

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDA 2021

NO. 139

COMMONWEALTH OF PENNSYLVANIA

VS.

RAHSAAN O. MAY,
Appellant

REPLY BRIEF FOR APPELLANT

Appeal From the Judgment Of Sentence Of The Court Of Common Pleas Of Delaware County, Order Entered November 23, 2020, Imposed On Information No. CP-23-CR-0004281-2018.

STEVEN M. PAPI, Assistant Defender
Assistant Chief, Appeals Division
EMILY MIRSKY, Assistant Defender
Chief, Appeals Division
CHRISTOPHER WELSH, Defender

Delaware County Office of the Public Defender
220 N. Jackson St.
Media, PA 19063
Identification No. 89661
(610) 891-4100

October, 2021

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE CASE	1
II. ARGUMENT	2
1. THE TESTIMONY OF MR. MAY’S DEFENSE EXPERT WAS RELEVANT TO INFORM THE COURT ABOUT THE SIGNIFICANCE OF THE MINIMAL AMOUNT OF THC IN HIS BLOOD EVEN THOUGH 75 PA.C.S. § 3802(D)(1) DOES NOT REQUIRE EVIDENCE OF IMPAIRMENT.	2
2. COURTS CONSIDERING WHETHER A FINE IS CONSTITUTIONALLY EXCESSIVE SHOULD CONSIDER A PERSON’S ABILITY TO PAY.	4
3. THE COMMONWEALTH CONFUSES THE LAW REGARDING COSTS, AS OPPOSED TO FINES, AND PA.R.CRIM.P. 706(C) REQUIRES AN ABILITY TO PAY INQUIRY PRIOR TO IMPOSITION OF FINES.	9
4. <i>COMMONWEALTH V. FORD</i> , 217 A.3D 824 (PA. 2019), DID NOT HOLD THAT 42 PA.C.S. § 9726(C) DOES NOT APPLY TO MANDATORY FINES.	10
III. CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>City of Philadelphia v. Neely</i> , 2021 WL 3853060 (Pa. Commw. Aug. 30, 2021)	8
<i>City of Seattle v. Long</i> , 493 P.3d 94 (Wash. 2021).....	1, 5, 6, 7, 9
<i>Commonwealth v. Cherpes</i> , 520 A.2d 439 (Pa. Super. 1987).....	13
<i>Commonwealth v. Dinardo</i> , 2021 WL 1718071 (Pa. Super. April 30, 2021)	12
<i>Commonwealth v. Eisenberg</i> , 98 A.3d 1268 (Pa. 2014)	5
<i>Commonwealth v. Etchinson</i> , 916 A.2d 1169 (Pa. Super. 2007).....	3, 4
<i>Commonwealth v. Ford</i> , 217 A.3d 824 (Pa. 2019)	1, 10, 11, 12, 13
<i>Commonwealth v. Gipple</i> , 613 A.2d 600 (Pa. Super. 1992).....	12, 13
<i>Commonwealth v. Hutchins</i> , 42 A.3d 302 (Pa. Super. 2012).....	3
<i>Commonwealth v. Lopez</i> , 248 A.3d 589 (Pa. Super. 2021).....	9, 10
<i>Commonwealth v. Martin</i> , 335 A.2d 424 (Pa. Super. 1975).....	9, 10
<i>Commonwealth v. Mead</i> , 446 A.2d 971 (Pa. Super. 1982).....	8
<i>Commonwealth v. Snyder</i> , 251 A.3d 782 (Pa. Super. 2021).....	10
<i>Commonwealth v. Wright</i> , 2021 WL 1291629 (Pa. Super. April 7, 2021)	13
<i>Commonwealth v Kress</i> , 2020 WL 6778992 (Pa. Super. Nov. 18, 2020)	12
<i>Dep't of Labor & Emp't v. Dami Hosp., LLC</i> , 442 P.3d 94 (Colo. 2019)	6
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998)	6

Statutes

1 Pa. C.S. § 1933..... 13
18 Pa.C.S. § 7508..... 12
42 Pa.C.S. § 9726..... 1, 8, 10, 11, 12, 14
75 Pa. C.S.A § 1547(c)(4)..... 3
75 PA.C.S. § 3802(d)(1) 1, 2, 3, 4
75 Pa. C.S. § 3804(b)(1) 11
Article I, Section 13 of the Pennsylvania Constitution..... 4

Rules

Pa.R.Crim.P. 706(C) 1, 9, 10, 14
Pa.R.A.P 127 15

I. STATEMENT OF THE CASE

Mr. May's principal brief sets forth the procedural history and facts of this case. This reply brief first addresses the Commonwealth's contention that defense expert testimony was irrelevant because impairment is not an issue under 75 Pa.C.S. § 3802(d)(1). Next, Mr. May addresses a recent case from the state of Washington discussing the analysis for a claim that a fine is unconstitutional under the Excessive Fines Clause of the United States Constitution. This reply further addresses the Commonwealth's contentions that imposition of costs and imposition of fines are subject to the same analysis, and that *Commonwealth v. Ford*, 217 A.3d 824 (Pa. 2019), holds that 42 Pa.C.S. § 9726(c) does not apply to mandatory fines.

Contrary to the Commonwealth's contentions, (1) defense expert testimony was relevant to explain the significance of the very low level of THC in Mr. May's blood; (2) in applying the Excessive Fines Clause in this case, this Court should look to guidance from the recent decision in *City of Seattle v. Long*, 493 P.3d 94, 114, 116 (Wash. 2021), attached as Exhibit "A," holding that courts considering whether a fine is constitutionally excessive must also consider a person's ability to pay; (3) this Court has expressly ruled that while Pa.R.Crim.P 706(C) does not require the sentencing court to consider ability to pay costs, it does require it to consider ability to pay fines; and (4) *Ford* did not address the issue of mandatory fines.

II. ARGUMENT

1. THE TESTIMONY OF MR. MAY'S DEFENSE EXPERT WAS RELEVANT TO INFORM THE COURT ABOUT THE SIGNIFICANCE OF THE MINIMAL AMOUNT OF THC IN HIS BLOOD EVEN THOUGH 75 PA.C.S. § 3802(D)(1) DOES NOT REQUIRE EVIDENCE OF IMPAIRMENT.

In his principal brief, Mr. May argues that the trial court erred in precluding Mr. May from calling Dr. Guzzardi as an expert witness, where the expert's testimony pertaining to the low amount of TCH (5 nanograms) in Mr. May's blood was relevant to a *de minimus* argument, to the credibility of the Commonwealth's witnesses and to the reliability of the lab results. The Commonwealth contends that because 75 Pa.C.S. § 3802(d)(1) does not require proof of impairment, any defense expert testimony regarding the blood tests is irrelevant. Contrary to the Commonwealth's contention, however, the expert testimony here was relevant despite the fact that evidence of impairment was not an issue.

Even though Section 3802(d)(1) provides that an individual may not drive a vehicle if there is "any amount" of a Schedule I controlled substance in the person's blood, and does not require proof of impairment (like subsections (d)(2) and (d)(3)), this does not automatically translate to the irrelevance of defense expert testimony in

cases involving Section 3802 (d)(1). See 75 Pa.C.S. § 3802(d)(1)(i). Here, the amount of TCH – 5 nanograms – is so low that it is the bare minimum amount required by the Pennsylvania Department of Health in order for chemical test results to be admitted into evidence in a prosecution for Driving Under the Influence involving the controlled substance of marijuana. 47 Pa.B. 4045 (July 22, 2017); *see* 75 Pa. C.S.A § 1547(c)(4).

However, the significance of a finding only 5 nanograms of THC is not a matter within the realm of a layperson. *See Commonwealth v. Hutchins*, 42 A.3d 302, 308 (Pa. Super. 2012) (explaining that the meaning of the discovery of carboxy acid in someone’s blood stream is not an issue within the knowledge of an ordinary layman); *Commonwealth v. Etchinson*, 916 A.2d 1169, 1175 (Pa. Super. 2007) (J. Bender, concurring and dissenting) (explaining that expert testimony was necessary to draw a nexus from the findings to impairment where the “effect of marijuana upon an individual and the significance of finding 53 nanograms of cannabinoids per milliliter is not a matter within the realm of a layperson). Despite the fact that evidence of impairment is not required under Section 3802(d)(1), expert testimony regarding the meaning of a finding of only 5 nanograms of TCH in the lab results is relevant to the fact that this is the minimal “any amount” required under the statute and is therefore relevant to the reliability of the results and Mr. May’s *de minimus*

argument.

If Dr. Guzzardi had been permitted to testify, he could have explained that 5 nanograms is the minimal amount required for a DUI prosecution for marijuana and that a result lower than 5 nanograms per milliliter would fall below the minimum detection level and, therefore, be inadmissible in a DUI Controlled Substance prosecution. He could have also testified that the metabolites for which Mr. May's blood tested positive are stored in fatty tissue and can be detected weeks and even months after consumption. *See Etchinson*, 916 A.2d at 1175. This testimony would have supported a *de minimus* argument by Mr. May. The "any amount" language in Section 3802(d)(1) refers to an amount above the minimum level required by the Department of Health. Therefore, defense expert testimony regarding the significance of the low level of THC was relevant to Mr. May's defense.

2. COURTS CONSIDERING WHETHER A FINE IS CONSTITUTIONALLY EXCESSIVE SHOULD CONSIDER A PERSON'S ABILITY TO PAY.

In his principal brief, Mr. May raises a claim that the trial court imposed an unconstitutional fine in violation of Article I, Section 13 of the Pennsylvania Constitution and the 8th Amendment to the U.S. Constitution, which prohibit "excessive fines." The Commonwealth contends that "neither the United States

Constitution nor the Magna Carta require an ability to pay [inquiry] when imposing a mandatory fine.” *See* Brief for Appellee, at 21. The Supreme Court of the State of Washington recently held, however, that compliance with the Excessive Fines Clause *does* require that a court consider the person’s ability to pay. *City of Seattle v. Long*, 493 P.3d 94, 114, 116 (Wash. 2021), attached as Exhibit “A.” *Long*’s conclusion was based on an analysis of historical considerations, including the United States Constitution and the Magna Carta. *Id.* at 107-109, 111-113, 114. This Court should hold the same. Moreover, the Pennsylvania Supreme Court has already ruled that the Excessive Fines Clause prohibits imposing even "mandatory" fines if they are excessive. *See Commonwealth v. Eisenberg*, 98 A.3d 1268, 1282 (Pa. 2014) (holding that the mandatory fine at issue was excessive and violated the Excessive Fines Clause of the Pennsylvania Constitution).

In *Long*, the defendant was ordered to pay a fine in the amount of \$547.12 for parking his truck on property owned by the city of Seattle for more than 72 hours, in violation of a local ordinance. *Long*, 493 P.3d at 99. Mr. Long was homeless and the truck served as his home. *Id.* at 99, 114-15. On appeal, he argued, among other things, that imposition of the fine constituted a violation of the state and federal excessive fines clause. *Id.* at 99.

The Supreme Court of Washington explained that “[t]he touchstone of the

constitutional inquiry under the Excessive Fines Clause is the principle of proportionality” and that the proportionality inquiry under the Eighth Amendment requires consideration of a person's ability to pay. *Id.* at 110-111 (*quoting United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). In doing so, it cited to the history of the clause and the fact that a “number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required.” *Id.* at 111-13 (citations omitted).

In reaching its ultimate conclusion, the Court further elucidated,

The weight of history and the reasoning of the Supreme Court demonstrate that excessiveness concerns more than just an offense itself; ***it also includes consideration of an offender's circumstances.*** The central tenant of the *excessive fines* clause is to protect individuals against fines so oppressive as to deprive them of their livelihood. Inherent in this safeguard is the recognition that ““what is ruin to one man's fortune, may be a matter of indifference to another's.”” ***As one Pennsylvania court astutely noted, “[T]he excessive fines analysis under the Eighth Amendment requires more than ‘lip service.’ ... This requires a thorough examination of every property owner's circumstances.” 1997 Chevrolet, 106 A.3d at 871.***

Id. at 113 (internal citations and quotations omitted) (emphasis added).

A fine that is more than a person can pay is ‘excessive’ within the meaning of the Eighth Amendment. *Id.* at 113 (*citing Dep't of Labor & Emp't v. Dami Hosp.*,

LLC, 442 P.3d 94, 101 (Colo. 2019)). A fine that would bankrupt one person would be a substantially more burdensome fine than one that did not. *Id.* Regarding the effect of the defendant’s homelessness on this analysis, *Long* stated, “[t]he 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.*

Instantly, there is no indication in the record that Mr. May is homeless, but there is also nothing in the record that provides *any* indication of his financial circumstances other than that he is at least partially employed and has three children—and, of course, that he is impoverished and represented by the Office of the Public Defender. Yet, the Commonwealth asserts, without any evidence regarding Mr. May’s salary or expenses, that the fine here was not so extreme as to prevent him from earning a living. *See* Brief for Appellee, at 20. The defendant in *Long*, too, was employed, yet he still was not “able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life.” *Long*, 493 P.3d at 115.

The Excessive Fines Clause bars a penalty that requires surrender of a person's means of subsistence. Here, Mr. Clements faces a fine that he may well

only be able to pay by dipping into whatever subsistence funds he has – taking away money from food, shelter or medical care for himself and his family. As with Section 9726(c), the Excessive Fines Clause requires a trial court to ensure that it is not imposing an unaffordable fine and that the record reflects that any fine will not cut into basic life needs. Here, the lack of a more detailed record only underscores the trial court’s error and the constitutional problem.¹

Moreover, the Commonwealth appears to concede that individual circumstances are relevant to the Excessive Fines Clause analysis. *See* Brief for Appellee, at 19-20 (citing cases for the proposition that the Excessive Fines Clause is not implicated unless a fine affects one’s ability to earn a living). Therefore, the Commonwealth seems to agree that the Clause does require a subjective analysis of what one can afford. Accordingly, to be a constitutional fine, Mr. May’s circumstances must be factored into the proportionality inquiry and whether he has

¹ Though discussed in detail in Mr. May’s principal brief, it bears repeating that the mere fact that a person is employed is not sufficient to find that a person is able to pay a fine. *See* Brief for Appellant at 23-24 (citing cases); *see, e.g., Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. 1982) (presentence report addressing “sporadic employment history, but [that] does not disclose his current income,” was insufficient to allow a court to impose a fine). The Commonwealth Court recently noted that compliance with the Excessive Fines Clause requires that trial courts “analyze separately the issues bearing on the propriety of the fine amount, taking evidence if necessary.” *City of Philadelphia v. Neely*, 1293 CD 2019, 2021 WL 3853060 at *7 (Pa. Commw. Aug. 30, 2021) (unpublished). That did not happen here.

the ability to pay any fine. Therefore, this Court should adopt the rationale and holding of *Long* and hold that courts considering whether a fine is constitutionally excessive must also consider a person's ability to pay. A remand is necessary to determine whether imposition of a fine here would require Mr. Clements to dip into his basic life need funds.

3. THE COMMONWEALTH CONFUSES THE LAW REGARDING COSTS, AS OPPOSED TO FINES, AND PA.R.CRIM.P. 706(C) REQUIRES AN ABILITY TO PAY INQUIRY PRIOR TO IMPOSITION OF FINES.

Mr. May also argues in his principal brief that, pursuant to Pa.R.Crim.P. 706(C), trial courts must conduct an ability to pay inquiry prior to imposing fines. In response, the Commonwealth cites some cases regarding imposition of *costs* for the proposition that an ability to pay inquiry is required prior to imposition of *costs* only when a defendant faces incarceration. *See* Brief for Appellee, at 20. The Commonwealth misstates the law.

Commonwealth v. Lopez, 248 A.3d 589 (Pa. Super. 2021) (*en banc*), recently reaffirmed the holding in *Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. 1975) (*en banc*), that in order to impose a *fine*, a sentencing judge must consider Rule 706(C) of the Pennsylvania Rules of Criminal Procedure. *Lopez*, 248 A.3d at 595. In doing so, *Lopez* explained that *Martin* does not apply to costs. *Id.* As this Court

subsequently explained when discussing *Martin*, “[p]ursuant to *Lopez*, the legal distinctions between fines and costs under Pennsylvania law persist.” *Commonwealth v. Snyder*, 251 A.3d 782, 798 n.14 (Pa. Super. 2021). Moreover, *Martin* did not hold that an ability to pay inquiry is required only if a person is facing incarceration. *See Martin*, 335 A.2d at 425 (“In order to impose a fine, a sentencing judge must consider provisions of the Pennsylvania Rules of Criminal Procedure. Rule 1407(c), 19 P.S. Appendix, provides: ‘The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of his financial means, including his ability to make restitution or reparations.’”).

Therefore, the imposition of the instant fine constituted an illegal sentence as the trial court failed to consider Mr. May’s ability to pay as required by Pa.R.Crim.P. 706(C) and *Martin*.

4. *COMMONWEALTH V. FORD*, 217 A.3D 824 (PA. 2019), DID NOT HOLD THAT 42 PA.C.S. § 9726(C) DOES NOT APPLY TO MANDATORY FINES.

Mr. May argues in his principal brief that trial courts must consider a defendant’s ability to pay a fine, even where the fine is “mandatory” for those who can afford to pay it. This is a question of statutory interpretation where the

statute setting forth the fine, here 75 Pa. C.S. § 3804(b)(1), must be read in conjunction with 42 Pa.C.S. § 9726—something that this Court has never done.

The Commonwealth, however, engaged in no statutory interpretation in its brief. Instead, it contends that *Commonwealth v. Ford*, 217 A.3d 824 (Pa. 2019), specifically held that 42 Pa.C.S. § 9726(c) does not apply to mandatory fines such that an ability to pay inquiry is not required, and therefore Mr. May's argument has already been rejected. *See* Brief for Appellee, at 19. The Commonwealth has mis-stated the holding in *Ford*.

Contrary to the Commonwealth's contention, the Pennsylvania Supreme Court in *Ford* explicitly and intentionally left the matter of whether 42 Pa.C.S. § 9726 applies to mandatory fines unaddressed, as that decision addressed only the discretionary, non-mandatory fines that were the subject of that appeal. *See Ford*, 217 A.3d at 831 (vacating the entire sentence as illegal where an ability to pay inquiry was required prior to imposition of non-mandatory fines even though the defendant had agreed to pay fines as part of a guilty plea). In *Ford*, the trial court imposed both non-mandatory and mandatory fines, but it was only the issue related to imposition of the non-mandatory fines that was appealed by the Commonwealth to the Pennsylvania Supreme Court. *Id.* at 828. While discussing the procedural history of the case, *Ford* cited the lower court opinion and a

footnote from *Commonwealth v. Gipple*, 613 A.2d 600, 601 n.1 (Pa. Super. 1992), (where the issue of mandatory fines was neither raised by the parties nor briefed), for the notion that Section 9726(c) does not apply to mandatory fines; but that was not the issue on appeal nor was it at all the holding in *Ford*. *Ford*, 217 A.3d at 827. Therefore, the Commonwealth's representation here that *Ford* specifically held that an ability to pay inquiry is not required prior to imposition of mandatory fines is patently inaccurate.

In lieu of any analysis in response to Mr. May's statutory analysis, the Commonwealth points to the unpublished decision of *Commonwealth v. Kress*, 2020 WL 6778992 (Pa. Super. Nov. 18, 2020) (unpublished disposition), and to a footnote in *Commonwealth v. Gipple*, 613 A.2d 600, 601 n.1 (Pa. Super. 1992). *Gipple*, however, merely states in a footnote – where the issue was not briefed or raised by counsel – that 42 Pa.C.S. § 9726 does not apply to the mandatory fine provision of 18 Pa.C.S. § 7508, which is an entirely different sentencing provision than the one at issue in this case. *Gipple*, 613 A.2d at 601 n.1. *Kress* relies upon that footnote and *Ford*, which as discussed *supra*, does not hold what the Commonwealth contends it does.

The Commonwealth also cites to two other unpublished decisions, *Commonwealth v. Dinardo*, 2021 WL 1718071, at *2 (Pa. Super. April 30, 2021)

(unpublished), and *Commonwealth v. Wright*, 2021 WL 1291629, at *3 (Pa. Super. April 7, 2021) (unpublished), both of which similarly rely solely on the mis-stated holding in *Ford* and/or the footnote in *Gipple* for the proposition that a defendant's ability to pay is not a factor when fines are mandatory. See Brief for Appellee, at 19.

Finally, the Commonwealth cites to *Commonwealth v. Cherpes*, 520 A.2d 439 (Pa. Super. 1987), for the proposition that a specific, mandatory fine controls over the general requirement to consider a person's ability to pay. See Brief for Appellee, at 19. As discussed in Mr. May's principal brief, *Cherpes* did not engage in a proper statutory construction analysis regarding the reading of specific and general provisions of a statute; and the facts of *Cherpes* should be cabined to the specific fine at issue in that case, which has long since been repealed. See Brief for Appellant, at 27-31 (discussing that *Cherpes* did not follow the rule of statutory construction that statutes related to the same subject be read *in pari materia*; that statutes "shall be construed, if possible, so that effect may be given to both"; and that a specific provision controls over a general one *only if* the two provisions are irreconcilable. 1 Pa. C.S. § 1933.).

Accordingly, it is time for this Court to conduct the proper statutory analysis that is consistent with the rules of construction. Doing so shows that

Section 9726 – and Rule 706(C) – apply even to the otherwise “mandatory” fine at issue here.

III.CONCLUSION

Based upon the arguments raised herein and in Mr. May’s principal brief, the judgment of sentence must be vacated and the matter remanded for a new trial; and in the alternative, remanded for a new sentencing hearing to address Mr. May’s ability to pay a fine.

Respectfully submitted,

 /S/ *Emily Mirsky*
EMILY MIRSKY, Assistant Defender
Chief, Appeals Division
CHRISTOPHER WELSH, Defender

EXHIBIT A

493 P.3d 94
Supreme Court of Washington.

CITY OF SEATTLE, Respondent,

v.

Steven Gregory LONG, Petitioner.

No. 98824-2

|

Filed: August 12, 2021

Synopsis

Background: Truck owner sought review of municipal court order requiring him to reimburse city \$547.12 for impoundment costs via payment plan of \$50 per month, for truck that served as owner's home. The Superior Court, King County, [Catherine Shaffer, J.](#), affirmed in part and reversed part. City petitioned for discretionary review, and owner cross-petitioned. The Court of Appeals, [13 Wash.App.2d 709, 467 P.3d 979](#), affirmed in part and reversed in part. Parties sought further review.

Holdings: In a case of first impression, the Supreme Court, en banc, [Madsen, J.](#), held that:

- [1] truck automatically qualified as a homestead;
- [2] homestead claim was premature;
- [3] impoundment did not violate state constitutional provision protecting against unwarranted government intrusions into private affairs;
- [4] impoundment and associated costs were partially punitive and thus constituted fines;
- [5] a court considering whether a fine is constitutionally excessive should consider a person's ability to pay; and
- [6] payment plan as imposed violated excessive fines clause.

Affirmed in part and reversed in part.

González, C.J., filed concurring opinion.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Motion for Summary Judgment.

West Headnotes (49)

[1] **Appeal and Error** 🔑 Review using standard applied below

Supreme Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court.

[2] **Homestead** 🔑 Nature of estate or right

Homestead act implements the policy that each citizen have a home where the family may be sheltered and live beyond the reach of financial misfortune. [Wash. Rev. Code Ann. § 6.13.010 et seq.](#)

[3] **Homestead** 🔑 Construction of homestead laws in general

Homestead act is favored in law, and courts construe it liberally so it may achieve its purpose of protecting family homes. [Wash. Rev. Code Ann. § 6.13.010 et seq.](#)

[4] **Appeal and Error** 🔑 Statutory or legislative law

Meaning of a statute is a question of law that Supreme Court reviews de novo.

[5] **Statutes** 🔑 Intent

A court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent.

[6] **Statutes** 🔑 Plain Language; Plain, Ordinary, or Common Meaning

If a statute's meaning is plain on its face, a court must follow that plain meaning.

[7] **Statutes** 🔑 Construction based on multiple factors

A statute's plain meaning is discerned from the ordinary meaning of the language, the context of the statute, related provisions, and the statutory scheme as a whole.

[8] **Statutes** 🔑 Superfluosness

Whenever possible, statutes are to be construed so no clause, sentence, or word shall be superfluous, void, or insignificant.

[9] **Statutes** 🔑 Purpose and intent; determination thereof

Statutes 🔑 Plain, literal, or clear meaning; ambiguity

If a statute is ambiguous, a court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.

[10] **Homestead** 🔑 Necessity

Homestead 🔑 Nature of property in general

Homestead act automatically protects personal property occupied as a principal residence, and no declaration is required. Wash. Rev. Code Ann. § 6.13.040(1).

[11] **Statutes** 🔑 Language

A court presumes that the legislature says what it means and means what it says.

[12] **Statutes** 🔑 Similarity or difference

When the legislature uses two different terms in the same statute, a court presumes the legislature intends the terms to have different meanings.

[13] **Homestead** 🔑 Necessity

Homestead 🔑 Nature of property in general

Truck that served as owner's home and that was impounded by city for parking infraction automatically qualified as a homestead without need for owner to file a declaration. Wash. Rev. Code Ann. § 6.13.040(1).

[14] **Homestead** 🔑 Contest and determination of claim

Truck owner's homestead claim seeking shield against attachment, execution, or forced sale of his truck that served as his home and that was impounded by city for parking infraction was premature, where city did not seek to collect on owner's debt in the form of impoundment costs for which magistrate set up payment plan to reimburse city. Wash. Rev. Code Ann. §§ 6.13.030, 6.13.070.

[15] **Creditors' Remedies** 🔑 Particular Remedies--Execution

An "execution" is a judicial mode of obtaining the debt recovered by judgment such as a lien.

[16] **Creditors' Remedies** 🔑 Particular forms of execution

A "forced sale" is a nonconsensual sale to recover a debt.

[17] **Homestead** 🔑 Construction of homestead laws in general

Homestead act operates as a shield to protect against creditors' actions; it is not a sword to prevent such actions in the first instance. Wash. Rev. Code Ann. § 6.13.010 et seq.

[18] **Homestead** 🔑 Amount or Extent

A "debt" contemplated by homestead act's shield against attachment, execution, or forced sale for the debts of the owner is determined at adjudication. Wash. Rev. Code Ann. §§ 6.13.030, 6.13.070.

- [19] **Appeal and Error** 🔑 Necessity of presentation in general
 Generally, a party waives the right to raise an issue on appeal that was not raised before the trial court.
- [20] **Appeal and Error** 🔑 Constitutional questions
 To obtain review of unpreserved error on the basis that it is manifest error affecting a constitutional right, an appellant must show (1) the error is manifest and (2) the error is truly of constitutional dimension. *Wash. R. App. P. 2.5(a)*.
- [21] **Appeal and Error** 🔑 Constitutional questions
 In determining whether an unpreserved error may be reviewed on the basis that it is manifest error affecting a constitutional right, a reviewing court looks to the asserted claim and assesses whether, if correct, it implicates a constitutional interest. *Wash. R. App. P. 2.5(a)*.
- [22] **Appeal and Error** 🔑 Constitutional questions
 Whether an error is manifest under rule providing for review of unpreserved manifest error affecting a constitutional right requires a showing of actual prejudice. *Wash. R. App. P. 2.5(a)*.
- [23] **Searches and Seizures** 🔑 Expectation of privacy
 A two-step analysis applies to determine the existence of a violation of state constitutional provision protecting against unwarranted government intrusions into private affairs, with a court first determining whether the action complained of disturbs one's private affairs, and, if so, then determining whether authority of law justifies the intrusion. *Wash. Const. art. 1, § 7*.
- [24] **Searches and Seizures** 🔑 Necessity of and preference for warrant, and exceptions in general
 Warrantless seizures are per se unreasonable. *Wash. Const. art. 1, § 7*.
- [25] **Searches and Seizures** 🔑 Presumptions and Burden of Proof
 State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule that warrantless seizures are per se unreasonable. *Wash. Const. art. 1, § 7*.
- [26] **Searches and Seizures** 🔑 Vehicles
 Impounding a car is a “seizure” under the State Constitution. *Wash. Const. art. 1, § 7*.
- [27] **Automobiles** 🔑 Time and place; impoundment, inventory, or booking
 A vehicle may be lawfully impounded in the course of enforcing traffic regulations if the driver committed a traffic offense for which the legislature has expressly authorized impoundment.
- [28] **Searches and Seizures** 🔑 Inventory and impoundment; time and place of search
 If no probable cause exists to seize a vehicle and a reasonable alternative to impoundment exists, it is unreasonable to impound the vehicle. *Wash. Const. art. 1, § 7*.
- [29] **Searches and Seizures** 🔑 Fourth Amendment and reasonableness in general
 Reasonableness of a search or seizure is decided in light of the facts of the case, and a police officer must consider reasonable alternatives. *Wash. Const. art. 1, § 7*.

[30] Searches and Seizures 🔑 Inventory and impoundment; time and place of search

Impoundment of a vehicle is lawful under state constitutional provision protecting against unwarranted government intrusions into private affairs only if, in the judgment of the impounding officer, it is reasonable under the circumstances and there are no reasonable alternatives. Wash. Const. art. 1, § 7.

[31] Automobiles 🔑 Parking or standing

Impoundment of truck for parking infraction after city posted notice of violation of 72-hour parking ordinance did not violate state constitutional provision protecting against unwarranted government intrusions into private affairs, where truck owner told officers his truck was in need of repairs and could not be driven, even though owner used truck as his home and did not have access to it for 21 days. Wash. Const. art. 1, § 7.

[32] Homestead 🔑 Construction of homestead laws in general

A vehicle owner can object to impoundment of vehicle that is his or her home and the payment of fees, but the homestead act is not a sword to prevent impoundment. Wash. Rev. Code Ann. §§ 6.13.030, 6.13.070.

[33] Homestead 🔑 Contest and determination of claim

Homestead protections are resolved upon enforcement, not issuance, of a parking ticket or impoundment of a vehicle that is the owner's home. Wash. Rev. Code Ann. §§ 6.13.030, 6.13.070.

[34] Appeal and Error 🔑 Necessity
Constitutional Law 🔑 Relation to Constitutions of Other Jurisdictions

When a party urges a different or more protective interpretation under the State Constitution for the first time, the Supreme Court expects supportive briefing, particularly when the language of that provision is identical to the federal constitutional provision.

[35] Fines 🔑 Excessive fines

The excessive fines clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense. U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.

[36] Fines 🔑 Excessive fines

A qualifying "fine" under the excessive fines clause is a payment to a sovereign as punishment for some offense. U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.

[37] Fines 🔑 Excessive fines

To trigger the excessive fines clause, a sanction must be a fine and it must be excessive. U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.

[38] Fines 🔑 Excessive fines

Qualifying fines under the excessive fines clause must be at least partially punitive. U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.

[39] Fines 🔑 Excessive fines

First step in an excessive fines inquiry is whether the state action is punishment, and the second inquiry is whether the fine is constitutionally excessive. U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.

[40] Appeal and Error 🔑 Constitutional Rights, Civil Rights, and Discrimination in General

The question of whether a fine is constitutionally excessive is subject to de novo review. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

imposed for violation, and (4) extent of harm caused. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[41] Automobiles 🔑 Parking or standing

Fines 🔑 Excessive fines

Impoundment and associated costs for truck that had a parking infraction were partially punitive and thus constituted fines under excessive fines clause, even though owner retrieved truck and costs were intended to reimburse city for towing and storage fees, where costs were imposed only as a result of the impoundment, which city code characterized as a penalty. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[46] Fines 🔑 Excessive fines

Excessiveness a fine concerns more than just an offense itself; it also includes consideration of an offender's circumstances. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[42] Courts 🔑 Decisions of United States Courts as Authority in State Courts

On federal constitutional questions, the state Supreme Court is bound only by decisions of the United States Supreme Court.

[47] Fines 🔑 Excessive fines

Central tenet of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[43] Fines 🔑 Excessive fines

Touchstone of constitutional inquiry under excessive fines clause is principle of proportionality; the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[48] Fines 🔑 Excessive fines

A court considering whether a fine is constitutionally excessive should consider a person's ability to pay. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[44] Fines 🔑 Excessive fines

A fine violates the excessive fines clause if it is grossly disproportional to the gravity of a defendant's offense. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[49] Automobiles 🔑 Parking or standing

Fines 🔑 Excessive fines

City's impoundment of truck for parking infraction and \$547.12 payment plan of \$50 per month for impoundment costs were unconstitutionally excessive for truck owner who used truck as residence, where nature of offense was a civil parking infraction that carried a \$44 fine, city suspended enforcement of the 72-hour parking violation during COVID-19 pandemic signaling that city viewed violation as a relatively minor offense, there was no evidence that the infraction was related to any other criminal activity, truck was not parked in residential area or area of hot demand for city vehicles, owner made at most \$700 per month, owner was attempting to save for apartment to move himself out of homelessness, and owner could not access his tools for work as general tradesman during impoundment. *U.S. Const. Amend. 8; Wash. Const. art. 1, § 14.*

[45] Fines 🔑 Excessive fines

Test to determine whether a fine is grossly disproportional in violation of excessive fines clause includes: (1) nature and extent of crime, (2) whether violation was related to other illegal activities, (3) other penalties that may be

West Codenotes

Prior Version Recognized as Unconstitutional

 Wash. Rev. Code Ann. §§ 46.55.350,  46.55.360

*97 Appeal from King County Superior Court, Docket No: 17-2-15099-1, Honorable [Catherine D. Shaffer](#), Judge

Attorneys and Law Firms

[James Elliot Lobsenz](#), Carney Badley Spellman, Alison Sophia Bilow, Columbia Legal Services, Seattle, WA, for Petitioner.

[Erica Franklin](#), Seattle City Attorney's Office, [Robert Bertelson Mitchell Jr.](#), [Aaron Edward Millstein](#), K&L Gates LLP, Seattle, WA, [Michael Jordan Thompson](#), Attorney at Law, Polson, MT, for Respondent.

Thomas E. Weaver Jr., Attorney at Law, Bremerton, WA, for Amicus Curiae on behalf of Wa Association of Criminal Defense Lawyers.

[William R. Maurer](#), Institute For Justice, Seattle, WA, for Amici Curiae on behalf of Institute for Justice, Southern Poverty Law Center, Oregon Law Center, Equal Justice Under Law, Policy Advocacy Clinic, MacArthur Justice Center.

[William R. Maurer](#), Institute For Justice, Seattle, WA, [Lisa Foster](#), Fines and Fees Justice Center, New York, NY, for Amicus Curiae on behalf of Fines and Fees Justice Center.

[Nancy Lynn Talner](#), Breanne Schuster, American Civil Liberties Union of Washington, Julia Mizutani, Attorney at Law, Seattle, WA, for Amicus Curiae on behalf of Aclu of Washington.

Alexandria Marie Hohman, The Washington Defender Association, Seattle, WA, for Amicus Curiae on behalf of Washington Defender Association.

[Ann Marie Logerfo](#), Logerfo Garella, PLLC, Seattle, WA, for Amicus Curiae on behalf of Interfaith Task Force On Homelessness.

Sara Rankin, Homeless Rights Advocacy Project, Seattle, WA, for Amicus Curiae on behalf of Homeless Rights Advocacy Project.

Tristia Bauman, National Law Center on Homelessness, Washington, DC, for Amicus Curiae on behalf of National Law Center On Homelessness and Poverty.

[Kymberly Kathryn Evanson](#), Pacifica Law Group LLP, Seattle, WA, for Amicus Curiae on behalf of International Municipal Lawyers Association.

[Kimberly Noel Gordon](#), Law Offices of Gordon & Saunders PLLC, Seattle, WA, [Marsha L. Levick](#), [Jessica Feierman](#), [Lindsey E. Smith](#), Juvenile Law Center, Philadelphia, PA, for Amicui Curiae on behalf of Juvenile Law Center, African American Juvenile Justice Project, Center for Children and Youth Justice, Children and Family Justice Center, Civitas Childlaw Center, COAlition for Juvenile Justice, Justice Policy Institute, Legal Counsel for Youth and Children, National Center for Youth Law, National Juvenile Defender Center, National Juvenile Justice Network, Public Counsel, Teamchild, UC Berkeley School of Law Policy Advocacy Clinic, W. Haywood Burns Institute, Youth Advocate Programs, Inc., Youth Correctional Leaders for Justice.

[Todd Maybrown](#), Allen Hansen Maybrown & Offenbecher, PS, Seattle, WA, for Amici Curiae on behalf of Professor Alexes Phd Harris, Professor Mary Phd Pattillo.

Carrie Suzanne Graf, Northwest Justice Project, Olympia, WA, [Scott Crain](#), Northwest Justice Project, Seattle, WA, for Amicus Curiae on behalf of Northwest Justice Project.

Amanda Nicole Martin, Northwest Consumer Law Center, Seattle, WA, for Amicus Curiae on behalf of Northwest Consumer Law Center.

[Daniel G Lloyd](#), Vancouver City Attorney's Office, Vancouver, WA, [Duncan McGehee Greene](#), Van Ness Feldman LLP, Seattle, WA, for Amicus Curiae on behalf of Washington State Association of Municipal Attorneys.

Prachi Vipinchandra Dave, Public Defender Association, Rebecca Charney Fish, Catherine A Bentley, Attorneys at Law, Seattle, WA, for Amicus Curiae on behalf of Public Defender Association.

[Toby James Marshall](#), Terrell Marshall Law Group PLLC, Seattle, WA, [Leslie A. Bailey](#), Brian Hardingham, John He, Public Justice, PC, Oakland, CA, for Amicus Curiae on behalf of Public Justice.

Mary B. McCord, Seth Wayne, Institute for Constitutional Advocacy, Washington, DC, for Amicus Curiae on behalf of Institute for Constitutional Advocacy and Protection.

Claudia Wilner, Linda Morris, Nat. Center for Law & Eco Justice, New York, NY, for Amicus Curiae on behalf of National Center for Law and Economic Justice.

John W. Whitehead, Douglas R. McKusick, Rutherford Institute, Charlottesville, VA, for Amicus Curiae on behalf of Rutherford Institute.

Opinion

MADSEN, J.

*99 ¶1 Steven Gregory Long parked his truck on property owned by the city of Seattle for more than 72 hours, violating Seattle Municipal Code (SMC) 11.72.440(B). For this civil infraction, a city-contracted towing company impounded Long's truck. Long contested the infraction and eventually agreed to a payment plan to reimburse the city for the costs of the impoundment. He now argues, among other things, that the impoundment violated Washington's homestead act, ch. 6.13 RCW, and the federal excessive fines clause. For the reasons discussed below, we affirm in part and reverse in part.

BACKGROUND


¶2 In 2016, Long was living in his truck. Long, then a 56-year-old member of the Confederated Salish and Kootenai Tribes of the Flathead Nation, worked as a general tradesman and stored work tools as well as personal items in his vehicle. One day, Long was driving to an appointment when the truck began making “grinding” noises. On July 5, 2016, Long parked in a gravel lot owned by the city of Seattle. Long stayed on the property for the next three months.


¶3 On October 5, 2016, police alerted Long that he was violating the SMC by parking in one location for more than 72 hours. SMC 11.72.440(B). Long claims he told the officers that he lived in the truck. Later that day, a parking enforcement officer posted a 72-hour notice on the truck, noting it would be impounded if not moved at least one city block. SMC 11.30.060. Long did not move the truck. While Long was at work on October 12, 2016, a city-contracted company towed his truck. Without it, Long slept outside on the ground before seeking shelter nearby to escape the rain and wind.

¶4 Long requested a hearing to contest the parking infraction. SMC 11.30.120 (vehicle owner may request a hearing in municipal court to contest an impoundment). At the November 2, 2016 impoundment hearing, Long reiterated that he lived in his truck and kept all of his work tools in it. The magistrate found that Long had parked illegally, but the magistrate waived the \$44.00 ticket, reduced the impoundment charges from \$946.61 to \$547.12, and added a \$10.00 administrative fee. SMC 11.31.121 (violating the 72-hour rule is a “parking infraction” subject to \$44.00 fine).¹ The magistrate drafted a payment plan requiring Long to pay \$50.00 per month.² Long felt “forced” to agree or risk losing his truck at a public auction. Clerk's Papers (CP) at 109.

¶5 Long appealed the magistrate's findings. Though he did not contest that the truck was parked illegally, Long argued that the impoundment violated the state and federal excessive fines clauses, substantive due process, and the homestead act. Long moved for summary judgment, which the municipal court denied.

¶6 On a RALJ appeal, the superior court affirmed and reversed in part: it rejected the substantive due process claim, and it held that the impoundment costs were unconstitutionally excessive under the federal constitution and that the payment plan violated the homestead act. The court concluded that the impoundment itself did not violate the Eighth Amendment to the United States Constitution.

¶7 The parties then sought review at the Court of Appeals. In a published decision, the court concluded that the payment plan was invalid under the homestead act and rejected the constitutional argument that the impoundment and associated costs were excessive.  *City of Seattle v. Long*, 13 Wash. App. 2d 709, 467 P.3d 979 (2020). The court also held that Long failed to show the impoundment was unlawful pursuant to [article I, section 7 of the Washington State Constitution](#),

*100 declining to review it for the first time on appeal.  *Id.* at 733-35, 467 P.3d 979.

¶8 Long sought review here of the excessive fines and the [article I, section 7](#) issues. Pet. for Review at 4-5, 8-18. Seattle cross petitioned, raising the homestead act as a contingent issue. Answer to Pet. for Review at 16-20. We granted review of all three.³ Order, No. 98824-2 (Wash. Dec. 2, 2020). Numerous amici curiae have filed briefs in support of Long, including the Institute for Justice, Public Justice, the American Civil Liberties

Union (ACLU) of Washington, Northwest Justice Project, Juvenile Law Center, and Professors Alexes Harris and Mary Pattillo. Two amici contributed briefs in support of Seattle: the International Municipal Lawyers Association and the Washington Association of Municipal Attorneys.⁴

ANALYSIS

[1] ¶9 We review a summary judgment order de novo, engaging in the same inquiry as the trial court. [Highline Sch. Dist. No. 401 v. Port of Seattle](#), 87 Wash.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is proper if the record shows “no genuine issue as to any material fact” and the “moving party is entitled to a judgment as a matter of law.” [CR 56\(c\)](#). The parties do not appear to contest the facts in this case.

I. The Homestead Act

¶10 A “uniquely American contribution” to real property law, homestead exemptions are based on the notion that citizens should have a home where family is sheltered and living beyond the reach of financial misfortune and the demands of certain classes of creditors. George L. Haskins, [Homestead Exemptions](#), 63 HARV. L. REV. 1289, 1289 (1950); [Charless & Blow v. Lamberson](#), 1 Iowa 435, 439 (1855); see also Paul Goodman, [The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880](#), 80 J. AM. HIST. 470, 470 (1993). States began enacting homestead laws in the 19th century in order to provide security in an increasingly volatile American economy. Goodman, *supra*, at 470. Prior to these laws, the United States experienced financial panics that caused unemployment, bankruptcy, and loss of the family home. *Id.* at 471.

¶11 Texas enacted the first homestead exemption in 1839. MacKenzie Breitenstein, Note, [The Ideal Homestead Exemption: Avoiding Asset Conversion & Fraud but Still Protecting Dependents](#), 58 DRAKE L. REV. 1121, 1123 (2010). Today, 48 states have homestead exemption laws. *Id.* at 1126. All such laws require the claimed “homestead” to be the primary residence of the debtor or his or her dependents, and only one homestead may be claimed. *Id.* at 1127. Relevant here, the homestead exemption does not protect the full value of a homestead but protects up to “the sum of fifteen thousand dollars in the case of other personal property *101 described in [RCW 6.13.010](#).” Former [RCW 6.13.030\(2\)](#) (2007).

[2] [3] ¶12 Washington's constitution provides,

The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

WASH. CONST. art. XIX, § 1. The legislature fulfilled this mandate by passing the homestead act in 1895. LAWS OF 1895, ch. 64, § 1; [Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle](#), 101 Wash.2d 416, 418, 679 P.2d 928 (1984). Like all homestead acts, Washington's statute “implements the policy that each citizen have a home where [the] family may be sheltered and live beyond the reach of financial misfortune.” [In re Dependency of Schermer](#), 161 Wash.2d 927, 953, 169 P.3d 452 (2007) (alteration in original) (internal quotation marks omitted) (quoting [Pinebrook Homeowners Ass'n v. Owen](#), 48 Wash. App. 424, 427, 739 P.2d 110 (1987)). The act is favored in law, and courts construe it liberally so it may achieve its purpose of protecting family homes. *Id.*

¶13 Under the homestead act some residences are automatically protected while others require an owner to file a declaration. [RCW 6.13.040\(1\), \(2\)](#); [In re Tr.'s Sale of Real Property of Sweet](#), 88 Wash. App. 199, 201, 944 P.2d 414 (1997) (“Since 1981, homestead protection is ‘automatic.’”). Qualifying homes are protected from attachment and execution or forced sale for the debts of the owner up to the amount specified in the statute. Former [RCW 6.13.070](#) (1987). The homestead exemption does not protect the full value of a homestead, but it protects up to “the sum of fifteen thousand dollars in the case of other personal property described in [RCW 6.13.010](#).” Former [RCW 6.13.030\(2\)](#).

¶14 Here, we must determine whether the homestead act applies and whether any violation occurred. First, Seattle agrees that Long's truck *may* qualify as a homestead but contends that additional procedural steps are necessary—namely, that [RCW 6.13.040\(1\)](#) requires Long to file a declaration, which he did not. Long responds that because he occupied the truck as his principal residence, it automatically qualifies. Second, Seattle argues that no attachment, execution, or forced sale occurred; Long disagrees.

¶15 For the following reasons, we agree with Long. RCW 6.13.040(1) automatically protects occupied personal property as a homestead, and no declaration is required. Long's truck therefore constitutes a homestead. However, we agree with Seattle that no attachment, execution, or forced sale occurred. The homestead act protections were not triggered at this point in Long's case because no party sought to collect on Long's debt.

A. RCW 6.13.040(1) Automatically Protects Personal Property Occupied as a Principal Residence

[4] [5] [6] [7] ¶16 The meaning of a statute is a question of law we review de novo. *State v. Mitchell*, 169 Wash.2d 437, 442, 237 P.3d 282 (2010). “ ‘The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent.’ ” *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wash.2d 359, 367, 89 P.3d 217 (2004)). If a statute's meaning is plain on its face, we must follow that plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002). A statute's plain meaning is discerned from the ordinary meaning of the language, the context of the statute, related provisions, and the statutory scheme as a whole. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 909, 154 P.3d 882 (2007).


[8] [9] ¶17 Whenever possible, statutes are to be construed so “ ‘no clause, sentence or word shall be superfluous, void, or insignificant.’ ” *Kasper v. City of Edmonds*, 69 Wash.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wash.2d 403, 407, 213 P.2d 483 (1950)). “If a statute is ambiguous, we ‘may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.’ ” *Five Corners Family Farmers v. State*, 173 Wash.2d 296, 305-06, 268 P.3d 892 (2011) (quoting **102 Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003)).

¶18 RCW 6.13.040(1) provides,



Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner or, if the homestead is unimproved or improved land that is not yet occupied as a homestead, from and after the declaration or declarations required by the following subsections are filed for record or, if the homestead is a mobile home not yet occupied as a homestead and located on land not owned by the owner of the mobile home, from and after delivery of a declaration as prescribed in RCW 6.15.060(3)(c) or, if the homestead is any other personal property, from and after the delivery of a declaration as prescribed in RCW 6.15.060(3)(d).

(Emphasis added.) Much of the emphasized language above was added in a 1993 amendment. LAWS OF 1993, ch. 200, § 3. The amendment also included a section requiring a debtor claiming as a homestead “any other personal property” under RCW 6.13.040 to file a declaration stating they reside on the personal property. *Id.* § 5 (codified as RCW 6.15.060(3)(d)). Former RCW 6.13.010(1) (1999) defines a “homestead” as “real or personal property that the owner uses as a residence.”

[10] ¶19 The parties essentially dispute whether the final clause of RCW 6.13.040(1) contemplates occupied or unoccupied personal property. Seattle argues that if occupied personal property is automatically exempt via the first clause of RCW 6.13.040(1), then “any other personal property” in the final clause must be *unoccupied*—yet lawmakers did not include that qualifier in the provision. City of Seattle's Suppl. Br. (Seattle's Suppl. Br.) at 3-4. Further, Seattle notes RCW 6.15.060(3)(d) requires a declaration for “any other personal property” to state that “ ‘the debtor resides thereon as a homestead.’ ” This requirement would be unnecessary if RCW 6.13.040(1) meant all personal property was occupied personal property. *Id.* at 2-3 (quoting RCW 6.15.060(3)(d)).


[11] ¶20 We conclude that RCW 6.13.040(1)'s final clause refers to unoccupied property. RCW 6.13.040(1) states explicitly that automatic protections occur when "real or personal property is *occupied* as a principal residence." (Emphasis added.) The first and final clauses of RCW 6.13.040 were added to the homestead act in a 1993 amendment. LAWS OF 1993, ch. 200, § 3. The decision to add both clauses to the act in the same amendment indicates that they apply to different situations. "[W]e presume the legislature says what it means and means what it says."  *State v. Costich*, 152 Wash.2d 463, 470, 98 P.3d 795 (2004).

[12] ¶21 If lawmakers intended for the final clause to refer to occupied property, they could have included the term as they did in the first clause; they did not. Indeed, the final clause uses different words than the first clause: "*any other* personal property." RCW 6.13.040(1) (emphasis added). When the legislature uses two different terms in the same statute, we presume the legislature intends the terms to have different meanings. *Densley v. Dep't of Ret. Sys.*, 162 Wash.2d 210, 219, 173 P.3d 885 (2007). Thus, under the plain language of RCW 6.13.040(1), automatically protected real or personal property must be occupied while any other personal property does not.

¶22 The statutory history of RCW 6.13.040 supports this reading. In 1881, a homestead could be created by mere occupancy. *Davies v. Metro. Life Ins. Co.*, 191 Wash. 459, 465, 71 P.2d 552 (1937). With the passage of the homestead act in 1895, a homestead could be created only by filing a declaration. *Id.* Homestead by declaration persisted until 1981, where the legislature changed course. It reintroduced automatic protection, which was ultimately codified in RCW 6.13.040. See LAWS OF 1981, ch. 329, § 9; see also  *In re Wenner*, 61 B.R. 634, 635 (1985) ("The 1981 amendments [to the homestead act] provided that a homestead was automatically created in the debtor's permanent residence beginning, 'at the time the property is occupied as a permanent residence by the owner.'" (quoting  RCW 6.12.080)). As a result, declarations have been used in instances where ***103** property was not yet occupied. The 1981 amendment added a section requiring a declaration for homesteads on unimproved land purchased with the intention of residing thereon. LAWS OF 1981, ch. 329, § 9. In 1987, the legislature added qualifying language to unimproved land and required a declaration for mobile homes: "if the homestead is unimproved or improved land that is not yet occupied

as a homestead, from and after the declaration ... or, if the homestead is a mobile home not yet occupied as a homestead and located on land not owned by the owner of the mobile home, from and after delivery of a declaration." LAWS OF 1987, ch. 442, § 204(1)-(2).

¶23 Lawmakers further evidenced their intent to automatically protect personal property, such as Long's truck, in the 1993 amendment. "Because some Washington citizens reside on their boats or in their *cars or vans*, it has been recommended that the homestead exemption's scope be expanded to include any personal or real property that the owner uses as a residence." FINAL B. REP. ON SUBSTITUTE S.B. 5068, 53d Leg. Reg. Sess. (Wash. 1993) (emphasis added). Admittedly, expanding the definition of homestead does not directly answer the question of whether a declaration is required for a nontraditional residence. But, when combined with the plain language and statutory history of RCW 6.13.040, it is evident that the legislature intended occupied personal property to be automatically protected as homesteads and other, unoccupied personal property to qualify upon declaration.

¶24 In addition to the plain language and history of .040(1), we reject Seattle's reading because it would render the first clause of .040(1) meaningless. See *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wash.2d 304, 309, 237 P.3d 256 (2010) (" 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.' " (internal quotation marks omitted) (quoting  *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003))). The first clause refers to occupied personal or real property; the last clause refers to "any other personal property," that is, property *other than* that already mentioned.

[13] ¶25 Long's truck qualifies as a homestead because it was occupied personal property. RCW 6.13.040(1). The homestead act does not require him to file a declaration in addition to occupying the vehicle as his primary residence.

B. The Homestead Act Does Not Apply at This Point in Long's Case

¶26 We next consider the homestead act's protections against "attachment and ... execution or forced sale for the debts of the owner up to the amount specified in RCW 6.13.030." Former RCW 6.13.070. Long argues his truck was under threat of a

forced sale by public auction unless he agreed to the payment plan and was unlawfully attached under a possessory lien when the truck was towed. Suppl. Br. of Pet'r/Cross-Resp't Long (Suppl. Br. of Long) at 20-25. Seattle contends that its conduct fell short of all three enumerated actions because Long indirectly consented to the sale when he parked illegally and that no lien attached to the truck because its \$4,000 value fell below the homestead act's \$15,000 protection. *See* former RCW 6.13.030.

[14] ¶27 Seattle is partially correct. No attachment and execution or forced sale occurred here, but not for the reasons the city offers. Rather, the homestead act's protections do not apply because Seattle has not sought to collect on Long's debt. Thus, his homestead act claim is premature.

[15] [16] ¶28 Former RCW 6.13.070 protects debtors against specific creditor actions. An "attachment" is the physical "seizing of ... property to secure a judgment or to be sold in satisfaction of a judgment." BLACK'S LAW DICTIONARY 157 (11th ed. 2019); *see, e.g., Weber v. Laidler*, 26 Wash. 144, 146, 66 P. 400 (1901) (noting that attachment involves seizure). An "execution" is a judicial "mode of obtaining the debt recovered by judgment" such as a lien. *Pinebrook Homeowners*, 48 Wash. App. at 431, 739 P.2d 110 (quoting *First Nat'l Bank v. Tiffany*, 40 Wash.2d 193, 196, 242 P.2d 169 (1952)); BLACK'S, *supra*, 714 (defining "execution" as *104 a "[j]udicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property"). A "forced sale" is a nonconsensual sale to recover a debt. *Felton*, 101 Wash.2d at 422-23, 679 P.2d 928; BLACK'S, *supra*, 1604 (defining "forced sale" as "[a] hurried sale by a debtor because of financial hardship or a creditor's action. Cf. voluntary sale" (emphasis omitted)).

[17] ¶29 As these definitions illustrate, former RCW 6.13.070 protects against actions taken to secure a debtor's judgment. The homestead act does not specify a procedure for asserting and determining the validity of a homestead, leaving courts to formulate the remedy. *Traverso v. Cerini*, 146 Wash. 273, 277, 263 P. 184 (1928). The Court of Appeals has held that the validity of a homestead claim should be determined whenever it is *asserted as a defense to execution* of judgment against property. *Enyart v. Humble*, 17 Wash. App. 181, 184, 562 P.2d 648 (1977); *see also City of Algona v. Sharp*, 30 Wash. App. 837, 638 P.2d 627 (1982) (homeowner moved to quash an order and notice of foreclosure for failure to pay an assessment for sewer installation). Where property

claimed as a homestead was sold under execution, owners properly brought a quiet title action against a purchase for the purpose of asserting the homestead exemption. *Domke v. Beck*, 18 Wash.2d 568, 573, 139 P.2d 1017 (1943). The homestead act operates as a shield to protect against creditors' actions; it is not a sword to prevent such actions in the first instance. *Christensen v. Christgard, Inc.*, 35 Wash. App. 626, 631, 668 P.2d 1301 (1983) (citing *Webster v. Rodrick*, 64 Wash.2d 814, 816, 394 P.2d 689 (1964)).

[18] ¶30 As a legal matter, a debt is determined at adjudication. *See Shaffer v. Heitner*, 433 U.S. 186, 210 n.36, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Similarly, former RCW 6.13.070(2) leaves it to courts to determine whether an exemption from the consequences of a debt applies. *See Enyart*, 17 Wash. App. at 184, 562 P.2d 648 ("The legislature has provided that homesteads should be identified and protected by the courts.").

¶31 Further, the homestead act's monetary exemption is not a complete one. A homestead is protected for debts "up to the amount specified in RCW 6.13.030." Former RCW 6.13.070. This limited exemption cannot exceed the lesser of, among other things, the total net value of homestead lands, manufactured homes, and a mobile home as described in former RCW 6.13.010; or the sum of \$125,000 in the case of lands, manufactured homes, and a mobile home or the sum of \$15,000 in the case of other personal property described in former RCW 6.13.010. Former RCW 6.13.030. When an owner's equity in property exceeds these exemption amounts, creditors seeking the excess value of the homestead must record a judgment pursuant to RCW 6.13.090 to obtain a lien.⁵ For a homestead vehicle exceeding the \$15,000 exemption, creditors would follow the same statutory procedure. Former RCW 6.13.030; RCW 6.13.090. If the homestead exemption applies as the concurrence contends to prevent attachment by means of towing, the process of determining a vehicle's value would occur on the streets — bypassing adjudication and falling to parking enforcement officers. *See* concurrence at 1. In sum, the homestead act protects only up to a certain amount and at least some portion of the value of the homestead will likely be available to pay the debt. Accordingly, the act operates a shield to preclude debtors from initially incurring a debt.⁶

*105 ¶32 The Washington State Association of Municipal Attorneys (WSAMA) urges us to conclude, as a threshold matter, that the impoundment and payment plan are not

“debts” contemplated by former RCW 6.13.070. Br. of Amicus Curiae WSAMA at 12. For support, WSAMA points to [Tellevik v. 6717 100th Street S.W.](#), 83 Wash. App. 366, 376-77, 921 P.2d 1088 (1996). In that case, the Court of Appeals held that civil asset forfeiture is not subject to homestead protection because it is not based on such debts. *Id.* WSAMA argues that as in [Tellevik](#), Long's impoundment and assessed costs arose from an offense rather than a debt. See Br. of Amicus WSAMA at 12, 14-16. WSAMA is incorrect. The impoundment and associated costs are not analogous to civil forfeiture. Long did not commit a criminal offense and his property was not seized pursuant to a forfeiture statute unlike [Tellevik](#), 83 Wash. App. at 375, 921 P.2d 1088 (citing RCW 69.50.505).

¶33 Here, Long's parking infraction gave rise to his debt. After contesting the infraction in municipal court, the magistrate imposed, and Long agreed to, a payment plan to reimburse the city for the impoundment costs. 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”). Seattle is Long's creditor to whom he owes a \$547.12 debt. See BLACK'S, *supra*, 506 (defining “debt” as “[I]ability on a claim; a specific sum of money due by agreement or otherwise”). At this point, however, there is no evidence that the city has attempted to collect on Long's debt. Therefore, the homestead act's shield against attachment, execution, or forced sale is unnecessary because none of these actions has occurred.

II. Article I, Section 7

[19] ¶34 Long also contends the impoundment of his truck violated [article I, section 7](#). He first raised this issue in a reply brief at the Court of Appeals. See Resp't Long's Reply Br. (No. 78230-4-I May 13, 2019) at 23-24; see also Suppl. Br. of Resp't/Cross-Pet'r (No. 78230-4-I Oct. 21, 2019) at 1-2, 5. Generally a party waives the right to raise an issue on appeal that was not raised before the trial court. See Seattle's Suppl. Br. at 19 (citing [Brundridge v. Fluor Fed. Servs., Inc.](#), 164 Wash.2d 432, 441, 191 P.3d 879 (2008)). RAP 2.5(a)(3) permits a party to raise a manifest error affecting a constitutional right for the first time on appeal. The Court of Appeals declined to address the issue pursuant to RAP 2.5(a) because Long did not make this showing. RAP 2.5(a)(3); [Long](#), 13 Wash. App. 2d at 733-34, 467 P.3d 979 (citing [State v. A.M.](#), 194 Wash.2d 33, 38, 448 P.3d 35 (2019)).

[20] [21] [22] ¶35 To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must show (1) the error is manifest and (2) the error is truly of constitutional dimension. [State v. O'Hara](#), 167 Wash.2d 91, 98, 217 P.3d 756 (2009) (citing [State v. Kirkman](#), 159 Wash.2d 918, 926, 155 P.3d 125 (2007)). Reviewing courts look to the asserted claim and assess whether, if correct, it implicates a constitutional interest. *Id.* (citing [State v. Scott](#), 110 Wash.2d 682, 687, 757 P.2d 492 (1988)). Whether an error is manifest requires a showing of actual prejudice. *Id.* at 99, 217 P.3d 756 (citing [Kirkman](#), 159 Wash.2d at 935, 155 P.3d 125).

¶36 Here, Long relies on [State v. Villela](#), 194 Wash.2d 451, 460, 450 P.3d 170 (2019), to argue that the city's failure to consider alternatives to impoundment was unreasonable under [article I, section 7](#). Long's claim implicates a constitutional privacy interest, but he does not show prejudice.

[23] [24] [25] [26] ¶37 Article I, section 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Courts use a two-step analysis to determine whether this provision has been violated. [State v. Puapuaga](#), 164 Wash.2d 515, 521-22, 192 P.3d 360 (2008) (citing [State v. Surge](#), 160 Wash.2d 65, 71, 156 P.3d 208 (2007) (plurality opinion)). First, we determine whether the action complained of disturbs one's private affairs. *Id.* at 522, 192 P.3d 360. If so, we look to the second inquiry: *106 whether authority of law justifies the intrusion. *Id.* “[W]arrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule.” [State v. Doughty](#), 170 Wash.2d 57, 61, 239 P.3d 573 (2010) (citing [State v. Williams](#), 102 Wash.2d 733, 736, 689 P.2d 1065 (1984)). Impounding a car is a seizure under our state constitution. [State v. Reynoso](#), 41 Wash. App. 113, 116, 702 P.2d 1222 (1985) (citing [State v. Davis](#), 29 Wash. App. 691, 697, 630 P.2d 938 (1981)).

[27] [28] [29] [30] ¶38 Most relevant to this case, a vehicle may be lawfully impounded in the course of enforcing traffic regulations if the driver committed a traffic

offense for which the legislature has expressly authorized impoundment. [Vilella](#), 194 Wash.2d at 459, 450 P.3d 170 (quoting [State v. Tyler](#), 177 Wash.2d 690, 699, 302 P.3d 165 (2013)). If no probable cause exists to seize the vehicle and a reasonable alternative to impoundment exists, it is unreasonable to impound the vehicle. [Id.](#) Reasonableness of a search or seizure is decided in light of the facts of the case, and a police officer must consider reasonable alternatives. [State v. Houser](#), 95 Wash.2d 143, 148, 622 P.2d 1218 (1980); [Tyler](#), 177 Wash.2d at 699, 302 P.3d 165. Pursuant to [Vilella](#), an impoundment is lawful under [article I, section 7](#) only if, in the judgment of the impounding officer, it is reasonable under the circumstances and there are no reasonable alternatives. [Vilella](#), 194 Wash.2d at 460, 450 P.3d 170.

[31] ¶39 The impoundment was reasonable under the circumstances, and no alternatives existed in this case. The Court of Appeals correctly noted that Long told the officers his truck was in need of repairs and could not be driven.

[Long](#), 13 Wash. App. 2d at 735, 467 P.3d 979; *see also* CP at 301-02 (“OFFICER 1: So I’m assuming this [the truck] runs? ... MR. LONG: No, it doesn’t. It’s got a broken (inaudible)... OFFICER 1: You need to get that thing fixed as soon as possible ... and get it moving because somebody’s going to come through here, probably a parking enforcement officer.”). The parking enforcement officer knew of this. CP at 306 (parking enforcement officer arrived at the location where Long’s truck is parked and was told Long “can’t move it”). When Long’s truck was towed, there appeared to be no other alternative to move it.

¶40 Furthermore, the officers had authority of law to seize Long’s truck. Long violated the city’s 72-hour parking ordinance. SMC 11.72.440. He had no right to park on a public right of way. *See Galvis v. Dep’t of Transp.*, 140 Wash. App. 693, 706, 167 P.3d 584 (2007) (parking on a public right of way is a privilege); SMC 11.30.060 (a “vehicle ... may be impounded after notice of such proposed impoundment has been securely attached”).

¶41 Finally, Long contends that even if the initial impoundment was reasonable, holding his truck for an additional 21 days was unreasonable because the impoundment violated the homestead act. Suppl. Br. of Long at 19-21. We reject this argument. While it is far from acceptable that Long was deprived of his home for three


weeks, Long does not argue that it violated due process. At the Court of Appeals, Long claimed the city violated his substantive due process rights with deliberate indifference by depriving him of shelter and exposing him to inclement weather. [Long](#), 13 Wash. App. 2d at 731-33, 467 P.3d 979. The court rejected this argument in part because Long offered no case considering the doctrine outside the context of a [42 U.S.C. § 1983](#) claim. [Id.](#) at 732-33, 467 P.3d 979. Long did not seek review of the issue here.








[32] **[33]** ¶42 We note that our decision on the homestead act does not call into question the city’s independent authority to impound a vehicle. The Seattle Municipal Code provides this mechanism to enforce parking infractions. SMC 11.72.440. A vehicle owner can object to the impoundment and payment of fees, but the homestead act is not a sword to prevent impoundment. *Christensen*, 35 Wash. App. at 631, 668 P.2d 1301. Homestead protections are resolved upon enforcement, not issuance, of a parking ticket or impoundment of a vehicle. *See Enyart*, 17 Wash. App. at 184, 562 P.2d 648; *Domke*, 18 Wash.2d at 573, 139 P.2d 1017; *Sharp*, 30 Wash. App. at 839, 638 P.2d 627.

*107 III. Excessive Fines





¶43 Long also seeks relief under the state and federal excessive fines clauses. Pet. for Review at 17; WASH. CONST. art. I, § 14; U.S. CONST. amend. VIII. Washington’s constitution states, “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” WASH. CONST. art. I, § 14. The federal constitution provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.



[34] ¶44 This court has stated that [article I, section 14](#) provides greater protection than the Eighth Amendment for the purposes of cruel punishment. *E.g.*, [State v. Roberts](#), 142 Wash.2d 471, 506, 14 P.3d 713 (2000) (recognizing that the “Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment”); *accord* [State v. Manussier](#), 129 Wash.2d 652, 674, 921 P.2d 473 (1996) (citing [State v. Fain](#), 94 Wash.2d 387, 392-93, 617 P.2d 720 (1980)). Long has failed to provide an analysis under [State v. Gunwall](#), 106 Wash.2d 54, 720 P.2d 808 (1986), in support of his argument that the excessive fines prohibition under our state constitution






should be evaluated differently from the parallel provision in the United States Constitution. A  *Gunwall* analysis is not a talisman but an interpretive tool. When a party urges a different or more protective interpretation under our state constitution for the first time, we expect supportive briefing, particularly when the language of that provision is identical to the United States constitutional provision. Absent support for an independent analysis, we view [article I, section 14](#) and the Eighth Amendment as coextensive for the purposes of excessive fines.

[35] **[36]** ¶45 The excessive fines clause “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’ ”  *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis omitted) (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)). Thus, a qualifying “fine” is a payment to a sovereign as punishment for some offense.  *United States v. Bajakajian*, 524 U.S. 321, 327-28, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998);   *Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. 2909. The Supreme Court recently concluded that the clause is applicable to the states.  *Timbs v. Indiana*, — U.S. —, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019).












A. Historical Considerations

¶46 The excessive fines clause was taken “verbatim” from the English Bill of Rights and the Magna Carta, which guaranteed that a “[f]ree-man shall not be amerced^[7] for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment.”⁸  *Id.* at 687-88 (quoting Magna Carta). The Magna Carta required monetary sanctions to be “‘proportioned to the wrong’” and “‘not be so large as to deprive [an offender] of his livelihood.’ ”  *Id.* at 688 (alteration in original) (quoting   *Browning-Ferris*, 492 U.S. at 271, 109 S.Ct. 2909).




¶47 Despite these guarantees, Stuart kings continued to impose large fines on English subjects in order to raise revenue, harass political rivals, and detain those unable to pay.  *Id.* at 688 (majority),  694 (Thomas, J., concurring in judgment) (reviewing the heavy fines imposed on the critics


of the crown during the 17th century, such as a £100,000 levy against the sheriff of London for speaking against the Duke of York). After the last Stuart king was overthrown, the English Bill of Rights reaffirmed the Magna Carta’s excessive fines protection.  *Id.* at 688. Virginia was the first to adopt the familiar *108 language from the English Bill of Rights, and the Eighth Amendment was based directly on article I, section 9 of the Virginia Declaration of Rights of 1776.  *Id.*; see also   *Browning-Ferris*, 492 U.S. at 294, 109 S.Ct. 2909 (O’Connor, J., concurring in part and dissenting in part).⁹ All 50 states now include constitutional provisions against excessive fines.  *Timbs*, 139 S. Ct. at 689.






B. The Excessive Fines Cases






¶48 The Supreme Court largely ignored the excessive fines clause for two centuries. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 297 (2014) (“Though the Excessive Fines Clause was ratified in 1791, nearly two centuries passed before the Supreme Court undertook its first meaningful foray into analyzing the Clause.”). 1993 marked the Court’s first substantial engagement with excessive fines in  *Austin*. See  *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 803 n.2, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) (Scalia, J., dissenting) (stating that  *Austin* “rescued” the excessive fines clause “from obscurity”).  *Austin* held that civil and criminal forfeitures are subject to the excessive fines clause if they are at least partially punitive.  509 U.S. at 609-10, 113 S.Ct. 2801. In that case, a defendant pleaded guilty to a drug offense and forfeited his automobile body shop and mobile home.  *Id.* at 604-05, 113 S. Ct. 2801. The government argued on appeal that civil forfeiture was not “punishment” and could not be excessive under the Eighth Amendment.  *Id.* 607, 113 S. Ct. 2801. The Court disagreed, concluding that punishment “‘cuts across the division between the civil and criminal law.’ ”  *Id.* at 610, 113 S. Ct. 2801 (quoting  *United States v. Halper*, 490 U.S. 435, 447-48, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)). Civil proceedings “‘may advance punitive [and] remedial goals.’ ”  *Id.* (quoting  *Halper*, 490 U.S. at 447, 109 S.Ct. 1892). The relevant question, according to the Court, was whether a sanction

is “simply” or “purely” remedial or whether it has any punitive characteristics, in which case it “must be considered a punishment for the purpose of the excessive fines clause.”










  *State v. McClendon*, 131 Wash.2d 853, 883, 935 P.2d 1334 (1997) (plurality opinion); *see also*  *Austin*, 509 U.S. at 621, 113 S.Ct. 2801.

¶49 Five years later, the Court returned to excessive fines in  *Bajakajian*, in which a defendant was arrested at an airport for failing to declare that he and his family were transporting over \$350,000 in currency out of the country.



 524 U.S. at 324, 118 S.Ct. 2028. Federal law required persons to forfeit to the government any property involved in such an offense. 18 U.S.C. § 982(a)(1) (2012). The Supreme Court explained that proportionality was the appropriate standard to assess excessive fines and, specifically, that a punitive fine violates the Eighth Amendment if it is “grossly disproportional to the gravity of the offense.”  *Bajakajian*, 524 U.S. at 324, 118 S.Ct. 2028. The Court found the forfeiture of the entire sum was unconstitutionally excessive after considering that among other things, it was not an egregious infraction and the money was not connected to any illegal activities.  *Id.* at 337-40, 344, 118 S. Ct. 2028. Both  *Austin* and  *Bajakajian* remain the seminal cases in the Court’s excessive fines jurisprudence.

¶50 In 2019, the Court once more examined the excessive fines clause in  *Timbs*. There, a defendant pleaded guilty to dealing a controlled substance and conspiracy to commit theft.  *Timbs*, 139 S. Ct. at 686. The police seized the defendant’s Land Rover SUV (sport utility vehicle) purchased for \$42,000.  *Id.* At the civil forfeiture hearing, the trial court found the vehicle had been used to facilitate a criminal offense but its value constituted four times the maximum monetary fine for the drug conviction (\$10,000); thus, forfeiting the vehicle would be grossly disproportionate to the gravity of the offense.  *Id.* The Indiana Supreme Court did not examine excessiveness and instead held the excessive fines clause did not apply to state action. The Supreme Court granted review to answer this narrow question and *109 held that the clause is an incorporated protection applicable to the states under the Fourteenth Amendment.  *Id.*

C. Legal Principles

[37] [38] [39] [40] ¶51 It is self-evident that to trigger the Eighth Amendment’s excessive fines clause, a sanction must be a “fine” and it must be “excessive.” Because the clause limits the government’s power to extract payments as “punishment for some offense,”   *Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. 2909, qualifying fines must be at least “partially punitive.”  *Timbs*, 139 S. Ct. at 689. Therefore, the first step in an excessive fines inquiry is whether the state action is “punishment.”  *State v. Clark*, 124 Wash.2d 90, 102, 875 P.2d 613 (1994), *overruled in part on other grounds by*  *State v. Catlett*, 133 Wash.2d 355, 945 P.2d 700 (1997);  *Austin*, 509 U.S. at 610, 113 S.Ct. 2801. The second inquiry is whether the fine is constitutionally excessive.  *Clark*, 124 Wash.2d at 102-03, 875 P.2d 613;  *Bajakajian*, 524 U.S. at 334, 118 S.Ct. 2028. Courts engage in this inquiry de novo.  *Bajakajian*, 524 U.S. at 336-37, 118 S.Ct. 2028; *State v. Chenoweth*, 160 Wash.2d 454, 462, 158 P.3d 595 (2007) (interpreting the constitution is a question of law we review de novo).

i. “Punishment”

[41] ¶52 The Court of Appeals assumed without deciding that the impoundment of Long’s truck and the associated costs constitute a fine.  *Long*, 13 Wash. App. 2d at 730, 467 P.3d 979. Here, the parties disagree that either is a punishment and consequently a fine. Long argues that SMC 11.72.440(E) characterizes the impoundment and payment plan as a “penalty” for violating the 72-hour law, making them partially punitive. Suppl. Br. Long at 7; *see also* Consol. Br. of Resp’t/Cross-Pet’r Long (No. 78230-4-I Jan. 4, 2019) at 28-29. Seattle responds that the impoundment is not a fine because “ ‘deprivation by the government must be intended to be permanent.’ ” Seattle’s Suppl. Br. at 11 (quoting  *Coleman v. Watt*, 40 F.3d 255, 263 (8th Cir. 1994)). Long retrieved his truck, thus the impoundment was not permanent. *Id.* Regarding the associated costs, Seattle contends the payment plan is remedial rather than punitive because it was meant to recoup the towing and storage fees that the city paid on Long’s behalf. We agree with Long that the impoundment and associated costs are partially punitive

and constitute fines. [Austin](#), 509 U.S. at 610, 113 S.Ct. 2801.

¶53 If a sanction is partially punitive, it falls within the excessive fines clause. [Id.](#); see also [Tellevik](#), 83 Wash. App. at 372, 921 P.2d 1088 (“If the statutory provision has any purpose not solely remedial, the forfeiture is punishment within the meaning of the Eighth Amendment.”). 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 for by law.” (Emphasis added.) As the municipal and superior courts recognized, the plain language shows that one purpose of the ordinance is to penalize violators. See Hr’g (Mar. 2, 2018) at 50.

¶54 The associated costs were intended to reimburse the city for towing and storage fees, but they did not exist in isolation. The fees were imposed only as a result of the impoundment, which SMC 11.72.440(E) characterizes as a “penalty.” While the costs may be remedial, they are also punitive. See [Bajakajian](#), 524 U.S. at 329, 118 S.Ct. 2028 (citing BLACK’S LAW DICTIONARY 1293 (6th ed. 1990) (“[R]emedial action” is one “brought to obtain compensation or indemnity.”); [One Lot Emerald Cut Stones v. United States](#), 409 U.S. 232, 237, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972) (monetary penalty provides a “reasonable form of liquidated damages” and thus a “remedial” sanction for compensating the government for lost revenue)). We hold the impoundment and associated costs are both partially punitive.

¶55 Seattle does not meaningfully dispute the remedial versus punitive nature of the impoundment. Instead, the city argues that a fine must be a permanent loss as required by [Coleman](#). Seattle’s Suppl. Br. at 11; Answer to Pet. for Review at 6-7. In that case, the Eighth Circuit Court of Appeals stated that a government deprivation “must be intended to be permanent to constitute a fine, as in the case of civil forfeitures.” [Coleman](#), 40 F.3d at 263 (citing [Austin](#), 509 U.S. at 602, 113 S.Ct. 2801; [Alexander v. United States](#), 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993)). While [Austin](#) and [Alexander](#) concerned the permanent loss of property via forfeiture, neither requires it. [Austin](#), 509 U.S. at 604, 606-22, 113 S.Ct. 2801; [Alexander](#), 509 U.S. at 547-48, 558-60, 113 S.Ct. 2766.

¶56 Additionally, [Coleman](#) devoted “little discussion” to the argument that a temporary deprivation is an excessive fine. [Coleman](#), 40 F.3d at 263. Instead, the opinion focused on the subject of [Austin](#) and [Alexander](#) rather than their underlying reasoning. See [id.](#) The [Austin](#) Court explained that a forfeiture may serve a remedial purpose and still be subject to the excessive fines clause if it also serves “in part to punish.” [Austin](#), 509 U.S. at 610, 113 S.Ct. 2801; see also [Browning-Ferris](#), 492 U.S. at 265, 109 S.Ct. 2909. This inquiry looks to the function of a specific sanction, not its form or duration. See Benjamin Gillig, Note, *Nexus Rethought: Toward a Rational Factual Standard for Federal Criminal Forfeitures*, 102 IOWA L. REV. 289, 297 (2016) ([Austin](#) “emphasized the function that a forfeiture plays in a particular case”). It advances a categorical analysis rather than a bright line rule as suggested by Seattle’s interpretation. See [Tellevik](#), 83 Wash. App. at 372, 921 P.2d 1088 (interpreting Supreme Court excessive fines precedent as applying a “categorical” approach that examines whether a forfeiture constitutes a punishment depending on the purposes of the provision).

¶57 Though [Austin](#) took no direct position on whether a temporary deprivation may still be partially punitive, its reasoning supports this conclusion. Outside the parking infraction context, temporary vehicle deprivation is punitive. For example, former [RCW 46.55.350-.360](#) (2019), also known as “Hailey’s Law,” required officers to impound a vehicle when arresting drivers for DUIs (driving under the influence). LAWS OF 2011, ch. 167, § 3. The law also precluded drivers from redeeming their vehicles until 12 hours after it arrived at the tow truck operator’s storage facility. *Id.* Hailey’s Law was meant to “deter those arrested for driving or controlling a vehicle while under the influence of alcohol or drugs.” *Id.* § 2(1)(c) (emphasis added). Deterrence has traditionally been viewed as a goal of punishment. [Bajakajian](#), 524 U.S. at 329, 118 S.Ct. 2028.

¶58 This court held that Hailey’s Law violated [article I, section 7](#) and found the statute unconstitutional in [Villela](#), 194 Wash.2d at 462, 450 P.3d 170. See also LAWS OF 2020, ch. 117, § 4 (repealing Hailey’s Law). While in effect, however, Hailey’s Law required temporary deprivation of a car for DUI arrest as a deterrent. This temporary deprivation was

plainly a punishment. See [Bajakajian](#), 524 U.S. at 329, 118 S.Ct. 2028; [Tellevik](#), 83 Wash. App. at 372, 921 P.2d 1088. Under [Austin](#), 509 U.S. at 610, 113 S.Ct. 2801, and [Bajakajian](#), 524 U.S. at 329, 118 S.Ct. 2028, the law would qualify as partially punitive. Similarly, the temporary impoundment of Long's is a penalty, and so, it is partially punitive. SMC 11.72.440(E); [Austin](#), 509 U.S. at 610, 113 S.Ct. 2801; [Bajakajian](#), 524 U.S. at 329, 118 S.Ct. 2028.

[42] ¶59 Moreover, we are not bound by [Coleman](#)'s rather conclusory treatment of the Eighth Amendment. See [40 F.3d at 263](#) (devoting “little discussion” to the argument that a temporary deprivation is an excessive fine). On federal constitutional questions, we are bound only by decisions of the Supreme Court of the United States. [State v. Vance](#), 168 Wash.2d 754, 762 n.7, 230 P.3d 1055 (2010) (citing [State v. Radcliffe](#), 164 Wash.2d 900, 906, 194 P.3d 250 (2008); [Tricon, Inc. v. King County](#), 60 Wash.2d 392, 394, 374 P.2d 174 (1962)). We therefore anchor our interpretation on the Supreme Court's reasoning in [Austin](#) and [Bajakajian](#) rather than the Eighth Circuit's interpretation of those cases. Under the Court's precedent, the impoundment of Long's truck was partially punitive and constitutes a fine.

ii. “Excessive”




[43] [44] ¶60 Next, we consider whether the fines were excessive. [Bajakajian](#), 524 U.S. at 333, 118 S.Ct. 2028; [Tellevik](#), 83 Wash. App. at 372, 921 P.2d 1088. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” [Bajakajian](#), 524 U.S. at 334, 118 S.Ct. 2028 *111 (citing [Austin](#), 509 U.S. at 622-23, 113 S.Ct. 2801; [Alexander](#), 509 U.S. at 559, 113 S.Ct. 2766). A fine violates the excessive fines clause if it is grossly disproportional to the gravity of a defendant's offense. [Id.](#) at 336, 118 S. Ct. 2028.


¶61 Despite mandating a proportionality inquiry, the Court has not yet articulated a test to carry it out. See [id.](#) at

337-40, 118 S. Ct. 2028; David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 542 (2017) (“[T]he Supreme Court ... has not given clear or meaningful guidance for when a forfeiture should be deemed ‘excessive.’”). In lieu of such direction, lower courts have looked to [Bajakajian](#) for factors that the Court found persuasive.¹⁰ This has resulted in a “patchwork” of tests in the federal circuits. Pimentel, *supra*, at 543-44. For example, the Eleventh Circuit applies a three-factor test¹¹ and the Tenth Circuit a nine-factor test.¹² *Id.* at 544. Regardless of the factors, the various tests are consistent in their “general permissiveness.” *Id.*

[45] ¶62 This court adopted the Ninth Circuit's test to determine whether a fine is grossly disproportional. The test includes but is not limited to “ ‘(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.’ ” [State v. Grocery Mfrs. Ass'n](#), 195 Wash.2d 442, 476, 461 P.3d 334 (2020) (quoting [United States v. \\$100,348.00 in U.S. Currency](#), 354 F.3d 1110, 1122 (9th Cir. 2004) (citing [Bajakajian](#), 524 U.S. at 337-40, 118 S.Ct. 2028)); see also [Tellevik](#), 83 Wash. App. at 374-75, 921 P.2d 1088 (listing similar factors). [Bajakajian](#) does not require the consideration of “any rigid set of factors in deciding whether a punitive fee is” proportional to the offense. [United States v. Mackby](#), 339 F.3d 1013, 1016 (9th Cir. 2003).








¶63 Critical to the present case is whether this proportionality inquiry can or should include consideration of a person's ability to pay. [Timbs](#) notes that [Bajakajian](#) took “no position on ... whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine,” [139 S. Ct at 688](#), yet [Bajakajian](#) also observed that no argument was presented on the issue: “[r]espondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood and the District Court made no factual findings in this respect.” [524 U.S. at 340 n.15](#), 118 S.Ct. 2028 (citation omitted). While the Court has not yet decided whether ability to pay is required, the history of the Eighth Amendment suggests it is.

¶64 The Magna Carta—from which the Eighth Amendment descended—limited the government's power to impose punitive fines by, in part, forbidding penalties “so large as to deprive [a person] of his livelihood.”  *Browning-Ferris*, 492 U.S. at 271, 109 S.Ct. 2909. English freemen could be amerced only in such a way as to save “ ‘to him his contenment,’ ” a merchant “his merchandise,” and a serf his “wainage.”¹³  *Bajakajian*, 524 U.S. at 335-36, 118 S.Ct. 2028 (quoting Magna Carta); *see also*  *Timbs*, 139 S. Ct. at 694 (Thomas, J., concurring in judgment) (quoting 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND: FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 34 (8th ed. 1867) (noting the Magna Carta's provision that no person be amerced to the *112 “ ‘full extent of his means’ ”)). *Blackstone's Commentaries* echo this notion: no one “shall have a larger amercement imposed ... than his circumstances or personal estate will bear.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *372 (1769).

¶65 Across the pond, the Virginia Supreme Court of Appeals explained that its excessive fines clause reflected the traditional understanding that any “fine or amercement ought to be according to the degree of the fault *and the estate* of the defendant.”  *Jones v. Commonwealth*, 5 Va. 555, 558 (1799) (emphasis added). Thomas Cooley's esteemed constitutional treatise stated that the excessive fines provision requires a fine to “have some reference to the party's ability to pay it.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 328 (1868).





¶66 Nineteenth century lawmakers appear to have accepted this traditional understanding. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 883-84 (2013). In a 1864 speech to the United States Senate, one Pennsylvania Republican noted that an excessive fine “ ‘is a technical term’ ” and must “ ‘be determined from the condition of the man how much he could pay without touching the sustenance of his wife and children.’ ” *Id.* at 884 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan)). Though not uniformly accepted, many state courts applied this understanding of the excessive fines clause.¹⁴ For example, the Florida Supreme

Court concluded that “[t]he duration and quantity of each [fine]” depends on the “aggravation, or otherwise, of the offense, [and] *the quality and condition of the parties* ... the quantum, in particular, of pecuniary fines neither can nor ought to be ascertained by an invariable.” *Id.* (second alteration in original) (quoting *Frese v. State*, 23 Fla. 267, 270-71, 2 So. 1 (1887)).

¶67 A number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required. *E.g.*, *Oregon v. Goodenow*, 251 Or. App. 139, 153, 282 P.3d 8 (2012) (“When assessing the severity of a defendant's forfeiture, courts consider the amount of the forfeiture and the effect of the forfeiture on the defendant.” (citing  *United States v. Levesque*, 546 F.3d 78 (1st Cir. 2008);  *Browning-Ferris*, 492 U.S. at 266-67, 109 S.Ct. 2909));  *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. Cmwlth.2014) (“the excessive fines analysis ... requires ... a thorough examination of every property owner's circumstances”); Rachel J. Weiss, *The Forfeiture Forecast After Timbs: Cloudy with a Chance of Offender Ability to Pay*, 61 B.C. L. REV. 3073, 3108 (2020); Suppl. Br. of Long at 9 n.19 (citing law review articles in support). Federal circuit courts are split on the issue.  *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) (“[I]n the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause.”). *But see*  *United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (deeming a “ ‘defendant's *113 inability to satisfy a forfeiture at the time of conviction’ ” is not relevant to constitutional analysis (quoting  *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir. 2008))); *accord*  *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009).

¶68 The Colorado Supreme Court recently observed that history and precedent constitute “persuasive evidence that a fine that is more than a person can pay may be ‘excessive’ within the meaning of the Eighth Amendment.” *Dep't of Labor & Emp't v. Dami Hosp., LLC*, 2019 CO 47M, ¶ 30, 442 P.3d 94, 101. In addition to historical considerations, the Colorado court found that the “concept of ‘proportionality’ itself” supported considering ability to pay. *Id.* ¶ 31. A fine




that would bankrupt one person would be a substantially more burdensome fine than one that did not. *Id.*

[46] [47] ¶69 The weight of history and the reasoning of the Supreme Court demonstrate that excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances. The central tenant of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood.  *Timbs*, 139 S. Ct. at 688. Inherent in this safeguard is the recognition that “ ‘what is ruin to one man's fortune, may be a matter of indifference to another's.’ ”   *Browning-Ferris*, 492 U.S. at 300, 109 S.Ct. 2909 (O'Connor, J., concurring in part and dissenting in part) (quoting 4 BLACKSTONE, *supra*, *371). As one Pennsylvania court astutely noted, “[T]he excessive fines analysis under the Eighth Amendment requires more than ‘lip service.’ ... This requires a thorough examination of every property owner's circumstances.”  *1997 Chevrolet*, 106 A.3d at 871.

¶70 The homelessness crisis and widespread use of fines to fund the criminal justice system also fully support an ability to pay inquiry. Amici have demonstrated what any casual observer of the news already knows: America is facing a severe housing crisis. *E.g.*, Br. of Amici Curiae ACLU of Wash. et al. at 1; Benjamin Schneider, *CityLab University: Understanding Homelessness in America*, BLOOMBERG CITYLAB (July 6, 2020), <https://www.bloomberg.com/news/features/2020-07-06/why-is-homelessness-such-a-problem-in-u-s-cities> (reviewing a brief history, geographic and demographic trends, and the effect of COVID-19 on homelessness in America). In King County, nearly 12,000 people are experiencing homelessness, and over 2,000 of those individuals live in their vehicles. *Homelessness in King County 2019*, ALL HOME, <http://allhomekc.org/wp-content/uploads/2019/05/All-Homes-Infographic-V04.pdf> [<http://perma.cc/5LQX-ZCQE>]; Amicus Br. of Nw. Justice Project at 2-3.

¶71 Many factors have contributed to this emergency: volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices—all exacerbated by the global COVID-19 pandemic. Br. of Amici Curiae ACLU of Wash. et al. at 1-7 (examining the effects of the seizure of Seattle and surrounding lands from indigenous peoples and racially restrictive covenants on communities of color); see also RICHARD ROTHSTEIN,

THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 64, 97-99 (2017) (reviewing federal, state, and local housing policies that supported segregation such as redlining, that is the refusal to insure mortgages in black neighborhoods). 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.

¶72 Further, this court has recognized that punitive fines should not be sought or imposed as “ ‘ ‘a source of revenue.’ ” *Grocery Mfrs. Ass'n*, 195 Wash.2d at 476, 461 P.3d 334 (quoting  *Timbs*, 139 S. Ct. at 689 (quoting  *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (plurality opinion)). It has been said that “offender-funded justice” comprises much of the funding for criminal justice across the country, including traffic and parking violation fines. *E.g.*, Bryan L. Adamson, *114 *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 NW. J.L. & SOC. POL'Y 305, 315 (2020); Suppl. Br. of Long at 13. Courts scrutinize “governmental action more closely when the State stands to benefit.”  *Harmelin*, 501 U.S. at 979 n.9, 111 S.Ct. 2680 (lead opinion). Including an ability to pay inquiry for an excessive fines claim allows courts to do just that.

[48] ¶73 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. See *Dami Hosp.*, 2019 CO 47M, ¶ 31, 442 P.3d 94.

D. Application to Long

[49] ¶74 Our gross disproportionality test considers “ ‘(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. See *Grocery Mfrs. Ass'n*, 195 Wash.2d at 476, 461 P.3d 334; *Dami Hosp.*, 442 P.3d at 101. In light of these factors, we conclude that the impoundment and \$547.12 payment plan were unconstitutionally excessive.

¶75 First, the nature of the offense at issue is a civil parking infraction that carries a \$44 fine. SMC 11.31.121 (“Monetary penalties—Parking infractions”). The city certainly has an interest in keeping its streets clear and free of traffic, but the offense of overstaying one’s welcome in a specific location is not particularly egregious. *See* Seattle’s Suppl. Br. at 13. Moreover, the city has suspended enforcement of the 72-hour parking violation during COVID-19, signaling that the city views it as a relatively minor offense. *See* Amici Br. of Pub. Justice et al. at 8. Second, there is no evidence that the infraction was related to any other criminal activity. Third, the only penalty identified is the \$44 ticket and towing/storage costs. In this case, the magistrate waived the ticket and reduced the associated costs from approximately \$900 to \$550. If Long fell behind on payments, he would be subject to additional penalties in the form of late charges and collection efforts. Fourth, the extent of the harm caused was minimal. As the superior court noted, Long was not parked in an area of “very hot demand for city vehicles or otherwise.” Hr’g at 54. He was not parked in a residential neighborhood, and as noted, he was not cited for blocking or obstructing a roadway.

¶76 On the other hand, the city was harmed when it paid the costs of towing and impoundment. *See* SMC 11.30.160(B) (allowing a payment plan requires that “the City shall be responsible for paying the costs of impoundment to the towing company”). Seattle leans heavily on the notion of reimbursement as evidence that the payment plan is not excessive because “[t]he government is entitled to rough remedial justice.” [Clark](#), 124 Wash.2d at 103, 875 P.2d 613; Seattle’s Suppl. Br. at 15. [Clark](#) reasoned that the value of the forfeited property in that case was equivalent to the cost of prosecution, thus the government received rough remedial justice, and the court declined to consider the forfeiture as an excessive fine. [124 Wash.2d at 103-04, 875 P.2d 613](#). But Seattle overlooks a critical caveat: [Clark](#) also explicitly acknowledged that “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 the forfeiture is ‘excessive.’ ” [Id.](#) at 104, 875 P.2d 613 (emphasis added). Reimbursement is but one factor courts may consider in a proportionality inquiry.

¶77 Fifth, Long’s circumstances were such that he had little ability to pay \$547.12. When his vehicle was impounded, Long earned between \$300.00 and \$600.00 in addition to

\$100.00 in tribal fees per month. He told the magistrate at his impoundment hearing that he lived in his truck and had only \$50.00 to his name. Long was attempting to move himself out of homelessness by saving for an apartment. During that time, Long’s truck held his clothes, food, bedding, and various work tools essential to his job as a general tradesman. After the truck was towed, Long slept outside before seeking shelter from the cold weather, and he contracted [influenza](#). These facts indicate Long could not afford to pay the \$547.12 assessment. From October 13 until November 3, Long did not have his truck and could not access his tools, thus he [*115](#) could not find skilled labor jobs. During that period, he was homeless and sick, likely making very little money. The impoundment severely compromised Long’s ability to work—in other words, his livelihood. *See* [Bajakajian](#), 524 U.S. at 335, 118 S.Ct. 2028; [Timbs](#), 139 S. Ct. at 688 (“ ‘[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear.’ ” (quoting 4 BLACKSTONE, *supra*, *372)).

¶78 Moreover, paying \$50 per month when Long made at most \$700, would leave him \$650 with which to live. *Cf.* Hr’g at 57 (the superior court stated that Long’s “income per month is something like \$300 at best.”); *see also* Amici Br. of Pub. Justice et al. at 18 & n.12 (the self-sufficiency standard or minimum amount of money to adequately meet one’s needs for a Seattle resident is \$2,270 per month). It is difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life. *See* Amici Br. of Pub. Justice et al. at 17-19 (noting poor offenders facing large financial penalties routinely forgo basic needs, miss bills, and borrow at high interest rates); Professors Amicus Curiae Br. in Supp. of Resp’t at 9-16 (reviewing the “dramatically different type of justice” poor people face than “defendants with financial means,” including automatic license suspensions for failure to pay court fines, longer periods of homelessness, and persistent mental health concerns). Seattle asserts that treating the payment plan as excessive punishment is to “trivialize the Eighth Amendment.” Seattle’s Suppl. Br. at 14. Yet to do what the city asks is to ignore the Eighth Amendment entirely. This we cannot do.

¶79 Finally, though not referenced in our proportionality test, the Court of Appeals below considered the legislative approval of the fines. [Long](#), 13 Wash. App. 2d at 731, 467 P.3d 979. Pursuant to [Seher](#), 562 F.3d at 1371, if the value of the fine is within the range prescribed by a

legislative body, a strong presumption exists that a forfeiture is constitutional. The Court of Appeals found that towing and requiring a vehicle owner to pay the associated costs are the “exact penalties” authorized by the city council for violating the 72-hour rule. [Long](#), 13 Wash. App. 2d at 731, 467 P.3d 979. While the Seattle City Council likely contemplated impoundment when enacting the parking ordinance at hand, it did not approve the related costs. Long points out that the fees here were set by a contract negotiated with the towing company. Seattle responds that the towing company went through the city's competitive bidding process, indicating legislative approval for towing and storage costs. *See* Seattle's Suppl. Br. at 16. But the process of competitive bidding shows only that Lincoln Towing won the contract, it does not explain how the company determines towing and storage costs. *See* Hr'g at 20-21 (superior court oral ruling). Nor does the record contain this information. This is far from the congressionally approved maximum financial penalty set out in [Bajakajian](#). As such, it does not indicate a strong presumption of constitutionality.

¶80 For these reasons, the impoundment and associated costs deprived Long of his means of living and violated the excessive fines clause.

¶81 This decision is not intended to suggest that Seattle can never impound vehicles or impose costs associated with towing. Nor does it require city parking enforcement officers to determine a vehicle owner's ability to pay at the issuance of a parking infraction, contrary to amicus International Municipal Lawyers Association's assertion. *See* Amicus Br. of Int'l Mun. Lawyers Ass'n at 13. The above analysis focuses only on enforcement. *See* [State v. Catling](#), 193 Wash.2d 252, 264, 438 P.3d 1174 (2019) (noting that federal law does not preclude the imposition of a legal financial obligation but does restrict the use of Social Security for payment of the debt). The excessive fines clause prohibits the extraction of payment as a punishment for some offenses that would deprive a person of his or her livelihood. *See* [Bajakajian](#), 524 U.S. at 335, 118 S.Ct. 2028; [Timbs](#), 139 S. Ct. at 688. A natural venue for this inquiry is an impoundment hearing in municipal court. *See* SMC 11.30.120(D) (vehicle owner entitled to a hearing in municipal court to contest an impoundment).

CONCLUSION

¶82 We affirm the superior court's conclusion that Long's truck automatically qualifies [*116](#) as a homestead and that no declaration is required. [RCW 6.13.040\(1\)](#). However, because Seattle has not yet attempted to collect on Long's debt, former [RCW 6.13.070](#) does not apply, and Long's homestead act claim is premature. Thus, we reverse the superior court's decision that Seattle violated the act.

¶83 As to Long's excessive fines claim, we hold that the impoundment and associated costs are fines and that an ability to pay inquiry is necessary. Long has shown that he lacks the ability to pay the imposed costs.

¶84 Finally, we conclude that the payment plan as imposed was excessive. However, a reasonable fine may still be constitutional and appropriate. Accordingly, we remand the case to the trial court for further proceedings consistent with this opinion.

WE CONCUR:

Johnson, J.

Owens, J.

Stephens, J.

Gordon McCloud, J.

Montoya-Lewis, J.

González, C.J. (concurring)

¶85 I largely concur with the well-reasoned majority. I particularly agree that Steven Long's truck automatically qualified as his homestead because he obviously lived in it. In my view, though, the homestead act, ch. 6.13 RCW, also protected Long's home both from being towed and from being subject to forced sale, regardless of whether the sale was ultimately avoided.

¶86 By operation of law, as soon as the truck was towed, a lien was placed on it. [RCW 46.55.140\(1\)](#). This lien effectively attached the home as security for the impound debts. This violates the homestead act and never should have happened.¹ *See* former [RCW 6.13.070](#) (1987). If a home is automatically protected as a principal residence under former

RCW 6.13.010 (1999), it cannot be simply towed by an agent of the state and attached as security for the cost of that tow.² Even if that were permissible, requiring Long to consent to a fine for the privilege of redeeming his home was not. Under threat of forced sale, Long was forced to accede to a payment plan even though the magistrate knew that the vehicle was Long's primary residence. This, too, violates the clear protections of former RCW 6.13.070.

¶87 The homestead act protects “ ‘a home where [the] family may be sheltered and live beyond the reach of financial misfortune’ ” and the act is construed “liberally so it may achieve its purpose of protecting family homes.” *In re Dependency of Schermer*, 161 Wash.2d 927, 953, 169 P.3d 452 (2007) (alteration in original) (internal quotation marks omitted) (quoting *Pinebrook Homeowners Ass'n v. Owen*, 48 Wash. App. 424, 427, 739 P.2d 110 (1987)). These protections would be gutted if the homeowner had to wait until their home is seized and a forced sale scheduled before invoking the act's protections. The impoundment hearing is the very latest time the homestead act's protections could be meaningfully raised. See RCW 46.55.120(2)(b).

¶88 The city contends that the homestead act does not apply because a forced sale was *117 merely contemplated and because Long impliedly consented to having his home

impounded by failing to move it. See City of Seattle's Suppl. Br. at 9-10. But Long could not move his truck because he could not afford a new part. That is not consent. Long did not violate the parking ordinance willingly; he simply had no other option. Nor did Long willingly enter into an arrangement that provided him a benefit with some possible risk. See *Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle*, 101 Wash.2d 416, 421, 679 P.2d 928 (1984).

¶89 Simply put, the homestead act was intended to provide shelter for families. *Macumber v. Shafer*, 96 Wash.2d 568, 570, 637 P.2d 645 (1981) (citing *Clark v. Davis*, 37 Wash.2d 850, 226 P.2d 904 (1951)). The act bars the city from towing a vehicle that is occupied as a primary residence and from forcing an individual to agree to a payment plan to prevent that vehicle from being sold at a public auction. With these observations, I respectfully concur.

Yu, J.

Whitener, J.

All Citations

493 P.3d 94

Footnotes


- 1 The parties do not dispute that the impound charges for Long's truck totaled \$946.61. In municipal court, however, the fee was stated as \$917.57. Regardless of this total, Long was ordered to pay \$547.12, which he argues is unconstitutionally excessive.
- 2 Default under the payment plan would not have subjected the vehicle to forfeiture but could result in late charges and collection efforts.
- 3 Seattle argues that Long is not an aggrieved party and that the case is moot because he retrieved his truck and the Court of Appeals affirmed the voided payment plan. Answer to Pet. for Review at 5; RAP 3.1. Long counters that Seattle can still impose towing costs because the Court of Appeals eliminated only the storage costs; it did not preclude the city from “charging a vehicle owner for costs associated with the towing and impounding of a vehicle.” *Long*, 13 Wash. App. 2d at 715, 467 P.3d 979; Pet'r's Reply Br. at 8. Further, Long contends the case meets the exception to mootness due to the public nature of the issue, the need to provide future guidance, and the likelihood that the issue will reoccur. Pet'r's Reply Br. at 8-9 (citing *In re Eaton*, 110 Wash.2d 892, 895, 757 P.2d 961 (1988)). Long is correct that the excessive fines clause issue is public, arising in other jurisdictions, e.g., *Pimentel v. City of Los Angeles*, 966 F.3d 934 (9th Cir. 2020) (remanding case to determine whether parking fines were constitutionally excessive), and likely to reoccur considering the large population of persons living in vehicles. See Mem. of Amici Curiae in Supp. of Review at

3 (close to 12,000 people are homeless in Seattle/King County with more than 2,700 living in their vehicles). As a technical matter, we did not grant review of the standing issue. Our order grants Long's petition and the "issue contingently raised in the answer," that is, the homestead act. See Order, No. 98824-2 (Wash. Dec. 2, 2020) (emphasis added); Answer to Pet. for Review at 16-20. Even assuming the case is moot, Long persuasively shows the issues should be considered.



4 This list does not include all amici curiae that have submitted briefing in this court. We refer only to first amici author listed on the briefing.


5 RCW 6.13.100 allows a creditor to apply for the appointment of an appraiser when a judgment is executed on property. Once appointed, the appraiser submits a report on the value of the homestead, and the superior court will order either (1) a division of the property allowing the owner to retain a homestead and the creditor to seek enforcement of the execution on the remainder of the land or (2) sale of the property under the execution with no bid to be received unless it exceeds the amount of the homestead exemption. RCW 6.13.150, .160.

6 We understand the concurrence's interest in protecting individuals who find themselves living in their vehicles, facing the towing and impoundment of their homes. See concurrence at 1-2. Nevertheless, towing a vehicle is not a debt protected under the homestead act until that debt is adjudicated. The practical consequences of the concurrence's interpretation would also improperly shift the burden of determining the value of a homestead away from a court and onto parking enforcement officers. Such an interpretation transforms the act from a shield into a sword and would, at the very least, frustrate the statutory procedure for creditors pursuing the value of property exceeding the exemptions under former RCW 6.13.030. See RCW 6.13.090.

7 *Black's* defines "amerce" as "[t]o impose a fine or penalty that is not fixed but is left to the court's discretion" or "[t]o fine or punish in any manner." BLACK'S, *supra*, 103; see also  *Timbs*, 139 S. Ct. at 693 (Thomas, J., concurring in judgment) (noting that "amergements" are the medieval predecessors of fines).

8 "Contentement" is defined as "[f]reehold land held by a feudal tenant, [especially] land used to support the tenant. #Magna Carta (1215) exempted this property from seizure." BLACK'S, *supra*, 398.

9 Sadly, in spite of our vaunted independence, America followed our English forebears' history of economic abuse. See  *Timbs*, 139 S. Ct. at 688. After the Civil War, Southern states enacted "Black Codes," imposing "draconian fines" for violations of vagrancy and recreating the system of involuntary servitude.  *Id.* at 688-89.


10 Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 845-46 (2013) ("[E]ach circuit has had to develop its own version of the  *Bajakajian* [] multi-factor gross disproportionality test, with the gross disproportionality determination often characterized as an inherently fact-intensive inquiry." (internal quotation marks omitted)).


11  *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007).

12  *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1101 (10th Cir. 2002).

13 For the definition of "contentement," see *supra* note 8. *Black's* defines "wainage" as "[t]he plow, team, and other implements used by a person ([especially] a villein) to cultivate the soil" or the "[c]ultivated land or the profits from it." BLACK'S, *supra*, 1894.

14 See McLean, *supra*, at 885 & n.195 (citing *State v. Staub*, 182 La. 1040, 1044-45, 162 So. 766 (1935) ("What constitutes an excessive fine for the violation of a penal statute depends in part ... upon the ability of the defendant to pay. A fine which in one case would be only slight punishment, because easily paid, might in another case be excessive, because its payment would be ruinous to the convict."); *People v. Hershey Farms, Inc.*, 175 Misc. 641, 643, 24 N.Y.S.2d 163 (N.Y.Gen.Sess. 1941) (quoting 15 AM. JUR. *Criminal Law* § 551 (1938)) (" 'A fine is excessive if it seriously impairs his ability to gain a livelihood.' "); *Cohen v. State*, 173 Md. 216, 232, 195 A. 532 (Ct. App. 1937) ("[W]hen a fine is imposed, it should be done with due regard to the ability of the defendant to pay."); cf. *State v. Ross*, 55 Or. 450, 474, 104 P. 596, 106 P. 1022 (1909) ("[I]mprisonment ... for life, for the nonpayment of [a] fine, ... is a cruel and unusual punishment."). Not all state courts, however, agreed on this point. See, e.g., *Poindexter v. State*, 137 Tenn. 386, 392, 193 S.W. 126

(1917) (“A fine is proportioned to the gravity of the offense punished, and the financial ability of a defendant to pay is not ordinarily considered.”);  [Conley v. State, 85 Ga. 348, 11 S.E. 659 \(1890\)](#); [State v. Little, 42 Iowa 51, 56 \(1875\)](#) (“It seems to us that this is one of the cases which call for severe punishment. In view of the fact that the extent of the punishment in such cases is fixed by law at one thousand dollars, we think a fine of half that sum is far from being excessive in this case.”)).

- 1 Homesteads are not protected against debts secured by “mechanic’s, laborer’s, construction, maritime, automobile repair, material supplier’s, or vendor’s liens arising out of and against the particular property claimed as a homestead.” Former [RCW 6.13.080\(1\)](#) (2019). These exceptions are strictly construed and do not include an operator’s lien that arises from the towing of a vehicle. See  [Pinebrook Homeowners Ass’n v. Owen, 48 Wash. App. 424, 428-29, 739 P.2d 110 \(1987\)](#) (holding that an assessment lien does not qualify as one of the statutory homestead exceptions); see also [City of Algona v. Sharp, 30 Wash. App. 837, 842-43, 638 P.2d 627 \(1982\)](#) (stating that “[a]n inference must therefore be made that the legislature intended the omission” of lien types not listed in the statute).
- 2 Amici curiae Northwest Justice Project and Northwest Consumer Law Center note that impoundment and auction of a vehicle is an expedited process with minimal due process protections. Amicus Br. of Nw. Justice Project et al. at 15. In fact, “[t]here is a high likelihood that vehicle-sheltered individuals will not even receive the [towing] notice, since it is mailed to the registered owner’s physical address, at which the homeless individual likely does not reside.” *Id.* at 15-16 (citing [RCW 46.55.110\(a\)](#)). This provides additional support for an automatic homestead protection that prevents towing in the first instance, as it “may be the only meaningful protection” prior to impound and auction. *Id.* at 16.