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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,

Appellants/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

ANSWER TO AMICI CURIAE BRIEF OF WASHINGTON ASSOCIATION OF COUNTIES AND WASHINGTON ASSOCIATION OF COUNTY CLERKS

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

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

Attorneys for Appellants/Plaintiffs

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I. Introduction

Plaintiffs Nicole Bednarczyk and Catherine Selin are prospective jurors who allege that King County is violating the Juror Rights Statute, RCW 2.36.080(3), and the Minimum Wage Act, RCW 49.46.020(1), by refusing to pay minimum wages to jurors for each hour of service. Plaintiffs filed this proposed class action to end discriminatory conduct in King County's jury system and to require King County to pay minimum wages to those who do not otherwise receive compensation from an employer while performing jury service.

The failure of King County to pay jurors for the time they spend performing jury service is causing a substantial segment of the community to be denied the ability to participate in a fundamental part of American democracy. The resulting lack of economic and racial diversity in Washington's jury venires threatens the viability and legitimacy of our system of justice. This Court has the duty to interpret statutes and remedy violations. In addition, the Court has the inherent power to require payment of minimum wages to jurors as a means of ensuring the administration of justice. The preservation of American democratic ideals and institutions has never been more important.

The trial court granted summary judgment in favor of King County, and the Court of Appeals affirmed. This Court should reverse and rule that jurors must be paid minimum wages for their service.

II. Summary of Argument

Plaintiffs bring claims under the Jurors Right Act and the Minimum Wage Act. This Court has the responsibility to interpret these statutes, and the monetary relief caused by their violation does not violate separation of powers. Moreover, the Court has the inherent power to supervise the administration of justice. The economic and ethnic diversity of juries is a core component of the justice system, and the separation of powers is not violated by the required allocation of funds to pay minimum wages to jurors.

The Juror Rights Statute prohibits the exclusion of citizens from jury service "on account of 'economic status.'" RCW 2.36.080(3). There is an abundance of evidence showing low-income people are systemically excluded from jury service on that basis. Plaintiffs claim an implied cause of action under the statute, asserting the failure of King County to pay minimum wages to jurors is a neutral practice that has a disparate impact on this protected class. Because the minimum wage rate is the lowest amount of compensation allowed for each hour of work performed, jurors must be compensated at that rate to prevent the systemic exclusion of low-income jurors in violation of the Jurors Right Statute.

Plaintiffs also claim a violation of the Minimum Wage Act ("MWA"), chapter 49.46 RCW, because "[j]urors are employees of the

county by virtue of their responsibility to the superior court." *Bolin v. Kitsap Cnty.*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990).

Low-income citizens are regularly unable to participate as jurors because doing so would prevent them from meeting their basic needs or the needs of their family. The fair cross-section provision of the Juror Rights Statute, RCW 2.36.080(1), is violated regardless of whether a citizen is included on a juror master list. A citizen who has been systemically excluded on account of "economic status" does not have the "opportunity to serve" as a juror.

The fiscal decisions of counties always reflect their priorities. In most instances, a county's misplaced priorities are not a matter of judicial concern. But the administration of justice is a core tenet of the judiciary. The economic and ethnic diversity of juries is of the highest priority, and this Court should so rule.

III. Argument

A. The Court Has the Inherent Power to Supervise the Administration of Justice and to Remedy the Systemic Exclusion of Low-Income Jurors.

The Washington State Association of Counties and Washington State Association of County Clerks ("Amici") argue that it is the legislature's responsibility to allocate funds and that the separation of powers doctrine prevents courts from second-guessing those allocations regardless of how misguided. Br. of Amici Curiae Wash. Ass'n of

Counties et al. ("Amici Br.") at 4. But as it relates to jurors, the legislature has only allocated funds for the reimbursement of *expenses* under RCW 2.36.150. Plaintiffs neither challenge nor seek to modify this section of the statute and do not second-guess the allocation of funds for that limited purpose.

Amici confuse and conflate the Court's responsibility to interpret statutes with the Court's inherent power to supervise the administration of justice. Amici Br. at 5-6. It is not a violation of the separation of powers for the Court to hold that a county has violated a statute and to order a remedy for that violation despite the financial consequences. Likewise, it does not violate the separation of powers for the Court to exercise its inherent power to supervise the administration of justice and order compensation for jurors to prevent systemic exclusion based on economic status.

1. The Court has inherent power to supervise the administration of justice.

In the matter of *In re Juvenile Director*, the Court considered a lower court order "directing the Board of Commissioners to increase the salary of the Lincoln County Director of Juvenile Services beyond the funds designated by the legislative or executive branches." 87 Wn.2d 232, 237, 552 P.2d 163 (1976). The Court determined that "the propriety of court action to compel funding of its own functions must begin with an

examination of the theoretical underpinnings of the doctrines of separation of powers, checks and balances, and inherent judicial power." *Id.*

After a scholarly exposition on the separation of powers, the Court explained that "complete separation was never intended and overlapping functions were created deliberately." *Id*. at 242 (quoting *The Federalist* No. 47, at 141 (R. Fairfield ed. 1966) (J. Madison)). The Court's authority "is not limited to adjudication, but includes certain ancillary functions, such as rule-making and *judicial administration*, which are essential if the courts are to carry out their constitutional mandate." *Id*. at 242 (emphasis added). The purpose of the separation of powers doctrine "is 'to preserve the efficient and expeditious administration of justice and protect it from being impaired or destroyed.'" *Id*. For example, the Court recognized its inherent power to appropriate funds to pay expenses for a sequestered jury, expenses for janitors, and the costs of indigent expense. *Id*. at 246-47; *see also Taylor v. Louisiana*, 419 U.S. 522, 526-527 (1975) ("in the course of exercising its supervisory powers over trials in federal courts . . . the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community"); *Ballard v. United States*, 329 U.S. 187, 192-93 (1946) (exercising power over administration of justice to prevent systemic exclusion of women jurors); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 222-23 (1946) (same for low-income jurors).

2. There exists "clear, cogent and convincing" evidence that the administration of justice is substantially impaired.

Recognizing the perils associated with the judicial appropriation of funds for judicial functions, the *Juvenile Director* Court acknowledged that such authority should only be exercised when "the funds sought to be compelled are reasonably necessary for the holding of court, *the efficient administration of justice*, or the fulfillment of its constitutional duties." 87 Wn.2d at 250 (emphasis added). "Lacking clear, cogent and convincing proof of a reasonable need for additional funds, it is unlikely the court would be willing to use its contempt power to enforce compliance with its fiscal determination." *Id*. at 251.[1] The Court ultimately ruled there was an insufficient showing to support the "determination that the salary paid to the Director of Juvenile Services was so inadequate that the court could not fulfill its duties." *Id*. at 252.

The record in this case establishes by "clear cogent and convincing" evidence that the failure to compensate jurors for their service has resulted in the systemic exclusion of people of low economic status. *See* Apps.' Amended Opening Br. at 3-8. And it is well established that the systemic exclusion of a particular group creates dysfunction in the

[1] Justice Utter wrote for a unanimous court except insofar as the majority imposed a "clear, cogent, and convincing evidence" standard. *In re Juvenile Director,* 87 Wn.2d at 253 ("I agree with the majority opinion in all but one matter . . . . The majority [] employs the 'clear, cogent, and convincing evidence' test . . . . The normal 'preponderance of the evidence' test is most appropriate, and I would so hold.") (Stafford, C.J. concurring with three others).

administration of justice. *See, e.g.*, *Peters v. Kiff*, 407 U.S. 493, 503 (1972) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."); *State v. Saintcalle*, 178 Wn.2d 34, 101, 309 P.3d 326 (2013) ("Jury participation is critically important t the functioning and legitimacy of our government.") (Gonzalez, J., concurring). King County has made no effort to rebut these conclusions. At summary judgment, all facts and inferences must be construed in a light most favorable to the non-moving party. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1999).

Amici argue that jurors are responding in sufficient numbers to allow trials to proceed. Amici Br. at 5. But the complete cessation of trials is not required to establish that the administration of justice is substantially impaired. Many civil trials, which have a lower priority than criminal trials, are continued or delayed "due to an inability to seat enough jurors." CP 532. More importantly, the systemic exclusion of low-income citizens—many of whom are people of color—from trials negatively impacts both our system of justice and the democratic process. *See*, Brief of Amici Curiae Am. Civil Liberties Union of Wash. *et al*. at 3-16.

The Washington State Jury Commission was established in 1999 in recognition that the lack of economic and ethnic diversity of juries

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

Two decades later, nothing has changed. Juror compensation remains "inadequate," and "lower income and minority populations are disproportionally affected by the financial hardships of jury service." Minority & Justice Comm'n Jury Diversity Task Force 2019 Interim Report at 3.[2] In other words, the failure to pay minimum wages to jurors for their service has resulted in the systemic exclusion of citizens on account of economic status and has substantially impaired the

[2] Available at www.courts.wa.gov/subsite/mjc/docs/Jury%20Diversity%20Task%20Force%20Interim%20Report.pdf (last visited Oct. 16, 2019).

administration of justice. This Court has the inherent power to fashion a remedy.

3. Separation of powers is not implicated by the enforcement of statutes that require minimum wages for jurors.

To remedy ongoing violations of the MWA and Jurors Right Statute, King County will have to allocate additional funds to pay minimum wages to jurors. But this remedy does not implicate the exacting standard that must be met to invoke the Court's inherent authority.

In *Dolan v. King County*, public defenders in King County filed a class action in which they argued that "defender organizations . . . are no different from any other agency of King County and that the employees of these defender organizations are . . . entitled to be enrolled in the government's Public Employees Retirement System (PERS)." 172 Wn.2d 299, 258 P.3d 20 (2011). The Court agreed and held "that the county has exerted such a *right of control* over the defender organizations as to make them agencies of the county. We hold that under Washington common law as adopted in RCW 41.40.010(12), the employees of the defender organizations are *employees* of the county for purposes of PERS." *Id*. at 320 (emphasis added).

Without question, the decision to recognize public defenders as "employees" in *Dolan* was not constitutionally mandated and caused the County to appropriate additional money to fund the compensation of public defenders. Yet the decision did not violate the separation of powers.

Jurors are no less essential to the administration of justice than are public defenders. Under the "economic dependence" test, jurors are "employees" within the meaning of the MWA. *See* Amended Opening Br. at 30-39; *cf. Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805(1990) (holding jurors are "employees" under IIA). The compelled financial cost for paying minimum wages to jurors is no more a violation of the separation of powers than it was for lawfully compensating public defenders.

The lack of economic and ethnic diversity in King County juries has substantially impaired the quality of criminal and civil justice and the efficient administration of justice. This Court has the inherent power to fashion a remedy even in the absence of statutory violations. But here, the systemic exclusion of jurors on the basis of "economic status" violates the Juror Rights Statute, and jurors are "employees" under the Minimum Wage Act. Requiring minimum wages to be paid to jurors to remedy violations of these statutes does not implicate the separation of powers and does not require clear, cogent, and convincing evidence.

B. Minimum Wages for Jurors Will Increase Economic and Racial Diversity.

Amici argue that minimum wages are not a silver bullet and that people fail to respond to summons for a variety of reasons. Amici Br. at 11-12. Yet as Amici concede, one of the most significant reasons for this is that they "cannot afford to miss work and are not confident they will be

able to secure an exemption." *Id.* at 12 n.24. Moreover, the systemic exclusion of low-income citizens exists even among those who respond to jury service. *See* Minority & Justice Comm'n Jury Diversity Task Force 2019 Interim Report at 3 ("financial hardship is the second highest reason to excuse a potential juror, behind undeliverable summonses").

Minimum wages for jurors will undeniably increase the representation of both lower-income people and people of color. Amici acknowledge that "[d]ue to correlations between race and economic status it appears that African-American and Latinos fail to respond to jury summons at a disproportional rate. When income is controlled for, the response rate for African-Americans and Latinos is the same as whites." *Id.* (citing Nin W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 Washburn L.J. 103, 124-24 (Winter 2019)). And the Jury Commission concluded that "[i]ncreased fees will not only address the current inequity in juror compensation, but will also contribute to more economically and ethnically diverse juries by enabling a broader segment of the population to serve." CP 292. Any suggestions to the contrary are unfounded.[3]

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[3] Amici cite a 2008 report for the proposition that paying jurors for their time will not increase participation. Amici Br. at 12. This study is flawed for several reasons, some of which are acknowledged in the report itself. Among other things, the study was limited, and the participants did not reflect a fair cross-section of the community. Latino and Hispanic people, for example, made up 47 percent of the population in Franklin County but only 2.18 to 5.10 percent of those surveyed. CP 125. Furthermore, the temporary increase in pay lasted only one year, and a post-study survey showed that 92 percent of the prospective jurors who received a summons but failed to serve were entirely unaware of the increase. CP 111. The remaining eight percent totaled only 32 people, an

C. The Equal Opportunity to Serve as a Juror Is Incompatible with Systemic Exclusion Based on a Protected Classification.

Citizens have a statutory right not to be excluded from jury service based on "economic status." RCW 2.36.080(3). Amici argue that this right is satisfied so long as King County follows the random jury selection procedures contained in chapter 2.36 RCW. Amici Br. at 16-17; 20-21. But the statutory right not to be excluded requires more than an "equal chance of being summoned for jury duty." *Id*. at 16. If the latter were the only requirement, a juror could be excluded based on a protected classification after being summoned. Such exclusion would be an obvious violation of RCW 2.36.080(3). *See Rocha v King County*, 7 Wn. App. 2d 647, 668, 435 P.3d 325 (2019) (Bjorn J., dissenting).

In *Taylor v. Louisiana*, the Court considered state statutory and constitutional provisions that provided "a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service." 419 U.S. at 523. The Court found "[t]he Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded *systematic impact* is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service." *Id*. at 525 (emphasis added). Despite the fact that women had an *opportunity to*

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insufficient sample size. *Id*. Finally, other studies have shown that an increase in juror compensation leads to an increase in juror response rates. CP 112.

serve, the Court held: "If the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be *systematically excluded* from jury panels from which petit juries are drawn." *Id*. at 533 (emphasis added).

In Louisiana, women were not *per se* disqualified. Indeed, they were given the opportunity to serve. But to do so they had to *opt in* to jury service. This opportunity to serve as jurors did not prevent a violation of the Sixth Amendment's fair-cross-section rule because a substantial number of women were systemically excluded.

In King County, low-income citizens are also not *per se* disqualified. Similar to the women of Louisiana, these citizens have an opportunity to serve as jurors but can request to *opt out* of such service. But neither the opportunity to serve nor the ability to opt out prevents a violation of the Juror Rights Statute, which guarantees "that all persons selected for jury service be selected at random from a fair cross section of the population . . . ." RCW 2.36.080(1). As with the Sixth Amendment, the Juror Rights Statute is violated by the systemic exclusion of people on account of economic status. The proper focus of the analysis is on the *systemic exclusion* of low-income citizens, not the *opportunity to serve.* The opportunity to serve as a juror does not negate systemic exclusion based on a protected classification.

D. The Counties' Fiscal Decisions Sacrifice the Quality and Administration of Justice.

Amici argue that the payment of minimum wages to jurors would create a financial hardship for counties. Amici Br. at 8-11.[4] Amici use Grays Harbor County as an example, asserting that it would cost Grays Harbor an additional $72,996 per year to pay minimum wages to jurors and that these funds would have to be diverted from other necessary programs. *Id*. at 8-9. But this additional cost equals approximately .002% of Grays Harbor's total 2017 budget of $35,679,475. *Id*. at 8 n.12. Moreover, King County has never argued that it is unable to afford to pay minimum wages to jurors for their service.

Juror participation is one of the highest priorities in our society. "Jury participation is critically important to the functioning and legitimacy of our government. The use of juries validates the justice system through community participation, provides a check against governmental abuses of power, educates citizens and promotes civic engagement, and promotes integration and mutual understanding across social groups." *Saintcalle*, 178 Wn.2d at 101 (Gonzalez, J., concurring). "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

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[4] At the same time, Amici assert the state of Washington will most likely bear this cost. *Id*. at 6 n.5 (citing RCW 43.135.060).

King County's refusal to pay minimum wages to jurors not only violates the Juror Rights Statute and MWA but also reflects that juror welfare is a low priority. Under many circumstances, the fiscal decisions of counties would not be a matter of judicial concern no matter how misguided. But the administration of justice is a core judicial concern. Moreover, the preference to fund other programs is not a defense to the failure to pay minimum wages to "employees" or to prevent the systemic exclusion of citizens from jury service on account of economic status.

IV. Conclusion

The Court should rule that jurors must be paid minimum wages for the time spent serving as jurors. The Court should rely on the Juror Rights Statute, the Minimum Wage Act, and the Court's inherent powers. The Court should remand for further proceedings consistent with the Court's opinion.

Respectfully submitted this 17th day of October 2019.

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

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

LAW OFFICE OF JEFFREY NEEDLE

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- bruce.stern@justice.org
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- gordon.hill@kingcounty.gov
- griff1984@comcast.net
- hillary@defensenet.org
- janine.joly@kingcounty.gov
- jlarm-bazzill@frankfreed.com
- jrobinson@aclu.org
- lbaker@kingcounty.gov
- leeme@seattleu.edu
- levinje@seattleu.edu
- mmacdonald@reedlongyearlaw.com
- msubit@frankfreed.com
- office@blacklawseattle.com
- pamloginsky@waprosecutors.org
- paoappellateunitmail@kingcounty.gov
- pleadings@aclu-wa.org
- prachi.dave@defender.org
- raina.wagner@klgates.com
- rhonda.hinman@klgates.com
- rmoore@aclu.org

- sglaberson@publicjustice.net
- smritisastry@gmail.com
- talner@aclu-wa.org
- tarra.simmons@defender.org
- tcarter@aclu.org
- tdavis@aclu-wa.org
- tim@blacklawseattle.com
- tmarshall@terrellmarshall.com
- tweaver@tomweaverlaw.com
- valeriemcomie@gmail.com
- whitehead@sgb-law.com

Comments:

Plaintiffs' Answer to County Amici

Sender Name: Jeffrey Needle - Email: jneedlel@wolfenet.com
Address:
705 2ND AVE STE 1050
SEATTLE, WA, 98104-1759
Phone: 206-447-1560

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