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NO. 96990-6

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

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

Petitioners/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

**BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON, THE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION, THE
AMERICAN CIVIL LIBERTIES UNION, THE FRED T.
KOREMATSU CENTER FOR LAW AND EQUALITY,
WASHINGTON ASSOCIATION FOR CRIMINAL DEFENSE
LAWYERS, CIVIL SURVIVAL PROJECT, PUBLIC
DEFENDER ASSOCIATION, SOUTH ASIAN BAR
ASSOCIATION OF WASHINGTON, LOREN MILLER BAR
ASSOCIATION, LEGAL VOICE, WASHINGTON
DEFENDER ASSOCIATION, AND ONEAMERICA**

Jamal N. Whitehead, WSBA #39818
whitehead@sgb-law.com
SCHROETER GOLDMARK &
BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Tel: (206) 622-8000
ACLU-WA Cooperating Attorney

Nancy Talner, WSBA 11196
talner@aclu-wa.org
Antoinette M. Davis, WSBA #29821
tdavis@aclu-wa.org
ACLU OF WASHINGTON
FOUNDATION
901 5th Avenue, Suite 360
Seattle, Washington 98164
Tel: (206) 624-2184

Jeffery Robinson, WSBA #11950
Twylla Carter, WSBA #39405
ReNika Moore
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004
Tel: (212) 549-2636
Counsel for ACLU Foundation

Robert S. Chang, WSBA #44083
changro@seattleu.edu
Melissa R. Lee, WSBA #38808
leeme@seattleu.edu
Jessica Levin, WSBA #40837
levinje@seattleu.edu
RONALD A. PETERSON LAW CLINIC SEATTLE
UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4025
Counsel for Fred T. Korematsu Center for Law and Equality

Rita Griffith, WSBA #14360
tweaver@tomweaverlaw.com
Tom Weaver, WSBA #22488
tim@blacklawseattle.com
Teymur Askerov, WSBA # 45391
WASHINGTON ASSOCIATION FOR CRIMINAL
DEFENSE LAWYERS
1511 Third Ave, Suite 503
Seattle, WA 98101
Tel: (206) 623-1302
Counsel for Washington Association for Criminal Defense Lawyers

Tarra Simmons, WSBA #53760
tarra.simmons@defender.org
CIVIL SURVIVAL PROJECT
PUBLIC DEFENDER ASSOCIATION
110 Prefontaine Pl. S, Suite 502
Seattle, WA 98104
Tel: (206) 392-0050
Counsel for Civil Survival Project

Prachi Dave, WSBA #50498
prachi.dave@defender.org
PUBLIC DEFENDER ASSOCIATION
110 Prefontaine Pl. S, Suite 502
Seattle, WA 98104
Tel: (206) 392-0050
Counsel for Public Defender Association

Smriti Chandrashekar, WSBA #55222
SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON
1915 2nd Ave Apt 2408
Seattle, WA 98101-3167
Counsel for SABAW

Raina Wagner, WSBA #45701
raina.wagner@klgates.com
LOREN MILLER BAR ASSOCIATION
P.O Box 1873
Seattle, WA 98111
Tel: (206) 370-8087
Counsel for LMBA

Courtney Chappell
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101
Tel: (206) 682-9552
Counsel for Legal Voice

Hillary Behrman, WSBA #22675
THE WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Place South, #610
Seattle, WA 98104-2626
Tel: (206) 623-4321
Counsel for Washington Defender Association

Bonnie Wasser Stern, WSBA #34311
bonnie@bswasserlaw.com
ONEAMERICA
320 W Galer St Ste 201
Seattle, WA 98119-3065

Tel: (206) 282-2279
Counsel for OneAmerica

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae incorporate the statement of interests articulated in their motion filed this same day requesting leave to file *amici curiae* briefing.

II. INTRODUCTION

Consider the following hypothetical: one by one, potential jurors answered as the judge asked whether serving a three-week trial would be a hardship. One woman, a salesclerk, answered, “I’m the only one working in my household, and I can’t afford to miss that much work.” “I just paid rent and don’t have enough money this time of month to pay for gas and parking downtown for the trial,” responded another man who worked as a day laborer. On it went, with the judge’s response the same in each case, “Thank you. You may be excused.” When the jury was finally selected, 12 relatively prosperous White men and a few White women sat ready to decide the fate of the accused.

This fictional, but all too real, scenario replays itself in Washington jury venires with shocking regularity, as the failure to pay jurors more than a token *per diem* effectively bars those from lower income brackets—who are disproportionately African American and other people of color—from jury service simply because they cannot endure the economic strain of serving. This reality stands in stark contrast to Washington’s obligation to

minimize the burden of jury service, which necessarily entails an obligation to compensate jurors fairly.

Current juror compensation¹ rates are so low that they cannot sustain jurors who are uncompensated by their employers during their service, or who otherwise cannot afford to serve, thwarting any efforts to achieve racial and economic diversity in Washington jury venires, and thus, representative juries.

It is against this backdrop that *amici curiae* urge the Court to reverse the Court of Appeals' decision holding that Plaintiffs could not bring a disparate impact claim based on economic status and a claim for minimum wage related to jury service in King County. From a policy perspective, minimum wage coverage is the most effective tool for ensuring fair compensation for jurors and achieving more diverse juries in Washington.

Should the Court find that the current compensation system results in improper or illegal systemic exclusion but finds that RCW 49.46.020 does not apply, it would be appropriate for the Court to remand for further proceedings to allow the parties to brief more fully what the appropriate remedy should be, if not minimum wage. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (after concluding that

¹ The term "compensation" refers to the total amount of money paid to jurors for their services.

“segregation is a denial of the equal protection of the laws,” the Court restored the cases to its docket and the parties were “requested to present further argument” with regard to the remedy).

III. STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as outlined by Ms. Bednarczyk and Ms. Selin in their previously filed briefs.

IV. ARGUMENT

A. **Juror Diversity is Essential to Complying with Significant Constitutional Principles, and to Having Well-Functioning Juries whose Decisions are Viewed as Legitimate.**

Numerous authorities recognize the importance of drawing juries from a cross-section of the community, and not just one segment. *In re Yates*, 177 Wn.2d 1, 19, 296 P.3d 872 (2013) (“[A] criminal defendant has a right to “a jury drawn from a fair cross section of the community.”) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)); see 28 U.S.C. § 1861 (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”). The Supreme Court, in extolling the virtues of the fair cross-section requirement, has stated:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. ***Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society.*** Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard [sic] it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Thiel v. S. Pac. Co., 328 U.S. 217, 220, 66 S.Ct. 984, 90 L.Ed. 1181 (1946)

(emphasis added).

Numerous authorities also recognize that the quality of jury-decision making benefits from jury diversity. The jury's fact-finding function may be enhanced by a diverse composition in several ways. To start, representation of different groups serves to minimize the effect of any individual bias by balancing the biases of some jurors against those of others. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 Vand. L. Rev. 353, 361-62 (1999) (footnote omitted). Indeed, "[y]ears of empirical studies of mock and actual juries show that racially mixed panels minimize the distorting risk of bias."

Tanya E. Coke, *Lady Justice May Be Blind, But Is She A Soul Sister? Race-*

Neutrality and the Ideal of Representative Juries, 69 N.Y.U.L. Rev. 327, 351 (1994). It follows, then, that the deliberations of a broadly representative jury can be marked by a “diffused impartiality.” Forde-Mazrui, *supra*, at 362 (footnote omitted). Moreover, studies have shown that diverse groups are typically more thorough and competent than homogenous ones in that diverse juries spend more time deliberating, discussing a wider range of case facts and personal perspectives, and making fewer factual errors. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, *Journal of Personality and Social Psychology*, Vol. 90, No. 4, 597-612 (2006), at 608; *see* Shamena Anwar, *et al.*, *The Impact of Jury Race in Criminal Trials*, *Quarterly Journal of Economics*, 127, 2, 1017-1055 (2011), available at <http://www.courts.wa.gov/subsite/mjc/docs/2017/The%20Impact%20of%20Jury%20Race%20in%20Criminal%20Trials.pdf> (last visited Sept. 27, 2019).

Diverse juries also help legitimize the justice system’s decisions in the eyes of both litigants and the public. Forde-Mazrui, *supra*, at 363 (footnote omitted). “Even if there is no difference between verdicts from representative and non-representative juries, verdicts from the former may have greater legitimacy.” *Id.* (footnote omitted). “The need for legitimacy

is at its greatest in a highly charged, potentially racially-polarizing case. The all-White [sic] jury that acquits White police officers who commit violence on an African American (Rodney King, for example), is the archetypal case of this type.” Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 Mich. J. Race & L. 5, 37-38 (2004). For the jury to carry out its role in meting out the public’s justice with meaningful legitimacy, it must speak for all segments of society. And when the jury fails to represent certain groups—whether it be African Americans or low-income persons—members of those groups may justifiably doubt whether the “system” represents their interests, respects their judgments, or welcomes their participation.

Along these same lines, representativeness enhances the educational function of jury service by providing an opportunity for citizens to participate in and exercise the power of self-government. Forde-Mazrui, *supra*, at 364 (footnote omitted). The inclusion of people from diverse backgrounds within a community provides the chance for every group to participate in administering justice. *Id.* As one commentator put it, “Through deliberation with jurors from different groups or classes, jurors on representative panels learn to work together toward the shared goal of determining guilt or innocence in accordance with law and the community’s sense of justice.” *Id.* at 364.

Diverse juries are not just necessary to the constitutional requirement of a “fair cross-section”: they are a testament to the idea that impartiality is *not* limited to a single juror “type” or “ideal,” but rather it is achieved through cross-pollinating a range of views and experiences. In this way, the issue of jury diversity is less about whether Whites, Blacks, or people earning a low income have a greater or lesser capacity for impartial decision-making, but whether the optimum conditions for that deliberative process exist. As it turns out, the more representative a jury is, the more the verdict can be trusted by the parties and the public at large as accurate, consistent with community values, and legitimate. These considerations support this Court reversing the trial court’s summary judgment ruling and allowing the case to proceed to trial.

B. Juror Diversity is Lacking in Washington Jury Venires, and the Benefits of Jury Diversity are Seriously Harmed by the Low Rate of Juror Compensation.

Racial and ethnic minorities, as well as the poor, are consistently underrepresented in most state court jury pools and venires, and the role played by low juror compensation cannot be denied. *See* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Nat’l Black L.J. 238, 263-66 (1994) (noting underrepresentation of the poor, the less educated, daily wage earners, and minorities, particularly Black and Hispanic women in jury service). There

is ample evidence of this problem in Washington as well. A recent study by Washington's Administrative Office of the Courts and professors at Seattle University found that underrepresentation of people of color and the poor was prevalent in this state. Hon. Steve Rosen, *et al.*, *Juror Data Issues Affecting Diversity and Washington Jury Demographic Survey Results*, available at <https://www.courts.wa.gov/subsite/mjc/docs/2017/Juror%20Data%20Issues%20Affecting%20Diversity%20and%20WA%20Jury%20Demographic%20Survey%20Result%20-%20Judge%20Rosen%20and%20SU.pdf> (last visited Sept. 18, 2019). The survey was designed to capture juror demographic data, and largely mirrored the U.S. Census questions about race and ethnicity. Over the course of a year beginning in February 2016, the survey was given to potential jurors statewide across “a diverse group of courts: rural, urban, suburban, college town, agricultural, geographically spread out, etc.” In all, 64,753 useable surveys were collected for an average response rate of 83.74 percent across the various courts. *Id.*

Researchers concluded from this recent Washington data that “[w]ith limited exception, findings suggest that racial/ethnic minority populations are underrepresented in most jurisdictions.” *Id.* For instance, Black or African Americans were represented a little more than half the

expected rate in King County relative to their actual percentage within the population. *Id.* The numbers were much, much worse for other counties. *Id.*

Moreover, the connection between this lack of juror diversity in Washington and the low rate of juror compensation at issue in this case is apparent. Despite the history of racial discrimination in jury service and the legal gains that have been attained to stop such practices,² the reality is that juror pay remains a practical barrier to jury service felt disproportionately by African Americans, other people of color, and low-income people in Washington. *See generally* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010) at p. 25, available at <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> (last visited Sept. 27, 2019). Even as the benefits of diverse juries have become nearly universally accepted, *see State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) (recognizing constitutional

² The United States has an ignoble history of discrimination in jury service, and is continuing to work on removing legal barriers for racial minorities and women from serving on juries. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303, 310, 25 L.Ed. 664 (1879) (holding that racial minorities may not be excluded from jury service); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (holding that preemptory challenges may not be used to exclude jurors based on sex); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (holding that private litigant in a civil case may not use preemptory challenges to exclude jurors because of race); *Batson v. Kentucky*, 476 U.S. 79, 89-90, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (same in criminal trial).

implications and benefits of diverse juries), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), little to nothing has been done to remove this barrier.

1. Despite its importance, juror compensation has been a neglected issue in Washington.

Jury service is a privilege and an honor that all citizens should have the opportunity to engage in as a bedrock function of our democracy. *Powers v. Ohio*, 499 U.S. 400, 407, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (“[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”); *Peters v. Kiff*, 407 U.S. 493, 499, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (“[T]he exclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the ‘privilege of participating equally ... in the administration of justice.’” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L.Ed. 664 (1879))).

Less discussed, however, is the fact that jury service is a binding obligation imposed by the government. RCW 2.36.093 (authorizing jury summons when “the public business requires a jury term to be held”) and .170 (“A person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor.”). Because they cannot, in

theory at least, refuse to participate when summoned, jurors sacrifice their time, potential earnings, and in some cases, already scarce financial resources, during their time of service to the justice system.

For this reason, jurors have been compensated in America since the nation's independence from British rule. The first federal jury fee was roughly equivalent to the average laborer's *daily* wages, an amount that surely limited the financial burdens faced by less wealthy jurors called into service. Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U.J. Legis. & Pub. Pol'y 289, 385 (2002) (citing Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 217 (prescribing fifty cents jury fee for nation); *see id.* at 352 (Figure 3) (depicting federal jury compensation in relation to laborers' daily earnings during colonial era)).

Similarly, Washington has adopted a policy of minimizing the burden of jury service on prospective jurors and their families since its early days in the Union by compensating jurors for their expenses. *See* Laws of 1893 § 2086 ("Each grand and petit juror shall be allowed for each day's attendance on a court of record ... [\$]3[.]00."); RCW 2.36.072(2) ("It is the policy of this state to minimize the burden on the prospective jurors, [and] their families ... resulting from jury service.").

Juror compensation has hardly budged since this time, however, with many Washington counties neglecting any type of raise for decades, or in the case of King County, generations. Indeed, King County has not increased juror compensation since 1959, when the State increased the minimum *per diem* to \$10. *Compare* Laws of 1959, ch. 73, § 1 (“Each grand and petit juror shall receive for each days attendance upon the superior or any inferior court in the state of Washington, besides mileage, ten dollars...”) with *Jury Service – Frequently Asked Questions* available at <https://www.kingcounty.gov/courts/superior-court/juror-information/FAQ.aspx> (“Jurors currently earn \$10.00 per day of service.”) (last visited Sept. 27, 2019). Adjusted for inflation, the \$10 daily rate from 1959 would equal \$85.47 in today’s dollars. This amount lags behind juror compensation provided in many states, *see* Evan Bush, *How Washington compares when it comes to paying jurors*, Seattle Times, Aug. 9, 2016, available at <https://www.seattletimes.com/seattle-news/how-washington-compares-when-it-comes-to-paying-jurors/> (last visited Sept. 27, 2019) (surveying national jury pay), and remains flat even as the costs of living continue to rise. Bureau of Labor Statistics, *Consumer Price Index Seattle Area – December 2017*, available at https://www.bls.gov/regions/west/news-release/consumerpriceindex_seattle.htm (last visited Sept. 27, 2019) (reflecting consumer prices up 3.5 percent from preceding year).

C. Low Juror Pay Disproportionately Affects Those Facing Financial Hardship and African Americans and Other People of Color.

Because race and socioeconomic status are so intertwined, the effect on jury pools is that disproportionately fewer minorities serve as jurors. Paula Hannaford-Agor, *Systemic Negligence In Jury Operations: Why The Definitions of Systemic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 774 n.3 (Spring 2011). Ample evidence demonstrates the wealth and income levels of African Americans and other racial and ethnic minorities lag behind that of Whites; thus, the financial burden posed by jury service is felt heaviest by those with modest economic means and African Americans. See Francesca Murnan & Alice Park, *Understanding King County Racial Inequities: King County Racial Disparity Data* at 8-11 (King County United Way Nov. 2015), available at https://www.uwkc.org/wp-content/uploads/ftp/RacialDisparityDataReport_Nov2015.pdf (last visited Sept. 27, 2019). This burden is further compounded by the fact that Washington does not require employers to cover the difference between the pay jurors receive for their service and the salary they would have received in the course of their ordinary employment. That is, employers cannot retaliate against employees on jury duty, but there is no attempt to encourage such service RCW 2.36.150(2) (“An employer shall not deprive an employee of employment or threaten, coerce, or harass an employee, or

deny an employee promotional opportunities because the employee receives a summons, responds to the summons, serves as a juror, or attends court for prospective jury service.”). In any event, the unemployment rate for African Americans and other racial and ethnic minorities is twice that of whites. Murnan & Park, *supra*, at 24. And that is nothing to say of jurors who are unemployed, but forced to expend precious resources they otherwise would have conserved in the name of civic duty (*e.g.*, obtaining childcare).

Various commissions and studies in Washington have recognized the practical barrier that low-juror compensation presents to jury service for low-income people and persons of color. In 1999, a variety of legal and judicial organizations formed the Washington State Jury Commission to address issues of underrepresentation and low summons response rates for jurors. The Commission created a detailed report with a series of recommendations aimed to “improve the jury process while maintaining access to justice and a fair trial.” Washington State Jury Commission Report (2000) at p. iii, available at http://www.courts.wa.gov/committee/pdf/jury_commission_report.pdf (last visited Sept. 27, 2019).

The Commission concluded, among other things, that juror compensation in Washington was “unacceptable,” and recognized that the rates paid “do not remotely approach minimum wage.” *Id.* at p. 23. “The

Commission view[ed] a fee increase as its highest priority, [because] [c]itizens required to perform jury service should be compensated fairly and appropriately.” *Id.* at p. x (Executive Summary); *see id.* at p. 3 (“[S]pecial efforts should be made to increase the participation in jury service by sectors of society that traditionally have not participated fully, particularly young people and minority communities.”). In the nearly 18 years that have passed since the Commission issued its report, juror pay has remained flat in King County. *See supra* p. 12.

More recently, the Minority and Justice Commission convened a Task Force to examine a range of policy proposals that might increase minority representation on Washington State Juries. The Task Force identified “economic hardship” as a significant factor causing minority underrepresentation on juries. Minority and Justice Commission Jury Diversity Task Force 2019 Interim Report at p. 1, available at http://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20190405_p.PDF (last visited Sept. 27, 2019). Data collected by the Task Force found that financial hardship was the second highest reason to excuse potential jurors, behind only undeliverable summonses. *Id.* at pp. 2-3. The Task Force went on to recognize that “lower income and minority populations are *disproportionately affected by the financial*

hardships of jury service,” and it unanimously recommended “increase[d] juror compensation statewide.” *Id.*

And the Equal Justice Initiative, led by widely acclaimed civil rights lawyer Bryan Stevenson, issued a report in 2010 calling on state and local justice systems to provide jurors an adequate daily wage “to increase the likelihood that low-income wage earners can serve on juries.” Equal Justice Initiative Report, *see supra*, at p. 49.

There are thus many compelling grounds for concluding the current rate of juror compensation cannot stand, including the risk of excluding a disproportionate number of African-American jurors and low-income people who are most affected by juror pay stagnation.³ Reversal should be ordered.

V. CONCLUSION

The minimal amount of compensation jurors receive for their services is among the most evident hurdles to achieving truly representative juries in Washington, as a disproportionate number of African Americans,

³ As retired Washington Supreme Court Justice Gerry Alexander succinctly commented about the rate of jury compensation, “It just isn’t fair.” Jeff Vanderford, *Pay jurors more, state Supreme Court justice says*, The South Whidbey Record, Jan. 7, 2006 (“[Justice] Alexander thinks paying at least the minimum wage ... is reasonable.”), available at https://www.courts.wa.gov/programs_orgs/pos_bja/cftf/20060111SWhidbey.pdf (last visited Sept. 27, 2019).

other people of color, and low-income people are simply unable to afford the cost of jury service. The fact is, as some Washingtonians have found it harder to make ends meet in the face of the rising cost of living, jury compensation has progressed at a snail's pace, remaining unchanged for decades in many counties. The state of the law supports coverage for jurors under the State's minimum wage laws, which also supports the important policy gains accompanying more diverse juries.

Alternatively, should the Court determine that the current juror compensation scheme results in systematic exclusion of African Americans and other people of color from jury service, but finds that minimum wage laws do not apply to jurors, we request that the Court remand for further proceedings to allow the parties to more fully address what the appropriate remedy should be, if not the minimum wage.

DATED this 27th day of September, 2019.

s/ Jamal N. Whitehead
Jamal N. Whitehead, WSBA #39818
whitehead@sgb-law.com
SCHROETER GOLDMARK &
BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Tel: (206) 622-8000

ACLU-WA Cooperating Attorney

s/ Nancy Talner
Nancy Talner, WSBA 11196
talner@aclu-wa.org
Antoinette M Davis, WSBA #29821
tdavis@aclu-wa.org
ACLU OF WASHINGTON
FOUNDATION
901 5th Avenue, Suite 360
Seattle, Washington 98164
Tel: (206) 624-2184

Jeffery Robinson, WSBA #11950
Twyla Carter, WSBA #39405
ReNika Moore
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004
Tel: (212) 549-2636
Counsel for ACLU Foundation

Robert S. Chang, WSBA #44083
changro@seattleu.edu
Melissa R. Lee, WSBA #38808
leeme@seattleu.edu
Jessica Levin, WSBA #40837
levinje@seattleu.edu
RONALD A. PETERSON LAW CLINIC SEATTLE
UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4025
Counsel for Fred t. Korematsu Center for Law and Equality

Rita Griffith, WSBA #14360
tweaver@tomweaverlaw.com
Tom Weaver, WSBA #22488
tim@blacklawseattle.com
Teymur Askerov, WSBA # 45391
WASHINGTON ASSOCIATION FOR CRIMINAL
DEFENSE LAWYERS
1511 Third Ave, Suite 503
Seattle, WA 98101
Tel: (206) 623-1302
Counsel for Washington Association for Criminal Defense Lawyers

Tarra Simmons, WSBA #53760
tarra.simmons@defender.org
CIVIL SURVIVAL PROJECT
PUBLIC DEFENDER ASSOCIATION
110 Prefontaine Pl. S, Suite 502
Seattle, WA 98104
Tel: (206) 392-0050
Counsel for Civil Survival Project

Prachi Dave, WSBA #50498
prachi.dave@defender.org
PUBLIC DEFENDER ASSOCIATION
110 Prefontaine Pl. S, Suite 502
Seattle, WA 98104
Tel: (206) 392-0050
Counsel for Public Defender Association

Smriti Chandrashekar, WSBA #55222
SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON
1915 2nd Ave Apt 2408
Seattle, WA 98101-3167
Counsel for SABAW

Raina Wagner, WSBA #45701
raina.wagner@klgates.com
LOREN MILLER BAR ASSOCIATION
P.O Box 1873
Seattle, WA 98111
Tel: (206) 370-8087
Counsel for LMBA

Courtney Chappell
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101
Tel: (206) 682-9552
Counsel for Legal Voice

Hillary Behrman, WSBA #22675
THE WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Place South, #610
Seattle, WA 98104-2626
Tel: (206) 623-4321
Counsel for Washington Defender Association

Bonnie Wasser Stern, WSBA #34311
bonnie@bswasserlaw.com
ONEAMERICA
320 W Galer St Ste 201
Seattle, WA 98119-3065

Tel: (206) 282-2279
Counsel for OneAmerica

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on September 27, 2019, I caused to be delivered via email a true and correct copy of this document addressed to the following counsel of record:

Toby Marshall Terrell Marshall Law Group PLLC 936 North 34 th Street, Suite 300 Seattle, WA 98103	Jeffrey Needle Law Office of Jeffrey L. Needle 119 First Avenue South, Suite 200 Seattle, WA 98104
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Attorneys for Petitioners

Co-Counsel for Petitioners

Karen Pool Norby
Janine Joly
Heidi Jacobsen-Watts
King Co.
Prosecuting Attorney's Office
500 Fourth Avenue, Suite 900
Seattle, WA 98104

Attorneys for Respondent

DATED at Seattle, Washington this 27th day of September, 2019.

s/ Sheila Cronan

SHEILA CRONAN, Paralegal
SCHROETER GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104

SCHROETER GOLDMARK BENDER

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- jneedlel@wolfenet.com
- leeme@seattleu.edu
- levinje@seattleu.edu
- msubmit@frankfreed.com
- paoappellateunitmail@kingcounty.gov
- talner@aclu-wa.org
- tmarshall@terrellmarshall.com

Comments:

Sender Name: Sheila Cronan - Email: cronan@sgb-law.com

Filing on Behalf of: Jamal N. Whitehead - Email: whitehead@sgb-law.com (Alternate Email:)

Address:
810 Third Ave.
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Phone: (206) 622-8000

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