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NO. 94955-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NICOLE BEDNARCZYK and CATHERINE SELIN, individually and on behalf of all others similarly situated,

Appellants/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

APPELLANTS' AMENDED OPENING BRIEF

Toby J. Marshall, WSBA #32726
TERRELL MARSHALL
LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF
JEFFREY L. NEEDLE
119 First Avenue South, Suite 200
Seattle, Washington 98104
Telephone: (206) 447-1560
Facsimile: (206) 447-1523

Attorneys for Appellants/Plaintiffs

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I. INTRODUCTION

Nicole Bednarczyk and Catherine Selin are prospective jurors who allege that King County is violating the Juror Rights Statute, RCW 2.36.080(3), and the Minimum Wage Act, RCW 49.46.020(1), by refusing to pay minimum wages to jurors for each hour of service. The prospective jurors filed this proposed class action to end discriminatory conduct in King County's jury system and to require King County to pay minimum wages to those who do not otherwise receive compensation from an employer while performing jury service. The prospective jurors respectfully seek declaratory and injunctive relief. Ms. Selin also seeks an award of damages for those who have performed jury service but were not compensated by an employer for that service.[1]

King County filed a motion for summary judgment, which the trial court granted. CP 83. The prospective jurors filed a timely notice of appeal. CP 679. They seek direct review by the Supreme Court pursuant to RAP 4.2. CP 679.

The failure to pay jurors for the time they spend performing jury service is causing a substantial segment of the community to be denied an opportunity to participate in a fundamental part of American democracy. The resulting lack of economic and racial diversity in Washington's jury

[1] Plaintiff Ryan Rocha, a mixed-race individual who identifies as Black, also brought claims for declaratory and injunctive relief on behalf of himself and a proposed class of Black and African-American individuals who are eligible to perform jury service in the courts of King County. Since the filing of the lawsuit, however, Mr. Rocha has moved to Florida. Because Mr. Rocha is no longer eligible to be summoned as a juror in King County, he was voluntary dismissed from the lawsuit without prejudice.

venires threatens the viability and legitimacy of our system of justice. The preservation of American democratic ideals and institutions has never been more important. For these reasons and those set forth below, this Court should reverse the trial court's grant of summary judgment and remand for further proceedings.

II. ASSIGNMENT OF ERROR

A. Assignment of Error.

1. The trial court erred in granting summary judgment to King County by order entered on August 4, 2017.

B. Issues Pertaining to Assignment of Error.

1. Is "economic status" a protected classification under the Juror Rights Statute, RCW 2.36.080(3)?

2. Does RCW 2.36.080(3) allow for a disparate impact claim on the basis of economic status?

3. Are jurors "employees" within meaning of the Washington Minimum Wage Act, chapter 49.46 RCW?

4. Does the juror expense payments statute, RCW 2.36.150, prohibit counties from paying jurors for the time they spend performing jury service?

5. Do the prospective jurors have standing to seek equitable relief against King County for its failure to compensate jurors for their time serving on a jury?

III. STATEMENT OF THE CASE

A. Statement of Facts.

1. Juror compensation will enhance economic and ethnic diversity.

Since 1959, individuals performing jury service in the courts of King County have received nothing more for their attendance than an expense payment of $10 per day plus mileage or travel fare. CP 23, ¶ 5.56 & CP 50, ¶ 5.56; CP 330; CP 616. A minimum wage worker in Seattle currently earns at least $120 for an eight-hour workday, and a minimum wage worker outside of Seattle earns at least $88 for an eight-hour workday. SMC 14.19.030.A; RCW 49.46.020(1)(a).

In 1999, the Board for Judicial Administration founded the Washington State Jury Commission to "conduct a broad inquiry" into issues such as the "adequacy of juror reimbursement" and "improving juror participation at trials." CP 292. After completing numerous surveys and studies, the Jury Commission reported that "special efforts should be made to increase participation in jury service by sectors of society that traditionally have not participated fully, particularly young people and minority communities." CP 310. The Commission made numerous recommendations for achieving this goal, but the "highest priority" was increasing compensation for jurors. CP 292, 299, 310-311. In no uncertain terms, the Commission deemed it "unacceptable that this state's citizens are required to perform one of the most important civic duties at a rate that does not remotely approach minimum wage." CP 330.

In its report to the Board of Judicial Administration, the Jury Commission concluded that "[i]ncreased fees will not only address the current inequity in juror compensation, but will also contribute to more economically and ethnically diverse juries by enabling a broader segment of the population to serve." CP 292. Many commentators agree. *See, e.g.*, Julia Badin & Loretta Velaochaga Klugger, *Seeking Fair Representation: Potential Barriers to the Representation of Hispanic Populations in Jury Pools of the EDWA*, The State of the State for Washington Latinos, at 45 (Whitman College 2014) (noting that "77 percent of Hispanic jurors indicate they are willing to serve on juries if they are paid an hourly minimum wage"); Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, at 49 (August 2010) ("Eliminating economic barriers to jury service is absolutely critical to ensure that juries are representative and fair."); Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 Cal. L. Rev. 101, 140 (1996) ("So long as the poor and other underrepresented groups seek hardship exemptions from . . . jury service in disproportionate numbers, juries will not reflect all the relevant groups in the community that are critical to the legitimacy of the jury process.").[2]

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[2] King County has cited a 2008 report for the proposition that paying jurors for their time will not increase juror participation. CP 100, n. 12 & CP 107. This study is flawed for several reasons, some of which are acknowledged in the report itself. Among other things, the study was limited, and the participants did not reflect a fair cross-section of the community. For example, Latino and Hispanic people made up 47 percent of the population in Franklin County but only 2.18 to 5.10 percent of those surveyed. CP 111. Furthermore, the temporary increase in pay lasted only one year, and a post-study survey showed that 92 percent of the prospective jurors who received a summons but failed to serve were entirely unaware of the increase. *Id.* at 4. The remaining eight percent totaled

2. King County excuses a substantial number of jurors based on economic status, which significantly burdens the administration of justice.

In accordance with RCW 2.36.100(1) and GR 28, King County has a policy and practice of excusing individuals who have been summonsed for jury service if they "are not being paid for jury service by their employer" and "will be unable to meet the[ir] basic needs [or those of their] family." CP 416, CP 418. King County staff members authorize and record administrative grants of financial hardship excusal requests. CP 416-525. But once jurors "are placed on the court list and provided to the court location," staff members may not excuse jurors "unless authorized by a Judge to do so." CP 418; *see also* CP 416. At that point, it is up to the judge to decide whether to grant a request for economic excusal. CP 530. Most if not all judicial economic excusals go unrecorded.

King County exempts a substantial number of prospective jurors because they cannot meet their basic needs. At the administrative level alone, King County excused more than 5,100 prospective jurors on account of financial hardship between 2011 and 2016—an average exceeding 850 per year. CP 420. A sample of emails from judges and staff underscore the scope of the problem. *See* CP 526-542. As one judge wrote, "I think we have all been experiencing the 50% + hardship requests from a panel for a case that is going to last 2+ weeks." CP 537. For longer

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only 32 people, an insufficient sample size. *Id*. Finally, other studies have shown that an increase in juror pay leads to a corresponding increase in juror response rates. CP 112, CP 118. Whether paying minimum wages to jurors will increase juror participation is a question of fact for the jury.

trials, it can be necessary to have as many as 200 prospective jurors appear in order to seat a jury of twelve with two alternates, given the number of financial hardship excusals that will be sought. CP 534, CP 541. In the words of former Presiding Judge Susan Craighead: "we are spending a lot of money bringing in jurors who just cannot sit for more than two days because of their economic situations, yet I can't remember the last time I presided over a two or three-day trial." CP 527. Many civil trials, which have a lower priority than criminal trials, are continued or delayed "due to an inability to seat enough jurors." CP 532.

Excusals for financial hardship are only the "tip of the iceberg." It is likely that most people of low economic status simply refuse to respond to summonses for fear that they will not receive a hardship exemption. CP 532. Of the 510,681 people King County summonsed for jury service between 2011 and 2016, only 147,743 appeared—a yield rate of less than 29 percent. CP 198 ¶ 5. The other 362,938 did not respond. *See id*.

3. People of color, who are more likely to be of low economic status, are substantially underrepresented in King County's jury venires.

Research from across the country has shown that "prospective jurors in lower social classes are consistently under-represented in most federal and state court jury pools and venires." Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service & Jury Selection*, 24 J. of Crim. Just. 71,

72 (1996).[3] This is because "the economic and occupational backgrounds of prospective jurors exert greater influence [on participation] than jurors' ascriptive measures, such as race/ethnicity and gender." *Id.*; *see also* Robert C. Walters, Michal D. Marin & Mark Curriden, *Jury of our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 320 (2005) ("The most common reason given for why people skipped jury service was because they could not afford it."). "[M]inority jurors in lower social class positions are found to be the most under-represented group . . . ." Fukurai, *supra*, at 85. The results are no different here.

In King County, the annual household incomes of people of color are substantially below those of white people. In 2013, for example, the median annual household income was $36,150 for Black and African-American residents, $42,526 for American-Indian and Alaska-Native residents, and $45,626 for Hispanic and Latino residents. Francesca Murnan & Alice Park, *Understanding King County Racial Inequities: King County Racial Disparity Data* 9 (King County United Way Nov. 2015).[4] For white residents, however, the median household income was more than $75,000 per year. CP 571.

An even bigger disparity among races exists with respect to net wealth, "a crucial determinate of economic stability." *Id.* "Net wealth accounts for the total sum of accumulated assets (money plus

[3] A courtesy copy of this article can be found at CP 543-61.
[4] A courtesy copy of this report can be found at CP 562-96.

property/possessions that can be liquidated into money) minus the sum of debt/financial obligation." *Id*. "Assets enable families to survive set-backs and build a strong economic base that supports future success." *Id*. In 2013, the median household net wealth for nonwhite and Hispanic residents was $18,100, whereas the median household net wealth for white residents was $142,000. CP 572.

There is also a substantial disparity among races in terms of poverty levels. The U.S. Census Bureau estimates that in King County, the percentage of Blacks and African-Americans living below the poverty line is 29.2. CP 598. The percentage for American-Indian and Alaska-Native residents is 26.1, and the percentage for Hispanic or Latino residents is 24.3. *Id*. For white residents, however, the percentage living below the poverty line is less than 9.0. *Id*.

Washington's Administrative Office of the Courts recently conducted a survey designed to gather data on the racial makeup of jury venires in courts across Washington. CP 601-604. The results show that White residents are overrepresented in King County's jury venires, whereas American-Indian, Alaska-Native, Black, and African-American residents are all substantially underrepresented. *Id*. Hispanic and Latino residents are also underrepresented in the County's district courts as well as the superior court division in Kent. *Id*.

4. King County controls every aspect of juror service.

King County has admitted numerous facts that demonstrate it "employs" jurors and thus is obligated to pay those jurors at applicable minimum wage rates for time spent performing jury service. For example, King County admits that it instructs jurors on the time and location of their jury service, their roles and responsibilities, and the completion of forms. CP 54-55 ¶¶ 5.24, 5.26; CP 606-608, Nos. 1, 3. King County also admits it has the authority to excuse individuals from jury service and to dismiss them once their service is complete. CP 55 ¶ 5.27; CP 608, No. 4. King County admits that it maintains records regarding jurors who are called to serve, who are dismissed, who are assigned to specific courtrooms, who are paid reimbursements and mileage, and who request accommodations. CP 55 ¶ 5.29; CP 609, No. 6. King County also admits that it provides the premises on which jurors perform their service. CP 260 ¶ 5.30; CP 609-610, No. 7. King County admits the work of jurors is not specialized and does not require particular knowledge or ability. CP 56 ¶¶ 5.31, 5.32; CP 610, No. 8. Finally, King County admits that jurors perform a vital service for the County. CP 56 ¶ 5.34; CP 610, No. 9.

5. Minimum wage for jurors would cost considerably less than claimed by King County.

King County estimates that based on 2015 jury service data, it would cost approximately $7.4 million to pay applicable minimum wage rates to jurors who serve in the County's courts. CP 649-652. This estimate, however, assumes all jurors would be compensated for their

service. *See id*. The prospective jurors seek minimum wage payments only for those who are not already compensated for their time by their employer. CP 208-209 ¶¶ 4.1.1– 4.1.4. Thus, the actual costs to King County would be substantially less.

Even if King County paid minimum wages to all jurors, the cost of doing so would be small in relation to the County's overall budget, which exceeds $11 billion for the 2017-2018 biennial. *See* King County 2017-2018 Biennial Budget Executive Summary.[5]

B. Procedural History.

Ms. Bednarczyk and Ms. Selin filed this lawsuit in Pierce County Superior Court on August 8, 2016. CP 1. The prospective jurors assert six claims for relief on behalf of themselves and three proposed classes. CP 5-6. In the first and second claims, Ms. Bednarczyk alleges King County's failure to pay minimum wages to jurors has a discriminatory disparate impact on people of low economic status in violation of RCW 2.36.080(3), and she seeks declaratory and injunctive relief under that statute and the Uniform Declaratory Judgments Act, chapter 7.24 RCW. CP 26-29. In the sixth claim for relief, Ms. Bednarczyk and Ms. Selin seek a declaratory judgment that jurors are "employees" within the meaning of the Minimum Wage Act ("MWA"), chapter 49.46 RCW, and an injunction requiring King County to pay jurors for their time if they are not already

[5] Available at http://www.kingcounty.gov/~/media/depts/executive/performance-strategy-budget/budget/2017-2018/17-18BudgetBook/17-18_BudgetExecSummary_FINAL.ashx?la=en.

compensated by an employer. CP 34-36. In the seventh, eighth, and ninth claims for relief, Ms. Selin alleges King County is liable under the MWA and other wage statutes for failing to pay jurors for their service. CP 36-40.[6]

Shortly after filing their complaint, the prospective jurors served discovery requests on King County. CP 197 ¶ 2. Among other things, the prospective jurors sought information about electronic data processing systems that the County utilizes to record, store, compute, analyze, or retrieve information relating to jury service in its courts. CP 197-98. The prospective jurors also sought King County's policies and practices for jury service, the identity of people who have requested an exemption from jury service, relevant studies or reports, and other documents concerning jury service in King County. CP 198. To date, King County has produced more than 61,000 documents, which amount to more than 366,000 pages of materials and data. *Id*.

The prospective jurors also requested public records from Washington's Administrative Office of the Courts (AOC). *Id*. ¶ 4. Over several months, AOC produced approximately 670 documents. *Id*. Those materials largely concern the survey that AOC recently conducted of jurors across the state. *Id*.

On July 7, 2017, King County moved for summary judgment, challenging the claims of the prospective jurors on several legal grounds.

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[6] Ryan Rocha was the only Plaintiff who asserted the third, fourth, and fifth claims for relief. As explained above, those claims have been dismissed. *See* note 1, *supra*.

CP 83-126; *see also* RP 15:24–16:2 ("we are dealing with issues of law"). The prospective jurors opposed the motion. CP 155-96. The trial court granted summary judgment to King County based on three main holdings. CP 675-78.

First, the trial court held that "[t]he RCW 2.36.080(3) proscription of exclusion for jury service on account of economic status does not create a protected class and there is no cognizable disparate impact claim under the statute." CP 676. Second, the trial court held that "[j]urors serving in King County are not employees of the County for purposes of wage and hour laws." *Id*. And third, the trial court held that "King County is not required or permitted to pay jurors more than the amount set forth in RCW 2.36.150." *Id*.

The prospective jurors timely appealed. CP 679-85.

IV. SUMMARY OF ARGUMENT

Jury service is one of the most significant forms of citizen participation in a free society. *See Powers v. Ohio,* 499 U.S. 400, 407, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The jury system allows randomly selected citizens to dispense social justice unfiltered by elections, politicians, bureaucrats, or lobbyists. Jurors guard against governmental abuses of power and hold the most powerful interests in society accountable to the rule of law. Jurors reflect the conscience of the community and are an indispensable component of American democracy.

Both economic and racial diversity in the jury venire is necessary to a properly functioning jury system. When the jury is drawn from a fair cross-section of the community, the quality and impartiality of the jury's decision-making is improved, and the jury's political legitimacy as a democratically inclusive institution is enhanced. There exists a regrettable lack of economic and racial diversity in King County juries.

Washington law prohibits the exclusion of eligible citizens from jury service on account of race, color, religion, sex, national origin, or economic status. RCW 2.36.080(3). "Economic status" is a protected classification within the meaning of the statute, and the statute is violated by even a neutral practice, without discriminatory intent, that has a disparate impact on people of low economic status. The trial court erred in concluding otherwise.

Defendant King County is violating this law in the operation of its jury system. Although King County pays jurors $10 a day for some expenses, it fails to pay jurors for time spent performing jury service. The failure to pay jurors for their time is a neutral practice that has a disparate impact on people of low economic status, particularly people of color. This form of institutional exclusion and discrimination violates the fundamental statutory rights of jurors, suppresses juror participation, and has a pernicious effect on the judicial system and American democracy.

King County argued below that it complies with all relevant statutes and does not intentionally discriminate on the basis of economic

status. But intentional discrimination is not an element of a disparate impact claim. The County's motive is irrelevant.

King County also argues that citizens of low economic status voluntarily choose to avoid jury service. But this so-called "choice" is not free at all. Many trials in King County Superior Court, both criminal and civil, lasts for weeks. Some trials even last for months. King County excuses hundreds of prospective jurors for economic hardship because the individuals will be unable to meet their basic needs or those of their family. The economic hardship that jury service creates for these people forecloses participation. Many citizens cannot forego their income and subsist on $10 a day, even for short periods of time. The "choice" between serving on a jury or paying rent is neither voluntary nor one that more affluent jurors are required to make. The option presented to a prospective juror is akin to a poll tax for voting. It dilutes participation on account of economic status.

King County does not deny the common-sense conclusion that the failure to pay jurors for their time has a disparate impact on people of low economic status, and the trial court made no ruling to the contrary. Instead, the trial court ruled that "economic status" is not a "protected classification" under the Washington Law Against Discrimination ("WLAD"), and "therefore, there is no cognizable disparate impact claim under 2.36.080." RP 18:9-13. The trial court is wrong.

The WLAD does not foreclose other anti-discrimination statutes from creating different protected classifications. To the contrary, the WLAD explicitly provides that "[n]othing contained in this chapter shall be . . . construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights." RCW 49.60.020. The statutory protection afforded "economic status" in RCW 2.36.080(3) is no different than the protection afforded jurors on the basis of race, color, religion, sex, or national origin. If "economic status" were not a "protected classification," the statutory prohibition against "economic status" discrimination would be unenforceable and meaningless, and the legislature's obvious intent would be defeated.

King County is also violating the MWA by failing to pay minimum wages to jurors for their time of service.[7] Nearly thirty years ago the Washington Supreme Court concluded that "[j]urors are employees of the county" for purposes of workers' compensation coverage. *Bolin v. Kitsap Cnty.*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990). As explained below, jurors are also employees of the county for purposes of the MWA. Thus, jurors are entitled to be paid for their service at the applicable minimum wage rate. The trial court erred in holding to the contrary.

The right to minimum wages for time spent performing jury service is not foreclosed by RCW 2.36.150. That statute is entitled in

[7] A juror's right to minimum wage is independent of the right to be free from discrimination under RCW 2.36.080(3).

relevant part: "Juror expense payments—Reimbursement by state." It provides that jurors will receive "for each day's attendance" both a "mileage" allowance and an "expense payment[]" or "per diem" of "up to twenty-five dollars but in no case less than ten dollars." RCW 2.36.150. The trial court ruled that "King County is not required or permitted to pay jurors more than the amount set forth in RCW 2.36.150." CP 676. But workers compensation is not authorized by RCW 2.36.150, and the Supreme Court has already ruled in *Bolin* that jurors are eligible to receive workers compensation. Moreover, the plain language of the statute limits its reach to "expense payments." RCW 2.36.150. The statute does not address payment for services and creates no conflict with paying jurors for their service in addition to expense payments.

Finally, the prospective jurors have standing to seek equitable relief. The Superior Court did not specifically address King County's argument to the contrary but to reach the merits of the litigation, the Court must have necessarily concluded that standing is satisfied. This Court should explicitly rule on the issue and conclude that the prospective jurors, who have been summonsed in the past and are subject to being summonsed for jury service at any time, have standing to seek a declaratory judgment and injunctive relief.

The Court should reverse the trial court order's granting summary judgment and remand for further proceedings.

V. ARGUMENT

A. The Standard of Review Is De Novo.

"When reviewing an order granting summary judgment, an appellate court reviews the matter de novo by engaging in the same inquiry as the trial court." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 295, 996 P.2d 582 (2000). "Under this standard, the appellate court determines whether genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." *Id*. "Facts are reviewed in the light most favorable to the nonmoving party." *Id*.

A question of statutory interpretation is a question of law that an appellate court also reviews de novo. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

B. Participation by All in Jury Service is Integral to American Democracy.

The majority of cases addressing the composition of juries are decided in the context of a criminal defendant's Sixth Amendment right to a fair trial. In this case, however, the prospective jurors do not seek to enforce the Sixth Amendment; rather, they seek to enforce the *right of jurors* to participate in both the civil and criminal systems of justice without discrimination based on "economic status." *See* RCW 2.36.080(3).

The importance of citizen participation in jury service cannot be understated. Jurors decide the fate of persons charged with the most serious crimes and hold the most powerful corporations and the government accountable to the rule of law. The right to a jury trial is listed

in the Declaration of Independence as one of the grievances to justify the American revolution, and it is enshrined in two constitutional amendments in the Bill of Rights. *See* Declaration of Independence para. 20 (U.S. 1776); U.S. Const. amends. VI & VII. Moreover, "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions . . . ." *Parklane Hosiery Co., v. Shore*, 439 U.S. 322, 341, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) (Rehnquist, J., dissenting) (quoting L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 281 (1960)).

> It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.

Id.

"We have juries for many reasons, not the least of which is that it is a ground level exercise of democratic values." *State v. Saintcalle*, 178 Wn.2d 34, 49, 309 P.3d 326 (2013). "The government does not get to decide who goes to the lockup or even the gallows. Ordinary citizens exercise that right as a matter of democracy." *Id*. Thus, "[j]ury participation is critically important to the functioning and legitimacy of our government. The use of juries validates the justice system through community participation, provides a check against governmental abuses of power, educates citizens and promotes civic engagement, and promotes integration and mutual understanding across social groups." *Id*. at 101 (Gonzalez, J., concurring). "[W]ith the exception of voting, for most

citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. "The jury system postulates a conscious duty of participation in the machinery of justice . . . ." *Balzac v. Porto Rico*, 258 U.S. 298, 310, 42 S. Ct. 343, 66 L. Ed. 627 (1922). "One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Id.*; *see also* Joanna L. Grossman, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. L. Rev. 1115, 1121-23 (1994) (explaining the historical significance of juror participation).

"[T]here is a constitutional value in having diverse juries, quite apart from the values enshrined in the Fourteenth Amendment." *Saintcalle*, 178 Wn.2d at 50. "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *see also Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."). "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 92

S. Ct. 2163, 33 L. Ed. 2d 83 (1972). "It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Id*. at 503-04; *see also Ballard v. United States*, 329 U.S. 187, 195, 67 S. Ct. 261, 91 L. Ed. 181 (1946) (noting that when "an economic or social class" is largely excluded, "there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.").

C. "Economic Status" Is a Protected Classification Within the Meaning of RCW 2.36.080(3).

The undeniable purpose of Washington's Juror Rights Statute is to prevent discrimination in the context of jury service based on explicit categories. *See* RCW 2.36.080(3). The trial court nevertheless held that the statute "does not create a protected class" in relation to "economic status." CP 676. Inexplicably, the trial court concluded that because "economic status" is not a protected classification within the meaning of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, there is no cognizable claim under RCW 2.36.080(3). *See* RP 18:10-12.

The trial court erred. There exists well-established precedent for protecting jurors from discrimination based on economic status. Moreover, the WLAD is not the exclusive source of protected classifications under Washington law.

In *Thiel v. Southern Pac. Co.*, the Court held that jurors could not be excluded based upon their economic status. 328 U.S. 217, 222-23, 66 S. Ct. 984, 90 L. Ed. 1181 (1946). The Court recognized that "those eligible for jury service are to be found in every stratum of society." *Id.*, 328 U.S. at 220. Indeed, "[t]hat fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Id*.

The plaintiff in *Thiel* sued a railroad company for damages. 328 U.S. at 219. After demanding a jury trial, the plaintiff moved to strike the entire jury panel because citizens of lower economic status—namely, daily wage earners—were not included on the lists used to fill the panel. *Id*. at 219, 221. The trial court denied the motion, and the Ninth Circuit Court of Appeals affirmed. *Id*. at 220. The Supreme Court reversed, holding that "exclusion [from jury service] of all those who earn a daily wage cannot be justified by federal or state law." *Id*. at 222. "Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." *Id.* at 223; *see also, e.g.*, *Hardin v. City of Gadsden*, 837 F. Supp. 1113, 1116 (N.D. Ala. 1993) ("The use of a district wide master jury wheel and qualified jury wheel in the Northern District of Alabama, covering half of the state and in which eligible black jurors are disproportionately poor and lack vehicular transportation, has the

disparate impact of excluding citizens from service as petit jurors on account of race, color, and economic status in violation of 28 U.S.C. § 1862 (Supp. 1993)."); *Bogan v. State*, 811 So.2d 286, 289-91 (Miss. Ct. App. 2001) (Irving, J., concurring) (finding state statute that prohibits exclusion from jury service on account of economic status creates protected classification).

In apparent recognition of the Court's ruling in *Thiel*, the United States, Washington, and other states enacted statutes that protect citizens from being excluded in jury service based on "economic status."[8] The relevant statute in Washington is RCW 2.36.080(3), which provides: "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status."

"The first step in interpreting a statute is to examine its plain language." *State v. Gonzalez*, 168 Wn.2d 256, 264, 226 P.3d 131 (2010). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State*

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[8] *See* 28 U.S.C. §1862 (1968) ("[n]o citizen shall be excluded from [jury service in the Federal courts] on account of race, color, religion, sex, national origin, or economic status"). In passing the statute, the congressional committees recognized the "political function" of the jury in the administration of law and that "the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice." *Taylor v. Louisana,* 419 U.S. 522, 529-530 (1975) (citing H.R. 1076, 90th Cong. (2d Sess.1968) and S. 891, 90th Cong. (1st Sess. 1967)). At least sixteen states other than Washington prohibit the exclusion of citizens from jury service based on economic status. *See* Miss. Code Ann. § 13-5-2; Del. Code Ann. Tit. 10, § 4502; 705 Ill. Comp. Stat. 305/2; Utah Code Ann. § 78B-1-103; Neb. Rev. Stat. § 25-1601.03; Md. Code Ann., Cts. & Jud. Proc. § 8-102; Me. Stat. tit. 14, § 1202-A; Ala. Code § 12-16-56; N.D. Cent. Code § 27-09.1-02; Ind. Code § 33-28-5-18; N.H. Rev. Stat. Ann. 500-A:4; Iowa Code § 607A.2; W. Va. Code § 52-1-2; Haw. Rev. Stat. § 612-2; Idaho Code § 2-203; Minn. Stat. § 593.32.

v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). "Just as [courts] 'cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language," they "may not delete language from an unambiguous statute." *Id*. (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

The trial court's ruling necessarily reads the phrase "economic status" out of the Juror Rights Statute, rendering the words superfluous. It is meaningless to say the law prohibits the exclusion of citizens from jury service on account of "economic status" if economic status is not a protected category. Nobody could legitimately argue that the Juror Rights Statute fails to create protected categories for race, color, religion, sex, or national origin. Because economic status is included alongside those classifications, it too is a protected classification under RCW 2.36.080(3).

The trial court turned away from the plain language of RCW 2.36.080(3) and focused instead on the WLAD, holding "economic status" is not a protected classification in the former because it is omitted from the latter. CP 676. That conclusion is wrong. The WLAD prohibits discrimination in various contexts against broad protected classifications, including "race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or

service animal by a person with a disability." RCW 49.60.010. But the WLAD is not the exclusive source for all protected classifications.[9]

The WLAD "expressly states that nothing in this chapter shall be 'construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.'" *Bennett v. Hardy*, 113 Wn.2d 912, 927, 784 P.2d 1258 (1990) (quoting RCW 49.60.020). "This language indicates legislative recognition that other means of redress than those in the state Statute should be available." *Id*. "The WLAD . . . resounds with provisions confirming the right to seek redress beyond its own remedies . . . Importantly, the WLAD recognizes that freedom from discrimination is a *civil right*, not merely a statutory promise." *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 795, 317 P. 3d 1009 (2014) (Stephens, J., dissenting) (emphasis original).

The right to participate in jury service without discrimination based on economic status is a civil right protected by RCW 2.36.080(3). The WLAD does not limit that right in any way. The trial court erred in reaching the opposite conclusion.

[9] For example, RCW 49.44.090 is a separate statute that prohibits employment discrimination based on age. Although the statute provides no remedy for its violation, the Supreme Court has recognized that RCW 49.44.090 creates an implied cause of action even where the WLAD is inapplicable. *See Bennett v. Hardy*, 113 Wn.2d 912, 919-21, 926-27, 784 P.2d 1258 (1990).

D. The Juror Rights Statute Allows for a Disparate Impact Claim Based on Low Economic Status.

The Juror Rights Statute prohibits discrimination against prospective jurors on the basis of "economic status." RCW 2.36.080(3). A central claim in this case is that King County's failure to compensate jurors for the time they spend performing jury service has a disparate *impact* on people of low economic status and causes them to be excluded from jury service in disproportionate numbers. *See* CP 211 ¶¶ 1.9, 1.13.[10]

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[10] The prospective jurors allege RCW 2.36.080(3) creates an implied cause of action. *See* CP 211 ¶ 4.3.1.c. King County for the first time on appeal argues that RCW 2.36.080(3) does not create an implied cause of action. *See* Answer to Statement of Grounds at 5-6. This issue was not raised by King County in the trial court, CP 88, and the trial court didn't address the issue. CP 675. The issue is now foreclosed from consideration on appeal. *See* RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court"). Moreover, the County is wrong.

For every right there must be a remedy. "The foundation of liability is that where there has been an injury, there is a remedy." *Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 821, 355 P.2d 781 (1960) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803)). To recognize an implied cause of cause of action, the Court must determine "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Bennett*, 113 Wn.2d at 920-21; *see also M.W. v. Dept. Soc. & Health Servs.*, 149 Wn.2d 589, 595-97, 70 P.3d 954 (2003) (same).

King County argues that public policy is limited to the pronouncement of RCW 2.36.080(1) that "all qualified citizens have the opportunity . . . to be considered for jury service . . . ." Answer to Statement of Grounds at 5. The County maintains that so long as all qualified citizens have an opportunity to serve as jurors, there exists no implied cause of action. *Id*. at 5-6. King County's argument entirely ignores subsection three to the statute, which explicitly prohibits a citizen's exclusion "from jury service in this state on account of race, color, religion, sex, national origin, or economic status." RCW 2.36.080(1). Jurors of low economic status are a class for whose benefit the statute was enacted; legislative intent supports creating a remedy because in the absence of any remedy, the statute is unenforceable by people within the class; and a remedy is consistent with the underlying purpose of the statute, which is to prohibit the exclusion of jurors on the basis of "economic status." *See Bennett*, 113 Wn.2d at 921 ("we may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights").

Success on this claim is unrelated to whether jurors are "employees" under the MWA. *See* Section V.D, *infra*.

Generally, there are two different types of discrimination claims: disparate treatment and disparate impact. *Oliver v. Pac. Nw. Bell Tele. Co.*, 106 Wn.2d 675, 677, 724 P.2d 1003 (1986). "Disparate treatment is demonstrated when the [defendant] simply treats some people less favorably than others because of [a protected characteristic]." *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 811 (9th Cir. 2004). This type of claim requires the plaintiff to prove that an illegal reason was a "substantial factor" in the decision to take adverse action. *Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). The prospective jurors do not allege disparate treatment here.

In order to prove disparate *impact* under Washington law, a plaintiff must establish: (1) a facially neutral practice, (2) that falls more harshly on a protected class. *Shannon v. Pay'N Save*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985); *see also Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) ("Disparate impact' is demonstrated when . . . practices that are facially neutral in their treatment of different groups . . . fall more harshly on one group than another and cannot be justified by business necessity.") (internal quotation marks and citation omitted).

Proof of a facially neutral practice simply requires a plaintiff to show that he is attacking a practice that includes objective, nondiscretionary features. *Oliver*, 106 Wn.2d at 680; *Shannon*, 104

Wn.2d. at 727. To satisfy the second element, the plaintiff must produce evidence sufficient to justify an inference that the practices complained of caused a substantial disproportionate exclusionary impact on the protected class, other than by mere chance. *Id.* at 679. In *Shannon*, the Court rejected the so-called 4/5ths rule and established that whether plaintiffs could succeed in establishing the necessary degree of disproportionality is a question of fact for the jury to decide. 104 Wn.2d at 728-29. A discriminatory motive is not required to prove a disparate impact claim. *Id*. at 727 ("Unlike disparate treatment, the disparate impact theory enables a plaintiff to address the consequences of seemingly objective employment practices by allowing the plaintiff to prevail in a . . . discrimination suit *without establishing discriminatory motive*.") (emphasis added).

"Under Washington law, as under federal law, the [defendant] can defeat the plaintiff's prima facie 'disparate impact' claim by showing that the challenged . . . practice serves a 'business necessity.'" *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 499, 325 P.3d 193 (2014). "If the employer establishes a 'business necessity,' the plaintiff may still prevail by showing that other less discriminatory alternatives can equally serve the employer's legitimate business requirements." *Shannon*, 104 Wn.2d at 727.

In this case, the prospective jurors challenge King County's failure to compensate jurors for their time. It is undisputed that this is a facially

neutral practice insofar as King County declines to pay such compensation to any juror. Significantly, the County also does not dispute the common-sense conclusion that this policy falls more harshly on people of low economic status. Indeed, the subject of whether the failure to pay minimum wages has a disproportionate impact on the basis of economic status was never addressed by the County or the trial court below.[11]

Where economic status is a protected classification, as it is under RCW 2.36.080(3), and where a disproportionate impact on that class can be established, the only defense is that a neutral practice of not paying minimum wages to jurors constitutes a "business necessity" and no other less discriminatory alternatives can equally serve the employer's legitimate business requirements. The County does not claim business necessity.

The prospective jurors allege King County's neutral practice of failing to compensate jurors has a disproportionate impact on people of low economic status. Significantly, the County does not factually dispute or even address this allegation.

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[11] Rather, King County has argued that because it adheres to all necessary rules regarding the process of jury summonses and does not intentionally discriminate, the prospective jurors cannot prevail regardless of the disparate impact the County's practice has on the protected class of economic status. The County is wrong and confuses the theory of disparate treatment with that of disparate impact. The prospective jurors do not claim that they were treated differently than other potential jurors "because of" their economic status. That standard applies only to disparate treatment. *Scrivener v. Clark College,* 181 Wn.2d 439, 444, 334 P.3d 541 (2014). In a disparate impact claim, proof of intentional discrimination is not required. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985).

1. Jury service is analogous to voting.

In *Harper v. Virginia Bd. of Elections,* 383 US 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), the Supreme Court considered the constitutionality of a poll tax for voting. The Court ruled that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id*. at 666. The strong command of the Equal Protection Clause requires that an otherwise qualified citizen be able to vote whether he "has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Id*.

"The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay." *Id*. As the Court held:

> Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. *Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored.* To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination that runs afoul of the Equal Protection Clause.

Id. at 668 (internal citations omitted) (emphasis added). "[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id*. at 670.

Because King County fails to compensate jurors for their time, the County's jury system creates a situation that is akin to but worse than a poll tax. To participate in this democratic process, people of low economic status who are not otherwise compensated by an employer must forego their income for days, weeks, or even months. This requirement burdens the fundamental right to jury participation far more than a poll tax burdens the right to vote. Like voting, wealth is an irrelevant consideration to the ability to serve as a juror. The Supreme Court has recognized the right of all citizens to participate on a jury regardless of economic status. *Thiel*, 328 U.S. at 222-23.

King County argues that jurors of low economic status who obtain a hardship exemption voluntarily choose not to serve on a jury, and the County has no responsibility for that choice. But as the Supreme Court has concluded, the fact that citizens are not *required* to pay a poll tax provides no justification for that tax. *Harper*, 383 U.S. at 666. The tax remains unconstitutional.

King County's refusal to compensate jurors who are not otherwise paid by their employer while performing jury service violates the fundamental right to serve on a jury in the same way that a poll tax violates the right to vote. The prospective jurors state a proper claim for disparate impact based on economic status.

E. Jurors Are Employees Within the Meaning of the MWA.

The prospective jurors seek equitable relief and damages on the ground that an individual who performs jury service in a King County

court is an "employee" of the County. CP 34-40. The trial court rejected this assertion, holding that "[j]urors serving in King County are not employees of the County for purposes of wage and hour laws." CP 676. The trial court's decision is erroneous.

1. The Washington Supreme Court has determined that jurors are employees of the county in which they serve.

The Washington Supreme Court has already considered the question of whether a juror is an employee of the county in which she serves. In *Bolin v. Kitsap County*, the plaintiff sought compensation under the Industrial Insurance Act ("IIA") for injuries he suffered in a car accident that occurred while returning home from jury service. 114 Wn.2d at 71. The Board of Industrial Insurance Appeals found the statute provided no coverage, and the trial court affirmed. *Id.* The Supreme Court reversed, holding the plaintiff "was an employee of Kitsap County while serving as a juror and that the car accident occurred in the course of his employment." *Id.*

In concluding that "[j]urors are employees of the county" in which they serve, the Supreme Court first noted that the IIA defines "employee" to include "all workers," and the term "worker" includes "every person in this state . . . in the employment of an employer." *Id.* at 72, 75 (quoting RCW 51.08.180 and citing RCW 51.08.185). The Court also noted that the IIA is "construed liberally" and that "[j]ury service is not within the list of those employments excluded." *Id.*

Next, the Court analyzed the test typically used to determine coverage under the IIA. The right to control test provides that an employment relationship exists when (1) "the employer has the right to control the servant's physical conduct in the performance of his duties," and (2) "there is consent by the employee to this relationship." *Id.* at 73 (citation omitted). Because "jurors are involuntary workers, rather than workers subject to traditional employment relationships based on consent of both parties," the Court concluded the second part of the test had no application to the facts of the case. *Id.* at 72-73. As for the first part of the test, the Court held "jurors [are] under a superior court judge's control" and therefore "are county employees." *Id.* at 76. Stated another way, "[j]urors are employees of the county by virtue of their responsibility to the superior court." *Id.* at 75.

The Supreme Court "presumes that the legislature is aware of judicial interpretations of its enactments and takes [the legislature's] failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). In *Koenig*, the statute at issue had not been modified by the legislature "in the 23 years since the [Court issued a] decision" interpreting it. *Id.* As such, the Court concluded "the legislature has implicitly assented to our holding . . . ." *Id.* Here, more than 27 years have passed since *Bolin* was decided, yet the legislature has not amended the IIA to modify the status

of jurors as employees of the county. This strongly indicates the legislature agrees with the *Bolin* Court's conclusion that jurors are employees of the county in which they serve for purposes of the IIA.

2. Under the "economic-dependence" test, jurors are County employees for purposes of the MWA.

Jurors are also employees of the county in which they serve for purposes of the MWA. Indeed, the test for determining employee status under the MWA "provides *broader* coverage than does the right-to-control test." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (emphasis added).

The MWA defines "[e]mployee" as "any individual employed by an employer." RCW 49.46.010(3). Under the statute, "'[e]mploy' includes to permit to work." RCW 49.46.010(2). And "[e]mployer" is defined as any individual or entity "acting directly or indirectly in the interest of an employer in relation to an employee." RCW 49.46.010(4). "Taken together, these statutes establish that, under the MWA, an employee includes any individual permitted to work by an employer. This is a broad definition." *Anfinson*, 174 Wn.2d at 867.

In *Anfinson*, the Supreme Court held that the "economic-dependence test" is used to determine whether a person is an "employee" for purposes of the MWA. 174 Wn.2d at 871. The defendant there had argued that the common law "right-to-control test" should be used, but the Supreme Court rejected this because "the economic-dependence test results in *a more inclusive definition* of employee" and thus comports with

the "liberal construction" and "remedial purpose" of the MWA. *Id.* at 870, 872 (emphasis added). The Court acknowledged, though, "that control is one important factor in the economic-dependence test." *Id.* at 873.

In *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 196-97, 332 P.3d 415 (2014), the Supreme Court discussed "13 nonexclusive factors" that are typically considered when applying the economic-dependence test, which is also referred to as the "economic reality" test. These factors include the "nature and degree of control of the workers"; the "degree of supervision, direct or indirect, of the work"; the "right, directly or indirectly, to hire, fire, or modify the employment conditions"; whether the work is a "specialty job"; whether "the premises and equipment of the employer are used"; whether the workers "had a business organization that could or did shift as a unit from one worksite to another"; "whether the employee had an opportunity for profit or loss depending upon . . . managerial skill"; and "whether the service rendered is an integral part of the alleged employer's business." *Becerra,* 181 Wn.2d at 196-97 (internal marks and citations omitted). "These factors are not exclusive and are not to be applied mechanically or in a particular order." *Id.* at 198.

A review of the facts of this case demonstrates that jurors serving in the courts of King County are employees under the economic-dependence test. For example, King County:

- "[A]dmits that it . . . instruct[s] [jurors] on the time and location of their jury service" and that "once a juror is assigned to a courtroom, the judge provides the schedule." CP 258 ¶ 5.24; CP 606-07, No. 1.

- "[A]dmits that it has jury supervisors or clerks in the jury room or courtroom who instruct jurors on completing forms and on their role and duty as jurors . . . ." CP 259 ¶ 5.26; *see also* CP 607-08, No. 3.

- "[A]dmits it has the authority to excuse individuals from jury service . . . and to dismiss jurors once their jury service is complete." CP 259 ¶ 5.27; *see also* CP 608, No. 4.

- "[A]dmits that it maintains records regarding jurors who are called to serve in each courthouse, jurors who are dismissed from service, jurors who are assigned to specific courtrooms, jurors who are paid by defendant for their service . . . and jurors who request accommodations in order to perform jury service." CP 259 ¶ 5.29; *see also* CP 609, No. 6.

- "[A]dmits . . . that it provides jury rooms, courtrooms, or both at all of the Superior Court and District Court courthouses in King County." CP 260 ¶ 5.30; *see also* CP 609 - 610, No. 7.

- Admits the work of jurors is not specialized and does not require particular knowledge or ability, as "a person is competent to serve as a juror unless that person is (1) less than eighteen years of age; (2) is not a citizen of the United States; (2) is not a resident of the county in which he or she has been summoned to serve; (4) is not able to communicate in the English language; or (5) has been convicted of a felony and has not had his or her civil rights restored." CP 260 ¶¶ 5.31, 5.32; *see also* CP 610, No. 8; RCW 2.36.070.

- "[A]dmits that jurors perform a vital service to the community in King County and without them [the] system of justice could not function." CP 260 ¶ 5.34; CP 610, No. 9.

These admissions establish that King County jurors are employees entitled to the protections of the MWA. In addition, the Court determines

what evidence a jury will consider and instructs them on the law they are bound to follow in reaching their verdict.

3. Jurors are not exempt from the MWA's definition of "employee."

The MWA's definition of "employee" excludes certain groups of people. *See* RCW 49.46.010(3)(a)-(p). At issue in this case is the following provision:

> 'Employee' includes any individual employed by an employer but shall not include . . . [a]ny individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section . . . .

RCW 49.46.010(3)(d). The trial court held that this provision exempts jurors because jurors receive expense payments and mileage reimbursement under RCW 2.36.150. RP 19:6-19. This holding is erroneous.

The first sentence of RCW 49.46.010(3)(d) identifies two specific scenarios under which individuals who are engaged in the activities of a state or local governmental body or agency will be deemed exempt from the MWA's coverage: (1) where the employer-employee relationship does not in fact exist; and (2) where the services are rendered gratuitously. Neither situation applies to jurors. As the Supreme Court has held, and as

the evidence here demonstrates, an employer-employee relationship between King County and jurors *does* in fact exist. *Bolin*, 114 Wn.2d at 75; CP 258-60, 606-10. Moreover, the Supreme Court has determined that jurors do not render service gratuitously but are "*involuntary* workers." *Bolin*, 114 Wn.2d at 72, 75 (emphasis added). Indeed, "[a] person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor." RCW 2.36.170. Thus, jurors do not fall within the exemption.

The second sentence of subsection .010(3)(d) does not alter this analysis. To begin with, the second sentence applies to individuals who fall within the scope of the subsection's first sentence. And more specifically, the second sentence applies only to those who render their services gratuitously. The purpose of the second sentence is to determine when "an employer-employee relationship is deemed *not* to exist," and such a determination is unnecessary if, under the first sentence, it has already been determined that an employer-employee relationship "does not in fact exist." RCW 49.46.010(3)(d).

In short, the second sentence provides that the receipt of reimbursement or nominal compensation for *voluntary* services rendered does not make one an employee. This conclusion is supported by the statute's legislative history. In 1976, the Washington Attorney General issued an opinion in which it concluded that "[v]olunteer firefighters and others who perform volunteer services for local government [and] often

receive a small amount of compensation to cover expenses . . . would have to be paid the minimum wage since they are not specifically exempt from the provisions of the Minimum Wage Act." H.R. Rep. on H.B. 104, ex. s. c 69 § 1, at (Wash. 1977) (citing Wash. AGO 1976 No. 21 (Wash. A.G.)).[12] Concerned about "increased costs to political subdivisions which make use of such volunteer services," the legislature responded by enacting RCW 49.46.010(3)(d). *Id*. The legislature summarized the underlying bill as follows:

> Persons performing voluntary services are exempt from the provisions of the Minimum Wage Act. The bill also specifically exempts full time employees of governmental bodies as to any services performed on a voluntary basis.
>
> The bill further states that any voluntary services *or compensation therefor* shall not qualify the volunteer for state or local retirement benefits or add to any such benefits except as to coverage under present law dealing with volunteer firemen's relief and pensions.

HB 104 Rep. (emphasis added). This supports the conclusion that the second sentence of subsection .010(3)(d) refers only to individuals who receive a reimbursement or nominal payment for performing services on a voluntary basis.

The "liberal construction" afforded to the MWA "is one that favors classification as an employee." *Anfinson*, 174 Wn.2d at 870. Accordingly, "exemptions from [MWA] coverage 'are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the

[12] A copy of this report is attached as Appendix A.

terms and spirit of the legislation.'" *Id.* (quoting *Drinkwitz*, 140 Wn.2d at 301). The assertion that jury service is a duty of citizenship has no bearing on whether jurors are entitled to the protections of the MWA. King County compels jurors to work and when they do, they should be compensated for their time at no less than the applicable minimum wage rate. The trial court erred in concluding that jurors are not employees under the MWA.

F. Payments to Jurors Are Not Limited to Those Identified in RCW 2.36.150.

As a third and final basis for granting summary judgment, the trial court concluded that "King County is not required or permitted to pay jurors more than the amount set forth in RCW 2.36.150." CP 676. This was error.

RCW 2.36.150 is titled in relevant part: "Juror expense payments—Reimbursement by state." It requires King County to pay jurors "for each day's attendance" both a "mileage" allowance and an "expense payment[]" or "per diem" of "up to twenty-five dollars but in no case less than ten dollars." RCW 2.36.150. In *Bolin v. Kitsap County*, the Court determined that jurors are "employees" within the meaning of the IIA and are therefore eligible to receive workers compensation payments. 114 Wn.2d at 71. But workers compensation payments are not authorized by RCW 2.36.150. Thus, the Court necessarily decided that jurors are entitled to payments beyond those authorized by RCW 2.36.150. *See Bolin*, 114 Wn.2d at 77 (recognizing Kitsap County's "statutory

obligation" under RCW 2.36.150 to pay transportation expenses but concluding juror was entitled to additional "compensation" under IIA).

The plain language of RCW 2.36.150 supports this conclusion. *See Gonzalez*, 168 Wn.2d at 264 (noting the "first step" of statutory interpretation "is to examine [the] plain language"). The statute's operative terms are "expense," "reimbursement," and "per diem," all of which are undefined. "When a statutory term is undefined, the words of a statute are given their ordinary meaning, and a court may look to a dictionary for such meaning." *Id*. at 263. An "expense" is a "financial burden or outlay," a "cost."[13] To "reimburse" is "to pay back to someone."[14] And a "per diem" is "[a] monetary daily allowance, usu. to cover expenses."[15]

Based on the usual understanding of these terms, it is clear that RCW 2.36.150 does *not* speak to whether jurors are entitled to receive wage payments for hours worked; rather, it only addresses what jurors are entitled to receive by way of expense or reimbursement payments. "If [a] statute is unambiguous after a review of the plain meaning [of its terms], the court's inquiry is at an end." *Gonzalez*, 168 Wn.2d at 263 (noting "a statute is not ambiguous merely because different interpretations are conceivable") (citation omitted); *see also Cerrillo v. Esparza*, 158 Wn.2d

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[13] https://www.merriam-webster/dictionary/expense.
[14] https://www.merriam-webster/dictrionary/reimburse.
[15] *Black's Law Dictionary 1157* (7th ed. 1999). Notably, King County repeatedly refers to the expense payments made under RCW 2.36.150 as "per diem" payments. CP 84 ("$10.00 per diem"), CP 88 ("$10.00 to $25.00 per diem"), CP 90 ("the amount is still a per diem"), CP 93 ("to pay a per diem"). The trial court similarly found "per diem" to be synonymous with "expense payment." RP 17:4-5.

194, 202, 142 P.3d 155, 159 (2006) ("aids to construction . . . [are] appropriate only after a determination that a statute is ambiguous"). The trial court erred in holding that RCW 2.36.150 forecloses the right of jurors to be compensated for their time.

G. The Prospective Jurors Have Standing to Seek Equitable Relief.

In its motion for summary judgment, King County argued that the prospective jurors lack standing to pursue equitable relief. The trial court implicitly rejected this argument; otherwise, the court would have been unable to reach the merits of the claims. This Court should explicitly confirm that standing is met.

Ms. Bednarczyk and Ms. Selin are eligible to serve as jurors; indeed, King County has summonsed both for jury service, and Ms. Selin served as recently as the fall of 2015. CP 655-656 ¶¶ 2, 7-8; CP 653-654 ¶¶ 2-6; CP 644. The injuries the prospective jurors will suffer are not speculative. King County's practice of failing to pay minimum wages to jurors has caused Ms. Bednarczyk to be excluded from participating in jury service on account of her economic status. *See* CP 655-656 ¶¶ 2-6; CP 646. And King County has already failed to pay minimum wages to Ms. Selin for the time she spent performing jury service. *See* CP 653 ¶ 4.

1. Standing is met under the Uniform Declaratory Judgment Act.

"In order to have standing, a party must demonstrate (1) that [she] falls within the zone of interests that a statute or ordinance protects or regulates and (2) that [she] has or will suffer an injury in fact, economic or

otherwise, from the proposed action." *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33, 260 P.3d 245 (2011) (citation omitted). The prospective jurors satisfy both requirements.

The purpose of the Uniform Declaratory Judgments Act ("UDJA") "is to settle and to afford relief from uncertainty or insecurity with respect to rights, status and other legal relations." RCW 7.24.120. A person whose rights "are affected by a statute [or] ordinance" may have determined "<u>any</u> question of construction or validity arising under" the statute or ordinance and may also obtain a declaration of his or her rights. RCW 7.24.020 (emphasis added; internal marks omitted). The act is "remedial" and thus "is to be liberally construed and administered." RCW 7.24.120; *see also Sorenson v. City of Bellingham*, 80 Wn.2d 547, 559, 496 P.2d 512 (1972) ("The Declaratory Judgments Act should be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law.") (citation omitted). Washington courts "have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010.

The prospective jurors assert two claims under the UDJA. *See* CP 204-245 ¶¶ 7.1–7.11 and 11.1–11.19. The first claim concerns the Juror Rights Statute, RCW 2.36.080(3). The second claim concerns both the MWA and the Seattle Minimum Wage Ordinance, SMC 14.19.030.A, which sets a minimum wage for employees who work within Seattle.

As a resident of King County who is qualified to serve as a juror, Ms. Bednarczyk is well within the zone of the Juror Rights Statute. Bednarczyk Decl. ¶ 8. The law is designed to protect prospective jurors, and King County does not challenge Ms. Bednarczyk's status as such. Likewise, both of the prospective jurors are well within the zone of the applicable minimum wage laws because jurors are employees of the County. *See Bolin*, 114 Wn.2d at 75.

"To show an injury in fact, the [plaintiff] must demonstrate that [she] will be 'specifically and perceptibly harmed' by the [challenged] conduct." *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 868, 351 P.3d 875 (2015).[16] "Where, as here, a party alleges a threatened injury, as opposed to an existing injury, the party must prove that the threatened injury is immediate, concrete, and specific." *Id.*, 187 Wn. App. at 869 (citation omitted). "The injury in fact test is not meant to be a demanding requirement." *Id.* "Typically, if a litigant can show that a potential injury is real, that injury is sufficient for standing." *Id.*

With respect to Juror Rights Statute, Ms. Bednarczyk will suffer real injuries if she is excluded from participation in jury service on account of her economic status. Among other things, she will be denied

[16] The *City of Burlington* case addressed standing under the Administrative Procedure Act (APA), but in doing so the Court of Appeals relied on decision of the Washington Supreme Court that "involved standing under the uniform declaratory judgment act (UDJA) chapter 7.24 RCW." 187 Wn. App. at 873 n.16 (citing *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012)). The Court of Appeals referred to the Supreme Court's decision as "controlling authority because the two-part standing test under the UDJA is nearly identical to the APA two-part standing test." *Id.*

one of the "most significant opportunit[ies] . . . to participate in the democratic process." *See Powers*, 499 U.S. at 407. She will also be denied the educational benefits that come from jury service. *See Saintcalle*, 178 Wn.2d at 101 (Gonzalez, J., concurring).

With respect to the minimum wage laws, Ms. Bednarczyk and Ms. Selin will suffer real financial injuries if King County fails to pay them at least the applicable minimum wage for each hour of jury service. "Economic interests are sufficient to give standing to sue." 15 Karl B. Tegland, *Wash. Prac., Civil Proc.* § 42:2 (2d ed. Aug. 2016 Update); *see also Ayers v. City of Tacoma*, 6 Wn.2d 545, 547-50, 108 P.2d 348 (1940) (holding plaintiff was "eligible to become a member of the city's pension system" and thus had standing to seek declaratory judgment on behalf of himself and others regarding validity of pension ordinance).

The injuries the prospective jurors will suffer are not speculative. King County's practice of failing to pay minimum wages to jurors has caused Ms. Bednarczyk to be excluded from participating in jury service on account of her economic status. *See* Bednarczyk Decl. ¶¶ 2-6; Ex. 22. And King County has already failed to pay minimum wages to Ms. Selin for the time she spent performing jury service. *See* Selin Decl. ¶ 4. Accordingly, the prospective jurors meet the standing requirements.

2. Standing is met because the claims at issue impact the public interest.

Even if there were questions regarding the standing of the prospective jurors in this case, it would still be appropriate for the Court to

rule on their claims. "Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the [management and operation of governmental systems] generally, questions of standing to maintain an action should be given less rigid and more liberal answer." *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (quoting *Wash. Nat'l Gas Co. v. PUD 1*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969)).[17] Moreover, Washington courts will reach a "substantive issue presented where that 'issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide authoritative determination for the future guidance of public officials.'" *Farris*, 99 Wn.2d at 30 (citation omitted). The dispute before the Court meets these standards.

VI. CONCLUSION

The Court should rule (1) that "economic status" is a protected classification under RCW 2.36.080(3); (2) that the failure to pay jurors minimum wage states a claim for disparate impact based on economic status; (3) that jurors are "employees" within the meaning of the Minimum Wage Act; (4) that payment to jurors is not limited to those payments identified in RCW 2.36.150; and (5) that the prospective jurors have

[17] *See also Vovos v. Grant*, 87 Wn.2d 697, 699-701, 555 P.2d 1343 (1976) (applying relaxed standing requirements to resolve issue concerning "juveniles in Spokane County who become subject to the juvenile court's jurisdiction"); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245 (2011) ("even if the question of . . . standing were debatable, we would still address the issues presented in this appeal, because they involve significant and continuing matters of public importance").

standing to pursue equitable relief and damages. The Court should reverse the trial court's order granting summary judgment and remand for further proceedings.

Respectfully submitted this 14th day of December, 2017.

/s/ Jeffrey Needle .
Jeffrey L. Needle, WSBA #6346
Law Offices of Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, WA 98104
Telephone: (206) 447-1560
jneedlel@wolfenet.com

/s/ Toby Marshall .
Toby J. Marshall, WSBA #32726
Terrell Marshall Law Group PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
tmarshall@terrellmarshall.com

– APPENDIX A –

HB 98

SPONSORS: Representatives Bauer, Charnley, Douthwaite, Kilbury, Lee, Lysen, G. Nelson and Smith

COMMITTEE: Energy and Utilities

Establishing thermal performance standards for new dwellings.

ISSUE:

Proponents contend that thermal performance standards for new housing should be implemented to conserve energy.

SUMMARY:

Minimum thermal performance and design standards are established for new dwellings. All new dwellings equipped with a heating and/or cooling system for which applications for building permits are made subsequent to 90 days after the effective date of this bill must comply. This legislation does not apply to single-family dwellings not intended for year-round occupancy.

One building component of a dwelling may exceed the heat loss characteristics specified in the bill if the heat loss from another building component is decreased by the same amount. Cities, towns and counties may adopt alternative heat loss standards which must be as stringent as those standards provided in the bill.

House: (a)	86	6	Effective: Sept. 21, 1977
Senate: (a)	47	0	C 14 L 77 1st ex. sess.
H. Concur:	93	2	

HB 104

SPONSORS: Representatives King, Berentson, Conner, Erickson, Fortson, Grier, Hansen, Knedlik, Kreidler, Moreau, North, Owen, Pearsall, Sherman, Shinpoch, Struthers, Vroman and Walk

COMMITTEE: Labor

Exempting volunteer firemen from the state Minimum Wage Act.

ISSUE:

Volunteer firefighters and others who perform volunteer services for local government often receive a small amount of compensation to cover expenses. According to a recent Attorney General Opinion (AGO 1976, No. 24), such volunteers would have to be paid the minimum wage since they are not specifically exempt from the provisions of the Minimum Wage Act.

The Attorney General Opinion further indicates that if an employee of a governmental body provided volunteer service in addition to a regular 40-hour work week, the Minimum Wage Act's overtime provision might also apply.

If the interpretations in the Attorney General Opinion were followed, there would increased costs to political subdivisions which make use of such volunteer services.

SUMMARY:

Persons performing voluntary services are exempt from the provisions of the Minimum Wage Act. The bill also specifically exempts full time employees of governmental bodies as to any services performed on a voluntary basis.

The bill further states that any voluntary services or compensation therefor shall not qualify the volunteer for state or local retirement benefits or add to any such benefits except as to coverage under present law dealing with volunteer firemen's relief and pensions.

This bill contains an emergency clause.

House: (a)	92	0	Effective: May 24, 1977
Senate: (a)	41	0	C 69 L 77 1st ex. sess.
H. Concur:	91	0	

SHB 105

SPONSORS: Committee on Commerce (Originally sponsored by Representatives Warnke, Vallé, Greengo, Gaines and Sanders)

COMMITTEE: Commerce

Revising a definition in economic development law.

ISSUE:

Present law allows a manufacturing firm to obtain a sales tax deferral for a period of up to three years if it expands its plants into specified areas. In an attempt to encourage this expansion in areas not presently developed, the 1972 Legislature provided that the tax deferral benefit would not accrue to an industry which expanded into a major employment area. That provision contained an unworkable reference which has had the effect of discouraging expansion into certain areas. For example, a door manufacturing plant was prohibited from receiving the sales tax deferral because its proposed expansion was within a category containing logging and wood processing industries. This was true even though the proposed plant was the only door manufacturing plant which would have been located in this area.

LAW OFFICE OF JEFFREY NEEDLE

December 18, 2017 - 1:23 PM

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- paul.vernon@kingcounty.gov
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Comments:

Appellants' Amended Brief filed contemporaneously with the Motion to file Amended Brief.

Sender Name: Jeffrey Needle - Email: jneedlel@wolfenet.com
Address:
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SEATTLE, WA, 98104-3450
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