

March 3, 2020

Via email to supreme@courts.wa.gov

Chief Justice Debra Stephens
Members of the State Supreme Court
Susan L. Carlson, Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Support for Proposed General Rule 38 – Privilege from Civil Arrest

Dear Chief Justice Stephens, Members of the State Supreme Court, and Madam Clerk:

Columbia Legal Services (CLS) writes this letter in support of the proposed General Rule (GR) 38 to recognize the common law privilege from civil arrest. As one of Washington State's civil legal aid providers, CLS has as a core part of our mission ensuring access to justice for all Washingtonians. CLS advocates for laws and policies that advance social, economic, and racial equity for people living in poverty – in particular, for communities who are denied access to traditional legal services, including immigrants who lack legal status and their families.

Because our immigrant clients and their families are often targeted and threatened based on allegations related to their legal status, CLS has long advocated for the rights of immigrants to access the legal system free of intimidation and fear of reprisal. We are facing a unique moment in our history when particular groups are being targeted and intimidated by federal officials at courthouses, interfering with their basic right to access our courts. Accordingly, we urge this Court to promulgate the proposed rule to protect access to the courts for all Washingtonians for the following reasons.

Access to Courts Is a Fundamental Feature of the U.S. Legal System.

As the U.S. Supreme Court has recognized, access to the courts is a fundamental characteristic of our society and is linked to the fundamental right of due process:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . . **It is to courts, or other quasi-judicial**



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official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized **the centrality of the concept of due process** in the operation of this system. . . . **Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.**

Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971) (emphasis added).

The Washington Constitution provides that “justice in all cases shall be administered openly and without unnecessary delay,” Wash. Const. art. I, § 10, and guarantees the right of access to seek legal redress in the courts. *King v. King*, 162 Wn.2d 378, 388 (2007); *see also State v. Vance*, 29 Wash. 435 (1902) (recognizing the “right to the usual remedies to collect debts, and to enforce other personal rights” as fundamental rights protected under the Washington Constitution’s privileges and immunities clause). This Court has repeatedly recognized the importance of ensuring access to courts, particularly for indigent people. *See, e.g., Jafar v. Webb*, 177 Wn.2d 520, 530-31, 303 P.3d 1042 (2013) (confirming that GR 34 requires fee waivers for indigent litigants in all cases, beyond the constitutional “floor” established in *Boddie* and its progeny); *see also O’Connor v. Matzdorff*, 76 Wn.2d 589, 603, 458 P.2d 154 (1969) (“a litigant should not be denied his day in court simply because he is financially unable to pay the court fees”); *Iverson v. Marine Bancorporation*, 83 Wn.2d 163, 167, 517 P.2d 197 (1973) (“[t]he administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief”).

People Experiencing Poverty, Including Immigrant Communities, Typically Experience Multiple Legal Issues.

In Washington State, more than 70% of the state’s low-income households experience at least one civil legal problem each year on matters affecting the most fundamental aspects of their daily lives, including accessible and affordable health care; the ability to get and keep a job; the right to financial services and protection from consumer exploitation; and the security of safe and stable housing.¹ On average, low-income households will experience more than nine civil legal problems annually.²

Moreover, the Civil Legal Needs Study showed that low-income people of color, among other groups, experience substantially greater numbers of legal problems and regularly experience discrimination and unfair treatment that cut across every substantive legal

¹ Civil Legal Needs Study Update Committee, Washington Supreme Court, 2015 Civil Legal Needs Study, at 5 (Oct. 2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.

² *Id.*

category.³ The particular burdens faced by low-income immigrant communities in accessing justice – and the concomitant need to protect immigrants’ access to courts and the justice system – motivated the adoption of comment [4] to Rule of Professional Conduct 4.4(a) in 2013 and Evidence Rule 413 in 2017.

Specifically, Comment [4] to RPC 4.4(a) clarified that an attorney’s duty to third persons prohibited the “assertion or inquiry about a third person’s immigration status when the lawyer’s purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter.” RPC 4.4(a), Comment [4].⁴ Subsequently, the Court adopted ER 413, with this underlying statement of the policy goal: “**Providing immigrants with access to the courts and a fair trial is essential for our justice system.**”⁵ Based on a concern that immigration status was being inappropriately used to chill people’s exercise of their rights and thus, to limit access to courts and justice, ER 413 makes evidence of immigration status, for both parties and witnesses, inadmissible in civil cases unless that status is an essential fact to prove an element of the cause of action. ER 413(b).

Thus, this Court has previously recognized the need to exercise its rulemaking authority to protect and ensure access to justice. The time has come for the Court to take further action by recognizing the privilege against civil arrest to people seeking access to courthouses.

The Current Federal Enforcement Activity Targeting Courthouses Has a Chilling Effect on Access to Courts for a Range of Individuals.

As has been well documented, over the past few years, across Washington State, federal officials have stepped up their enforcement activity near courthouses, becoming increasingly brazen in their behavior and severely disrupting courthouse activities.⁶ Since 2016, there have

³ *Id.*, cited in Washington State Access to Justice Board, *2018–2020 State Plan for the Coordinated Delivery of Civil Legal Aid to Low Income People*, at 16, <http://allianceforequaljustice.org/for-the-alliance/state-plan/>.

⁴ See *GR 9 Cover Sheet, Suggested Amendment to RPC Rule 4.4*, submitted by the WSBA Board of Governors (2013), https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=281.

⁵ ER 413 – Immigration Status, GR 9 Cover Sheet, http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=605 (emphasis added).

⁶ See, e.g., ICE Arrest at Thurston County Courthouse Begs the Question: what does sanctuary mean?, <https://www.theolympian.com/news/local/article232346022.html> (describing a courthouse immigration enforcement action as having “all the lookings of a kidnapping”); Justice Compromised, University of Washington Center for Human Rights, <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrests/> (describing several arrests at the Grant County Courthouse, including one involving an SUV “speeding around corners” in the courthouse parking lot). See also Declarations accompanying the State’s Motion for Preliminary Injunction in *State of Washington v. Department of Homeland Security, et al.*, No. 2:19-cv-02043 (W.D. Wash.) (pending).

been more than 150 documented arrests at Washington courthouses, not to mention others that have not been recorded.⁷

These arrests have impacted a wide range of members of Washington's communities who are involved in the legal system, including people involved in criminal proceedings as defendants, witnesses, and people subjected to potential crimes; family members and friends of people involved in civil and criminal proceedings; survivors of violence and witnesses who come to testify or seek domestic violence protections; and even persons paying a parking fine or citation. **The result of this targeted federal enforcement activity has been to create an environment of fear that deters people from coming to court.**

The Court Can, and Should, Adopt General Rule 38 to Protect Access to the Courts, to the Benefit of all Washingtonians.

The proposed GR 38 would protect access to justice by ensuring people attending court are not subjected to warrantless civil arrests. This Court has long recognized a privilege from civil arrest for those going to, remaining at and returning from court.⁸ Moreover, two federal courts have very recently held that it is within states' authority to protect and recognize this common law privilege, reasoning that the privilege "creates a very narrow limitation on federal enforcement authority that is tailored to protect states' interests in managing their own judicial systems."⁹ Thus, both courts found that federal law does not preempt a state's ability to prohibit civil arrests at courthouses, for those coming to, remaining at, or going from a courthouse.¹⁰

We join the many other supporters of the petition and urge the Court to adopt the proposed GR 38, as amended. GR 38 is necessary to protect access to justice from the harms to our legal system that flow from targeted federal immigration enforcement activity at courthouses, and it is within the Court's authority to adopt it. Thank you for your consideration of this important proposal.

Sincerely,

Merf Ehman, Executive Director
Janet Chung, Director of Advocacy

⁷ See "Justice Compromised," University of Washington Center for Human Rights, <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrest>; "Man Arrested by ICE Outside Kitsap Courthouse Free on Bail," The Kitsap Sun, <https://www.kitsapsun.com/story/news/local/2019/12/07/man-arrested-ice-outside-kitsap-courthouse-free-bail/2613128001> (noting that in the fall of 2019 ICE arrested six individuals at the Kitsap County courthouse).

⁸ *State ex rel. Gunn v. Superior Court of King Cty.*, 111 Wash.187 191 (1920).

⁹ See *Ryan v. U.S. Immigration & Customs Enf't*, 382 F. Supp. 3d 142, 158 (D. Mass. 2019); see also *State v. U.S. Immigration & Customs Enforcement*, No. 19-CV-8876(JSR), 2019 WL 6906274 (S.D.N.Y. Dec. 19, 2019).

¹⁰ See *id.*

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From: Janet Chung [mailto:janet.chung@columbialegal.org]
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Please see attached. Thank you.

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Our vision of justice: A Washington State in which every person enjoys full human rights and economic opportunities.

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