No. 98824-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,

*Petitioner,*

v.

STEVEN G. LONG,

*Respondent*

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Catherine Shaffer

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# PETITIONER LONG'S ANSWER TO AMICUS CURIAE BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

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## I. INTRODUCTION

The amicus brief filed by the International Municipal Attorneys Association (hereafter, "Amicus") misrepresents both the facts and the law, and erroneously asserts that a ruling in favor of Long would cripple the ability of cities to protect the health and safety of city residents, ignoring the fact that there is no evidence in the record of this to show that Long's truck posed any health or safety danger to anyone.

## II. ARGUMENT

### A. Amicus ignores the fact that the City Council expressly labeled impoundment a "penalty" for a parking infraction.

In *Austin v. United States,* 509 U.S. 602, 610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), the Court held that the Excessive Fines Clause applies to sanctions that are imposed "as punishment" for some offense. But to come within the scope of the Clause, punishment need not be the only reason for imposing a sanction. *Austin* explicitly states, "[W]e are mindful of the fact that sanctions frequently serve more than one purpose." *Id.* The sanction at issue in *Austin* was forfeiture of the defendant's home. The Court recognized the possibility that this sanction might well serve *both* the purpose of punishment and the remedial purpose of recovering enforcement costs. Because the purpose was *partially* punitive, that was sufficient to bring the sanction within the scope of the Excessive Fines Clause, even though the purpose may also have been *partially* remedial.

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving *in part* to punish. We said in [*United States v.] Halper* [490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)] that "***a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment***, as we have come to understand the term."

*Austin*, 509 U.S. at 610 (emphasis added). Noting that innocent property owners were traditionally excluded from the scope of forfeiture laws, the Court concluded that one of the purposes of forfeiture was to punish.[1]

In the present case, there cannot be any doubt that punishment was at least one of the purposes behind the vehicle impoundment law because the City Council expressly said – right in the text of the law – that impoundment of a vehicle was a "penalty" that could be imposed "in addition to any other penalty." SMC 11.72.440(E) states:

> Vehicles in violation of this section are subject to impound as provided for in Chapter 11.30 SMC, ***in addition to any other penalty*** provided by law.

(Emphasis added).

There is no ambiguity lurking in the word "penalty." Both the courts and ordinary English dictionaries recognize the word "penalty" means

[1] "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense." *Austin,* 509 U.S. at 617.

"punishment." As the Court said in *Kokesh v. Securities Exchange Commission*, __ U.S. __, 137 S.Ct. 1635, 1642, 198 L.Ed.2d 86 (2017), "A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws,'" quoting *Huntington v. Attrill*, 146 U.S. 657, 667, 13 S.Ct. 224, 36 L.Ed. 1123 (1892). Because the remedy of disgorgement of unlawfully earned profits was intended to punish a person for violation of a public law, in *Kokesh*, the Court concluded that disgorgement was a "penalty."

Virtually every dictionary defines penalty as a word meaning punishment. Moreover, the word penalty is derived from the Latin word "poena" which, mean "of or pertaining to punishment by law." See "Origin and Meaning of Penal," *Online Etymological Dictionary* at www.etymonline.com/word/penal.[2] Thus, Amicus simply ignores the statutory language used by the City Council. The City enacted a law that explicitly authorized the sanction of impoundment as a "penalty" – a word that means punishment – and yet the City argues that the impoundment is *not* a punishment. Conceivably what the City is arguing is that while

[2] **penal (adj.)** "of or pertaining to punishment by law," mid-15c., from Old French *peinal* (12c., Modern French *pénal*) and directly from Medieval Latin *penalis*, from Latin *poenalis* "pertaining to punishment," from *poena* "punishment," from Greek *poinē* "blood-money, fine, penalty, punishment," from PIE **kwoina*, from root **kwei-* "to pay, atone, compensate" (source also of Greek *timē* "price, worth, honor, esteem, respect," *tinein* "to pay a price, punish, take vengeance;" Sanskrit *cinoti* "observes, notes;" Avestan *kaena* "punishment, vengeance;" Old Church Slavonic *cena* "honor, price;" Lithuanian *kaina* "value, price").

vehicle impoundment is a punishment, imposing a pecuniary obligation to pay for the costs of imposing that punishment is not a punishment. If that twisted logic were to be endorsed by the courts, then legislatures could require felons who had completed serving their prison sentences to pay back to the State all the money that the State had to spend to pay for his imprisonment and such "recoupment" statutes would not be subject to the Excessive Fines Clause because they would be "solely" remedial. But they clearly would not be remedial, requiring payment of the costs of imprisonment promotes the imposition of imprisonment and therefore is not "solely remedial." On the contrary, it is clearly punitive.

### B. Amicus ignores the fact that impoundment is intended to deter the commission of parking infractions and that sanctions imposed for deterrence purposes constitute punishments covered by the Excessive Fines Clause.

By definition "[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive ...." *Kokesh,* 137 S.Ct. at 1643.[3] *Accord United States v. Bajakajian*, 524 U.S. 321, 329, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) ("Deterrence ... has traditionally been viewed as a goal of punishment."); *Bell v. Wolfish*, 441 U.S. 520, 539, n.20, 99 S.Ct.

[3] In *Kokesh* the Court held that the civil sanction of disgorgement imposed by the SEC was "imposed for punitive purposes" and "emphasized the need 'to deprive the defendants of their profits in order to ... protect the investing public *by providing an effective deterrent* to future violations.'" In the years since, it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that "*[t]he primary purpose of disgorgement orders is to deter* violations of the securities laws by depriving violators of their ill-gotten gains." *Kokesh,* 137 S.Ct. at 1643 [Citations omitted].

1861, 60 L.Ed.2d 447 (1979) ("[r]etribution and deterrence are *not* legitimate *nonpunitive* governmental objectives.") (italics added); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (recognizing that one of the two "traditional aims of punishment" is "deterrence" and holding that sanction of stripping a person of citizenship was a "punitive" sanction).

In this case, the City has enacted a law which, by authorizing the impoundment of vehicles that are illegally parked, seeks to deter people from committing parking infractions. Indeed, Seattle Police Department's website explicitly warns people that "vehicles must be moved by the time indicated or drivers may receive a citation and their vehicle may be impounded and towed." CP 881. Thus, the City not only has labeled impoundment as a punishment by using the word "penalty" in the impoundment ordinance, it also demonstrates a punitive use of the ordinance as a means of accomplishing deterrence which is a traditional aim of punishment.

### C. Reimbursement of government for a cost incurred as a result of an enforcement action does not constitute "restitution." As the trial court recognized, Long's act of parking for too long in one spot did not cause Seattle any actual harm.

Ignoring the difference between harms suffered by private individuals and costs incurred by public law enforcement agencies, Amicus misrepresents the nature of orders requiring offender to reimburse

governments for costs incurred through enforcement. Amicus characterizes the monetary sanction imposed in this case as "restitution" and asserts that the Excessive Fines Clause was "never intended to prohibit a court from requiring a violator to provide reimbursement or restitution." *Amicus*, at 11. But reimbursement of enforcement costs is not restitution.

First and foremost, Amicus ignores the distinction between an injury caused by commission of an unlawful act and the cost of enforcing the law that was violated.[4] The commission of the parking infraction did not cause any injury to anyone. The unlawful act Long committed was to keep his vehicle in the same spot for more than 72 hours. As the Municipal Court Judge specifically noted, the commission of that act did not harm anyone. The presence of the truck in that spot did not damage anything. Long did not deprive anyone of anything. Long did not even inconvenience anyone else. The *only* harm that the Municipal Court Judge identified was the "harm" that she believed would result if the impound law was not uniformly enforced. Citing an unpublished federal district court case, the Municipal Court asserted that the City would be "harmed" if some parking violators escaped having their vehicles impounded because the law authorizing an

[4] RCW 9.94A.750(5) provides that "[r]estitution may be ordered whenever the offender is convicted of an offense which results in ***injury*** to any person or ***damage*** to or ***loss*** of property . . . ." (Emphasis added). A decision to take an enforcement action may result in government having to pay money for a prosecution, but it is untenable to assert that government was injured or damaged by having to pay for such enforcement.

impound *must* – in the Municipal Court's view – always be enforced:

> Although ***the City may not have-suffered any actual harm*** above and beyond Mr. Long's non-compliance with the laws, as the court in *Jones* pointed out, it has an inherent interest in ***the uniform application*** of its traffic and parking ordinances.

CP 900 (emphasis added).[5] It should be obvious that if punitive sanctions must be "uniformly" imposed then the Excessive Fines Clause will only prohibit a punishment if the punishment is grossly disproportional in every single case. Short of imposing a fine of say $100,000 in every single case of illegal parking, the Excessive Fines Clause would provide no protection at all. But by its very nature, both clauses of the Eighth Amendment – Cruel and Unusual Punishments and Excessive Fines – are not simply prohibitions against grossly disproportionate one-size-fits-all punishments.

### D. Amicus ignores the fact that in *Clark* this Court held that monetary sanctions intended to recover costs *can* violate the Excessive Fines Clause.

Amicus acknowledges that the Court of Appeals purported to rely on this Court's decision in *State v. Clark*, 124 Wn.2d 90, 103, 875 P.2d 613 (1994) for the proposition that "the government is entitled to rough remedial justice." But Amicus denies that the Court of Appeals treated this statement in *Clark* as a per se rule. Amicus bases this conclusion on the absence of

[5] The *Jones* case cited by the Municipal Court does not support the proposition for which the Court cited it. *Jones* says absolutely nothing about cities having an interest in the "uniform" application of penalties.

any express statement in the Court of Appeals' *Long* opinion that explicitly characterizes the "rough remedial justice" proposition as a per se rule: "The Court of Appeals did not say anything to that effect, however." *Amicus*, at 13. Thus, Amicus concedes that *Clark* did *not* establish a per se rule that orders to reimburse government for enforcement costs are always constitutional. In fact, *Clark* held the exact opposite: "The rough equivalence of the value of the property forfeited and the amount spent on prosecution may not always insulate a forfeiture from a finding that a forfeiture is 'excessive.'" *Clark,* at 104, citing *Austin*, 509 U.S. at 623, n.15.[6]

But Amicus, like the City, then ignores the effect of this concession. Having conceded that *Clark* does *not* establish any such per se rule, it follows that Amicus has conceded that a Court considering a claim that such an order is an unconstitutional Excessive Fine must consider whether *the particular order* being challenged is excessive under the circumstances of the particular case before it. And in fact, that is exactly what this Court said in *Clark*: "*On the particular facts of this case*, however, we do not find the punishment in the form of the civil forfeitures of the Clarks' home and motor home to be 'excessive.'" 124 Wn.2d at 620 (italics added).

[6] "Our decision today in no way limits the Court of Appeals from considering other factors [besides the relationship between the property and the offense] in determining whether the forfeiture of Austin's property was excessive." *Id.*

In this case, however, the Court of Appeals did not consider "the particular facts of this case." Shockingly, it did not consider the severity of the "offense" (a civil parking infraction). Nor did it consider the fact that the seized property – the impounded vehicle – was Long's only shelter. Nor did it consider the fact that Long had only $50 to his name at the time of the seizure, and had a monthly income that varied between $300 and $600. Nor did it consider the fact that by impounding his truck the City also impounded all of Long's work tools, clothes, bedding, and cooking utensils. Despite the fact that *Clark* specifically approved of cases from other jurisdictions where courts did consider the seizure of an offender's home to be constitutionally excessive, the Court of Appeals did not consider this factor. The bottom line is that the Court of Appeals did not conduct any proportionality review, (in direct conflict with another Court of Appeals' decision in *Tellevik* which reversed a lower court decision for precisely this reason).[7] In sum, in direct conflict with this Court's decision in *Clark*, while the Court of Appeals did not label its analysis with the words "per se rule," that is in fact exactly what it did. This analytical failure to consider any of the particular circumstances of Long's case is in direct conflict with not only this Court's decision in

[7] "When Chavez was before the trial court, ***he expressly asked for a proportionality analysis. The trial court declined. This was error***, and we remand for further proceedings to determine whether the forfeiture sought here is excessive within the meaning of the Eighth Amendment to the United States Constitution." *Tellevik v. Real Property Known as 6717 100th Street S.W.*, 83 Wn. App. 366, 375-76, 921 P.2d 1088 (1996), *rev. denied*, 133 Wn.2d 1029 (1998) (emphasis added).

*Clark*, but with all of the Excessive Fines Clause cases decided by the U.S. Supreme Court in the last 23 years. For example, in *Bajakajian*, the Court expressly held that the gravity of the defendant's offense is one factor which courts *must* consider:

> The district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, ***must*** compare the amount of the forfeiture to the gravity of the defendant's offense.

*United States v. Bajakajian,* 524 U.S. at 236-37 (italics added). The Court of Appeals never did that in this case. The Supreme Court also considered the harm that the defendant's offense caused to the public:

> *The harm that respondent caused was also minimal*. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country.

524 U.S. at 339 (italics added). In this case, the Court of Appeals never considered the degree of "harm" suffered by the City as a result of Long's "offense" of leaving his truck in the same place for more than 72 hours.

Dicta in other cases, strongly suggests that courts must also consider the financial condition of the individual defendant before the Court. *See, e.g., Timbs v. Indiana,* 139 S.Ct. 682, 688, 203 L.Ed.2d 11 (2019) (citing Blackstone for the proposition that Magna Carta, the seminal source of the Excessive Fines Clause, mandated that no man shall be ordered to pay a fine

"larger . . . than his circumstances or personal estate will bear.") The Court of Appeals did not consider this factor either. But the *only* thing that the Court of Appeals considered was the fact that the monetary sanction covered part of the City's costs incurred when it directed the towing company to impound Long's vehicle. Thus, the decision below improperly applied a *per se* rule that such a "governmental reimbursement" order can never violate the Excessive Fines Clause.[8]

### E. Amicus ignores decisions of this Court, such as *State v. Leonard* and *State v. Blazina,* which already require courts to determine the ability of individual offenders to pay monetary sanctions.

Amicus argues that it is simply too difficult to task trial courts with making determinations regarding an individual offender's ability to pay. According to Amicus, "the sheer cost of an individualized assessment of the circumstances of each person who violates the parking code would make code enforcement, which is already difficult, nearly impossible." Amicus, at 15. But this argument simply ignores the fact that (1) courts are already required to do that in all criminal cases, and (2) the fact that it took all of five or ten seconds for the magistrate to satisfy himself that Long did not

[8] In *Austin*, the Court *rejected* the Government's argument that there was a *per se* rule that exempted "civil" sanctions from Excessive Fines Clause analysis and remanded the case for consideration. While the Court declined Austin's invitation to "establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive,'" it did so only because the lower court "had no occasion to consider what factors should inform such a decision" and considered it prudent to let the lower courts consider what kinds of factual circumstances were relevant to that case-by-case determination. *Austin*, 509, U.S. at 622-23.

have the financial resources to be able to pay all the towing and storage fees unless he was allowed to make payments over time.

In 2018, the Legislature enacted RCW 10.01.160, which mandates that in all criminal cases sentencing courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."[9] The same statute also prohibits the imposition of costs on any defendant who is found to be indigent[10] at the time of sentencing.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), this Court held that RCW 10.01.160 was mandatory and that it required "individualized" consideration of the defendant's ability to pay:

> [T]his imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay."

*Id.*, at 838.[11]

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[9] That statute, however, applies only to criminal cases and has no application to civil penalties imposed for parking infractions.

[10] Indigency is defined in RCW 10.101.010(3)(c). Under the definition in that statute, Long was clearly indigent at the time of his infraction impound hearing because he was "[r]eceiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level …."

[11] *See also City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016) (order requiring defendant to pay $15 per month towards legal financial obligations violated anti-attachment provisions of Social Security Act and failure to consider whether such payments would impose a manifest hardship upon a homeless, indigent person violated RCW 10.01.160.)

Roughly seven months after *Blazina*, in *State v. Leonard,* 182 Wn.2d 827, 344 P.3d 680 (2015), this Court held that the same requirement applied to orders imposing the cost of imprisonment on a criminal defendant. In *Leonard* the sentencing court ordered a defendant convicted of murder to repay the State the cost of incarcerating him at the rate of $50 per day. It imposed these costs without considering the defendant's ability to pay. This Court reversed, again relying on a statutory command to consider the defendant's personal financial circumstances:

> [T]he statutes allowing imposition of these categories of costs require individualized inquiries regarding the ability to pay similar to the statute at issue in *Blazina.* Requiring an offender to pay costs of incarceration expressly depends on a determination by the trial court "that the offender, at the time of sentencing, has the means to pay." . . .
>
> Therefore, the assessment of costs of incarceration and costs of medical care must be based on an individualized inquiry into the defendant's current and future ability to pay that is reflected in the record, consistent with the requirements of *Blazina.* Here, the record reflects no such inquiry at the sentencing hearing, and the judgment and sentence form contains only boilerplate findings of ability to pay, which this court in *Blazina* held to be inadequate.

*Leonard,* at 507-08, citing RCW 9.94A.760(2) and *Blazina,* at 838.

For the past five years Washington courts have been complying with these statutory mandates. There is nothing to suggest that courts have found compliance with these statutory requirements to be "unworkable" or that the "sheer cost" of making inquiries into the defendant's ability to pay has

made enforcement of the criminal law impossible. Similarly, there is no reason to think that compliance with the constitutional requirement to consider the financial resources of the rare parking ordinance violator who claims to be homeless can afford to pay will be so difficult as to bring a halt to the enforcement of all the City's parking laws.

**F. Amicus falsely implies that the officers who summoned the parking enforcement to tag Long's truck for impound did not know that Long was living in his truck because he was homeless. Amicus also ignores the fact that at the impound hearing Long told the magistrate that his truck was his only home.**

Amicus raises the specter of liability for impounding a vehicle that the officer did not know was serving as a person's only shelter:

> [B]efore impounding a vehicle being driven with a suspended license pursuant to state law, an officer would be required to ascertain whether the driver was sleeping in the car, and regardless whether the driver had the means to make repayment.

Amicus, at 13.

But the record in this case conclusively demonstrates that the officers *did* know that Long was homeless and that he was using his truck as his home. First, the record contains Long's express sworn declaration that he spoke to the officers and "explained that the truck and the location was my home [and] that I had no other place to go ...." CP 107.[12] Second,

[12] As noted in the Court of Appeals' briefing, an officer's testimony that she does not remember whether or not Long told her that he was homeless and was living in the truck is insufficient as a matter of law to create a genuine issue of disputed fact as to whether or not she was told that.

the officers acknowledged that although Long had nothing to do with the reason they were dispatched to go to the general area where Long was parked, they had been sent to that area to clear out "transients" who had established homeless person's "encampment" in that area. CP 799. Third, the officers conceded that Long's truck was located next to "Peter's Place," a nonprofit day center that provides food and coffee to the homeless. CP 106. Fourth, Officer Velling admitted that she "associated" Long with Peter's Place. CP 78. Fifth, recording devices worn by the officers captured Officer Velling and a male officer joking about how Long had used a tarp to construct a "patio" for his home. CP 83-84. Sixth, the record contains the Parking Enforcement Officer's explicit admission that she doesn't care whether a vehicle is being used by a homeless person as their shelter and she *always* tags such vehicles for impound after 72 hours without regard to whether they are being used as shelter. CP 824-25. In sum, in this case there is absolutely no question whatsoever that the officers knew Long was homeless and was living in his truck. They just didn't care.

### G. The contention that a ruling in Long's favor would endanger health and safety simply ignores the record. The officers conceded Long's truck was not causing any problem.

As both the majority and the dissent recognized in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), "if a legislature made overtime parking a felony punishable by life

imprisonment," the courts would be obligated to conduct a proportionality review, and would find any such law that mandated such extreme punishment was unconstitutional, because although such "[a] statute . . . might well deter vehicular lawlessness, but it would offend our felt sense of justice.") *Id.* at 274 n.11 and 288. In this case, the City Council did not *mandate* impoundment in all instances of overtime parking. But *even if it did*, this Court would be constitutionally obligated to ignore such a draconian impoundment law. In this case, the City Council merely authorized ("may" impound) depriving a homeless person of his only shelter as a punishment for overtime parking. Similarly, this Court, is obligated to decide whether such a punishment is grossly disproportional to the "offense," and should conclude that it clearly is.

Amicus warns that "[s]hould this Court accept Mr. Long's Eighth Amendment arguments, it would undermine important health and safety considerations underlying municipal regulations across the country." *Amicus*, at 15. In support of this dire prediction, Amicus points to the statement in the municipal code that the purpose of the Vehicle and Traffic Code is "to provide for and promote the health, safety, and welfare of the general public." *Id.* SMC 11.10.040. Amicus ignores both (1) the fact that the present case involves only *one particular parking infraction* – the 72-hour law (SMC §11.72.440); and (2) that Long's argument is limited to the

proposition that *as applied to homeless people living in their vehicles,* the *particular punishment of impoundment* is an unconstitutional punishment because it *is grossly disproportionate to this particular infraction*.

Aside from parking more than 72 hours in one spot, there are many other parking ordinances which prohibit other acts of parking. For example, City ordinances prohibit parking in a space designated for fire vehicles or ambulances; in a manner that blocks a fire exit door; within fifteen feet of a fire hydrant; within an intersection; within six feet of a railroad track; in a manner which blocks a driveway entrance; on any public street in a manner when traffic will be unreasonably obstructed thereby; in a manner which restricts the use of a bus shelter; in a bus zone; on a crosswalk; or on a bridge.[13] Long makes no argument that impoundment is an excessive punishment for these parking infractions. Moreover, he does not contend that impoundment as punishment for violation of the 72-hour law is generally or usually unconstitutional. He argues only that impoundment for violation of this parking law is grossly disproportionate when the impounded vehicle is serving as a homeless person's shelter.

In the present case, the officers *conceded* that Long's vehicle was *not* causing any traffic obstruction, and that while it was illegal for it to

[13] See SMC §§ 11.72.450, 11.72.155; 11.72.160; 11.72.210; 11.72.350; 11.72.110; 11.72.035; 11.72.045; 11.72.050; 11.72.080; 11.72.130.

remain in that spot for more than 72 hours, that violation was not causing any kind of problem whatsoever:

> Q. And what was the parking violation?
> A. It was a 72 hour.
> Q. Other than the 72 hour issue, did you notice any other violations?
> A. I didn't.
> Q. Did any of the other officers speak with you about other violations?
> A. I don't recall talking about any other violations concerning the truck.
> Q. Did you notice if the truck was blocking a driveway?
> A. No, I didn't notice that.
> Q. Was it blocking a home?
> A. I don't believe so.
> Q. Was it in the way of other cars that you recall?
> A. No, not that I can recall.

CP 559.

Under *these* circumstances, since the parking infraction was admittedly *not* causing any harm to the "health, safety and welfare of the general public," the purposes of SMC 11.72.440 were *not* served by impoundment of Long's vehicle. The only thing impoundment accomplished was to deprive Long of his only shelter and all of his property, including his clothes, bedding, food, and tools.

Amicus cites to municipal laws from other states which simply declare that a vehicle that remains parked on public property for more than 48 or 72 hours is a public nuisance. *Amicus*, at 15. But municipal lawmakers do not have the power to simply declare that a punishment is constitutional. Whatever the local definition of a "nuisance" is, the issue

here is whether impoundment of a homeless person's vehicle shelter is unconstitutional because it is grossly disproportionate to the offense of "parking" more than 72 hours in one spot. Courts do not and cannot defer to legislative judgments regarding the constitutionality of laws. As the Court said in *Bajakajian*, a congressionally enacted sentencing Guideline that approved a range of punishments "cannot override the constitutional requirement of proportionality review." *Bajakajian*, 524 U.S. at 339 n.14.

**H. Amicus' reliance on *Coleman* ignores what that case was and was not about.**

Amicus suggests that *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994) is controlling, pointing to language rejecting Coleman's claim that the temporary deprivation of his car constituted an excessive fine. But Coleman was not a homeless person and he was not living in his car when it was impounded. Moreover, Coleman made a facial challenge to a court order that directed Little Rock police to impound every vehicle stopped for any violation of any one of 14 enumerated statutes. And Coleman filed a "class action" on behalf of unspecified "others" whose vehicles were impounded pursuant to the impound order. Since Coleman was making a *facial* challenge to the order, to prevail he had to establish that there was no set of circumstances where any impound for any one of the 14 types of parking or traffic infractions could ever be upheld as unconstitutional. Coleman was not homeless; Coleman was not living in his vehicle; and Coleman did not

make any "as-applied" challenge to the impound policy. Coleman did not even make a claim that the impound order was "excessive" as applied to him. Not surprisingly, Coleman's claim that every impound violated the Excessive Fines Clause was denied. But Coleman actually *won* his claim that the impound order was unconstitutional on its face because it violated procedural due process by forcing all owners of impounded vehicles to wait seven days before they could have a hearing on their claim that the impound of their vehicle was improper. *Coleman,* 40 F.3d at 260-61.

## III. CONCLUSION

The amicus brief submitted by the International Municipal Lawyers Association offers no principled basis for rejecting Steven Long's contentions that the impoundment of a homeless person's vehicle, when it is serving as his only shelter, is an excessive penalty that violates both the Eighth Amendment and Wash. Const., art. 1, §14. Nor does it offer any tenable basis for concluding that the trial court's failures to conduct a proportionality analysis, to consider the gravity of Long's infraction, his poverty and his ability to pay, constituted constitutional errors.

Respectfully submitted this 26th day of February, 2021.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email Service to the following:

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DATED this 26th day of February, 2021.

*s/Deborah A. Groth*
Deborah A. Groth, Legal Assistant

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