The City of Lacey is incorrect when it claims, without citing any of the Washington precedent detailed above, that its

ordinance does not discriminate in violation of the Washington Constitution. *See* Brief of Respondent at 60ff. The City recognizes that this Court requires intermediate scrutiny of "laws that burden both 'an important right and a semi-suspect class not accountable for its status…'" (quoting *Schroeder v. Weighall*, 179 Wn.2d 566, 578, 316 P.2d 482 (2014). But the City fails to recognize the crucial point that this Court views people who are poor as just such a class not accountable for their circumstances.[6] Intermediate scrutiny is required and given that the ordinance both directly discriminates against and severely burdens the

[6] The City is incorrect in its assertions about both state and federal law regarding the poor as a semi-suspect class. It is questionable whether the U.S. Supreme Court has directly held that there is no such semi-suspect class. *See* Rose, "The Poor as Suspect Class under the Equal Protection Clause: An Open Constitutional Question," 34 *Nova L. Rev.* 407 (2010). But as *Schroeder* and the cases cited above regarding the punishment of people who are poor make clear, even if the U.S. Supreme Court had made such a holding, this Court has taken a more expansive view under the Washington Constitution of what is a semi-suspect class "not accountable for its status" and of what burdens on people who are poor are constitutionally acceptable.

fundamental right to travel of people without means, the ordinance is unconstitutional.

V. CONCLUSION

The Court should hold that the ordinance violates the right to intrastate travel and banishes Mr. Potter in violation of Article I, Section 14 of the Washington Constitution as Mr. Potter requests, but should also address other aspects of the ordinance that violate the Washington Constitution's excessive fines clause and prohibitions on discrimination against people due to their status as poor.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), the document contains 3769 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 5,000 words for amicus curiae briefs as required by RAP 18.17(c)(6).

Respectfully submitted August 24, 2023.

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CERTIFICATE OF SERVICE

I certify that on the 24th day of August, 2023, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 24th day of August, 2023 at Vashon, WA.

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