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SENT VIA EMAIL: mhyman@auroragov.org

Michael J. Hyman
City Attorney, City of Aurora
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Aurora, CO 80012

Re: James Fisher

Dear Mr. Hyman,

The American Civil Liberties Union of Colorado (ACLU) represents James Fisher in his claims against the City of Aurora and the Aurora Municipal Court regarding debt-collection practices that unfairly punish poor people for their poverty. The city court has assessed against Mr. Fisher almost $1500 dollars in fees because he was too poor to make complete and timely payments to the court. As detailed below, these fees are unlawfully excessive, and most of them were either unauthorized by law or erroneously assessed. We write because you requested an opportunity to consider resolution of Mr. Fisher's claims without formal legal action. We appreciate the request. This letter provides some factual and legal background on Mr. Fisher's case and includes a settlement demand.

I. Overview

In 2012, Mr. Fisher was convicted in the Aurora Municipal Court of three municipal offenses – two for open container (issued on the same night) and one for driving without insurance. The court sentenced Mr. Fisher to pay a total of $678 in fines and costs for the three cases. Mr. Fisher, who was homeless and jobless at the time of his third conviction, was placed on a single payment plan that jointly addressed debt in all three of his cases.

Since his convictions, Mr. Fisher has had only intermittent day labor work and has been living between homeless shelters and hotels. Nevertheless, he has made significant efforts to pay his debt to the court. Specifically, he has made 19 payments totaling $1498 on his 3 cases. Still, he could not always make his full payment on time according to his payment plans. As a result, the Aurora Municipal Court assessed Mr. Fisher a total of $1680 in additional fees and issued 14 warrants for his arrest. He has been arrested on these warrants 3 times. To Mr. Fisher's extreme frustration, after years of making payments that total far more than his original debt, the court says he still owes $860.

Almost all of the $1680 in additional court fees was due to the Aurora Municipal Court's repeated assessment of $25 "failure-to-appear" fees and $75 warrant fees when Mr. Fisher

missed a payment, was late for a payment, made a partial payment, or did not appear on a payment date. These fee assessments are excessive and disproportionate given the minor nature of Mr. Fisher's offenses, his substantial efforts to pay, and his extreme poverty. Further, as we detail below, the court erroneously assessed many of the fees against Mr. Fisher when it double or triple charged him failure-to-appear and/or warrant fees for a single missed payment. Many of the fees were also assessed without statutory authority, or in violation of the Constitution, or both. Without these improper assessments, we calculate that Mr. Fisher would have paid his balance in full and his cases would have been closed as of December 30, 2013. This would mean that Mr. Fisher has overpaid his debt by at least $790 and that the City has been unjustly enriched by this amount.

Based on these facts, and the further detail provided below, we have advised Mr. Fisher that he has strong legal and equitable bases to demand that Aurora remit his remaining court debt and refund his overpayments. While Mr. Fisher welcomes the opportunity to resolve this matter informally, if settlement talks fail, he will file a combination Rule 106 and Section 1983 action against the City of Aurora and the Aurora Municipal Court.

II. Background on municipal court practice

In 2014, the Colorado legislature enacted HB 14-1061, which amended C.R.S. § 18-1.3-702, to ensure that impoverished Coloradoans were not jailed when they were unable to pay court-imposed debt. To accomplish this goal, the new statute prohibited all courts of record in Colorado from issuing warrants for "failure to pay." We hoped that this law would prompt Colorado courts to end the practice of issuing arrest warrants based solely on a poor defendant's missed payment. While district and county courts complied with the letter and spirit of the new law, most municipal courts in Colorado – including Aurora's – skirted the law by issuing failure-to-appear warrants at least as frequently and to serve the same function as the failure-to-pay warrants that were prohibited by the 2014 law. Municipal courts accomplished this by making every payment date under a payment plan a mandatory court appearance if the defendant did not pay. When a defendant did not pay or appear, the court often issued a failure-to-appear warrant. Of course, these warrants would never have been issued had the individuals paid their debt; so the warrants were, in essence, for failure to pay.

This year, the legislature closed the loophole. It passed HB 16-1311, again amending C.R.S. § 18-1.3-702, this time to explicitly render unlawful municipal courts' practice of issuing failure-to-appear warrants in lieu of failure-to-pay warrants. The bill passed with substantial bipartisan support after legislators learned of the extensive and largely uncontroverted evidence that municipal courts were exploiting a loophole in the 2014 law and thereby thwarting the legislature's intent.[1] The practices of the Aurora Municipal Court were at the center of legislative testimony that led to passage of the 2016 bill. There was compelling testimony from the ACLU, the Aurora Public Defender's Office, James Fisher, and even Chief Judge Richard Weinberg about the Aurora Municipal Court's consistent practice of issuing post-conviction failure-to-appear warrants for many poor defendants who could not pay their debt to the court.

[1] *See, e.g.*, comments by Representative Daniel Kagan on the House floor upon third reading of HB 16-1311 on April 8, 2016, available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=15&clip_id=9368 (at 32:42).

A good deal of the testimony surrounding HB16-1311 underscored the outsized burden Aurora's system of court debt collection places on poor people – working, impoverished defendants put on unrealistic payment plans by the court either had to spend half a day at the courthouse once or twice a month to appear before a judge and explain their continued inability to pay *or* face possible arrest. It should come as no surprise that poor people, especially those working low-wage jobs or who have child care responsibilities, often found it impossible to make these regular court appearances. To make matters worse for the poor, the Aurora Municipal Court commonly assessed a $25 failure-to-appear fee for each missed payment date and often a $75 warrant fee. Thus, for every missed payment date, a defendant could easily rack up $100 in additional fees (or more, as will be discussed below), which can quickly lead to a poor defendant's debt mushrooming to a sum far greater than the original sentence.[2]

III. Mr. Fisher

Mr. Fisher is a victim of these unfair practices of the Aurora Municipal Court. In 2012, he pleaded guilty to three municipal offenses – two for open container and one for driving without insurance.[3] He was sentenced to pay a total of $678 in fines and costs for the three cases.[4] He went on a payment plan that addressed all three cases together.[5] And Mr. Fisher did make payments – 19 of them totaling $1498 – more than twice the amount of his original sentence.[6] While it is true that Mr. Fisher did not always pay or appear as scheduled, there is ample evidence (besides the fact that he has paid almost $1500 to the court) that Mr. Fisher has sincerely attempted to resolve his debt. On top of his 19 separate payments, Mr. Fisher appeared

[2] *See, e.g.*, 2015-4-15, *Tr., 4:16-18.* (As one judge remarked in court to Mr. Fisher: "You might as well just hand the city of Aurora a $100 bill every time you don't come talk to us.")

[3] Mr. Fisher was issued summons J157014 and J172219—both for open container—within two hours on the same night (August 10, 2012). Later, on October 11, 2012, Mr. Fisher was issued summons E489603 in which he was charged with (1) u-turn prohibited and (2) no proof of insurance. The "u-turn prohibited" charge was dismissed upon Mr. Fisher's plea of guilty to no proof of insurance.

[4] Mr. Fisher was originally sentenced to pay a $100 fine in J157014 (open container). He was sentenced to pay $264 in J172219 (open container), including a $200 fine plus $35 in court costs and a $29 VWAF Fee. He was sentenced to pay $314 in E489603 (no proof of insurance), including a $250 fine (with an additional $250 suspended) plus $35 in court costs and a $29 VWAF Fee. We do not challenge Mr. Fisher's original sentence.

[5] Initially, payments were to be applied towards J157014, with his obligation in J172219 "trailing." *See* November 13, 2012 entries in the Addendums to Summons in case J172219 (noting "money to trail J157014") and case J157014 (noting "money trailing fr J172219"). Later, after Mr. Fisher was sentenced in E489603 on January 25, 2013, a Stay of Execution agreement was entered—but where the amount due would normally be filled in, the clerk simply wrote: "trails J172219."

[6] According to the court's notes ("Addendum to Summons") in cases J157014, J172219 and E489603, Mr. Fisher made the following payments: (1) $100 on November 13, 2012, (2) $70 on December 14, 2012, (3) $70 in January 2013, exact date unclear, (4) $40 on March 21, 2013, (5) $200 on November 25, 2013, (6) $200 on December 10, 2013, (7) $204 on December 30, 2013, (8) $100 on February 18, 2014, (9) $100 on March 18, 2014, (10) $100 in April 18, 2014, (11) $50 on May 27, 2014, (12) $174 transferred from bond on August 4, 2014, (13) $25 on October 14, 2014, (14) $5 on February 4, 2015, (15) $10 on April 17, 2015, (16) $10 on May 18, 2015, (17) $20 on July 27, 2015, (18) $10 on August 17, 2015, and (19) $10 on September 24, 2015.

in court on at least 11 occasions as a voluntary "walk in," when no court appearance had been scheduled, to discuss problems with payment.[7]

Still, the Aurora Municipal Court piled hundreds of dollars of fees on Mr. Fisher for his inability to pay in full and on time, even though the court was well-informed that Mr. Fisher was deeply impoverished and faced serious financial obstacles to paying in full and regularly appearing in court. Mr. Fisher told the court on several occasions that he could not afford to make payments; that he was homeless; that he was at times unemployed; and that even when he was employed as a day laborer, he was often unable to come to court because he would miss out on a day of pay, which would mean not being able to pay for his hotel room and having to sleep in a shelter or on the street. [8]

The Aurora Municipal Court placed Mr. Fisher on several different payment plans during the course of the case, many of which were unrealistic given his extreme poverty. For example, starting on March 21, 2013, Mr. Fisher was placed on a payment plan that required twice-monthly payments of $200 or more.[9] Mr. Fisher, who was homeless and unemployed at the time, could not keep up with the plan. The court issued warrants for Mr. Fisher's arrest when he failed to make the twice-monthly payments.[10] On November 25, 2013, Mr. Fisher voluntarily appeared before the court to discuss problems with making his payments. *See 2013-11-25 Tr.* At the appearance, Mr. Fisher explained to the court that he had been homeless, was just moving into a hotel, and had just begun a temp job. Still, he said he could pay $40 that day and could commit to that same $40 payment every two weeks. The court refused the offer stating: "$40 isn't enough payment."[11] The court pointed out that Mr. Fisher had recently managed to post bond of $187.50 to get out of jail when he was arrested for failing to adhere to his payment plan.[12] Mr. Fisher explained that he had posted only $100 of his own money to bond out, and that his mother had given him the rest. Still, the court pressured Mr. Fisher to increase his

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[7] Mr. Fisher appeared as a voluntary "walk in" on the following dates: November 13, 2012, January 14, 2013, March 21, 2013, November 25, 2013, December 31, 2013, January 16, 2014, April 16, 2014, May 21, 2014, August 22, 2014, January 26, 2014, and July 20, 2015 (*see* Records of Action for cases J157014, J172219 and E489603). Five of the times Mr. Fisher "walked in," there was an active warrant for his arrest (*see* the following warrants: (1) #W1209101 and #W1209102, active as of Mr. Fisher's appearance on November 13, 2013, (2) #W1301720, #W1301721 and #W1301722, active as of Mr. Fisher's appearance on March 21, 2013, (3) #W1411689, active as of Mr. Fisher's appearance on January 26, 2015, (4) #W1501214, by which Mr. Fisher was taken into custody when he appeared voluntarily on February 24, 2015, and (5) #W1505516, active as of Mr. Fisher's appearance on July 20, 2015.

[8] *See, e.g.* 2015-4-15, *Tr., 4:24-5:3* ("But again, living close to an indigent situation, if I don't go to work I lose out on $88 a day, which means I could possibly be back out on the street and I'm trying to be stable and try to make sure that I make the payments."); *see also* 2013-12-31, *Tr., 5:7-12*; 2014-5-21 *Tr., 7:2-5*; 2014-8-22, *Tr., 4:11-5:1*; 2015-01-26, *Tr., 4:22-5:8*.

[9] *See* Addendums to Summons and Stay of Executions entered on March 21, 2013 in cases E489603, J172219 and J157014.

[10] See Warrant #W1306980 in case J157014, Warrant #W1306979 in case J172219, and Warrant #1306981 in case E489603—all issued on August 7, 2013. Mr. Fisher turned himself in on these warrants to the police on November 2, 2013.

[11] *See 2013-11-25 Tr., 6:14.*

[12] It is worth noting that Mr. Fisher voluntarily turned himself in on the warrant issued for failure to pay or appear.

payment, and he ultimately succumbed. As Mr. Fisher explained to the court, he was willing to give the court more than he could afford because he wanted to avoid being jailed and thereby losing his hotel room and job.[13]

Despite Mr. Fisher's protestations, the court put him right back on the plainly unworkable $200 twice-monthly payment plan that had resulted in his arrest only a few weeks before. Mr. Fisher nonetheless made significant sacrifices to try to keep up with the payment schedule. He made a $200 payment that day, followed by two additional on-time payments – totaling $604 in just over a month. During this time, Mr. Fisher had to forego basic necessities like food and shelter. As Mr. Fisher explained to the court, he was staying at a homeless shelter and selling his blood plasma in order to make these payments.[14] Still, predictably, Mr. Fisher was ultimately unable to keep up with the payment schedule.

Mr. Fisher asked the court on several occasions to reconsider the balance due.[15] He argued that he had already paid more than his original fines and costs and that the remaining late fees were excessive given his payment history and poverty.[16] He repeatedly explained to the court that his failures to pay and/or appear were a result of his poverty. For instance, on January 26, 2015, Mr. Fisher truthfully told the court that he had been homeless or on the verge of homelessness for the past three years, that he was paying night-to-night in a hotel, working at a temp agency, and that missing out on one day's pay of $88 to come to court meant he likely would be on the street.[17] The court purported to review the relevant case files, but then concluded that Mr. Fisher had made only one payment on the case, ignoring the almost $1500 of payments he had made on the other two cases that the court had earlier prioritized for payment. The court concluded: "I'm not waiving anything. Your motion is denied."[18]

As you may know, Mr. Fisher provided compelling testimony in the House and the Senate in favor of HB 16-1311. His story touched and disturbed many legislators and even judges from other municipalities.[19] Mr. Fisher's story highlights the similarities between

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[13] 2013-11-25, *Tr., 7:9-13* ("I can increase [my payment] just so I don't go to jail. I just reestablished residence, I am working on a job. To turn around and go to jail is going to turn around have me to start my beginning all over.").

[14] *See* 2013-12-31 *Tr., 5:8-11.* ; *see also* 2013-12-31 *Tr., 5:23-24.*

[15] Mr. Fisher requested reconsideration of his outstanding balance on the following dates: December 31, 2013; April 16, 2014; May 21, 2014; August 22, 2014; January 26, 2015; and December 16, 2015. The court denied all of his requests, except in one instance the court agreed to waive $25 if Mr. Fisher made a $125 payment.

[16] *See, e.g.*, 2013-12-31, *Tr., 4:20-5:4*; 2014-4-16, *Tr.,3:13-17*; 2014-5-21, *Tr., 6:16-25*; 2014-08-22, *Tr., 3:13-19*; 2015-01-26, *Tr., 3:4-16*; and 2015-12-16 *Petition for Postconviction Relief Pursuant to Crim. P. 35(c)*, at p. 2.

[17] *2015-01-26, Tr. 4:22-5:8; accord 2015-4-15, Tr., 4:24-5:5.*

[18] *2015-01-26 Tr., 6:1-2.*

[19] *See, e.g.*, comments by Representative Jovan Melton on the House floor upon third reading of HB 16-1311 on April 8, 2016, available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=15&clip_id=9368 (at 36:12); comments by Senator Morgan Carroll concerning HB 16-1311 before the House Judiciary Committee on April 27, 2016, available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=47&clip_id=9567 (at 38:49); *see also* THE GAZETTE, Under proposed bill, Colorado's municipal courts would be unable to jail someone for failure to pay, 2016-04-27, *available at*

practices of the Aurora Municipal Court and practices that the Department of Justice criticized severely in a lengthy public report about Ferguson, Missouri. There, the municipal court was intentionally funded on the backs of the most desperately poor members of the community, with no concomitant benefit to public safety.[20]

IV. Law

Mr. Fisher has several powerful legal and equitable bases for demanding that Aurora remit his debt and refund his overpayment. First, Mr. Fisher's debt was created by grossly excessive fees assessed by the court in error and/or without statutory authority. Second, the court's total fee assessments against Mr. Fisher violate the Due Process and Excessive Fines Clauses of the United States and Colorado Constitutions. Third, the City of Aurora, in accepting Mr. Fisher's overpayments into its general fund, was unjustly enriched in violation of state law. Finally, and perhaps most importantly, the equities in this case tip strongly in favor of complete relief for Mr. Fisher and other similarly situated Aurora Municipal Court defendants. Certainly Mr. Fisher has been more than punished for the three minor offenses he committed four years ago – he has paid more than twice his original debt and has been incarcerated three times. Moreover, Mr. Fisher's debt to the court stems from a debt-collection practice that the legislature has now firmly rejected. The City of Aurora should not continue to benefit financially from that rejected practice.

A. Erroneous and unauthorized fee assessments

In the ACLU's view, all but $30 of $1680 in additional fees the Aurora Municipal Court assessed against Mr. Fisher were unwarranted.[21] As is detailed further below, $825 in warrant and failure-to-appear fees were assessed erroneously, mostly due to the court's practice of double and sometimes triple charging for a single missed payment date. Additionally, all $1,050 in warrant and "stay of execution" fees were unlawfully assessed, because the fees are not authorized by statute or ordinance. Finally, many of the failure-to-appear and warrant fees were unlawfully excessive because they sought money from defendants that far exceeds the actual costs to the City. Indeed, had the Aurora Municipal Court not assessed erroneous and legislatively-unauthorized fees against Mr. Fisher, he would have paid his balance in full and his cases would have been closed on December 30, 2013. Because of the court's unsupportable fee assessments, however, Mr. Fisher has overpaid by $790 to date.[22]

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http://gazette.com/under-proposed-bill-colorados-municipal-courts-would-be-unable-to-jail-someone-for-failure-to-pay/article/1574972.

[20] United States Department of Justice Civil Rights Division, Report on the Investigation of the Ferguson Police Department (March 4, 2015), available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[21] Mr. Fisher was assessed a $30 OJ/W fee, which the ACLU does not challenge.

[22] In further communications with the City, we can share a detailed chart reflecting our calculations.

i. The Aurora Municipal Court erroneously assessed failure-to-appear and warrant fees

After closely analyzing the court records in Mr. Fisher's three cases, we believe that $825 in failure-to-appear and warrant fees were assessed erroneously. The most persistent and significant assessment error we discovered was a court practice of double and triple charging failure-to-appear fees and warrant fees when Mr. Fisher missed a single payment. Each of Mr. Fisher's payment plans was designed to jointly address debt across all active cases through a payment practice the Aurora Municipal Court calls "trailing." This meant that, throughout the progression of the active cases, the municipal judge designated one case to be paid first, with all others "trailing" behind.[23] At all times, Mr. Fisher reasonably understood that he had an obligation to make only one payment on one case at a time (or to appear and explain why he could not make that payment).[24]

Yet, in ten instances, the court assessed warrant or failure-to-appear fees simultaneously across multiple active cases, including those that were supposed to be "trailing," for a single missed payment date.[25] For example, on February 14, 2013 Mr. Fisher was unable to make his monthly payment of $70 in J172219.[26] At the time, J172219 was expressly prioritized for

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[23] In response to a request for definitions, administrative guidance or directives concerning the Aurora Municipal Court's practice of "trailing," the clerk responded on June 2, 2016, that:

> Orders for payment of fines to "trail" are issued by the judge. The judge will order that the payment of a fine "trail" stays that have been granted in prior cases. Court Administration has been authorized to approve payment plans for eligible persons which will necessitate a prioritization of the application of the payments received. This will result in the payments for newer cases "trailing" older ones. The Stay of Execution officer will tailor a payment plan based on the defendant's request and/or financial circumstances.

[24] *See, e.g.*, Court Notes on 2012-11-13 in J172219: "money to trail J157014;" Court notes on 2013-03-21 in E489603: "Payment on J172219 & J157014 to trail this case now." For discussion in court, s*ee, e.g.,* 2013-3-21, *Tr., 4:15-5:20*; 2013-11-25, *Tr., 4:16-25*; 2013-12-31, *Tr., 8:20-22*; 2014-04-16, *Tr., 4:4-15.*

[25] Mr. Fisher was assessed simultaneous fees across multiple cases on the following 10 dates:

- *October 29, 2012* (failure-to-appear fees assessed in each J157014 and J172219),
- *October 31, 2012* (warrant fees assessed in each J157014 and J172219),
- *January 22, 2013* (failure-to-appear costs assessed in each J157014 and J172219),
- *February 14, 2013* (failure-to-appear fees assessed in each J157014, J172219 and E489603),
- *February 27, 2013* (warrant fees assessed in each J157014, J172219 and E489603),
- *April 22, 2013* (failure-to-appear costs assessed in each J172219 and E489603),
- *July 22, 2013* (failure-to-appear fees assessed in each J157014, J172219 and E489603),
- *August 7, 2013* (warrant fees assessed in each J157014, J172219 and E489603),
- *November 22, 2013* (failure-to-appear fees assessed in each J157014, J172219 and E489603),
- *April 17, 2014* (failure-to-appear costs assessed in each J157014 and J172219).

[26] See Stay of Execution executed on January 14, 2013 in J172219, requiring payment on January 22, 2013 (postponed from January 14, 2013) as well as the 14th of each month thereafter. There was no obligation to pay in any other case.

payment, with the other cases "trailing."[27] Nevertheless, because of the single missed payment, the court assessed three $25 failure-to-appear fees and three $75 warrant fees – one for each case.[28] Thus, Mr. Fisher was charged $300 for a single missed payment. We believe that under the Aurora Municipal Court's "trailing" model, all such simultaneous assessments were made in error.[29]

ii. The court lacked statutory authority to assess warrant fees and stay-of-execution fees

"A court may assess costs only if statutory authority exists to do so." *People v. Sinovcic*, 304 P.3d 1176 (Colo. Ct. App. 2013); *accord Bd. of County Comm'rs v. Wilson*, 34 P. 265, 266 (1893). ("The right to reimbursement for costs expended is therefore purely statutory. Without a statute giving it, it does not exist."). State law empowers municipal judges to "assess costs, as established by the municipal governing body by ordinance" against defendants who plead guilty or nolo contendere to a municipal ordinance violation. C.R.S. § 13-10-113(3). The Aurora City Council has enacted only two ordinances empowering judges to assess costs, Sections 50-36 and 50-37 of the Aurora Municipal Code. A significant driver of the debt Mr. Fisher owes to the court is fees (a subcategory of costs)[30] that are *not* explicitly authorized by city ordinance – namely $975 in warrant fees and $75 in stay of execution fees. Because these fees were not "established by the municipal governing body by ordinance" as required by C.R.S. § 13-10-113(3), the court had no authority to assess them.

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[27] All payments thus far had been applied towards J172219 with J157014 trailing (*see* Stay of Execution entered on January 14, 2013 in J172219). When Mr. Fisher was later sentenced in E489603 on January 25, 2013, a Stay of Execution was entered in this third case; where the amount due would normally be filled in the form simply states: "trails J172219."

[28] See the City of Aurora Disposition Screen Reports for cases J157014, J172219 and E489603 showing issuance of failure-to-appear fees in each case on February 14, 2013, as well as warrant fees in each case on February 27, 2013.

[29] There are at least two other instances in which the Aurora Municipal Court assessed fees erroneously against Mr. Fisher:

- On October 19, 2012—after appearing before the court for sentencing, Mr. Fisher was assessed $200 in failure-to-appear and warrant fees for failing to stop at the clerk's window to set up a payment plan. Even the City of Aurora's own ordinances concerning "failure to appear" do not include the failure to stop at the clerk's window as a justifiable basis for these fees. Aurora Municipal Code §§ 50-33(a) and 50-36(5).
- In a separate instance on July 22, 2013, the municipal court assessed against Mr. Fisher $300 in failure-to-appear and warrant fees when there was no express obligation to appear in court. These assessments were erroneous because Mr. Fisher never received notice to appear on this date.

[30] "Fees" are considered a type of cost. *See, e.g.*, C.R.S. § 18-1.3-701(2) (state statute delineating the costs state courts may charge convicted defendants includes many "fees" as a type of cost, including for instance, a "docket fee", a "jury fee", and a court reporter fee). Clearly, a court may not escape the well-established requirement that any cost assessment must be supported by statutory authority simply by calling the "cost" a "fee."

iii. The court improperly assessed fees far in excess of actual costs to the City

In Colorado, it is clearly established that any court cost/fee assessment is excessive if it does not reasonably approximate actual costs for the prosecution of the defendant. Indeed, the Colorado Court of Appeals has held: "Costs are imposed to reimburse the state for actual expenses incurred in prosecuting a defendant," and "[t]he assessments are limited to the actual costs incurred by the state or state agency." *People v. Howell*, 64 P.3d 894, 899 (Colo. Ct. App. 2002); *accord People v. Palomo*, 272 P.3d 1106, 1110-13 (Colo. Ct. App. 2011). Mr. Fisher has several bases for arguing that the costs and fees assessed against him grossly exceeded actual expenses related to his prosecution and were so arbitrary, unreasonable and unfair as to constitute an abuse of the court's discretion.

First, there can be no fiscal justification for double or triple charging Mr. Fisher for a single missed payment date. Clearly, these double and triple charges do not reasonably approximate actual expenditures by the City and, therefore, do not meet the definition of "costs" allowable by statute. Second, the amount of the warrant fee is susceptible to a legal challenge for gross excessiveness. The warrant fee of $75 far exceeds the actual costs to the municipality associated with issuance of warrants, especially those that are not executed.[31] In Mr. Fisher's case, he was arrested only three times, although thirteen warrants were issued against him.[32] For the ten warrants which were never executed, we understand the City had to do little more than type information into the City's warrants system. The $750 charge for these 10 warrants is grossly excessive compared to actual costs to the City.

Similarly, the $25 failure-to-appear fee assessments in Mr. Fisher's case do not appear to reimburse the court for any actual expenditure. Presumably a failure-to-appear fee might be justified as reimbursement to the court for the wasted judicial resources when the defendant fails to appear at a time the court has set aside to see him or her. When Mr. Fisher did not appear for payment dates, however, the court had not set aside any special time to see him. The court did not plan for or expect the vast majority of defendants to show for these dates. Because there were negligible judicial resources that were wasted associated with Mr. Fisher's failure to appear on a payment date, any assessed failure-to-appear fees are excessive compared to actual costs.

B. Certain fees assessed against Mr. Fisher violated his right to due process of law

Mr. Fisher suffered a procedural due process violation when the court failed to provide him adequate notice of the costs and fees assessed against him and a reasonable opportunity to challenge those assessments. Due process requires notice of and a meaningful opportunity to contest deprivation of a protected property interest.[33] *See, e.g., In re C.W. Mining Co.*, 625 F.3d

[31] Notably, state and county courts do not assess warrant fees at all, except in traffic cases which by statute require a $30 "administrative processing" fee prior to reinstating a driver's license if a warrant was issued on the underlying traffic ticket. C.R.S. § 42-2-118(3)(c).

[32] For two of the three arrests, Mr. Fisher voluntarily turned himself in on active warrants.

[33] Mr. Fisher certainly has a protected property interest in his own money. *See Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1176 (11th Cir. 1993) ("The plaintiffs clearly have

1240, 1244 (10th Cir. 2010). Adequate notice under the Due Process Clause must be "reasonably calculated" to apprise the interested parties of the deprivation and to "'afford them an opportunity to present their objections'" to that deprivation. *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110 (10th Cir. 2001) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also Wicks v. Colvin*, 2013 U.S. Dist. LEXIS 161091, *9 (D. Colo. Nov. 12, 2013) ("Due process requires that before a person can be deprived of a property interest, she must have at a minimum notice of the deprivation and a meaningful opportunity to contest it.").

The Aurora Municipal Court failed to provide Mr. Fisher with adequate notice of the specific costs and fees assessed against him. The lack of notice deprived him of a meaningful opportunity to present objections to those assessments. Despite a statute mandating that defendants are entitled to a bill of costs,[34] the court did not provide Mr. Fisher any document detailing the specific costs and fees assessed against him, nor did the court orally advise him of those specific assessments. Indeed, it took the ACLU's legal department weeks to study handwritten court notes and other court records to fully comprehend what costs and fees were assessed against Mr. Fisher and for what reasons. Without notice of the specific assessed costs, Mr. Fisher did not and could not have known that the Aurora Municipal Court fees were assessed erroneously and/or without statutory authority. This lack of adequate notice deprived him of a meaningful opportunity to challenge the fees assessed against him. This constitutional violation caused Mr. Fisher to overpay his debt by at least $790.

C. The total fees assessed against Mr. Fisher violate the Excessive Fines Clauses of the U.S. and Colorado Constitutions

The Eighth Amendment and Article 2, section 20 of the Colorado Constitution "in substantially identical language, prohibit the imposition of 'excessive fines.'" *Colorado v. Bolt*, 984 P.2d 1181, 1184 (Colo. Ct. App. 1999). In Mr. Fisher's case, the total cost and fee assessments against him for failure to appear on a payment date were so disproportionate to the gravity of the offense and his financial circumstances, that they constitute an unconstitutional excessive fine.

"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, 610 (1993) (internal quotations omitted). "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish." *U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998). In determining whether a fine is excessive, Colorado courts consider both the proportionality of the fine to the offense and to the defendant's ability to pay. *Colorado v. Pourat*, 100 P.3d 503, 507 (Colo. Ct. App. 2004); *accord Colorado v. Bolt*, 984 P.2d 1181, 1184 (Colo. Ct. App. 1999); *see also Boulder County Apt. Ass'n v. City of Boulder*, 97 P.3d 332, 337 (Colo. Ct. App. 2004); *People v. Malone*, 923 P.2d 163, 166 (Colo. Ct. App. 1995).

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a property interest in the money they own."); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-73, (1972).

[34] *See* C.R.S. § 13-32-106 (2016).

A monetary assessment need not be labeled a "fine" in order to fall within the purview of the Excessive Fines Clause. A "fine" is any "payment to a sovereign as punishment for an offense." *Bajakajian*, 524 U.S. at 327. Thus, in determining whether a monetary assessment is a "fine," courts ask whether one purpose of the assessment was punishment. In *Bajakajian*, for instance, the Supreme Court concluded that a court-ordered forfeiture of money constituted a punitive fine because it was imposed only after conviction and for the purpose of deterring misconduct, rather than to serve a "remedial purpose of compensating the Government for a loss." 524 U.S. 321, 329 (1998). Importantly, the Court clarified that a fine which is "remedial in some way," but still "punitive in part," falls within "the purview of the Excessive Fines Clause." 524 U.S. at 329 n.4; *accord Austin v. United States*, 509 U.S. 602, 610 (1993).

In Mr. Fisher's case, the failure-to-appear fees and warrant fees served a largely punitive, rather than remedial, purpose. Thus, they are regulated by the Excessive Fines clauses. The challenged monetary penalties were assessed after conviction. They sought to punish Mr. Fisher for failing to pay court-ordered monetary assessments and to deter him from future non-payment. Although some portion of these payments arguably reimbursed the court for expended costs, as discussed above, most of the fees imposed upon Mr. Fisher were either grossly disproportionate to the actual costs, or, in some cases, provided money to the municipality when it had expended no funds. Thus, the assessments served, at least in part, a punitive purpose. *Cf. People v. Howell*, 64 P.3d 894 (Colo. Ct. App. 2002) (clarifying that cost "assessments are limited to actual costs incurred by the state or state agency" and citing *United States v. Halper*, 490 U.S. 435 (1989) for the proposition that a "civil penalty that far exceeds actual damages and expenses may constitute punishment."). Another indicator that the assessments were punitive is that, until very recently, failure to appear on a payment date could (and for Mr. Fisher did) result in incarceration. Indeed, the Aurora Municipal Code designates failure to appear at a time designated by the court as a free-standing municipal violation punishable by up to one year in jail.[35] Because the challenged fees were grossly disproportionate, both with respect to the gravity of the offense (failure to appear or pay) and Mr. Fisher's financial circumstances, their assessments violated the Excessive Fines clauses of the state and federal constitutions.

D. The costs assessed unjustly enriched the City of Aurora

Under Colorado law, "unjust enrichment occurs when: (1) at the plaintiff's expense (2) the defendant received a benefit (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying." *Am. Family Mut. Ins. Co. v. Centura Health - St. Anthony Cent. Hosp.*, 46 P.3d 490 (Colo. Ct. App. 2002) (internal quotation marks omitted) (analyzing a claim for unjust enrichment based on fees charged in excess of those allowed by the workers' compensation fee schedule). All of the monies Mr. Fisher paid to the Aurora Municipal Court were, by ordinance, deposited in the City of Aurora's general fund. *See* Aurora Municipal Code § 11-11. Mr. Fisher's claim of unjust enrichment lies in equity and is quite simple: it is unjust for the City to have been enriched by his $790 in overpayment, because: (1) the Aurora Municipal Court erroneously and/or without authorization assessed fees against him; (2) the fees were excessive in light of his violations and his financial circumstances; (3) despite his extreme poverty, he has made significant efforts to pay and has already paid more than

[35] *See* Aurora Municipal Code §§ 50-33 ("Failure to Appear"), 1-13 ("General Penalty").

double the amount of his original sentence; and (4) he has already been arrested three times for his failure to pay.

V. Insensitivity to poverty within the Aurora Municipal Court

Mr. Fisher appeared before at least seven judges during the pendency of his cases. He repeatedly and honestly reported to these judges that he was deeply impoverished, struggling with homelessness and underemployment, and trying his very best to pay off his debt to the court.[36] His reported efforts were corroborated by his substantial payments on his cases and his repeated voluntary court appearances. He explained his failures to appear as directly related to his poverty and his need to earn a daily wage. With almost no exception, however, Mr. Fisher's pleas to the court for understanding of his desperate financial situation, his substantial payments on the case, and the equitable need to reduce his debt, were rejected and often met with cynicism.

We have heard several other anecdotal accounts of at least some Aurora Municipal Court judges' apparent disregard for the very real struggles of impoverished defendants and the unfairness of saddling them with years of court debt they are too poor to pay. We have not yet had an opportunity to research most of these reports. We are, however, part-way through an investigation of the City's case against Abdirashid Hussein. Mr. Hussein is a Somali refugee who was convicted of driving without insurance on July 7, 2015, and sentenced to pay $589.[37] He went on a payment plan and has made at least five separate payments on that plan. Still, because he failed to appear or pay on one occasion, the court issued a warrant for his arrest and entered an Outstanding Judgment/Warrant to suspend his driver's license until he pays in full.[38]

On March 29, 2016, Mr. Hussein voluntarily appeared before Judge Stine to explain why he was unable to make his payment. He explained that he was desperately poor, on "food assistance," was jobless, and was finding it very difficult to find work given that his driver's license was suspended.[39] In short, Mr. Hussein pleaded with the court to understand his financial desperation and his need for his driver's license.

The court responded: "[D]on't go telling me all that stuff because it doesn't change anything; you owe the money." 2016-3-29, *Tr., 4:10-12.* Mr. Hussein tried to provide proof of his extreme poverty, asking to show the court evidence that he was on "food assistance," and was three months behind on his car payment. The court showed no interest in these documents, repeatedly interrupting the defendant and telling him to "stop telling me things I told you not to tell me." 2016-3-29, *Tr., 4:18-5:15.* In a concerning turn of events, the court simply asked the

[36] *See, e.g.*, 2013-12-31, *Tr., 5:7-12*; 2014-5-21 *Tr., 7:2-5*; 2014-8-22, *Tr., 4:11-5:1*; 2015-01-26, *Tr., 4:22-5:8;* and 2015-4-15, *Tr., 4:24-5:3*.

[37] See Case No. E5855037.

[38] See Addendum to Summons in case E5855037.

[39] "I have situation from financial system. I (inaudible) I start my own business and then now today I'm taking food assistances, and it's not good for me. I'm not coming this country to take food assistances. . . . And when I apply every job is they asking me for my driver license. And it's very hard to get job. I don't have no money . . . . I have car payment to[o]." 2016-3-29, *Tr., 2:9-10.*

defendant if he would like to have his debt converted to jail.[40] As you likely know, conversion of fines into jail time due to a defendant's inability to pay has long been outlawed in this country because it violates the constitutional principles of due process and equal protection. *See, e.g., Tate v. Short*, 401 U.S. 395, 398 (1971). Such conversion also would have violated C.R.S. § 18-1.3-702 as amended in 2014. *See* HB 14-1061, amending C.R.S. § 18-1.3-702.

In the end, even though Mr. Hussein had made it utterly clear he did not have money to pay, the judge put Mr. Hussein right back on the same $35 payment plan on which he had defaulted in the past.[41] The judge suggested that Mr. Hussein should be thankful to be in the United States, because, if he was in Somalia and failed to pay a fine, he might have been shot.[42]

Mr. Hussein's story, which was not hard to uncover, has helped convince the ACLU that the indifference to Mr. Fisher's poverty shown by several Aurora Municipal Court judges is not unique, but is instead part of a larger trend in the municipal court. Mr. Fisher appeared in court only five times related to his underlying municipal violations.[43] But he appeared sixteen times related to his payments.[44] The court and court administrators and even police have spent wasted time trying to squeeze a few hundred more dollars from a man who has more than paid for his offenses and who is barely covering his most basic expenses. We ask, is this how the City of Aurora wants its judges spending their time? What is the public safety benefit or positive net outcome for society that Aurora expects to result from these types of practices? As the Department of Justice reminded us all in its report about Ferguson, Missouri, when courts act primarily as debt collectors and rely on the poor to fund the court's activities, the public suffers.[45]

VI. Settlement demand and conclusion

To resolve this matter, Mr. Fisher requires the following:

1. Cancel any pending Aurora Municipal Court warrant for Mr. Fisher;[46]

2. Release any active bond for Mr. Fisher;

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[40] The court asked: "Would you like to serve six days in jail and not have to pay it[?]" *See* 2016-3-29, *Tr., 6:13-14.*

[41] Mr. Hussein had suggested a $10 monthly payment, to which Judge Stine replied: "Now, stop being a jerk and tell me how much you're going to pay so we can get this set up." *See* 2016-3-29, *Tr., 7:5-18.*

[42] "I'm sorry you're unhappy, but, you know, if I was in Somalia I'd be a lot more unhappier because if I broke the law, they – you know . . . if I got a fine . . . I got to pay it, maybe they'll shoot me." *See* 2016-3-29, *Tr., 8:8-15.*

[43] Mr. Fisher appeared on his underlying violations on September 12, 2013; October 19, 2012; November 13, 2012; December 14, 2012; and January 25, 2013.

[44] Mr. Fisher appeared to discuss his payments on January 14, 2013; March 21, 2013; November 25, 2013; December 10, 2013; December 31, 2013; January 16, 2014; April 16, 2014; May 21, 2014; August 4, 2014; August 22, 2014; January 26, 2015; February 24, 2015; February 26, 2015; April 1, 2015; April 15, 2015; and July 20, 2015.

[45] *See* n.20, *supra.*

[46] As of the date of this letter, we are unsure whether Mr. Fisher's warrant has been cancelled pursuant to Judge Weinberg's order.

3. **Remit all of Mr. Fisher's remaining debt to the Aurora Municipal Court;**

4. **Refund the $790 of overpayments that Mr. Fisher made to the Aurora Municipal Court;**

5. **Pay Mr. Fisher's reasonable costs and attorneys' fees; and**

6. **For the 4,454 outstanding warrants associated with failure to pay or appear that the City of Aurora has already committed to cancel,[47] remit all unpaid warrant fees and failure-to-appear fees assessed in connection with those warrants.**

Regarding demand (6) above, we note that Judge Weinberg has taken an important first step in rectifying the practices that the legislature rejected in passing HB16-1311. He has issued a recent order to cancel all active warrants and release all bonds for failure to pay a fine or failure to appear on a payment date. *See* Amended Order Pursuant to C.R.S. 18-1.3-702 (June 28, 2016). While Judge Weinberg apparently did not believe that the new legislation required cancellation of active warrants, he nonetheless ordered cancellation because, in his words, "it would be fair and just" given passage of the legislation. We commend Judge Weinberg's decision. We believe it is similarly fair and just, in light of the legislation and the arguments in this letter, for the City to remit the warrant fees and the failure-to-appear fees that were assessed in connection with the warrants that have been or will be cancelled.

We sincerely appreciate the opportunity to write to you about the issues we have raised herein. We hope this letter has been helpful in convincing the City that the only appropriate response is to resolve this matter promptly. Please respond to this letter by **Thursday August 11, 2016**.

Sincerely,

Mark Silverstein
Legal Director, ACLU of Colorado

Rebecca Wallace
Staff Attorney, ACLU of Colorado

cc. Julie Heckman – Deputy City Attorney for the City of Aurora–jheckman@auroragov.org
cc. Richard Weinberg, Chief Judge of the Aurora Municipal Court – judicial@auroragov.org
cc. Zelda DeBoyes, Court Administrator for the Aurora Municipal Court – zdeboyes@auroragov.org

[47] *See* Aurora Sentinel, June 28, 2016, "Aurora looking at vacating thousands of arrest warrants after new law targeting debtor's prison loophole," available at: http://www.aurorasentinel.com/ news/aurora-looking-vacating-arrest-warrants-passage-debtors-prison-law/.