BOARD FOR JUDICIAL ADMINISTRATION

WASHINGTON COURTS

MEETING PACKET

Board for Judicial Administration
FRIDAY, May 19, 2023
9:00 A.M.

VIDEOCONFERENCE

Board for Judicial Administration Membership

VOTING MEMBERS:

Chief Justice Steven González, Chair
Washington State Supreme Court

Judge Tam Bui, Member Chair
District and Municipal Court Judges' Association
Snohomish County District Court

Judge Alicia Burton
Superior Court Judges' Association
Pierce County Superior Court

Judge Anne Cruser
Court of Appeals, Division II

Judge Sam Chung, President
Superior Court Judges' Association
King County Superior Court

Judge Marilyn Haan
Superior Court Judges' Association
Cowlitz County Superior Court

Judge Dan Johnson
District and Municipal Court Judges' Association
Lincoln County District Court

Judge Rick Leo, President
District and Municipal Court Judges' Association
Snohomish County District Court

Judge Mary Logan
District and Municipal Court Judges' Association
Spokane Municipal Court

Judge David Mann
Court of Appeals, Division I

Justice Raquel Montoya-Lewis
Washington State Supreme Court

Judge Rebecca Pennell
Court of Appeals, Division III

Judge Rebecca Robertson
District and Municipal Court Judges' Association
King County District Court

Judge Michael Scott
Superior Court Judges' Association
King County Superior Court

Judge Jacqueline Shea-Brown
Superior Court Judges' Association
Benton/Franklin Superior Court

NON-VOTING MEMBERS:

Judge Kristin Ferrera, President-Elect
Superior Court Judges' Association
Chelan County Superior Court

Dan Clark, President
Washington State Bar Association

Judge Jeffrey Smith, President-Elect
District and Municipal Court Judges' Association
Spokane County District Court

Terra Nevitt, Interim Executive Director
Washington State Bar Association

Dawn Marie Rubio
State Court Administrator

Board for Judicial Administration (BJA)

May 19, 2023 (9:00 a.m. – 12:00 p.m.)

Zoom Meeting

AGENDA and notes		
1. Call to Order **Welcome and Introductions**	Judge Tam T. Bui Chief Justice Steven González	9:00 a.m.
2. Panel Presentations: *Starting conversations: attorney issues and challenges* **Group Discussion:** What is a short-term and long-term solution in your jurisdiction? What can courts do to address/support attorney recruitment and retention challenges? What can the BJA do?	Katrin Johnson, Office of Public Defense Paul Kelley, Yakima Public Defender Director Patrick O'Connor, Thurston Public Defender Director Office of Civil Legal Aid Jim Bamberger, Director Bailey Zydek, Manager of the Children's Representation Program Philippe Knab, Manager of the Appointed Counsel for Tenant Defendants Program Judge Jackie Shea Brown, Benton Superior Court Jason Schwarz – Snohomish County Public Defender Director, Chair Council of Public Defense	9:05 Tab 1
Break		10:45-10:55
3. BJA Task Forces/Work Groups Alternatives to Incarceration Court Security Remote Proceedings	 Judge Mary Logan/Jeanne Englert Judge Rebecca Robertson/ Penny Larsen Judge Angelle Gerl/Penny Larsen	10:55 Tab 2
4. Standing Committees Budget and Funding Committee	 Judge Mary Logan/ Chris Stanley	11:10 Tab 3

Court Education Committee *Motion to approve revised CEC charter changes in consent agenda (Agenda #6)* Legislative Committee *Brief Legislative Summary* *Proposal to form BJA Work group* Policy and Planning Committee	Judge Tam T. Bui/Judith Anderson Judge Michael Scott/Brittany Gregory Judge Rebecca Robertson/ Penny Larsen	
5. Trial Court Updates **SCJA** **DMCJA**	 Judge Samuel Chung/Judge Jennifer Forbes Judge Rick Leo/Judge Jeffery Smith	11:30 Tab 4
6. Consent Agenda: (*one motion to approve all of the below items*) Motion to approve: March 17, 2023 minutes Meeting Schedule for following year BJA SCJA Member Co-chair CEC charter membership changes	Judge Tam T. Bui	11:45 Tab 5
7. Information Sharing Thank you to outgoing members DOJ Fees and Fines Letter	Judge Tam T. Bui	11:55 Tab 6
8. Adjourn		12:00
Persons who require accommodations should notify Jeanne Englert at 360-705-5207 or jeanne.englert@courts.wa.gov to request or discuss accommodations. While notice five days prior to the event is preferred, every effort will be made to provide accommodations, when requested.		

Next meeting:
September 15, 2023, 9:00 – 12:00 Location TBD
October 20, 2023, 9:00 – 12:00 – Location TB
November 17, 2023, 9:00 – 12:00 – Location TBD

TAB 1

Attorney Recruitment Articles and Efforts

Washington State Bar Association (WSBA)

Council on Public Defense

The Council on Public Defense (CPD) unites representatives of the bar, private and public criminal defense attorneys, current and former prosecutors, the bench, elected officials and the public to address new and recurring challenges that impact the public defense system.

- Council on Public Defense Statement on Workloads **(**Adopted January 2022)
- Council on Public Defense Statement: Statement: Public Defense Lawyers Should Seek Relief from Excessive Workloads. (Adopted July 2022)

Rural Practice Project

In November 2019, WSBA began focusing on the topic of "legal deserts", areas where access to legal services and representation are limited. Shortly thereafter, the WSBA formed a rural practice project team whose primary goal was to identify ways in which the WSBA is best positioned to support the practice of law in the rural communities of Washington state.

Small Town & Rural Practice Committee (Star)

The WSBA Small Town and Rural Practice — STAR — Committee is committed to strengthen and support the practice of law in the rural communities throughout Washington state. Members of the STAR Committee will work to ensure that the practice of law in rural communities is present, growing, and thriving. The formation of STAR is a result of the work conducted by the Rural Practice Project.

Local and National Articles:

Comment: State must bolster poorly funded public defense system
Op-ed Representative Tarra Simmons and Jason Schwarz.

Attorney shortage affecting some charging decisions in Yakima County, prosecuting attorney says (Yakima Herald-Republic)

Legal crisis. Tri-Cities officials race to fix lawyer shortage before criminal cases are dropped by Cameron Probert; Tri-City Herald.

Greening The Desert Strategies and Innovations to Recruit, Train, and Retain Criminal Law Practitioners for STAR Communities

'Well, Is There Blood on the Street?' Why so few lawyers are willing to take civil-rights cases. By Joanna Schwartz

106 Cases, Three Jobs, One Lawyer. The city's public defenders are struggling.
By Nia Prater, Intelligencer staff writer, who covers New York politics

Recruitment and Retention Ideas for Smaller and Rural Jurisdictions, OPD

Oregon public defender asks court to withdraw overworked attorneys, dismiss cases, Conrad Wilson

TAB 2

May 19, 2023

RE: Alternatives to Incarceration Task Force Report

The goal of this strategic initiative is for pre-trial and post-sentencing incarceration alternatives to be uniformly available to courts throughout the state regardless of the court's resources and the person's ability to pay.

The Task Force's next meeting is May 25, 12:00 – 1:30. All meetings are TVW livestreamed.

Assessment and Information Gathering Workgroup closed their court assessment survey and are in the process of reviewing the data. The purpose of this survey is to: identify jurisdictions that have pretrial and post-conviction adult alternatives to incarceration; determine what services they provide and how they are funded; and to gain insight into what is working and what is needed. The work group also sent out a survey to attorneys across the state to do a general assessment of alternatives used in communities across WA.

At the March meeting, there was a presentation ***Revolving Doors and Downward Spirals: Findings from the WA Rural Jails Project*** by Jennifer Schwartz and Jennifer Sherman of the Washington Rural Jails Network.

The authors shared their research – both qualitative and quantitative data on incarceration rates, pathways, and experiences in rural jails in six Washington Counties. Data: 30-38% of all jail bookings were related to problems navigating legal system requirements, - such as failure to appear, driving with suspended license, failure to obey to criminal justice system directions, not paying, fees and fines, etc.

Qualitative Key Findings: System navigation problems, Domestic violence – mandatory arrest (significant pathway into jail – most common source for concerns of false charges), drug/alcohol charges (long term cycles of addiction). Also found justice system challenges which included overworked public defender, lack of judges, poor personal connections with people working with, if had a good attorney then there was a better experience (deferred, etc.), structure of rural community and legal system, lack of transportation, mental health.

Rural structural challenges: lack of legal support and lack of access to legal supports, housing shortages, lack of transpiration, recovery services, shortage of jobs, inadequate jail facilities, shortage of female jail staff, importance of insider versus outsider status (if they are integrated into rural community can have an impact – who do you know and are you liked?)
Once in jail – physical discomfort, unsanitary conditions, clothing issues, drugs inside, lack of medical/health care.

May 19, 2023

TO: Board for Judicial Administration (BJA) Members

FR: Judge Sean O'Donnell and Judge Rebecca Robertson
Co-Chairs, BJA Court Security Task Force

RE: REPORT OF THE COURT SECURITY TASK FORCE

The state legislature appropriated $2 million in the 2023-2025 budget for court security equipment and services.

The Task Force used the feedback from key legislators after the unsuccessful funding request in the 2022 supplemental budget to put forth a successful funding request in 2023. The legislators specifically wanted two things that the Task Force was able to deliver:

- Legislators wanted local jurisdictions to contribute some funding for security equipment and services. The Task Force created a shared cost model that was proposed in the funding request.
- Legislators wanted to hear support for the funding from commissioners in the small rural jurisdictions. The Task Force Co-Chairs and local judges met with several boards of commissioners and were able to gather letters of support from them that were delivered to Chairs of the Ways & Means and Appropriations Committees.

The Task Force developed an advocacy campaign that encouraged the court community to contact legislators to support the funding request. Task Force co-chairs met with 17 legislators in February, and many of them stated that they "had been hearing about this request" from members of the court community in their districts.

The Task Force final meeting on May 15 will celebrate the successful funding request and accomplishments of the Task Force. Members will review outline of the final Task Force report and discuss recommendations to the BJA for future activities. The Task Force ends on June 30, 2023. Their final report will and recommendations will be available later this summer.

May 19, 2023

TO: Board for Judicial Administration (BJA) Members

FR: Judge Angelle Gerl and Judge Jim Rogers
Co-Chairs, BJA Remote Proceedings Work Group

RE: REPORT OF THE REMOTE PROCEEDINGS WORK GROUP

Court Rules Project is Underway

Five subgroups of judicial officers, spokespersons for attorney associations and court administrators across the state are working very diligently toward the timeline of the presenting the slate of rule recommendations to the Washington Supreme Court Rules Committee in early June.

The subgroups are reaching consensus on most of the proposed rule changes that are needed in order to allow for remote proceedings after the Emergency Orders are lifted by the Washington State Supreme Court. Groups are identifying issues that are important to address in the Remote Proceedings Best Practices Guidelines Project that will begin this summer.

Remote Proceedings Best Practices Guidelines Project will begin Summer 2023

This project will evaluate the best practices identified from other state courts, from the Court Rules Project and from the Survey of Remote Practices in Washington Courts conducted in January 2023. The Work Group will draft voluntary guidelines that will include tips and recommended practices for courts and practioners.

TAB 3

May 19, 2023

TO: Board for Judicial Administration Members

FROM: Judge Tam T. Bui, BJA Court Education Committee Chair
Judge Douglas J. Fair, BJA Court Education Committee Assistant-Chair

RE: Court Education Committee Report

The CEC is requesting administrative changes to the CEC charter. (See attachment.) The CEC request that the law school dean member also have "*or the Dean's designee*" added which will allow a law school dean to appoint a designee if they are not available. These changes are in Section VI – Membership and Section VIII – Term limits. There is also an update within Section IX. Other Branch Committees Addressing the Same Topic. We updated the title of the Court Interpreters Commission to *Court Interpreter and Language Access Commission*.

The CEC Strategic Positioning Plan is in the final phase of development. The CEC has identified three main goals and are working on developing action plans to meet those goals. The CEC is planning a July 14, 2023 retreat to finalize those action plans.

The Superior Court Judges' and Superior Court Administrators' Spring Programs were held at the end of April. Approximately 182 judges and 25 administrators attended the combined program. The District and Municipal Court Administrators' Academy was in early May. As required by ARLJ 14, over 70 new administrators attended the Academy and 40 additional experienced administrators attended to provide support and insight to new district and municipal court managers. Registration information has also been disseminated for the District and Municipal Court Judges' Spring program to be held in early June.

As the spring programs are held, many education chair positions are changing, which also means changes on the CEC. The CEC would like to thank long time members who are leaving – Judge Tam Bui, Snohomish District Court (Chair), Judge Doug Fair, Snohomish District Court (Assistant Chair), Judge Kevin Hull, Kitsap Superior Court, and Ashley Callan, Spokane Superior Court Administrator.

Work in Progress

- The Court Education Committee's Strategic Positioning Plan.
- Updating the CEC roster. New chair and assistant chair to be named.

Board for Judicial Administration (BJA)

COURT EDUCATION STANDING COMMITTEE CHARTER

I. Committee Title
Court Education Committee (CEC)

II. Authority
Board for Judicial Administrative Rules (BJAR 3)

III. Purpose
The CEC will improve the quality of justice in Washington by fostering excellence in the courts through effective education. The CEC will promote sound adult education policy, develop education and curriculum standards for judicial officers and court system personnel, and promote coordination in education programs for all court levels and associations consistent with its' mission statement and core values.

IV. Policy
The CEC will establish policy and standards regarding curriculum development, instructional design, and adult education processes for statewide judicial education, using the National Association of State Judicial Educator's *Principles and Standards of Judicial Branch Education* goals:

The goal of judicial branch education is to enhance the performance of the judicial system as a whole by continuously improving the personal and professional competence of all persons performing judicial branch functions.

1) Help judicial branch personnel acquire the knowledge and skills required to perform their judicial branch responsibilities fairly, correctly, and efficiently.
2) Help judicial branch personnel adhere to the highest standards of personal and official conduct.
3) Help judicial branch personnel become leaders in service to their communities.
4) Preserve the judicial system's fairness, integrity, and impartiality by eliminating bias and prejudice.
5) Promote effective court practices and procedures.
6) Improve the administration of justice.
7) Ensure access to the justice system.
8) Enhance public trust and confidence in the judicial branch.

V. Expected Deliverables or Recommendations

The CEC shall have the following powers and duties:

1. To plan, implement, coordinate, or approve BJA funded education and training for courts throughout the state.
2. Assure adequate funding for education to meet the needs of courts throughout the state and all levels of the court.
3. Collect and preserve curricula, and establish policy and standards for periodic review and update of curricula.
4. Develop and promote instructional standards for education programs.
5. Establish educational priorities.
6. Implement and update Mandatory Continuing Judicial Education polices and standards.
7. Develop working relationships with the other BJA standing committees and task forces.
8. Develop and implement standard curriculum for the Judicial College and District and Municipal Court Manager's Washington Court Administrator Academy per ARLJ 14. Provide education for judges and administrators that focuses on the development of leadership skills and provide tools to be used in the daily management and administration of their courts.

VI. Membership

- Voting Members: Three BJA members with representation from each court level
- Education committee chair or a designee from the following:
  - Superior Court Judges' Association (SCJA)
  - District and Municipal Court Judges' Association (DMCJA)
  - Appellate courts
- Annual Conference Education Committee Chair or designee
- Education committee chair or a designee from each of the following:
  - Washington State Association of County Clerks (WSACC)
  - District and Municipal Court Management Association (DMCMA)
  - Association of Washington Superior Court Administrators (AWSCA)
  - Washington Association of Juvenile Court Administrators (WAJCA)
- Washington State Law School Dean or the Dean's designee
- Appointments:

- BJA Members: Appointed by the BJA co-chairs
- Judicial Members: Trial court members appointed by their respective associations and appellate member appointed by the Chief Justice
- Annual Conference Chair: Annual Conference member appointed by Chief Justice
- Court Administrators and County Clerk Members: Administrative and County Clerk members appointed by their respective associations
- Washington State Law School Dean: CEC recruits and appoints

VII. CEC Committee Chair, Assistant Chair and Executive Committee

1. The Committee Chair shall be appointed by the BJA from the three BJA representatives. The chair shall serve for a term of two years.

2. The Assistant Chair shall be selected by the chair from the non BJA representatives for a term of two years.

3. The Chair, Assistant-Chair, a non-judicial representative and the AOC Administrator or his/her designee shall constitute the Executive Committee

4. The Executive Committee is authorized to make time-sensitive decisions without consultation or vote of the full CEC Committee. Executive Committee will immediately transmit the results of a decision to the CEC and decision memorialized in the following month's minutes

VIII. Term Limits

Staggered terms recommended (suggestion: staggered three-year terms for all members),

Representing	Term/Duration
BJA Member, Appellate Courts	***First population of members will be staggered (3 year term)**
BJA Member, SCJA	*
BJA Member, DMCJA	*
Appellate Court Education Chair or Designee (1)	Term determined by Chief Justice
Superior Court Judges' Association Education Committee Chair or Designee (1)	Term determined by their association
District and Municipal Court Judges' Association Education Committee Chair or Designee (1)	Term determined by their association
Annual Conference Chair or Designee (1)	Term determined by Chief Justice
Association of Washington Superior Court Administrators Education Committee Chair or Designee (1)	Term determined by their association
District and Municipal Court Management Association Education Committee Chair or Designee (1)	Term determined by their association

Washington Association of Juvenile Court Administrators Education Committee Chair or Designee (1)	Term determined by their association
Washington State Association of County Clerks Education Committee Chair or Designee (1)	Term determined by their association
Washington State Law School Dean or the Dean's Designee (1)	3-year term

IX. Other Branch Committees Addressing the Same Topic

The CEC identified the following organizations involved in education:

- Association education committees
- Annual Conference Committee
- Gender and Justice Commission
- Minority and Justice Commission
- Court Interpreter and Language Access Commission
- Certified Professional Guardian Board
- Court Improvement Training Academy
- Commission on Children in Foster Care
- AOC's Judicial Information System Education

The CEC will establish or continue relationships with the above-named entities.

X. Partnership with other Branch Committees

Foster continual relationships with the BJA Legislative, Budget and Funding and Policy and Planning Committees. The CEC will coordinate and collaborate with other BJA standing committees in order to develop long-term strategies for the funding of education and the creation of policies and procedures that are aligned with the BJA strategies and mission statement.

XI. Reporting Requirements

The CEC will report at each regularly scheduled BJA meeting.

XII. Recommended Review Date

Every two years from adoption of charter.

Adopted: July 18, 2014
Attached Memorandum of Understanding with BCE signed
Amended: March 20, 2015
September 19, 2014
September 18, 2015
July 15, 2022

May 9, 2023

To: BJA Members

From: BJA Legislative Committee

Re: Request to form BJA work group

1) **Sponsoring Individual/Entity**:
Sponsoring Individual/Organization: **BJA Legislative Committee**
Contact Person: **Haily Perkins**
Contact Email and Phone Number: **Haily.Perkins@courts.wa.gov / 360-968-3660**

2) **Issue (priority area or concern)**. *Provide a brief summary of the issue to be addressed. Include how you know this is an issue, what has been done about it, any identified goals/activities that need to be addressed, and who/what is impacted by this issue.*

The BJA Legislative Committee is requesting BJA to form a member workgroup to address electronic service of pleadings.

The response to COVID and changes in technology over the years has highlighted the need and the availability of alternative methods to assure that proper notice is given by those instituting legal actions and to those facing civil or criminal legal action.

Currently, service of original process in civil matters is controlled by RCW 4.28 as well as court rules. Alternative methods in lieu of personal service currently includes, but is not limited to, substitute service with follow-up mailing (RCW 4.28.080(17)), publication (RCW 4.28.100), registered mail (in a number of sections), service by mail in landlord tenant actions (RCW 59.12.085), non-resident motorists by mail (RCW 46.64.040), etc. The minor change suggested would open up an additional method of providing notice to make it easier for people serving process to give notice, but more importantly it would provide an additional way for people to avoid default judgments in civil cases and warrants in criminal cases. The homeless or transient populations would benefit the most.

Criminal court rules can be amended without this proposed legislation, (CrR 2.2(d)(2), CrRLJ 2.2(d)(2), IRLJ 2.2(c)(3), to specifically allow for email service. However, statutory changes would be needed to require the Department of Licensing to track email addresses if that is desired. A mandate for local courts and AOC to record email addresses in JIS could be added to court rules without any statute being amended, but that assumes that there would be no fiscal impact from such a move.

Currently, people can opt in to notice by email with private businesses as well as state and local government agencies, so we need to consider as a branch the need to catch up with current technology and practices.

3) **Goal**. *Provide a statement of desired outcome(s). What do you want to see happen as a result of BJA actions? Include whether the goal is a policy, administrative best practice, or funding consideration.*

Establishing electronic service of pleadings as a subsequent method of service statewide in Washington for Courts/Court Patrons who have an interest in electronic service as opposed to physical/mailed service or service by publication once a case has been initiated.

4) **Stakeholders.** *List stakeholder organizations with a likely interest in the issue.*
   - **COA**
   - **OPD**
   - **WDA**
   - **SCJA**
   - **DMCJA**
   - **AWSCA**
   - **DMCMA**
   - **WAJCA**
   - **WSACC**
   - **WSBA**
   - **WSAJ**
   - **WDTL**
   - **WAPA**
   - **DOL**
   - **Family Law Attorneys**
   - **Business Law Attorneys**
   - **Court Patron(s)**

5) **Other.** *Describe any other information that is helpful to know when making a decision. Include requested resources and timeline considerations.*

These changes would impact all court levels and AOC case management systems. There will also likely be a fiscal impact to update/modify case management systems

to track and utilize email addresses for electronic service. AOC IT/Case Management staff personnel will consult.

May 19, 2023

TO: Board for Judicial Administration (BJA) Members

FROM: Judge Rebecca Robertson, Chair, Policy and Planning Committee (PPC)

RE: REPORT OF POLICY AND PLANNING COMMITTEE

2023 Committee Work Plan Update:

Members listed the following policy issues they predict will be high priorities/on their respective association's lists and could be potential projects for the PPC in the next program year.

- Maintaining CLJ independence
- Remote hearings and challenges and benefits discussions for moving forward
- Courts and racial Justice issues
- Work/life balance – burn out and stress
- State funding
- Court security especially rural, smaller courts
- Securing personal judicial information as well
- Working with pro se litigants
- Staffing equities (additional judicial officers and court personnel). Remote hearings require more support and resources, need more facilitator positions/programs
- Court personnel income disparities across the state and in line with position requirements/skills. Recruitment and retention and diversity considerations.

Adequate Funding Project:
Committee members agreed the next step for the project is to reconvene the Adequate Funding Work Group at the May PPC meeting. Chris Stanley and Carl McCurley will attend and give their ideas and recommendations on how to move the work forward.

At Large Recruitment and Diversity Plan
Penny Larsen shared feedback she received on the plan to increase diversity on the BJA, which was approved in 2020. The current plan is for BJA Co-Chairs to attend the nominating committees' meetings at the SCJA and DMCJA conferences and encourage nominating judicial officers of color and from diverse backgrounds to BJA positions. Association noted the broader challenges they have in getting members to participate in committee work. Members discussed the problem and will present the BJA with a new plan in the coming year.

TAB 4

WASHINGTON STATE SUPERIOR COURT JUDGES' ASSOCIATION

April 2022 – April 2023 Selected Highlights

Court Rules

The SCJA suggested a number of court rule amendments, commented on proposed amendments suggested by other organizations, engaged in comprehensive reviews of relevant rules, and created a new ad hoc workgroup to review court rules in recognition of the need for a more systematic internal rule review process. The rule amendments suggested by the SCJA include:

- CJC Canon 2, Comments to Rule 2.2 and 2.6: The SCJA proposed changes to these specific rule comments, to assist judges discern what constitutes "reasonable accommodation" of unrepresented litigants in court. The changes were effective in September 2022.
- CrR 3.3: The SCJA submitted changes to Cr 3.3 to align with recent changes to CrR 3.4 regarding attorney signatures. The changes were effective January 2023.
- GR 9: The SCJA Board, in coordination with DMCJA and WSBA, suggested changes to the rulemaking process to increase transparency and participation.
- GR 26: The SCJA Equality and Fairness Committee's proposed changes to GR 26 were enacted in September 2022. GR 26 now requires 4.5 credits of judicial education per reporting period in diversity, equity and inclusion.
- JuCR 7.16: In coordination with WAJCA, the SCJA requested revocation or substantial amendments to this rule to address the substantive concerns raised by the superior courts, juvenile courts, and general public.
- Mental Proceedings Rules (MPR): The SCJA's Civil Law and Rules Committee undertook a comprehensive review of the MPR and submitted necessary changes, in view of recent amendments to the Involuntary Treatment Act.

Legislative Session

The SCJA was pleased to partner with the AOC to secure funding for a court security matching grant program for small and rural courts. Other highlights of the 2023 legislative session include:

- Take Your Legislator to Work: The SCJA organized a "Take Your Legislator to Work" event in the fall of 2022. Four participating counties hosted educational events at their courts with local legislators, provided tours of the court and court proceedings, and educated legislators about the role of superior courts.
- Funding: The SCJA collaborated with the AOC to successfully request legislative funding for three pretrial service pilot programs ($1.5M/biennium) and an additional year of funding for two self-help center pilot programs ($520,000/biennium).
- Policy: The SCJA's request legislation concerning *pro tem* pay for retired judges passed both chambers unanimously. This new law establishes pay equity between attorneys and retired judges for work as judges *pro tempore* and arbitrators in superior court. We are hopeful that it will increase the number of retired judges that are willing to continue to serve the courts.

- Increased communication with Supreme Court Commissions: To increase communication as to the SCJA's legislative positions, the SCJA worked with Commission staff to develop a weekly process to inform the Commissions of the SCJA's positions on bills. This increased communication created opportunities for meaningful dialogue between the Commissions and the SCJA regarding bills of shared importance.

Uniform Guardianship Act (UGA) Implementation

In collaboration with the State Court Administrator, the SCJA met with the Department of Social and Health Services' (DSHS) Secretary to improve and create regionalized access to required UGA training for court visitors and attorneys.

Workgroups

SCJA members previously served or serve currently in leadership positions on the Court Recovery Task Force, Court Security Task Force, Alternatives to Incarceration Task Force, Remote Proceedings Task Force, and on at least 75 other outside committees, work groups, boards and councils. The SCJA also leads two workgroups specific to its long-term priorities:

- Work-Life Balance Workgroup: In 2022 the SCJA formed a work-life balance workgroup charged with planning, promoting, and presenting educational programs on the subject of judicial work-life balance and well-being. In response to the popularity of this programming and the need for judges to develop skills to address job stress and burn-out, in April 2023 the membership voted to make the work-life balance work group a standing committee of the SCJA. Promoting work-life balance will be a top priority of the SCJA over the next year.
- Unrepresented Litigant Ad-Hoc Workgroup: Throughout spring 2022, the Workgroup offered three educational sessions to trial court and administrative law judicial officers titled, "Improving Judicial Response to Litigants Without Legal Representation", with several hundred receiving training. The workgroup also supports the implementation of the Grays Harbor and Spokane County self-help centers.

State v. Blake Implementation

The SCJA continues to provide judicial leadership and staff support to the *Blake* effort, meeting regularly with stakeholders and the AOC *Blake* team on issues of court process, data, and resentencing.

Salary Commission

The SCJA was pleased to coordinate with the Supreme Court, Court of Appeals, District Court, and the AOC regarding the Courts' presentation and written materials to the Washington Citizen's Commission on Salaries of Elected Officials (WCCSEO). The SCJA, together with the DMCJA, hired Fisher McCabe Public Affairs (FMPA) to assist with messaging.

Judicial College and the SCJA Spring Conference

The 2023 Judicial College and Spring Conference were both held again in-person, for the first time since 2020 (Judicial College) and 2019 (Spring Conference). The conference was enthusiastically attended by 175 judicial officers and 24 court administrators, many of whom were meeting colleagues in-person for the very first time. These attendance levels remain 10-15% lower than pre-pandemic participation.

Board for Judicial Administration (BJA) Meeting
Friday, March 17, 2023, 9:00 a.m. – 12:00 p.m.
Videoconference

DRAFT MEETING MINUTES

BJA Members Present:
Chief Justice Steven González, Chair
Judge Tam Bui
Judge George Fearing
Judge Jennifer Forbes
Judge Marilyn Haan
Judge Dan Johnson
Judge Mary Logan
Judge David Mann
Justice Raquel Montoya-Lewis
Judge Rebecca Pennell
Judge Rebecca Robertson
Judge Michael Scott
Judge Jeff Smith

Administrative Office of the Courts (AOC) Staff Present:
Crissy Anderson
Judith Anderson
Jeanne Englert
Kyle Landry
Penny Larsen
Dirk Marler
Stephanie Oyler
Haily Perkins
Christopher Stanley
Caroline Tawes

Guests Present:
Ellen Attebery
Ashley Callan
RaShelle Davis
Tim Fitzgerald
Robert Lichtenberg
Sophia Byrd McSherry
Robert Mead
Gabriel Villarreal
Judge David Whedbee

Call to Order
Chief Justice González called the meeting to order at 9:01 and the meeting participants introduced themselves.

Presentation: Disability Justice Task Force Steering Committee
Judge David Whedbee introduced himself as the Director of the Disability Justice Task Force Steering Committee, and Robert Lichtenberg introduced himself as a member of the Disability Task Force.

Judge Whedbee presented an overview of the Task Force Steering Committee, which is part of the Disability Justice Task Force. The Steering Committee has requested $805,000 to fund a two-year study of Washington State courts to discover problems with court access and to develop solutions to those problems. The proposed study would collect data from surveys and site visits, and the data will be analyzed to identify areas where the AOC and courts can create greater opportunities for access to justice and GR 33 compliance.

There is currently no comprehensive way for courts to manage GR 33. The plan is to create a practice for better data to help support compliance to GR 33. The Task Force will communicate to the Supreme Court on the progress of the study and will submit a final report to the Supreme Court upon completion of the two-year study.

The study will begin in 2024, and will address past and current access issues to identify deficiencies in GR 33 compliance. There will also be a focus on the intersection of disability and race and gender. This work will overlap with the work of the Gender and Justice Commission and the Minority and Justice Commission.

Funding for the study will cover one staff support, a research coordinator, part-time research assistants, and site visits. Stakeholder interviews will be part of the study. The Steering Committee is currently creating a charter and bylaws, finalizing the duties of the Task Force, communicating with outside groups to identify experts, and communicating with legislators and stakeholders to identify the composition of the Task Force.

This study will provide best practices and an evidence-based tool the Disability Justice Task Force can use to continue GR 33 best practices. The study will focus on both physical and programmatic access to courts with a comprehensive investigation of all issues for all courthouse users. Information from the study will provide reliable data regarding compliance with GR 33 and the Americans with Disabilities Act (ADA).

<u>Small Group Discussions</u>
Meeting participants broke into groups to discuss the following questions:

1) What kinds of situations involving a person with a disability would you like more guidance on handling, given that accommodations need to be done on a case by case basis? Consider how guidance may differ for judicial officers, administrators, and clerks.

    - It would be helpful to have a best practices guide with resources.
    - Education is needed and a resource center/toolkit. It feels overwhelming.
    - Zoom closed captioning technical assistance is needed.
    - Experts like clinical social workers and advocates would be very helpful consultants to serve individuals with complex needs like a disabling condition combined with mental illness.
    - A bench card for judges and staff is needed for steps to take when there is a request. Facilities are very different throughout the state.
    - Funding for capital improvements was a common theme among the groups.
    - Judges struggle with persons who say they have cognitive/mental health disabilities but have no documentation and ask for an attorney as an accommodation (not in situations dealing with indigent defense). Judges want to err on the side of accommodations but have limiting financial resources.
    - Court administrators and clerks need a standard operating procedure for requesting accommodations such as forms across the state, even though Washington is not a unified court system. A standard procedure for requesting accommodations would be helpful for patrons and court staff. Uniformity on how the request is made for each court jurisdiction is possible and could be helpful.

- In Lincoln County District Court the primary ADA/GR 33 request is for equipment in the courtroom for people who are not deaf but are hard of hearing. The court has equipment to provide when these requests are made and they seem to work pretty well. Judge Whedbee indicated it is up to the Judicial Officer to set the standard of serving as a juror to encourage everyone to participate in jury service.
- Spokane has received a lot of GR33/ADA requests for appointment of counsel which is problematic. How do Courts determine between a pro se who want a free lawyer and a pro se who has a neurodivergent disability? Judge Whedbee discussed a case where he appointed a GAL to help a litigant with a neurodivergent disability navigate the case processes. The group agreed this is an area that courts need more guidance on.
- The King County Courthouse has made improvements in becoming ADA accessible but it still is not an ideal situation.
- For requesting an accommodation under the ADA or GR 33, Spokane Superior Court has a single point of contact in Court Administration and then the requests are reviewed by the presiding judge. In King County Superior Court, the assigned judge sometimes reviews the request for accommodation which can cause ex parte communication concerns.
- How much can courts really assist with mental health disabilities or other similar challenges? People may be confused about procedures and documents that can be extremely overwhelming. Courts need more direction on how far they can really go without going too far.
- More clients are appearing at oral argument in the Court of Appeals and there are concerns with physical encumbrances/impediments. There are similar concerns with regard to mental health issues, and there is a request for appointment of an attorney, indicating that because of a developmental disability or mental illness the person needs assistance in navigating appellate system and presenting the brief and argument. This has raised two questions: when does someone qualify under the rule, and how is that assistance paid for? There is no money to pay an attorney to assist someone. When does a person with a disability get appointed counsel if it becomes apparent later while the person didn't want a lawyer, but needed secretarial help to go through the process. Not all those with a mental disability would be willing to accept help.
- If someone shows up and wants a sign language interpreter or hearing assistance device, are those available? For interpretation, there are only a limited number of languages.
- There is a lack of available attorneys who are willing to take on these cases, as the cases tend to be complicated and very involved. How can we work to expand funding and the number of people who are trained and willing to do this work?
- There needs to be more guidance on how to handle court clients with significant mental health needs.
- There needs to be guidance with clients for whom English is a second language or those who don’t speak English.
- Unseen disabilities present a unique issue in trying to anticipate needs.
- Approaches are needed that are specific to the individual. As much guidance and information as possible would be preferred, and the unhelpful aspects can be filtered out.

2) Do court staff get the kind of information from the GR 33 request that helps them make the right decision for a party, victim, or witness seeking accommodations? Do court staff know what an interactive dialogue with a requestor looks like or how it should be done?

- More guidance and education are needed. There needs to be guidance on how to conduct an inquiry when someone needs an accommodation. It would be helpful to have a subject matter expert to call.
- A lot of civil pro se clients have requested an attorney, and judges need guidance on when this accommodation is needed. Is there a statewide request form? Spokane has a form that lists exactly what they need. There was a discussion on training needed for working with clients with cognitive disabilities.
- Training for presiding judges and court administrators at a conference would be helpful.
- Staff need training and guidelines for how to deal with accommodations in general, both for the general public and court patrons.
- Annual training for courts and staff would be beneficial, but can be difficult with the turnover.
- No, the form has been sanctioned as the one to use but it has limited information and limited understanding of what accommodation is needed. More assistance is needed on how a court can truly assist with whatever request is begin made. Staff may need to be better educated on how to question someone.
- Staff need more guidance on when to appoint counsel for disabled individuals and navigators or facilitators. Assistance may not need to be a lawyer.
- Disability training is needed.
- Court staff approach judicial officers with accommodation requests.
- It may be difficult to have an interactive dialogue if there are multiple issues involved, such as neurodivergent and mobility issues.
- More guidance is needed, but that will be difficult due to the number of ways disabilities can manifest or work in combination. Many judges receive most of their support from their staff, so training for them could be helpful.
- How to handle it when a court provides an accommodation that they think is "good enough" yet is not an effective to meet the actual need effectively.
- What to do when a pro se litigant wants assistance with a writing a motion or brief as an accommodation.
- Give guidance on how to conduct an "interactive dialogue" so that the court and the requestor agree on an accommodation. Examples: Braille reader placed in an awkward location; audio describer request that was denied because there was no assurance of its accuracy.

Judge Whedbee thanked the BJA.

<u>BJA Task Forces</u>
<u>Alternatives to Incarceration Task Force</u>
The Task Force report was included in the meeting materials. The next meeting will be at the end of March. Meeting participants were encouraged to complete the Alternatives to Incarceration Task Force survey on assessment of services.

<u>Court Security Task Force</u>
The Task Force co-chairs have been meeting with legislators to advocate for their budget request of $5 million over two years with a shared cost model. Commissioners from seven rural counties wrote to legislators in support of the budget request and to express willingness to

match funds. The Task Force is working on a plan with the Department of Homeland Security to do free assessments of courthouse security.

Penny Larsen thanked Judge Fearing for meeting with legislators in support of court security funding, and thanked Kyle Landry for the audit survey.

Remote Proceedings Workgroup
The Workgroup report was included in the meeting materials. Workgroup members have created court-level groups. At the Workgroup meeting next week the members will review court rule drafts. The Workgroup will present at the Appellate Courts spring program, and will present their survey data at the May BJA meeting.

Standing Committee Reports
Budget and Funding Committee (BFC)
Members tracking a particular bill should consider that a bill passed out of one of the chambers is more likely to be funded by that chamber. Christopher Stanley let the members know he will write a proviso for a bill if there is not funding for it.

The revenue forecast will be published on Monday, March 20, 2023. There is not as much funding available as last year. AOC will send an e-mail to the court community when the budgets are published. The Senate budget is expected next Thursday, March 23, 2023.

AOC is preparing for the 2024 supplemental budget. Announcements will be sent in April. Supplemental budget packages will be submitted to AOC between mid-May and mid-July, will be analyzed in August, and released at the end of October.

Court Education Committee (CEC)
The CEC report was included in the meeting materials. The CEC is focusing on the structure of decision making of the CEC, and providing support and funds for educational events.

Registration is open for the spring programs, which will be in person this year.

AOC has hired a new Court Education Professional, Jennifer Mogren, who will focus on e-learning related to civil protection orders.

Legislative Committee (LC)
The LC is meeting weekly during the legislative session. The LC report was included in the meeting materials and includes information on BJA request legislation and other bills they are monitoring. Haily Perkins provided information on legislation of interest.

March 29 is the last day for live bills to move out committee; April 4 is the last day to move out of the fiscal and transportation committees; and the Legislature will adjourn on April 23, 2023.

Policy and Planning Committee (PPC)
No report was given.

Interbranch Advisory Committee
Adrienne Stuart reviewed the last Interbranch Advisory Committee meeting held on March 10 and provided a link to viewing the meeting on TVW. Representative Greg Cheney is a new member of the Committee.

The next meeting will be on June 20, 2023, from 9:00 a.m. to noon. It will be a hybrid Zoom/in person meeting; the in-person meeting will be held at Tumwater Center Building 3, the temporary location of the Supreme Court. Topics may include mental health treatment for those in jails and turnover in public defenders' and prosecutors' offices. An agenda is being developed.

Appellate Courts' Updates

The Supreme Court just finished its current term, and the next term will begin in a month and half. The Supreme Court is still in a temporary facility and expects to remain there for another year and a half, until work on the Temple of Justice is complete.

The Court of Appeals continues to transfer cases among divisions when necessary. A task force of Court of Appeals judges and Superior Court judges are working to facilitate the transfer of records among court levels and make records more accessible to counsel and parties. The Court of Appeals is facing the same downturn in cases experienced by Superior Courts early in the pandemic. The Court of Appeals oral arguments are streamed live on TVW, and some divisions are hearing cases at schools. Counsel may appear remotely or in person.

Judge Andrus is retiring from the Court of Appeals Division I, and Governor Inslee announced her replacement, as of May 1, 2023, will be Judge Leonard Feldman. Also, on May 1, Judge Lori Smith will become the Chief Justice of Division I as well as the Presiding Chief Judge. Judge Hazelrigg will become the Acting Chief Judge of Division I. Judge Smith will take Judge Mann's position on the BJA.

Feedback on future meeting topics

The Judicial Leadership Summit is planned for June 16, 2023, from 9:00 a.m. to 1:00. Planning is underway. BJA members were asked what topics would be beneficial to discuss at the Summit.

Members would like to discuss judicial branch priorities, especially what advances courts made during the pandemic, how courts look different now, acknowledge the hard work of courts during the pandemic, discuss what advances were made during the pandemic, and create standards for the future.

Another topic that could be discussed is the increasing complaints on the failure of judicial demeanor on the bench, and the effect of pandemic fatigue and increased remote viewing of court procedures. There could be a focus on judges' duties as employers and treating their staff with respect. Judge Logan reminded the participants of the Judicial Assistance Services Program (JASP).

A priority should be to continue advocating for funding from the Legislature, especially for small and rural courts.

Another topic suggested was the needs of unrepresented litigants.

The turnover and lack of public defenders and prosecutors will be discussed at the May BJA meeting. Participants are welcome to e-mail Jeanne Englert with suggestions on questions to include or whom to include in the discussion.

February 17, 2023 Minutes

The February 17, 2023 meeting minutes were passed by consensus.

Information Sharing

Judge Johnson discussed participation in a National Center for State Courts (NCSC) national technical assistance program on appearance rates for all defendants. Judge Johnson will participate in a related seminar next month and will report back to the BJA in May.

The Courts of Limited Jurisdiction Court Administrators' Academy will launch in May and will provide education, tools, and resources to administrators who have been in their position for four or fewer years. There may be room for those with a longer tenure. The District and Municipal Court Management Association will have information on financial and other support for the Academy.

Chief Justice González has been asked to speak in California, Arizona, Illinois, and Maine on Washington State's work on diversity, equity, inclusion, and culture, and the effect on state courts.

The Minority and Justice Commission is sponsoring the National Consortium on Racial and Ethnic Fairness in the Courts that will be held May 21–24, 2023, in Seattle. The Superior Court Judges' Association is offering tuition scholarships for the Consortium.

Participants were asked to send their group discussion notes to Jeanne Englert.

Adjourn
The meeting adjourned at 11:15.

Recap of Motions from the March 17, 2023 Meeting

Motion Summary	**Status**
Approve the February 17, 2023, meeting minutes.	Passed

Action Items from the March 17, 2023 Meeting

Action Item	**Status**
The Remote Proceedings Workgroup will present their survey data at the May BJA meeting	
The turnover and lack of public defenders and prosecutors will be discussed at the May BJA meeting.	
Judge Johnson will participate in a NCSC seminar next month and will report back to the BJA in May.	
February 17, 2023, BJA Meeting Minutes • Post the minutes online • Send minutes to the Supreme Court for inclusion in the En Banc meeting materials.	 Done Done

Board for Judicial Administration
2023–2024 Meeting Schedule

All meetings 9:00 a.m.–12:00 p.m. unless otherwise specified

Date	Location
September 15, 2023	TBD
October 20, 2023	TBD
November 17, 2023	TBD

Location - Zoom or SeaTac Location

AOC SeaTac Facility
SeaTac Office Center-South Tower
18000 International Blvd., Suite 1106
SeaTac WA 98188-4251

Board for Judicial Administration
2024 Meeting Schedule

Date	Location
February 16	TBD
March 15	TBD
May 17	TBD
June 21	TBD
September 20	TBD
October 18	TBD
November 15	TBD

TAB 6

Outgoing BJA and Committee Members 2022–23

Thank you to the following members for their commitment and contributions to the BJA and committees.

Board for Judicial Administration
Judge Tam T. Bui as Member Chair
Judge Jennifer Forbes
Judge Dan Johnson
Judge Rick Leo
Judge David Mann
Judge George Fearing

Budget and Funding Committee
Judge David Mann

Legislative Committee
Judge Jennifer Forbes
Judge Rick Leo
Judge George Fearing

Policy and Planning Committee
Judge Dan Johnson
Judge David Mann
Judge Jeffery Smith
Judge Sam Chung

Court Education Committee
Judge Tam Bui, Chair
Judge Doug Fair, Assistant Chair
Judge Kevin Hull
Ashley Callan

Public Engagement and Education Committee
Justice Mary Yu, Chair
Judge David Larson
Honorable Melissa Beaton

U.S. Department of Justice

Office of the Associate Attorney General

Associate Attorney General *Washington, D.C. 20530*

April 20, 2023

Dear Colleague:

The U.S. Department of Justice (Department) is committed to working with state and local courts and juvenile justice agencies to ensure that their assessment of fines and fees is constitutional and nondiscriminatory. To advance that goal, the Department has revised and updated a letter it previously issued in 2016 that focused on the assessment of fines and fees against adults, as well as a 2017 advisory addressing the assessment of fines and fees against juveniles. The letter, issued today by the Civil Rights Division, Office of Justice Programs, and Office for Access to Justice, addresses in detail the assessment of fines and fees against both adults and juveniles. The letter includes an updated discussion of the relevant case law on the assessments of fines and fees, cautions against discriminatory enforcement of fines and fees, and details the obligations of federal funding recipients to comply with federal statutory prohibitions against discrimination in the imposition and collection of fines and fees.

The letter outlines circumstances where unjust imposition and enforcement of fines and fees violate the civil rights of adults and youth accused of felonies, misdemeanors, juvenile offenses, quasi-criminal ordinance violations, and civil infractions, as well as circumstances that raise significant public policy concerns. In particular, the letter outlines the below seven constitutional principles:

(1) The Eighth Amendment prohibits the imposition of fines and fees that are grossly disproportionate to the severity of the offense;

(2) The Fourteenth Amendment prohibits incarceration for nonpayment of fines and fees without first conducting an ability-to-pay determination and establishing that the failure to pay is willful;

(3) The Fourteenth Amendment requires the consideration of alternatives before incarcerating individuals who are unable to pay fines and fees;

(4) The Fourteenth Amendment prohibits the imposition of fines and fees that create conflicts of interest;

(5) The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees by individuals who are unable to pay;

(6) The Sixth and Fourteenth Amendments require due process protections, such as access to counsel in appropriate cases, as well as notice, when imposing and enforcing fines and fees; and

(7) The Fourteenth Amendment prohibits the imposition of fines and fees in a manner that intentionally discriminates against a protected class.

In addition to constitutional responsibilities and related public policy concerns, the letter outlines the obligations of recipients of federal financial assistance (including courts) under Title VI of the Civil

Rights Act of 1964 (Title VI), the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), and other statutes with nondiscrimination provisions. Collectively, these statutes, and their implementing regulations, prohibit recipients of federal financial assistance from discriminating on the basis of race, color, national origin, religion, and sex. For example, under Title VI and the Safe Streets Act, which both prohibit national origin discrimination, state court systems and other federal funding recipients are required to take reasonable steps to provide meaningful access to people who have limited proficiency in English.

As noted in the letter, imposition of fines and fees that do not comply with constitutional and statutory requirements, or that fail to take account of other public policy concerns, may erode trust between local governments and their constituents, increase recidivism, undermine rehabilitation and successful reentry, and generate little or no net revenue. The letter further notes that the detrimental effects of unjust fines and fees (including escalating debt, being subjected to changes in immigration status, and loss of one's employment, driver's license, voting rights, or home, among others) fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal legal system and may already face economic obstacles arising from discrimination, bias, or systemic inequities. Moreover, the letter emphasizes the negative impact of imposing fines and fees on youth, which may also fall on families in low-income communities and people of color, because youth are unlikely to be able to afford to pay fines or fees without familial support.

The letter also identifies best practices and recommendations that courts can consider and adopt related to each principle. The letter acknowledges that many states, municipalities, and court leaders have adopted innovative approaches to reduce their reliance on fines and fees. The Department's Office for Access to Justice is developing a best practices guide, which will highlight work and efforts by states, municipalities, and court leaders in this area.

The Department remains committed to collaborating with court leaders and stakeholders in the criminal legal system to develop and share solutions. The Department is open to serve as a resource, collaborate and promote solutions, and provide grant funding and technical assistance to state, county, local, and tribal courts to improve the functioning and fairness of the justice system.

To that end, in the coming weeks, the Department's Office of Justice Programs, Bureau of Justice Assistance will release a solicitation ("The Price of Justice: Rethinking the Consequences of Fines and Fees") seeking a training and technical assistance provider to work with a select number of jurisdictions interested in understanding and reforming their fines and fees policies and practices, and ultimately seeking to reduce the use of unjust fines and fees and redirect the resources used in these systems into activities with a greater return on public safety. The Department of Justice supports wide dissemination of the letter.

Sincerely,

Vanita Gupta
Associate Attorney General

U.S. Department of Justice

Civil Rights Division

Office of Justice Programs

Office for Access to Justice

Washington, D.C. 20530

April 20, 2023

Dear Colleague:

The U.S. Department of Justice (Department) is committed to working with state and local courts and juvenile justice agencies to ensure that their assessment of fines and fees is constitutional and nondiscriminatory.[1] Court leaders, court administrators, lawmakers, advocates, and other stakeholders have urged the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices.[2]

This letter revises and updates a similar letter issued by the Department in March 2016[3] regarding the imposition and enforcement of fines and fees on adults in the criminal justice system, and a January 2017 advisory[4] setting forth the constitutional and statutory responsibilities regarding imposing and enforcing fines and fees on youth involved in the juvenile or criminal justice systems. This letter addresses some of the most common court-imposed fines and fees practices—applicable to adults and youth—with potential to run afoul of the U.S. Constitution.[5] This letter also describes relevant constitutional and statutory protections against discrimination and explains how they apply to fines and fees. Finally, many states, municipalities, and court leaders are adopting innovative approaches to reduce their reliance on fines and fees, and this letter

[1] This document does not bind the public. Rather, it advises the public of how the Department understands, and is likely to apply, binding laws and regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015)).

[2] As used in this letter, "courts" include state or local courts and the juvenile justice system applicable to youth, including juvenile courts and juvenile justice agencies. "Fines" are monetary punishments for infractions, misdemeanors, or felonies that may be imposed to deter crime or punish people convicted of an offense. "Fees" are itemized payments for court activities, supervision, or incarceration charged to people accused of or determined guilty of infractions, misdemeanors, or felonies, that may be unrelated to a conviction or punishment. *See generally* Council of Econ. Advisers, *Issue Brief: Fines, Fees, and Bail* 1 (Dec. 2015), https://perma.cc/K88Z-8L8X. The Department notes that any non-Departmental studies or external resources cited or linked to in this letter are provided for informational purposes only and do not necessarily represent the views of the Department.

[3] This letter updates and supersedes the March 2016 Dear Colleague Letter, which was rescinded in December 2017.

[4] This letter also updates and supersedes the January 2017 Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Youth Involved with the Juvenile Justice System, which was rescinded in December 2017.

[5] This letter addresses only fines and fees levied against individuals. Fines and fees levied against corporations do not raise the same concerns. Likewise, this letter does not address the imposition or enforcement orders relating to restitution for crime victims.

identifies some best practices, recommendations, and policy considerations that courts can consider and adopt.

There are circumstances in which assessment of fines and fees may be lawful, and many jurisdictions, lacking other dedicated sources of funding, rely on some of the revenue generated by fines and fees for important purposes. For example, some jurisdictions use some of the revenue generated by fines and fees to support crime victim services, including to reimburse victims for a wide variety of crime-related expenses, such as medical costs, mental health counseling, lost wages, as well as funeral and burial expenses.

But as this letter describes, in certain circumstances, unjust imposition and enforcement of fines and fees violate the civil rights of adults and youth accused of felonies, misdemeanors, quasi-criminal ordinance violations, and civil infractions.[6] The unjust imposition of fines and fees also raises significant public policy concerns. Imposing and enforcing fines and fees on individuals who cannot afford to pay them has been shown to cause profound harm. Individuals confront escalating debt; face repeated, unnecessary incarceration for nonpayment of fines and fees; experience extended periods of probation and parole; are subjected to changes in immigration status; and lose their employment, driver's license, voting rights, or home. This practice far too often traps individuals and their families in a cycle of poverty and punishment that can be nearly impossible to escape.[7] The detrimental effects of unjust fines and fees fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal justice system and already may face economic obstacles arising from discrimination, bias, or systemic inequities.[8]

Fines and fees can be particularly burdensome for youth, who may be unable to pay court-issued fines and fees themselves, burdening parents and guardians who may face untenable choices between paying court debts or paying for the entire family unit's basic necessities, like food, clothing, and shelter.[9] Children subjected to unaffordable fines and fees often suffer escalating negative consequences from the justice system that may follow them into adulthood.[10]

[6] *See, e.g.*, C.R. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://perma.cc/7QR3-BRLD (finding that the Ferguson, Missouri municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Ctr. for Just., *Criminal Justice Debt: A Barrier to Reentry* (2010), https://perma.cc/L7JA-RKXY (reporting on fine and fee practices in fifteen states); Am. C.L. Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (Oct. 2010), https://perma.cc/Y7BU-SK85 (discussing practices in several states); Dick M. Carpenter II et al., Institute for Justice, *The Price of Taxation by Citation: Case Studies of Three Georgia Cities That Rely Heavily on Fines and Fees* (2019), https://perma.cc/7XK4-HLQ8.

[7] *See* Council of Econ. Advisers, *supra* note 2, at 1 (describing the impact on the poor of fixed monetary penalties, which "can lead to high levels of debt and even incarceration for failure to fulfil a payment" and create "barriers to successful re-entry after an offense"); Ala. Appleseed Ctr. for Law and Just., *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama's Wealth Divide* (2018), https://perma.cc/A8Z9-Y3U4.

[8] *See, e.g.*, Tex. Fair Def. Project & Tex. Appleseed, *Driven by Debt: The Failure of the OmniBase Program* (2021), https://perma.cc/2AJK-VEX3; Maria Rafael, Vera Inst. of Just., *The High Price of Using Justice Fines and Fees to Fund Government in Washington State* 5 (2021), https://perma.cc/26G3-7BNS.

[9] Leslie Paik & Chiara Packard, Juv. Law Ctr., *Impact of Juvenile Justice Fines and Fees on Family Life: Case Study in Dane County, WI* 12-14 (2019), https://perma.cc/T837-T6TY.

[10] Jessica Feierman, Juv. Law Ctr., *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* (2016), https://perma.cc/C78Z-Z6KR. Recognizing these concerns, many states have eliminated or significantly reduced the number of fines and fees in their juvenile systems since the Department issued the 2017 advisory. These states include California, Louisiana, Maryland, Nevada, New Mexico, New Hampshire, New Jersey,

Notably, in addition to raising serious legal and practical concerns, assessment of unaffordable fines and fees often does not achieve the fines' and fees' stated purposes. In many cases, unaffordable fines and fees undermine rehabilitation and successful reentry and increase recidivism for adults and minors.[11] And to the extent that such practices are geared toward raising general revenue and not toward addressing public safety, they can erode trust in the justice system.[12]

The legal discussion below is intended to serve as a guide to constitutional protections related to assessing fines and fees and additional legal protections against the discriminatory imposition of fines and fees. Whether a particular policy regarding fines and fees complies with or violates these constitutional principles or federal statutory obligations requires a fact-specific analysis. This letter also identifies recommended policy considerations relevant to determinations about the circumstances in which fines and fees should and should not be imposed.

As court leaders and criminal justice stakeholders, your leadership on fines and fees is critical to ensure equal access to justice. Accordingly, as you review and reflect on this information, we strongly encourage you to consider alternative ways to obtain resources other than through the assessment of fines and fees. We also recommend that you review your jurisdiction's rules and procedures to ensure that they comply with the U.S. Constitution and federal law and promote sound public policy. We support wide dissemination of this letter, and welcome collaboration with you to develop and share solutions. We encourage you to forward this letter to every judge in your jurisdiction; to provide appropriate training for judges, prosecutors, and

Oregon, Texas, Utah, and Virginia as well as individual localities such as Chatham County, Georgia; Dane County, Wisconsin; Johnson County, Kansas; Macomb County, Michigan; Philadelphia, Pennsylvania; and Shelby County, Tennessee. *See* Cristina Mendez, Jeffrey Selbin & Gus Tupper, *Blood from a Turnip: Money as Punishment in Idaho*, 57 Idaho L. Rev. 767 (2021) (listing the states and localities that have reduced or eliminated juvenile fees to date), https://perma.cc/N29P-PFLE; Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. Rev. 401 (2020) (describing the growing national movement to repeal juvenile fines and fees), https://perma.cc/T5K6-UQ2S.

[11] Berkeley Law Pol'y Advoc. Clinic, *Making Families Pay* 18 (2017), https://perma.cc/RQK9-JQFG (reporting that, in fiscal year 2014-15, Orange County spent "over $1.7 million to employ 23 individuals to collect just over $2 million" in juvenile administration fees, and ultimately netted only $371,347, which represents less than .0068% of its annual budget); Matthew Menendez et al., Brennan Ctr. for Just., *The Steep Costs of Criminal Justice Fines and Fees* 9 (2019), https://perma.cc/7MQS-32KE (describing the high costs of fines and fees enforcement, including in-court proceedings, jail costs, warrant enforcement, and probation supervision, and estimating that collecting revenue through fines and fees consumes almost 100 times more resources than collecting it through general taxation); Alexandra Bastien, *Ending the Debt Trap: Strategies to Stop the Abuse of Court-Imposed Fines and Fees* 4-7 (2017), https://perma.cc/FZ2R-TP2M (describing the inefficiency and consequences of raising revenue through fines and fees); Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Violence & Juv. Just. 325 (2017), https://journals.sagepub.com/doi/10.1177/1541204016669213 (finding a strong positive correlation between monetary sanctions and youth recidivism); *see also* Council of Econ. Advisers, *supra* note 2.

[12] *See* Conf. of State Ct. Adm'rs, *2011-2012 Policy Paper: Courts Are Not Revenue Centers* (2012), https://perma.cc/75FU-BS5C. In some jurisdictions, the revenue may even be lower than the cost to incarcerate people for the failure to pay fines and fees. Mathilde Laisne et al., Vera Inst. of Just., *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* 24 (2017), https://perma.cc/VYW5-LPWS (determining that pretrial fines and fees enforcement costs New Orleans $1.9 million more in jail costs than the revenue it generates for criminal justice agencies). Critically, many jurisdictions do not track the costs of collecting fines and fees; it is therefore difficult to assess whether it effectively generates revenue at all. *See* Menendez et al., *supra* note 11, at 9 (describing the high costs of fines and fees). Thus, jurisdictions are encouraged to closely track these costs to determine whether fines and fees generate revenue.

probation officials regarding fines and fees; and to develop resources, such as bench books, to assist judges in performing their duties lawfully and effectively.

A. Constitutional Principles Relevant to the Assessment and Enforcement of Fines and Fees

The basic constitutional principles relevant to the imposition and enforcement of fines and fees by state and local courts, which apply to both adults and youth,[13] are grounded in the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. These principles, explained in subsequent sections below, are:

(1) The Eighth Amendment prohibits the imposition of fines and fees that are grossly disproportionate to the severity of the offense;

(2) The Fourteenth Amendment prohibits incarceration for nonpayment of fines and fees without first conducting an ability-to-pay determination and establishing that the failure to pay is willful;

(3) The Fourteenth Amendment requires the consideration of alternatives before incarcerating individuals who are unable to pay fines and fees;

(4) The Fourteenth Amendment prohibits the imposition of fines and fees that create conflicts of interest;

(5) The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees by individuals who are unable to pay;

(6) The Sixth and Fourteenth Amendments require due process protections, such as access to counsel in appropriate cases, as well as notice, when imposing and enforcing fines and fees; and

(7) The Fourteenth Amendment prohibits the imposition of fines and fees in a manner that intentionally discriminates against a protected class.

1. The Eighth Amendment prohibits the imposition of fines and fees that are grossly disproportionate to the severity of the offense.

The Eighth Amendment prohibits imposing excessive fines. A fine is unconstitutionally excessive under the Eighth Amendment when it "is grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998). In *Timbs v. Indiana*, the U.S. Supreme Court unanimously held that the Excessive Fines Clause is incorporated by the Fourteenth Amendment's Due Process Clause and is therefore applicable to the states. 139 S. Ct. 682, 687 (2019). 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*,

[13] As the U.S. Supreme Court has clearly held, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967).

509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

When assessing fines and fees that are at least in part punitive, courts are required to consider the severity of the offense. *Bajakajian*, 524 U.S. at 336-37; *Austin*, 509 U.S. at 609-10. As part of this broader analysis, we recommend that courts also consider individuals' economic circumstances when assessing fines and fees. The U.S. Supreme Court in *Timbs* noted that the Magna Carta "required that economic sanctions . . . 'not be so large as to deprive [an offender] of his livelihood.'" 139 S. Ct. at 688 (second alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 271). Some courts have required consideration of an individual's economic circumstances as part of the proportionality assessment.[14]

Regardless of whether it is constitutionally required, consideration of an individual's economic circumstances is a logical approach because fines and fees will affect individuals differently depending on their resources. When a person already cannot afford a basic need, such as housing, a fine or fee of any amount can be excessive in light of that person's circumstances, and thus may not be appropriate even if it were legally permitted.[15]

In addition, there are practical realities that weigh substantially against imposing fines and fees against youth. For example, minors are generally unable to earn the money needed to pay fines and fees because many are too young to legally work, are of compulsory school age or full-time students, have great difficulty obtaining employment due to having a juvenile or criminal record, or simply do not yet have employable skills typically expected of adults. As such, the imposition of any fine or fee on youth has the potential to be an excessive and unreasonable burden.[16]

[14] The Washington Supreme Court recently observed, "[a] number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required." *Seattle v. Long*, 493 P.3d 94, 112 (Wash. 2021); *see also, e.g.*, *Dep't of Labor & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019) (History and precedent constitute "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment."); *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. 2014) ("[T]he excessive fines analysis . . . requires . . . a thorough examination of every property owner's circumstances . . . .").

[15] Fining a person who is unhoused can destabilize that person and can further obstruct their ability to satisfy basic needs. Moreover, fining a person in such circumstances is likely ineffective. Unhoused individuals—who are unable to afford a place to live or sleep—are unlikely to be able to pay any fine or fee. *See* Jessica Mogk et al., *Court-Imposed Fines as a Feature of the Homelessness-Incarceration Nexus: A Cross-Sectional Study of the Relationship Between Legal Debt and Duration of Homelessness in Seattle, Washington, USA*, 42 J. Pub. Health e107 (2019), https://perma.cc/SP6Y-ZLEL (finding that unhoused adults with unpaid fines and fees were unhoused for longer periods of time than those with no legal debt, that fewer than one in four unhoused adults with debt from legal fines had ever made a payment on them, and that more than half of sentences imposed included a fine); *see also Blake v. City of Grants Pass*, No. 1:18-cv-01823, 2020 WL 4209227, at *11 (D. Or. July 22, 2020) (observing that unhoused people "do not have enough money to obtain shelter, so they likely cannot pay . . . fines"), *aff'd in part, vacated in part on other grounds sub nom. Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022). Further, laws requiring the imposition of fines and fees against unhoused individuals for behaviors related to living unhoused—such as panhandling or sleeping in public—may violate the First Amendment or the Eighth Amendment's Cruel and Unusual Punishment Clause. *See Martin v. Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (holding that, "as long as there is no option of sleeping indoors, the government cannot [under the Cruel and Unusual Punishment Clause] criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter"); *Norton v. City of Springfield*, 806 F.3d 411, 412-13 (7th Cir. 2015) (invalidating on First Amendment grounds an ordinance that restricted panhandling in the "downtown historic district").

[16] The Supreme Court has not expressly held that the Eighth Amendment's prohibitions against excessive fines and

2. The Fourteenth Amendment prohibits incarceration for nonpayment of fines and fees without first conducting an ability-to-pay determination and establishing that the failure to pay is willful.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Thus, the U.S. Supreme Court has repeatedly held that the government may not incarcerate individuals solely because of their inability to pay a fine or fee. In *Bearden*, the Court explained that cases about equal access to justice involve both equal protection and due process principles, and they therefore require courts to conduct a "careful inquiry" that balances the individual's interests against the state's interests. *Id.* at 666-67. After conducting this inquiry, the Court prohibited the incarceration of an indigent probationer for failing to pay a fine despite bona fide efforts to do so because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672-73. "Such a deprivation," the Court continued, "would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 673; *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that the state could not convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (holding that an indigent defendant could not be imprisoned longer than the statutory maximum for failing to pay his fine). The U.S. Supreme Court reaffirmed this principle in *Turner v. Rogers*, 564 U.S. 431 (2011), holding that a court cannot jail a parent for failure to pay child support without providing adequate procedural safeguards to ensure consideration of the parent's ability to pay. *Id.* at 445-48.[17]

State and local courts have an affirmative duty to determine an individual's ability to pay and whether any nonpayment was willful before imposing incarceration as a consequence. *See Bearden*, 461 U.S. at 672 (holding that in probation revocation proceedings "for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay").[18] State and local courts should conduct this analysis even if a defendant does not specifically raise the issue. *See id.*

When assessing whether nonpayment was willful, the key question is whether the individual has made "sufficient bona fide efforts legally to acquire the resources to pay." *Bearden*,

fees apply with any greater force to youth. However, the Court has consistently recognized that, as a general matter, standards of culpability and punishment should apply differently in the juvenile context. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the death penalty disproportionate when imposed on youth); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (sentencing a young person who committed a non-homicide offense to life without parole violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (sentencing a young person to mandatory life imprisonment without parole violates the Eighth Amendment). Accordingly, and particularly in light of the policy considerations referenced above, the Department encourages state and local courts to seek alternatives to fines and fees when engaging youth.

[17] Based on these principles, the Department has determined that bail practices that result in pretrial incarceration based on poverty violate the Fourteenth Amendment. U.S. Amicus Br. at 16-19, *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) (No. 18-11368); U.S. Amicus Br. at 18-20, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 16-10521-HH); U.S. Amicus Br. at 17-21, *Walker v. City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017) (No. 16-10521).

[18] Furthermore, Idaho's Supreme Court has held that, under *Bearden*, "a court must inquire into an individual's ability and efforts to pay a court-ordered fine before issuing a warrant . . . for failing to pay." *Beck v. Elmore Cnty. Magistrate Ct.*, 489 P.3d 820, 836 (Idaho 2021) (holding that magistrate court's failure to consider the defendant's ability to pay before issuing an arrest warrant for nonpayment of fines and fees violated the Fourteenth Amendment).

461 U.S. at 661-62, 672. In making ability-to-pay assessments, courts should rely on "criteria typically considered daily by sentencing courts throughout the land." *Id.* at 673 n.12. Historically, in undertaking this analysis, courts have not considered how an individual spends money, but have instead focused solely on whether the individual has sufficient income and financial resources to pay the fine at issue while still meeting basic needs. *See, e.g.*, *Tate*, 401 U.S. at 396 n.1 (considering evidence at sentencing hearing that petitioner and his family were "poverty stricken," that he earned limited income in "casual employment" and received monthly federal benefits, and that his family relied on him for support in finding that petitioner could not afford fees); *see also* U.S. Sent'g Guidelines Manual § 5E1.2(d)(2) (directing courts to consider "earning capacity and financial resources" when assessing a defendant's ability to pay a fine); Consent Decree at 9, *McNeil v. Comm. Prob. Servs.*, No. 1:18-cv-00033 (M.D. Tenn. Jan. 13, 2022) (requiring that neither an individual's expenses nor the financial resources of her friends and family members be considered in determining ability to pay).

A willfulness determination must be fair and accurate. Due process requires that courts uniformly and consistently apply standards for making such determinations, such as notifying the defendant that their ability to pay will be considered by the court and providing a meaningful opportunity for the defendant to be heard regarding their ability to pay. *See Turner*, 564 U.S. at 447-48 (holding that such procedures are adequate safeguards against unrepresented parties being jailed based on an inability to make child-support payments).

Even independent of legal considerations, jurisdictions may also benefit from creating presumptions of indigency for certain classes of defendants—for example, those who are eligible for public benefits, unhoused, living below a certain income level, or serving a term of confinement. *See, e.g.*, R.I. Gen. Laws § 12-20-10(a), (b) (2022) (listing conditions considered "prima facie evidence of the defendant's indigency" and limited ability to pay, including but not limited to "[q]ualification for and/or receipt of" public assistance, disability insurance, and food stamps); Consent Decree at 9, *McNeil v. Comm. Prob. Servs.*, No. 1:18-cv-00033 (M.D. Tenn. Jan. 13, 2022) (committing the parties to presume indigence for individuals whose net household income falls below 200% of the federal poverty guidelines; who were eligible for appointed counsel in a criminal case; who are eligible to receive or have dependents who are eligible to receive aid from any federal or state public assistance program based on financial hardship; and/or who are unhoused). This approach is logical, as individuals who cannot afford to pay for their basic needs also cannot afford to pay fines and fees out of their already insufficient incomes. It also conserves court resources by removing the obligation to conduct duplicative ability to pay assessments. Similarly, jurisdictions should presume that children and youth are indigent and unable to pay fines and fees.[19] States are increasingly passing legislation or changing court rules to codify a presumption of indigence for minors.[20]

[19] *See, e.g.*, C.R. Div., U.S. Dep't of Just., Mem. of Agreement Regarding the Juv. Cts. of Memphis & Shelby Cnty. 9 (Dec. 17, 2012), https://perma.cc/MM49-G9GE (Under that agreement, children must be presumed indigent unless information to the contrary is provided to the juvenile court.).

[20] *See, e.g.*, Del. Code Ann. Tit. 29, § 4602(c) (West 2016) ("Any person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services."); La. Child. Code Ann. Art. 320(a) (2022) ("For purposes of the appointment of counsel, children are presumed to be indigent."); Mass. S.J.C. Rule 3:10(h)(iv) (2016) (defining as indigent "a juvenile, a child who is in the care or custody of the Department of Children and Families, or a young adult"); Mont. Code Ann. § 47-1-104 (4)(b)(ii)-(iii) (West 2013) (providing that every youth charged in delinquency proceedings "is entitled by law to the assistance of counsel at

Furthermore, we recommend that courts conduct a willfulness analysis and apply *Bearden*'s balancing framework before imposing other adverse consequences that implicate liberty or property interests on an indigent criminal defendant for nonpayment. As the U.S. Supreme Court has recognized, non-carceral penalties "may bear as heavily on an indigent accused as forced confinement." *See Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (stressing that "[t]he collateral consequences of conviction may be even more serious"); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "may become essential in the pursuit of a livelihood"). Although some courts have declined to apply *Bearden* itself outside of the incarceration context, extending the *Bearden* guarantees to other serious adverse consequences will avoid depriving people of their liberty and property interests based on no fault of their own. *See Mendoza v. Strickler*, 51 F.4th 346, 357 (9th Cir. 2022) (observing that *Bearden* and related cases "address[] only the limitations on imposing subsequent or additional *incarceration* on those unable to pay their fines"); *Jones v. Governor of Florida*, 975 F.3d 1016, 1032 (11th Cir. 2020) (en banc) ("The Supreme Court has never extended *Bearden* beyond the context of poverty-based *imprisonment.*"). In addition, some courts have held that individuals should not be required to complete extended terms or more burdensome conditions of supervision solely because of their inability to pay fees.[21] Other courts have similarly held that individuals should not be barred from participating in or completing a diversion program, be subjected to more onerous conditions for participating in a diversion program, or have a diversion program extended because they cannot pay fees.[22]

public expense regardless of the person's financial ability to retain private counsel"); N.C. Gen. Stat. Ann. § 7b-2000(b) (West 2001) ("All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency."); Ohio Admin. Code 120-1-03(B)(4) (2017) ("An applicant is presumed indigent and thus entitled to the appointment of counsel at state expense [when] [t]he applicant is a child . . . . In determining the eligibility of a child for appointed counsel, the income of the child's parent, guardian, or custodian shall not be considered."); 42 Pa. Stat. and Cons. Stat. Ann. § 6337.1(b)(1) (West 2012) ("In delinquency cases, all children shall be presumed indigent."); Vt. Stat. Ann. Tit. 13, § 5238(g) (West 2016) (While nearly all potential defendants are evaluated to determine whether they should pay a co-payment or reimburse the state for publicly-funded legal counsel, the statute provides that "[a] juvenile shall not be ordered to pay any part of the cost of representation."); Wash. Rev. Code Ann. § 13.40.140(2) (West 2022) (While a youth's family's ability to pay will be assessed, "[t]he ability to pay part of the cost of counsel does not preclude assignment [and] [i]n no case may a juvenile be deprived of counsel because of a parent, guardian, or custodian refusing to pay."); Wis. Stat. Ann. § 938.23(1m)(a), (4) (West 2016) (providing a right to counsel to all youth charged with delinquency or held in detention, and providing that "[i]f a [child] has a right to be represented by counsel or is provided counsel at the discretion of the court under this section and counsel is not knowingly and voluntarily waived, the court shall refer the [child] to the state public defender and counsel shall be appointed by the state public defender . . . without a determination of indigency").

[21] *See, e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2021 WL 366776, at *28 (M.D. Tenn. Feb. 3, 2021) ("In the Court's view, *Bearden* applies to the restrictions on the liberty interests identified by Plaintiffs for those on supervised probation, including the requirement that they report regularly to [Community Probation Services], submit to drug tests (for which they are charged), refrain from traveling or moving freely, and the risk they will be arrested and/or jailed for alleged violations of conditions. This loss of liberty allegedly is not imposed (at least to the same extent) on those who are moved to unsupervised probation because they have the means to pay off the amounts owed."); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 775, 775-76 (M.D. Tenn. 2016) (applying *Bearden* to the imposition of onerous requirements and extended supervision terms on probationers).

[22] *See, e.g.*, *Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, at *10-13 (D. Ariz. June 18, 2019) (applying *Bearden*'s principles to the imposition of longer supervision terms and more onerous conditions on diversion participants who cannot afford to pay fees); *Mueller v. State*, 837 N.E.2d 198, 201-05 (Ind. Ct. App. 2005) (applying the *Bearden* framework to find that a criminal defendant's exclusion from a diversion program because she could not pay a fee violated the Fourteenth Amendment).

3. The Fourteenth Amendment requires the consideration of alternatives before incarcerating individuals who are unable to pay fines and fees.

Before an individual is incarcerated for a non-willful failure to pay a financial obligation, the Fourteenth Amendment requires a careful inquiry into factors such as the individual interest at stake, the extent to which the consequence imposes upon that interest, the rationality of the connection between the consequence and the state's interests, and whether "alternate measures" are "adequate to meet the State's interests." *See Bearden*, 461 U.S. at 666-67, 672.

We further recommend that, in the context of nonpayment of fines or fees due to inability to pay, state and local courts consider alternatives before imposing adverse consequences that implicate liberty or property interests. It is the position of the United States that imposing certain serious adverse consequences for failure to pay an unaffordable fine or fee, where alternative approaches could serve the government's interests, violates the Fourteenth Amendment. *See, e.g.*, U.S. Statement of Interest at 17-18, *Stinnie v. Holcomb*, No. 3:16-CV-00044 (W.D. Va. Nov. 7, 2016), U.S. Statement of Interest (Doc. 27) at 17-18 (arguing that automatically suspending drivers' licenses for unpaid fines was unconstitutional because there were alternative means of serving the state's interests); *see also* Section A.2, *supra*; *cf.* U.S. Amicus Br. at 19, *Daves*, *supra* (No. 18-11368) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc)) (concluding that the government cannot detain individuals for failure to pay an unaffordable bail amount absent a finding that alternatives would not adequately protect the government's interests in public safety and ensuring appearance at trial). States and localities should consider—at least as a best practice—requiring a factfinder to reach a reasoned determination that alternatives to a contemplated adverse consequence are inadequate to meet the State's interests in securing payment before penalizing individuals for their inability to pay.

As a best practice, jurisdictions should consider collecting fines and fees by, for instance, adopting penalty-free payment plans, offering amnesty periods during which individuals can have warrants cancelled and fees waived, or connecting individuals who cannot afford to pay fines and fees with workforce development and financial counseling programs.[23] These alternatives are likely to serve a jurisdiction's interest in ensuring payment of fines and fees better than incarceration or other adverse consequences. As the Court in *Bearden* observed,

> given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine . . . a sentencing court can often establish a reduced fine or alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence . . . .

461 U.S. at 672. Further, where appropriate, jurisdictions may also consider waiving or reducing the debt of a person unable to pay the debt. Jurisdictions can also consider alternatives to imposing punitive financial obligations in the first place. Alternatives could include, for example, requiring an individual to attend traffic or public safety classes, or imposing community service. Indeed, a

[23] *See, e.g.*, City of Montgomery, *Amnesty Days*, https://perma.cc/VS6T-B8K7 (last visited Apr. 18, 2023); *see also* Justin Ove, *City of Atlanta Municipal Court Announces Warrant Amnesty Program*, Patch.com (Feb. 10, 2015), https://perma.cc/UBX8-67KT.

number of jurisdictions have codified consideration of alternatives as a requirement into state law.[24]

Importantly, however, states and local governments should be mindful that these alternatives can, under certain circumstances, inadvertently impose greater penalties on those who are economically disadvantaged. For example, a payment plan might still unnecessarily penalize a low-income person for their poverty if the plan imposes onerous user fees or interest. Debts that are sold to third-party debt collectors can have a significant impact on credit scores, in turn affecting employment and housing opportunities. In addition, individuals' financial circumstances may change over the duration of a payment plan. Providing a mechanism for individuals to seek reductions in their monthly obligations in light of changed circumstances helps to protect against violations of individuals' Fourteenth Amendment rights.[25]

As a practical matter, the imposition of seemingly non-financial obligations may still result in indirect financial obligations. For example, while community service could be an alternative to payment for adults or youth, it could nevertheless exact a financial consequence if individuals are required to pay costs for participation, take unpaid leave from their jobs, pay for childcare, or miss educational opportunities to fulfill it. The same may be true for alternatives to adverse consequences that involve education, substance abuse and mental health counseling, and other programs. Public policy considerations counsel in favor of courts recognizing such obligations, particularly in considering whether an individual has an inability versus an unwillingness to comply. In the case of minors, any community-service obligations should be designed to avoid undermining treatment, services, fulfillment of other court-ordered conditions, compulsory school attendance, or educational and vocational attainment.

4. The Fourteenth Amendment prohibits the imposition of fines and fees that create conflicts of interest.

The Due Process Clause of the Fourteenth Amendment "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Accordingly, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the U.S. Supreme Court held that a defendant is denied due process if the judge deciding the case has a "direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. Based on that standard, the Court in *Tumey* held that a mayor who also served as a judge was not a neutral decisionmaker because fines that he imposed supplemented his salary and generated revenue for his town. *Id.* at 531-32. Similarly, in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court held that a mayor who also served as judge was not a neutral decisionmaker because fines and fees

[24] *See, e.g.*, Ga. Code Ann. § 42-8-102(f)(4)(A) (2021) (providing that for "failure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service"); Tex. Code Crim. Proc. Ann. 42.15 (West 2021) (When the court determines that "the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs" the court can determine whether the fine and costs should be "paid at some later date or in a specified portion at designated intervals; . . . discharged by performing community service . . . ; waived in full or in part . . . ."); *see also Tate*, 401 U.S. at 400 n.5 (discussing ineffectiveness of fine payment plans and citing examples from several states).

[25] *See* Fines and Fees Just. Ctr., *First Steps Toward More Equitable Fines and Fees Practices: Policy Guidance on Ability to Pay Assessments, Payment Plans and Community Service* (2020), https://perma.cc/W4BH-RJUX.

that he assessed accounted for a major portion of the village's revenue and he was personally and solely accountable to the village council for the village budget. *Id.* at 58, 60.

Due process also bars conflicts where an institutional financial interest in the outcome of a case gives rise to a significant personal interest for the judge, even when there is no prospect of personal financial gain. For example, in *Cain v. White*, 937 F.3d 446, 451 (5th Cir. 2019), the court held that parish judges were not neutral decisionmakers because they oversaw collection of fines and fees that funded a substantial portion of a judicial expense fund they administered and that supported the salaries of judicial staff and other court expenses. Similarly, in *Caliste v. Cantrell*, 937 F.3d 525, 531-32 (5th Cir. 2019), the court held that a judge violated the defendants' due process right to a neutral decisionmaker by both setting bail and administering a similar judicial expense fund financed in substantial part by fees assessed on commercial security bonds typically used by the defendants to make bail.[26]

Fines and fees collected by courts or other officials who enforce the law generally do not raise conflict-of-interest concerns, however, if those fines and fees are not paid directly to the officials in question. In *Dugan v. Ohio*, 277 U.S. 61, 65 (1928), the U.S. Supreme Court found permissible a mayor's participation on a judicial commission when the fines assessed by the commission were deposited into the same general fund from which the mayor's salary was paid, but where the mayor's salary was not dependent on a conviction in any specific commission matter. A key factor in the Court's analysis was the remoteness of the effect of any individual commission decision on the mayor's salary. *See also Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1154 (Fed. Cir. 2021); *Del. Riverkeeper Network v. Fed. Energy Regul. Comm'n*, 895 F.3d 102, 112 (D.C. Cir. 2018).

As the Department has previously observed, "[c]ourts, prosecutors, and police should be driven by justice—not revenue." U.S. Statement of Interest (Doc. 56) at 1, *Coleman v. Town of Brookside*, No. 2:22-cv-00423-RDP (N.D. Ala. July 26, 2022). It may interfere with an official's neutrality, raising due process concerns, if the official's imposition of fines or fees affects the amount of his or her compensation. The cases cited above establish that the Fourteenth Amendment bars judges from deciding cases where their decision-making may be distorted by direct, personal, substantial pecuniary interests. The Department has taken the position that due process protections also apply when the disposition of fines creates a personal interest in the outcome of an enforcement proceeding for other officials who enforce the law, including police, prosecutors, and probation officers. *See id.* at 10-11; *see also Marshall*, 446 U.S. at 249-50 (holding that the due process neutrality requirement applies to enforcement agents). Several courts have applied the neutrality requirement to private probation companies, individual probation officers, law enforcement officials, and county attorneys.[27]

[26] *See also* Order Denying Mot. to Dismiss (Doc. 80) at 14-15, *Coleman v. Town of Brookside*, No. 2:22-cv-00423-AMM (N.D. Ala. Mar. 23, 2023) (explaining that both personal and institutional conflicts of interest may contravene the federal Constitution).

[27] *See Brucker v. City of Doraville*, 38 F.4th 876, 887-88 (11th Cir. 2020) (explaining that the Fourteenth Amendment's due process requirements for conflicts of interest apply to law enforcement officers and prosecutors); *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1244 (11th Cir. 2020) (holding that a private probation company "was not impartial because its revenue depended directly and materially on whether and how it made sentencing decisions"); *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2021 WL 366776, at *18-25 (M.D. Tenn. Feb. 3, 2021) (denying a motion to dismiss due process claim where the plaintiffs alleged that the contract between a county and private

5. The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees by individuals who are unable to pay.

The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees such as court costs.[28] *See M.L.B. v. S.L.J.*, 519 U.S. 102, 119-24 (1996) (holding that Mississippi statutes that conditioned an indigent mother's right to appeal a judgment terminating her parental rights on prepayment of costs violated equal protection and due process); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that due process bars states from conditioning access to compulsory judicial process on the payment of court fees by those unable to pay); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."); *see also Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 502 (M.D. Ala. 1976) (holding that the conditioning of an appeal on payment of a bond violates indigent prisoners' equal protection rights and "has no place in our heritage of Equal Justice Under Law" (quoting *Burns v. Ohio*, 360 U.S. 252, 258 (1959))).[29]

Fines and fees assessed by courts are often incorrectly framed as a routine administrative matter. For example, a motorist who is arrested for driving with a suspended license may be told that the penalty for the citation is $300 and that a court date will be scheduled only upon the payment of $300 (sometimes referred to as a prehearing "bond" or "bail" payment). Courts most commonly impose these payment requirements on defendants who have failed to appear, depriving those defendants of the opportunity to establish good cause for missing court. However, regardless of the charge, predicating indigent individuals' access to a hearing, to counsel, or other judicial process on the payment of costs can deprive those without financial resources of access to justice and potentially violate their rights.[30]

probation company provided that the company's sole compensation came from fines and fees it collected from probationers); *Flora v. Sw. Iowa Narcotics Enf't Task Force*, 292 F. Supp. 3d 875, 903-05 (S.D. Iowa 2018) (denying summary judgment on due process claim against a narcotics task force, law enforcement officers, and county attorneys whose departments were funded in part by assets seized for forfeiture); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1195 (D.N.M. 2018) (finding "a realistic possibility that the forfeiture program prosecutors' judgment will be distorted, because in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend").

[28] Courts can, however, limit access to courts, including by requiring payment of fees, in many circumstances as a penalty for litigation conduct or to deter frivolous filings. *See, e.g.*, *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316-19 (3d Cir. 2001) (discussing Prison Litigation Reform Act's three-strikes rule); *Williams v. Adams*, 660 F.3d 263, 265-67 (7th Cir. 2011).

[29] The U.S. Supreme Court reaffirmed this principle in *Little v. Streater*, 452 U.S. 1, 16-17 (1981), when it prohibited conditioning indigent persons' access to blood tests in adversarial paternity actions on payment of a fee.

[30] Courts might also inappropriately impose fees that burden access to counsel. Depending on the jurisdiction, this can include fees for submitting an application for court-appointed counsel, fees for the court to process that application and appoint counsel, and fees for representation by the court-appointed counsel. As youth generally do not have financial resources independent from their parents or guardians, and cannot compel the adults to pay, predicating access to and services of counsel on payment of fees seriously risks youth being subjected to the unconstitutional denial of counsel. Nat'l Juv. Def. Ctr., *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel* 22-23 (2017), https://perma.cc/85RZ-49T6; Fines and Fees Just. Ctr., *At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees* (2022), https://perma.cc/6X33-YPD9.

6. The Sixth and Fourteenth Amendments require due process protections, such as access to counsel in appropriate cases, as well as notice, when imposing and enforcing fines and fees.

Defendants may have the right to be represented by counsel in certain fines and fees enforcement cases. Failing to appear or to pay outstanding fines or fees can result in incarceration, whether through criminal charges or criminal contempt, a suspended sentence, or civil contempt proceedings. The Sixth Amendment requires that a defendant be provided the right to counsel in at least any criminal proceeding that may result in incarceration, *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), and it forbids imposition of a suspended jail sentence on a probationer who was not afforded a right to counsel when originally convicted and sentenced, *Alabama v. Shelton*, 535 U.S. 654, 662 (2002). Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees where incarceration is a possible penalty. *See Turner*, 564 U.S. at 446-48 (holding that, although there is no automatic right to counsel in civil contempt proceedings for nonpayment of child support, due process is violated when neither counsel nor adequate alternative procedural safeguards are provided to prevent incarceration for inability to pay).[31] The Fourteenth Amendment's Due Process Clause also guarantees youth the right to counsel in juvenile proceedings, irrespective of any affirmative request. *In re Gault*, 387 U.S. 1, 38-41 (1967). Where a right to counsel exists, that right cannot be conditioned on a defendant's payment of fines or fees that the defendant lacks the ability to pay. *Fuller v. Oregon*, 417 U.S. 40, 52-53 (1974).

Further, a cornerstone of the Fourteenth Amendment's Due Process Clause is constitutionally adequate notice. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950). As the Court noted in *Mullane*, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. This core constitutional principle has been applied in cases involving minor offenses. *See*, *e.g.*, *Remm v. Landrieu*, 418 F. Supp. 542, 548 (E.D. La. 1976) (finding city towing ordinance unconstitutional "insofar as it authorizes the assessment of towing fees and storage charges without notice and the opportunity for a hearing").[32]

As a best practice, courts should ensure that individuals are provided with access to counsel in appropriate cases involving fines and fees, including, as discussed above, in proceedings that may result in incarceration and in juvenile proceedings. We recommend that courts undertake measures to ensure that individuals actually receive the citations and summonses intended for them, and adequately inform individuals of the precise charges against them, the amount they owe or other possible penalties, the date of their court hearing, the availability of alternate means of

[31] The Supreme Court's ruling in *Turner* that the right to counsel is not automatic was limited to contempt proceedings arising from failure to pay child support to a custodial parent who is unrepresented by counsel. *See* 564 U.S. at 446-48. The Court explained that recognizing such an automatic right in that context "could create an asymmetry of representation." *Id.* at 447. The Court distinguished those circumstances from civil contempt proceedings to recover funds due to the government, which "more closely resemble debt-collection proceedings" in which "[t]he government is likely to have counsel or some other competent representative." *Id.* at 449.

[32] *But see Goichman v. City of Aspen*, 859 F.2d 1466, 1468-69 (10th Cir. 1988) (holding that no additional hearing beyond one to adjudicate underlying parking violation was required by due process to determine validity of local towing and impoundment procedures).

payment, the rules and procedures of court, their rights as a litigant, and whether they must appear in person. Gaps in this vital information can make it difficult, if not impossible, for individuals to fairly and expeditiously resolve their cases. Inadequate notice can have a cascading effect, resulting in the individual's failure to appear and leading to the imposition of significant penalties in possible violation of an individual's due process rights.

7. The Fourteenth Amendment prohibits the imposition of fines and fees in a manner that intentionally discriminates against a protected class.

The Fourteenth Amendment's Equal Protection Clause prohibits state action that results in a discriminatory effect against a protected class when that state action is motivated, in whole or part, by a discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). Importantly, a consistent pattern of racial disparities can, itself, serve as evidence of discriminatory purpose. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997) ("[T]he impact of an official action is often probative of why the action was taken in the first place."). Thus, efforts to collect fines and fees that have a discriminatory effect on members of a particular race—yielding, for example, racially disproportionate stops and citations—may constitute evidence that, in combination with other evidence, could support a finding of intentional discrimination. *See, e.g.*, C.R. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://perma.cc/7QR3-BRLD (finding that Ferguson's failure to evaluate or correct its approach to raising revenue through fines and fees despite its disproportionate impact on Black residents constituted evidence of intentional discrimination in violation of the Fourteenth Amendment); *see also Nguyen v. La. State Bd. of Cosmetology*, 236 F. Supp. 3d 947, 953-56 (M.D. La. 2017) (denying defendants summary judgment on equal protection claims alleging fines imposed on nail salons discriminated on the basis of race). *Cf. Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation omitted)).

Even in the absence of intentional discrimination, we recommend that courts and other state actors carefully consider whether their collection of fines and fees have disproportionate effects based on race or another protected characteristic. For example, courts should consider whether certain fines and fees practices, such as debt-based driver's license suspensions, disproportionately affect people of color.[33] Effective alternatives to these practices may better ensure that states and

[33] *See, e.g.*, C.R. Corps, *The Fiscal Impact of Debt-Based Driver's License Suspensions* (2021), https://perma.cc/M8DL-DW6X (summarizing research in numerous states and concluding that debt-based driver's license suspension is ineffective and counterproductive to debt collection); Stephanie Seguino et al., *Trends in Racial Disparities in Vermont Traffic Stops, 2014-19*, at 2-3 (Jan. 2021), https://perma.cc/FL4V-RC4Q; Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behaviour 736 (2020), https://perma.cc/4W29-V7RN; N.Y. Law Sch. Racial Just. Project, *Driving While Black and Latinx: Stops, Fines, Fees, and Unjust Debts* 9 (Feb. 2020), https://perma.cc/HZ9Y-WBBH; Am. Bar Ass'n, *Unpaid Court Fees and Fines: License Suspensions Can't Be the Answer* (Jul. 27, 2020), https://perma.cc/BH9A-GDX4 (concluding that debt-based license suspensions are counterproductive because they often render individuals unable to work and place individuals at risk of incurring additional fines and fees that they cannot pay if they drive while their license is suspended); The Sent'g Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 19, 2018), https://perma.cc/97LF-HV2U; Findings, Stanford Open Policing Project, https://perma.cc/W839-7NBD; *see also* William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 Duke L.J. 1585, 1606 (2020), https://perma.cc/V4SD-DKYM.

localities do not inequitably burden members of protected classes.[34]

* * * * *

The Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601 (Section 12601), makes it unlawful for law enforcement officers to engage in a pattern or practice of conduct that violates the U.S. Constitution or federal law, including, under certain circumstances, the unconstitutional or unlawful imposition and enforcement of fines and fees. Accordingly, failure by jurisdictions to comply with the constitutional and legal requirements described in this letter might expose them to civil enforcement actions by the Department. For example, under its Section 12601 authority, the Department entered into a consent decree with the City of Ferguson, Missouri, that required the City to rectify its allegedly unconstitutional fines and fees practices by, among other things: (1) considering ability to pay in assessing and enforcing fines and fees; and (2) implementing an amnesty program for individuals previously subjected to unconstitutional fines and fees practices.[35]

With respect to youth in particular, the Department has utilized its Section 12601 authority to enforce the rights of those involved in the juvenile justice system through a comprehensive settlement with Shelby County, Tennessee,[36] following the Department's findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of system-involved youth.[37] Similarly, the Department has enforced the rights of minors in St. Louis County Family Court after finding systemic violations of their rights under the Due Process and Equal Protection Clauses. [38]

We also note that the courts' obligation to comply with these principles extends to activities carried out by court staff and private contractors on the courts' behalf. In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most court business is conducted by clerks or probation officers (including private contractors) outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection requirements. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed by all staff and private contractors to preserve "both the appearance and reality of

[34] For example, the Policy Advocacy Clinic at the School of Law at the University of California at Berkeley analyzed data on the allocation of fines and fees on juveniles in Alameda County, California, and found that Black youth were overrepresented at each step in the juvenile justice system, exposing them to significantly higher fees. Jeffrey Selbin & Stephanie Campos, *High Pain, No Gain: How Juvenile Administrative Fees Harm Low-Income Families in Alameda County, California* (Mar. 2016), https://perma.cc/RBP4-Z8ZF. Other research has shown that having unpaid monetary sanctions after case closing led to higher recidivism, and that youth of color were more likely to have unpaid monetary sanctions than their white peers. Piquero & Jennings, *supra* note 11, using a sample of over 1,000 youth.
[35] Consent Decree (Doc. 41) at 79-80, 83-84, *United States v. City of Ferguson*, No. 4:16-cv-180 (E.D. Mo. Apr. 19, 2016).
[36] Mem. of Agreement Regarding the Juv. Ct. of Memphis & Shelby Cnty., *supra* note 19.
[37] C.R. Div., U.S. Dep't of Just., Investigation of the Shelby Cnty. Juv. Ct. (Apr. 26, 2012), https://perma.cc/ZQ46-Y3XQ.
[38] C.R. Div., U.S. Dep't of Just., Mem. of Agreement Between the U.S, Dep't of Just. and the St. Louis Cnty. Fam. Ct. (Dec. 14, 2016), https://perma.cc/ZCN6-JTKA.

fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citation and internal quotation marks omitted); *see also* Model Code of Judicial Conduct, Canon 2, Rules 2.2, 2.5, 2.12 (Am. Bar Ass'n 2020).

B. Obligations Under Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968

Recipients of federal financial assistance, including court systems, must also comply with statutory prohibitions against discrimination in the imposition of fines and fees.[39] In particular, courts must be cognizant of their obligations under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulations, 28 C.F.R. § 42.101 *et seq.*, as well as under the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), 34 U.S.C. § 10228(c)(1) (nondiscrimination provision); 28 C.F.R. pt. 42, subpt. D.[40] Title VI and its implementing regulations prohibit race, color, and national origin discrimination in the delivery of services or benefits by recipients of federal financial assistance.[41] Recipients of funds covered by the Safe Streets Act, which is modeled on Title VI, must not discriminate based on race, color, national origin, religion, or sex.[42]

For example, Title VI and the Safe Streets Act prohibit discrimination based on national origin, such that state court systems and other federal funding recipients are required to take reasonable steps to provide meaningful access to individuals who are limited English proficient (LEP), including youth and their families, in their programs or activities.[43] *See* U.S. Dep't of Just.,

[39] For example, Title II of the Americans with Disabilities Act (ADA) and its implementing regulations prohibit state and local government entities, including court systems, from discriminating based on disability in their programs, services, and activities. 42 U.S.C. § 12132; 28 C.F.R. pt. 35. Among other things, covered entities must provide people with disabilities an equal opportunity to participate in or benefit from an aid, benefit, or service, and must make reasonable modifications to avoid discrimination based on disability unless the covered entity can demonstrate that making such modifications would fundamentally alter the nature of its service, program, or activity. 28 C.F.R. § 35.130(b)(1), (b)(7). Covered entities must also take appropriate steps to ensure that communications with people with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a)(1). Similarly, Section 504 of the Rehabilitation Act prohibits recipients of federal financial assistance from discriminating solely by reason of disability in their programs and activities. 29 U.S.C. § 794.

[40] Unlike Title VI, which generally applies to all recipients of federal financial assistance, the nondiscrimination provision of the Safe Streets Act only applies to recipients of certain federal financial assistance from the Department. Recipients of financial assistance from the Department should also be aware of their obligations to comply with the nondiscrimination provisions in certain Department program statutes. This includes (1) the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, and its implementing regulations, 34 U.S.C. § 11182(b), 28 C.F.R. pts. 31 & 42; (2) the Victims of Crime Act of 1984, as amended, and its implementing regulations, 34 U.S.C. § 20110(e), 28 C.F.R. § 94.114; and (3) the Violence Against Women Act of 1994, as amended 34 U.S.C. § 12291(b)(13).

[41] *See generally* C.R. Div., U.S. Dep't of Just., *Title VI Legal Manual*, https://perma.cc/XNC5-2HLL (hereinafter *Title VI Legal Manual*). In addition to prohibiting intentional discrimination, Title VI and the nondiscrimination provisions of the Safe Streets Act also bar recipients of federal financial assistance, including court systems, from implementing otherwise neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against individuals on the basis of race, color, or national origin. The legal framework for this type of discriminatory effects claim under Title VI and the Safe Streets Act is akin to the burden-shifting analysis of an employment discrimination claim under Title VII of the Civil Rights Act of 1964. *See, e.g.*, *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam). *See* 28 C.F.R. § 42.104(b)(2); *Title VI Legal Manual*, at sec. VII.

[42] 28 C.F.R. § 42.203(e).

[43] *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974).

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002) (hereinafter "DOJ LEP Guidance"); *see also* C.R. Div., U.S. Dep't of Just., "Communication with Courts Regarding Language Access" (Aug. 2008, republished 2018).[44]

In order to meet their statutory obligations, courts must, for instance, provide appropriate language assistance services to LEP individuals in connection with assessment and collection of fines and fees. Such assistance includes, but is not limited to, ensuring that court users with LEP have competent interpreting and translation services during all related hearings, trials, and motions, *see* DOJ LEP Guidance, 67 Fed. Reg. at 41471, provided at no cost. Meaningful language assistance is crucial, both within and beyond the fines and fees context.[45]

Title VI and the Safe Streets Act require recipients of federal funds, as a condition of receiving financial assistance, to contractually agree that they will comply with federal civil rights statutes.[46] Court systems receiving federal financial assistance that do not comply with Title VI or Safe Streets Act requirements might be subject to civil enforcement actions by the Department.[47] The Department has the authority to review and investigate recipients of its federal financial assistance.[48] The Department expects its funding recipients, including courts, to cooperate with investigations and, upon request, to provide records[49] that will enable the Department to ascertain

[44] U.S. Dep't of Just., *Communication with Courts Regarding Language Access*, https://perma.cc/5XN3-SNJE. Failure to provide meaningful language access in criminal proceedings also implicates constitutional rights. *See, e.g.*, *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) ("We hold that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact."). Several circuits have held that a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter. *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *see also United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) ("While these cases have often been concerned with the role of interpreters in helping a defendant to understand those who testify against him, and hence have focused on the Sixth Amendment right to confront witnesses, the withdrawal of an interpreter whose assistance has been enlisted in order that the defendant may deliver his own testimony clearly implicates the defendant's Fifth Amendment right to testify on his own behalf."); *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (per curiam); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (per curiam); *Ling v. State*, 702 S.E.2d 881, 884 (Ga. 2010).

[45] The Department has worked with state courts across the country to improve their language access services. *See* U.S. Dep't of Just., *State Courts*, https://perma.cc/747D-TUA7 (last visited Apr. 18, 2023).

[46] *See* 28 C.F.R. § 42.105 (describing assurances required of federal financial assistance recipients). The Department has the right to access pertinent records, personnel, and other information from its funding recipients. *See, e.g.*, Department of Justice Certified Standard Assurances ¶¶ 4, 7, https://perma.cc/GMS3-BR5Z; 34 U.S.C. § 10230; 28 C.F.R. § 42.106; 2 C.F.R. § 200.337(a); 28 C.F.R. § 42.105(a)(1) (requiring that every application for federal financial assistance from the Department include an assurance that the program will be conducted in compliance with all of the requirements of Title VI, as a condition of its approval).

[47] 28 C.F.R. § 42.101 *et seq*. (Title VI); 28 C.F.R. pt. 42, subpt. D (Safe Streets Act).

[48] Other federal agencies that administer federal financial assistance can also make referrals to the Department for administrative investigation and judicial enforcement regarding their programs or activities. *See, e.g.*, 28 C.F.R. § 50.3.

[49] *See* 28 C.F.R. § 42.106(b) ("Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with [the Title VI regulations]."). The Department's Safe Streets Act nondiscrimination regulations contain substantially similar recipient requirements. *See* 28 C.F.R.

whether the administration of fines and fees complies with Title VI and Safe Streets Act requirements.[50] If the Department finds that one of its funding recipients has violated federal law and has failed to voluntarily resolve those violations, the Department may suspend or terminate, or refuse to grant or continue, federal financial assistance.[51] The Department may also use civil litigation to enforce Title VI and the nondiscrimination provisions of the Safe Streets Act. Additionally, the Department may independently initiate compliance reviews (i.e., investigative audits) into its funding recipients to determine whether their administration of fines and fees violates applicable federal civil rights laws.[52]

In addition to the possibility of enforcement actions, the Department has specific resources available to courts, including juvenile courts and justice agencies, to help them comply with their civil rights obligations.[53]

C. Conclusion

Eliminating the unjust imposition of fines and fees is one of the most expeditious ways for jurisdictions to support the success of youth and low-income individuals, honor constitutional and statutory obligations, reduce racial disparities in the administration of justice, and ensure greater justice for all. We invite you to work with the Department to continue to develop and share solutions. The Department's Civil Rights Division is charged with protecting the civil and constitutional rights of all persons in the United States, and is available to provide technical assistance to courts, other recipients of federal financial assistance, and stakeholders, as appropriate. The Department's reinvigorated Office for Access to Justice (ATJ) works to mitigate economic barriers that prevent access to the promises and protections of our legal systems. ATJ will follow up on this letter by building a best practices guide, highlighting innovative work by states, municipalities, and court leaders in this area. ATJ welcomes the opportunity to serve as a

§ 42.207(a) (requiring recipients to "[p]ermit reasonable access" to "books, documents, papers, and records, to the extent necessary to determine whether the recipient is [in compliance]").

[50] Recordkeeping can help recipients identify potential disparities in the imposition of fines and fees and alert them to potential violations of federal nondiscrimination laws. Courts that receive federal funding should collect and analyze demographic data related to the imposition of fines and fees to ensure compliance with federal law. Such procedures are critical for evaluating the impact that fines and fees may have on a protected class over time.

[51] If a recipient has failed to comply with Title VI, and cannot correct this violation voluntarily, the Department "may suspend or terminate, or refuse to grant or continue, Federal financial assistance." 28 C.F.R. § 42.108(a), (b). The Department might also "use any other means authorized by law[] to induce compliance." *Id.* This might include enforcement proceedings under applicable federal, state, or local law. *Id.* Similarly, if the Department finds Safe Streets Act non-compliance, there is an administrative process by which the Department might suspend funding, as appropriate, to the specific program or activity in which the noncompliance was found. 28 C.F.R. § 42.210(a); *see also* 28 C.F.R. § 42.210(b) (providing for hearing procedures in the event of noncompliance).

[52] 28 C.F.R. § 42.206. For example, the Department's Office of Justice Programs, Office for Civil Rights examined whether Sacramento County, California and the Sacramento Superior Court discriminated on the basis of race, national origin, or age when assessing and collecting costs, fees, and fines against youth involved in the juvenile justice system. *See* Letter from the Office for Civil Rights to Judge Culhane and Supervisor Nottoli, Compliance Rev. of Sacramento Cnty., Cal. and the Sacramento Superior Ct. (16-OCR-2156) (May 15, 2017), https://perma.cc/29CY-Q3XB. In response, the Sacramento County Board of Supervisors directed that the assessment and collection of fines and fees from youth should cease, including fees associated with juvenile detention, supervision, drug testing, electronic monitoring, and representation in delinquency proceedings. The Board also directed the County to forgive over 23 million dollars of existing debt related to the juvenile justice system.

[53] The Civil Rights Division has created a webpage that highlights a number of resources designed to assist state courts in providing meaningful language access. *See State Courts*, *supra* note 45.

resource, and to collaborate and promote solutions. The Department's Office of Justice Programs (OJP)[54] provides grant funding and technical assistance to state, county, local, and tribal courts, which improves the functioning and fairness of the justice system, including by moving away from an overreliance on fines and fees to support government programs. In the spring of 2023, OJP's Bureau of Justice Assistance (BJA) plans to release a solicitation entitled "The Price of Justice: Rethinking Fines and Fees," which will seek a training and technical assistance provider to support jurisdictions seeking to examine, revise, and implement changes to policies and practices around both fines and fees. The goal of the solicitation is to support jurisdictions in implementing innovative approaches to address the common barriers to equitable systems of legal financial obligations.[55] We encourage you to visit OJP's website for a listing of available solicitations and opportunities from the OJP program offices.[56] BJA has a National Training and Technical Assistance Center that provides no-cost, on-demand training and technical assistance that may prove useful in thinking about new ways to address the needs of courts and the people they serve.[57]

The Department of Justice has a strong interest in ensuring that state and local courts provide everyone with the basic protections guaranteed by the U.S. Constitution, Title VI, the Safe Streets Act, and other federal laws, regardless of financial means. We are eager to build on the many reforms that jurisdictions have implemented over the past few years, and we look forward to working collaboratively to ensure that everyone receives equal, fair, and impartial access to justice.

Sincerely,

Kristen Clarke
Assistant Attorney General
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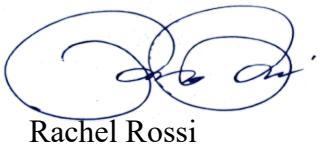
Amy L. Solomon
Principal Deputy Assistant
Attorney General
Office of Justice Programs



Rachel Rossi
Director
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[54] The Office of Justice Programs provides federal leadership, grants, training, technical assistance and other resources to improve the nation's capacity to prevent and reduce crime, advance racial equity in the administration of justice, assist victims and enhance the rule of law. For more information about OJP and its program offices, funding opportunities, and other resources, see www.ojp.gov.

[55] For guidance in preparing and submitting applications for OJP funding, please visit OJP's Grant Application Resource Guide, which contains details about application reviews and federal award administration: Off. of Just. Programs, U.S. Dep't of Just., *OJP Grant Application Resource Guide*, https://perma.cc/K7LQ-WXB8 (last visited Apr. 18, 2023).

[56] Off. of Just. Programs, U.S. Dep't of Just., *Opportunities & Awards: Current Funding Opportunities*, https://www.ojp.gov/funding/explore/current-funding-opportunities (last visited Apr. 18, 2023).

[57] Nat'l Training and Tech. Assistance Ctr., Bureau of Just. Assistance, U.S. Dep't of Just., *Request TTA*, https://bjatta.bja.ojp.gov/working-with-nttac/requestors (last visited Apr. 18, 2023).