No. 57580-9-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DUSTON THOMPSON,

Appellant,

v.

MASON COUNTY SHERIFF DEPARTMENT,

Respondent

BRIEF OF *AMICI CURIAE* COLUMBIA LEGAL SERVICES, NATIONAL HOMELESSNESS LAW CENTER, HOMELESS RIGHTS ADVOCACY PROJECT, WASHINGTON DEFENDER ASSOCIATION, PURPOSE DIGNITY ACTION, CIVIL SURVIVAL, AND NORTHWEST CONSUMER LAW CENTER

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici are nonprofit legal services or advocacy organizations. All amici have substantial legal, academic, or policymaking experience working with individuals living in vehicles. Most amici were directly involved as either amici or counsel in *City of Seattle v. Steven Long*, 198 Wn.2d 136, 493 P.3d 94 (2021). The identity and interest of Amici are set forth in more detail in the Motion for Leave to File Amici Curiae Brief in Support of Appellant.

II. STATEMENT OF THE CASE

Amici adopt Appellant Thompson's statement of the case as set forth in Brief of Appellant at 5–8.

III. ARGUMENT

A. Both the District Court's Failure to Undertake an Excessive Fines Analysis and Respondent's Arguments Are Based on Mistaken Understandings about the Facts in the *Long* Case.

In their briefing, both Appellant Thompson and Respondent Mason County devote extensive discussion to the Washington State Supreme Court's decision in *City of Seattle v. Steven Long,* 198 Wn.2d 136, 493 P.3d 94 (2021). As Appellant puts it in his opening brief: "It is difficult to imagine a case more on point to Mr. Thompson's situation than *City of Seattle v. Long*." Brief of Appellant at 12.

Amici curiae agree with Appellant. *Long's* holding dictates that the District Court *should have* conducted an Excessive Fines Clause analysis for Appellant's tow, impound, and storage charges. By failing to do so, the District Court's decision directly conflicts with a precedent of our State Supreme Court.

"A fine violates the excessive fines clause if it is grossly disproportional to the gravity of a defendant's offense." *Long,*

198 Wn.2d 136 at 167. In determining disproportionality, courts must look at " '(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused,' " as well as a person's ability to pay the fine. *Id.* at 173. "An individual's ability to pay can outweigh all other factors." *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 723, 497 P.3d 871, 879 (2021).

Respondent Mason County attempts to distinguish the facts and holding of the *Long* case from Appellant's case on two points: (1) Mr. Long's vehicle was towed by the City of Seattle while Mr. Thompson's vehicle was towed by a private tow company; and (2) Mr. Thompson's towing debt was owed to a private tow company, while Mr. Long's towing debt was owed to the City of Seattle. *See* Respondent's Brief at 8–9. However, both of these points fundamentally misunderstand the facts of the *Long* case.

(1) Respondent erroneously distinguishes the facts in *Long* by claiming that Long's car was towed directly by the City of Seattle.

In its brief, Respondent Mason County states:

"Long's car was towed by the City of Seattle, but Thompson's car was towed by a private tow company after the Mason County's Sheriff's Office authorized the tow." Brief of Respondent at 8.

This is a misstatement of the facts of *Long*. Long's car was *not* directly towed by the City of Seattle. Just like Appellant, his car was towed by a private tow company (Lincoln Towing) after law enforcement authorized the tow. *City of Seattle v. Long*, 198 Wn.2d 136, 143, 493 P.3d 94, 99 (2021) (a city-contracted company towed Long's truck); *see also City of Seattle v. Long*, 13 Wn. App. 2d 709, 718, 467 P.3d 979, 985 (2020), *aff'd in part, rev'd in part*, 198 Wn.2d 136, 493 P.3d 94 (2021) (Court of Appeals Division I decision explaining that Lincoln Towing executed the tow).

In fact, the only difference between the private tow company in *Long* and the private tow company in this case appears to be that the City of Seattle utilizes a competitive

bidding process, SMC 11.30.220.B, to determine what tow company it will call when law enforcement decides that a tow is required. The Mason County Sheriff's office appears to utilize a "rotational tow system", in which law enforcement calls whatever private tow company is on "rotation" in the area. *See* Respondent's Answer to Motion for Discretionary Review at 7. But this distinction is totally irrelevant to an Excessive Fines Analysis.

Regardless of whether the private tow companies had a bid-upon contract with a government entity, the private tow company in *Long* and the private tow company in this case were acting at the direction of, and as agents of, governmental entities. Both Long's impound and Thompson's impound would be considered "public impounds" under statute:

> (4) "Impound" means to take and hold a vehicle in legal custody. There are two types of impounds—public and private.
>
> (a) "Public impound" means that the vehicle has been impounded at the direction of a law

> enforcement officer or by a public official having jurisdiction over the public property upon which the vehicle was located.
> (b) "Private impound" means that the vehicle has been impounded at the direction of a person having control or possession of the private property upon which the vehicle was located.

RCW 46.55.010(4)(a)-(b).[1]

Constitutional rights, like the Excessive Fines Clause, certainly apply in instances where a law enforcement official has directed a private company to act on their behalf. Indeed, at least one federal court has found that it constitutes state action when private tow companies operate at the behest of law enforcement. In *Stypmann v. City & Cnty. of San Francisco*, the

[1] When an impoundment is unlawful under RCW 46.55, the entity who authorized a tow typically has to cover the impoundment costs and pay the private tow company. RCW 46.55.120 (3)(e) states: "If the impoundment is determined to be in violation of this chapter, then the registered and legal owners of the vehicle or other item of personal property registered or titled with the department shall bear no impoundment, towing, or storage fees, and any security shall be returned or discharged as appropriate, and the person or agency who authorized the impoundment shall be liable for any towing, storage, or other impoundment fees permitted under this chapter."

Ninth Circuit found that when a private towing company tows a vehicle at the direction of a law enforcement officer and the private tow company detains and asserts a tow lien, there is a "sufficiently close nexus between the State and the challenged action of the (towing company) so that the action of the latter may be fairly treated as that of the State itself." 557 F.2d 1338, 1341 (9th Cir. 1977).[2]

Respondent Mason County cannot simply wash its hands of its duty to comply with the Eighth Amendment (and its Washington State counterpart Article I, Section 14) by trying to claim this matter is solely between Appellant and a private impound company – Mason County *ordered* Appellant's vehicle to be towed. Respondent monetarily benefitted from the

[2] Respondent Mason County does not address the substantive arguments of *Stypmann*, which was also cited by Appellant. Instead, Respondent contends that Ninth Circuit decisions have no precedential value in our State courts. Brief of Respondent at 24. However, lower federal court decisions still have persuasive value. *Schuster v. Prestige Senior Mgmt., L.L.C.,* 193 Wn. App. 616, 630, 376 P.3d 412, 419 (2016).

tow by passing the costs of impound on to Appellant, leaving him without his home for 36 days and with a $1,765 bill. *See also Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S.Ct. 2680, 115 L. Ed. 2d 836 (1991) (lead opinion) (discussing Excessive Fines scrutiny where the government stands to benefit from fine imposition). Upholding the District Court's decision and analysis would create an arbitrary and untenable split in Washington State. Residents of cities or counties whose law enforcement entities have written, bid-upon tow contracts (like Seattle did in *Long)* would have entirely different constitutional rights from those who reside in cities or counties where law enforcement orders a tow by rotational system, even though in every instance it would be law enforcement or public officials who directed the tows.

(2) Respondent erroneously distinguishes the facts in *Long* by asserting that Long owed fees directly to a City while Mr. Thompson owed them to a private company.

Respondent Mason County also states the following in its brief:

> "As a result of the tow, Long owed money to the City of Seattle. Thompson, on the other hand, had no debt to the government, but instead owed towing and impound fees to the private tow company." Brief of Respondent at 9.

Respondent once again misstates the distinction between the facts of *Long* and Appellant's situation. Just as Appellant owed impound costs to the private tow company that law enforcement ordered to tow his car, Mr. Long initially owed the costs of the impound directly to the private tow company Lincoln Towing. In fact, the only costs at issue in *Long* were *direct reimbursement* for the *actual costs* of the impound itself. Only after entering into a court-ordered payment plan for the costs did Mr. Long then owe those costs to the City of Seattle. SMC 11.30.160(B) (upon imposition of a payment plan, "the City shall be responsible for paying the costs of impoundment

to the towing company"). *Long* at 155. The State Supreme Court in *Long* held that even though the payment owed was entirely a reimbursement for storage fees and impound costs to the private tow company, *Long* at 164 ("the associated costs were intended to reimburse the city for towing and storage fees"), these fines were excessive under the Eighth Amendment. Appellant's situation is no different: The costs owed to the tow company for the tow authorized and ordered by Respondent are subject to an Excessive Fines analysis under the Eighth Amendment and Washington State Constitution Article I, Section 14.

In all relevant ways, Mr. Long was in the same situation as Appellant Thompson. In fact, many of the same arguments that Respondent makes here were already made by the City of Seattle in the *Long* case. The City of Seattle's arguments failed in *Long*, and accordingly, Respondent's arguments should fail here.

Amici acknowledge that the constitutional mandates under *Long* have necessitated changes to certain state impound laws, such as RCW 46.55.130(c) (stating that fees shall not be adjusted, which applied to Mr. Long's impound as well). The State Legislature has considered but not yet resolved these issues, including funding a work group in 2022 to address necessary statutory changes in the wake of *Long*.[3] Several bills concerning how to reimburse the costs of constitutionally excessive impound fees were introduced in the 2023 legislative

[3] As full disclosure to this Court, Columbia Legal Services was a member of this workgroup, along with key stakeholders and judicial officials, including the district court judge in this case, Judge Stephen Greer. WSU Division of Governmental Studies and Services, Report: Identifying, Towing, and Impound Vehicle Residences: An Assessment and Recommendations Post City of Seattle v. Long, ESSB 5689 (December 2022). The full report is available here by clicking on "Work Session" and "Vehicle residences":
https://app.leg.wa.gov/committeeschedules/Home/Documents/30244

session, but none of these efforts was signed into law.[4] However, whatever solution the Legislature eventually approves, it will certainly not be what Respondent Mason County is proposing—to ignore the constitutional mandates of *Long* and to not conduct an Excessive Fines constitutional analysis in situations our Supreme Court has expressly said they must be conducted.

B. Impounding a Vehicular Home and Holding it Until the Owner Pays the Costs of the Government's Requested Enforcement is Punitive.

"If a sanction is partially punitive, it falls within the excessive fines clause." *Long* at 163 (quoting *Austin v. United States*, 509 U.S. 602, 610, 113 S.Ct. 2801, 2806 (1993)). The excessiveness of punishment is also more heavily scrutinized when a home is seized or when a person loses their livelihood. *See Long* at 171 ("The central tenet of the excessive fines

[4] Bills proposed this year include: Washington State House of Representatives Bill 1688 (2023-24), Washington State Senate Bill 5737 (2023-24), and Washington State Senate Bill 5730 (2023-24).

clause is to protect individuals against fines so oppressive as to deprive them of their livelihood.") (*citing Timbs v. Indiana*, 203 L.Ed. 2d 11, 139 S.Ct. 682, 689). *Accord* Browning-Ferris, 492 U.S. 257, 300 109 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (O'Connor, J., concurring) ("what is ruin to one man's fortune may be a matter of indifference to another's.")[5]

The impoundment of Appellant's vehicular home, the associated $1,765 in tow and storage charges, and the holding of his home for weeks, were clearly at least "partially punitive," and therefore fell within the excessive fines clause. Likewise, the deprivation of his home and imposition of costs, far outstripping his ability to pay, were clearly excessive.

The State Supreme Court in *Long* found that both the impoundment of Mr. Long's vehicle and the costs of the impoundment reimbursement were fines. *Long* at 177 ("We

[5] Courts have frequently found that forfeiture of a home violates the Excessive Fines Clause. *See, e.g., von Hofe v. United States,* 492 F.3d 175, 188-89 (2nd Cir. 2007); *United States v. 6380 Little Canyon Road*, 59 F.3d 974, 985-86 (9th Cir. 1985).

hold that the impoundment and associated costs are fines and that an ability to pay inquiry is necessary"). Forfeitures "historically have been understood, at least in part, as punishment." *Austin v. United States*, 509 U.S. 602, 607-08 (1993). In discussing the impoundment, the Court concluded that "outside the parking infraction context, temporary vehicle deprivation is punitive," and that "[d]eterrence has traditionally been viewed as a goal of punishment." *Long* at 136 (discussing the deterrent effect of impounds).

The lower court incorrectly refers to the storage fees levied against Appellant as a "rental fee," VRP at A104, and does not acknowledge that Appellant *could not afford* to get his vehicle out of the impound lot, causing those storage fees to accrue daily, out of his control. Appellant left his vehicle for the length of time required to get gas for it, a minor ordeal that could happen to any vehicle owner, and suddenly and unexpectedly faced more than a month without shelter and $1,765 in fees. In a recent letter to state and local courts, the

United States Department of Justice emphasized the punitive effect of fines and fees on low-income individuals, stating that, "[i]mposing and enforcing fines and fees on individuals who cannot afford to pay them has been shown to cause profound harm....This practice far too often traps individuals and their families in a cycle of poverty and punishment that can be nearly impossible to escape." U.S. Dep't of Justice, Dear Colleague Letter to Courts Regarding Fines and Fees for Youth and Adults, Apr. 20, 2023, 1, 2, https://www.justice.gov/opa/press-release/file/1580546/download. "When a person already cannot afford a basic need, such as housing, a fine or fee of any amount can be excessive in light of that person's circumstances,

and thus may not be appropriate even if it were legally permitted." *Id.* at 5.[6]

Here, the Mason County's Sheriff's insistence on impounding Appellant's vehicle begs the question: If there was not a punitive, deterrent goal, why was Appellant not allowed to simply fill his car with gas and drive away? Why did the Respondent not exercise other, less punitive options than shifting these costs to Appellant, benefiting by making Appellant pay for the costs of his own misfortune? *See also Harmelin v. Michigan*, 501 U.S. 957, 959 n.9 (1991) (Opinion

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[6] The accompanying press release also urges courts to be vigilant in preventing harmful fines and fees practices: "Obligations to satisfy fines and fees have a devastating effect on adults and youth who are experiencing poverty and other economic adversities, trapping many in an unending cycle of poverty and debt..."These obligations can also interfere with full and fair access to our justice system. For these reasons, we must remain vigilant to prevent harmful practices that do not serve the interests of justice. This letter is an important step in that ongoing process." U.S. Dep't of Justice, Press Release: Justice Department Issues Dear Colleague Letter to Courts Regarding Fines and Fees for Youth and Adults, Apr. 20, 2023, https://www.justice.gov/opa/pr/justice-department-issues-dear-colleague-letter-courts-regarding-fines-and-fees-youth-and

of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit.") Respondent Mason County insists that imposing the cost of towing and impound on Appellant could not have been punitive because his car "posed a traffic hazard." Respondent's Brief at 26. If Respondent's goal was to eliminate the traffic hazard, the means to do so was in Appellant's hands. The only purpose towing and impound could possibly have served at that point was punitive.

C. Respondent Mason County Violated Appellant Thompson's Article I, Section 7 Rights by Seizing his Vehicular Home Instead of Simply Letting him Fill his Car with Gas and Drive Away

Article I, Section 7 of the Washington State Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded without authority of law." Impounding a car is a seizure under the Constitution. *State v. Villela*, 194 Wn.2d 451, 458, 450 P.3d 170, 174 (2019).

Even where a vehicle is impounded pursuant to a state or local law, impoundment of a vehicle "must nonetheless be reasonable under the circumstances to comport with constitutional guarantees." *State v. Hill,* 68 Wn. App. 300, 30-306, 842 P.2d 996. Impoundment must be "reasonable under the circumstances" and there must be "no reasonable alternatives." *Villela*, 194 Wn.2d 451, 460, 450 P.3d 170, 175 (2019).

Homes have even broader Article I, Section 7 protections against seizure and intrusion into private affairs. *See, e.g, State v. Pippin*, 200 Wn. App. 826, 403 P.3d 907 (2017) (homeless individual's outdoor tent, located on public property, was entitled to Article I, Section 7 protections). *See also State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) ("the closer officers come to intrusion into a dwelling, the greater the constitutional protection") (internal quotations and citations omitted). Appellant's car was his home and subject to such

heightened protections. The impoundment of his home was completely unreasonable under the circumstances.

Here, Appellant Thompson's case is distinguishable from *Long.* In *Long*, the impound of Mr. Long's vehicular home was found to be "reasonable" under Article I, Section 7 by the State Supreme Court because Mr. Long had been parked in the same spot for months and was unable to move his vehicle due to mechanical issues, a fact police officers were aware of. *Long* at 157 ("When Long's truck was towed, there appeared to be *no other alternative* to move it." (emphasis added)). In Appellant's case, however, Appellant was at the ready with gas to fill his vehicle up and drive it away. Appellant's Motion for Discretionary Review at 3-4. Instead of allowing him to do this, law enforcement ordered his vehicle be towed, subjecting him to over a month of time in which he deprived of his home and subject to hundreds of additional dollars in daily storage fees. Respondent failed to exercise the obvious reasonable alternative of simply letting Appellant drive away prior to undertaking a

full impound. Other alternatives, such as towing his car to another nearby location until it was operational again, were also available but not considered. Respondent's failure to exercise any reasonable alternative, forcing Appellant to lose his home and accumulate $1,765 in debt he could not pay, violated his Article I, Section 7 rights.

D. Washington State is in the Midst of a Housing Crisis; Upholding the Legal Rights of People Living and Sheltering in Vehicles is of Paramount Importance.

Washington State, and indeed the United States more broadly, is facing "what any casual observer of the news already knows" a severe housing and homelessness crisis. *Long* at 171 (citing other sources).

The Washington State Department of Commerce has determined that increasing housing and rental costs have largely fueled this crisis. Department of Commerce, http://www.commerce.wa.gov/wp-content/uploads/2017/01/hau-why-homelessness-increase-2017.pdf. *See also Mason County 5-Year Homeless Housing*

Plan, 2019-2024, at 18, https://masoncountywa.gov/forms/Health/homeless-housing-plan-2019-2024.pdf (discussing the difficulty of affordable housing). Our State Supreme Court in *Long* recognized an array of other additional factors that have contributed to this emergency, including "volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices—all exacerbated by the global COVID-19 pandemic." *Id*. (citing Amici Curiae ACLU of Wash. et al.).

Sadly, the number of people experiencing homelessness in Mason County has nearly doubled since 2022, according to reporting on Mason County's 2023 Point in Time homeless census.[7] Of the people reflected in the 2023 count, just over

[7] The data from Mason County's 2023 Point in Time count will be available to the public "sometime in May." https://www.commerce.wa.gov/serving-communities/homelessness/annual-point-time-count/#:~:text=The%202023%20Point%20in%20Time,in%20HMIS%20by%20February%2028. Reporting on the story earlier this year indicated basic statistics, which are available here: https://www.masoncounty.com/story/2023/02/09/news/countys-homeless-count-soars/2273.html

25% of them lived in vehicles, RVs, or boats. Living in vehicles is a complete necessity and mode of survival for many people. When costs of living are at an all-time high and housing is unaffordable, a vehicle can be a person's last resort before sleeping unsheltered on the streets or trying to navigate shelter systems, which may be full, restrictive, inadequate, or have no space to safely store belongings. Vehicles provide a modicum of independence, transportation, space, security, and storage. *See* So, Jessica et al., *Living at the Intersection: Laws and Vehicle Residency*, Homeless Rights Advocacy Project 1, 5 (2016), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1005&context=hrap. Towing a person's vehicular home and holding it until payment disrupts their lives and harms them by depriving them of that independence and security. *See* Ivey, Tyrone Ray et al, *Hidden in Plain Sight: Finding Safe Parking for Vehicle Residents*, Homeless Rights Advocacy Project (May 3, 2018).

People lose their shelter, often for weeks, if they cannot afford to redeem it, and in some cases may lose it entirely. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 164, 60 P.3d 53, 64 (2002) ("for the poor, impoundment often means forfeiture.") Losing a vehicle disrupts their ability to survive and sustain themselves day to day, let alone access other services or save resources to secure more permanent housing. *See* Nat'l Law Ctr. On Homelessness & Poverty, *Housing Not Handcuffs* (2019), 1, 44, http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf (vehicular tows may result in people living in tents and loss of vehicles can interfere with employment, education, and medical care).

While Washington State struggles to manage its homelessness crisis, governmental entities often resort to "criminalization:" excluding people experiencing homelessness from public space through legal enforcement, such as laws restricting the use of public space, bans on sitting or sleeping on

sidewalks or erecting tents, and trespassing individuals. Costly impounds of vehicular homes are an aspect of criminalization and exclusion. In fact, laws restricting sheltering in vehicles are one of the fastest growing "criminalization" policies in the nation. *See Housing Not Handcuffs* at 44. In many Washingtonian counties and cities, impoundments operate on a call-and-complain process, which can further operate to discriminate against people whom others may deem "undesirable," and may amplify racial and other forms of discrimination. *See Id*. Depriving people of their only form of shelter because they cannot afford to pay hundreds or thousands of dollars in impound fees punishes them for their poverty. Alternatives to enforcement exist, such as establishing safe parking lots, towing vehicle residences to safe parking spots instead of impound lots, and an array of other options, some of these highlighted in the 2022 report to the Legislature on recommendations following the *Long* case. WSU Division of Governmental Studies and Services, *Report: Identifying,*

Towing, and Impound Vehicle Residences: An Assessment and Recommendations Post City of Seattle v. Long, ESSB 5689 (December 2022), https://app.leg.wa.gov/committeeschedules/Home/Documents/30244.

Respondent Mason County's actions here defy its stated commitment to a "housing first" approach to homelessness. *See, e.g., Mason County 5-year Homeless Housing Plan*, 2019-202rap 18/14, 1, 23, https://masoncountywa.gov/forms/Health/homeless-housing-plan-2019-2024.pdf (discussing recommendations to the state for "housing first and low barrier approaches.") Punishing someone by placing a $1,765 barrier between them and their only shelter is not "housing first" —it is directly exacerbating the problem of unsheltered homelessness in Mason County.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court find that the tow of Appellant's home constituted an unlawful seizure under Article I, Section 7. Amici also respectfully request that this Court find that the tow and impound of Appellant's vehicle was punitive, and that it should be subject to an excessive fines analysis.

V. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that this document contains 4,082 words, excluding the parts of the document exempted from the word count per RAP 18.17.

Respectfully submitted this 2nd day of June, 2023.

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