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No. 96990-6

NO. 94955-7

SUPREME COURT OF THE STATE OF WASHINGTON

RYAN ROCHA, NICOLE BEDNARCZYK, AND CATHERINE SELIN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Petitioners,

v.

KING COUNTY, A MUNICIPAL CORPORATION,

Respondent.

BRIEF OF RESPONDENT KING COUNTY

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I. INTRODUCTION

Under the juror payment statute, RCW 2.36.150, the Legislature has specified the limits of juror pay: “Jurors shall receive for each day’s attendance...the following expense payments:... (2) Petit jurors *may receive* up to twenty-five dollars but in no case less than ten dollars.” (Emphasis added.) Although King County generally agrees that juror pay is not commensurate with the crucial service that jurors provide, the proper amount of juror pay is a matter for the Legislature, not for King County or the courts. Since territorial days, the authority to establish juror pay has rested exclusively with the Legislature. *See* Code of 1881 § 2086, part. Suing one county out of 39 is not an appropriate way to achieve higher juror pay, especially when King County’s duty and ability to pay jurors is mandated by a controlling statute that limits what jurors “may receive.”

In challenging King County’s adherence to RCW 2.36.150, plaintiffs argue that the general minimum wage statute should somehow override the specific juror pay statute. This is a nonstarter. Under well-established rules of statutory construction, a general statute cannot override a specific one and statutes cannot be interpreted to render one ineffective in favor of another. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 701, 335 P.3d 416 (2014). In the same way, plaintiffs cannot

nullify the plain language of RCW 2.36.150 by claiming that other statutes contradict its commands, including plaintiffs' reliance on what they incorrectly term as the "juror rights statute," RCW 2.36.080(3), and/or the Washington Law Against Discrimination ("WLAD").

Plaintiffs' desire for improved juror pay and the possible benefits of such a system no doubt preaches to many choirs, *but the crucial problem with their lawsuit is that they are preaching to the wrong choir.* Barring a constitutional challenge, which plaintiffs do not make, only the Legislature can provide the relief they seek by altering the controlling statute for juror pay. King County does not have the option to ignore the statutory limitations on juror pay, nor does this Court have the ability to apply other statutes to nullify legislative judgement and expand appropriated funds. Because Plaintiffs lack a cogent argument to invalidate the plain language of the sole statute proscribing juror pay, the superior court's dismissal on summary judgment should be affirmed.

II. ISSUES PRESENTED

- A. Does the "juror pay statute," RCW 2.36.150, control the amount of money that King County can pay jurors for their service? Yes.
- B. Did King County violate any provision of RCW 2.36.080(3) by following the requirements of the juror pay statute? No.
- C. May plaintiffs seek extra compensation under the minimum wage statute when juror pay is limited by RCW 2.36.150? No.

- D. Do plaintiffs have a cause of action under RCW 2.36.080 against King County arising out of the county's decision to comply with the juror pay statute? No.
- E. Do plaintiffs have standing to raise claims under the Uniform Declaratory Judgment Act and the Sixth Amendment when are they are not within the zone of interests to be protected nor can they show any actual or threatened injury? No.

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Since territorial days, juror pay has been set by the Legislature through statutory law. *See* Code of 1881 § 2086, part. Since 1979, RCW 2.36.150¹ has provided that “Jurors *shall* receive for each day’s attendance, besides mileage as determined under RCW 43.03.060, the following expense payments:” grand, petit, coroner, and district court jurors “may receive up to twenty-five dollars but in no case less than ten dollars.” RCW 2.36.150 (emphasis added). In essence, the statute directs that a county “shall” pay jurors, but “may” choose any amount between \$10.00 and \$25.00. A majority of Washington’s 38 counties, like King County, currently pay jurors a \$10.00 per diem plus reimbursement for mileage or travel costs for each day of service. CP 128, 143.

Each year, King County receives a jury source list from the

¹ *See* Laws of 1979, Ex. Sess., ch. 135 §7. The statute also allows the payment of mileage reimbursement.

Washington Administrative Office of the Courts (AOC) that includes the county's registered voters, licensed drivers, and identicard holders. CP 128; RCW 2.36.055; GR 18. County staff review the jury source list and removes duplicates and invalid entries. The resulting list is King County's master jury list. CP 128. The master jury list is certified by King County Superior Court, filed with the county clerk, and then used by both the Superior and District Court to summons jurors. *Id.*; RCW 2.36.055; GR 18. Persons appearing on the master jury list are identified by last name, first name, middle initial where available, date of birth, gender, and county of residence. CP 128; GR 18. It is important to note that this appeal raises no challenge to the master jury list or the process for generating this list.

When jurors appear in response to their summonses, they report to a jury assembly room. CP 129-30, 144-45. When a venire is requested, it is created at random from the list of jurors assembled and those jurors complete a brief biographical form, which is provided to the requesting trial court and the litigants. *Id.* The form does not ask for the juror's race, ethnicity, or income. CP 129-30, 134, 144-45, 150.

Upon receipt of a summons, potential jurors are asked to declare under penalty of perjury that they possess the qualifications to perform jury duty: at least eighteen years of age; citizen of the United States; residence in the county; able to communicate in English language; and no felony

convictions without a corresponding restoration of civil rights. CP 129, 132, 143, 147-48; RCW 2.36.070. If a potential juror does not meet these qualifications, he or she is excused from jury duty. *Id.*

Potential jurors may also be excused from jury duty upon a showing of undue hardship, extreme inconvenience, public necessity, or any other reason deemed sufficient by the summoning court. RCW 2.36.100; GR 28. These potential jurors may be excused from service altogether or their service may be deferred to another term within the following twelve month period. *Id.*

Whenever a potential juror *requests to be excused* for undue hardship, the King County Superior and District Courts have guidelines for court staff regarding who may be excused without having to appear. CP 129, 144. Staff may excuse people who are physically fragile or are essential caregivers. *Id.* Staff may also excuse potential jurors who will not be paid by their employers for time spent serving, but this alone is not a basis for excusal. *Id.* Potential jurors who are not paid by their employers for jury service may only be excused if service will result in the potential juror being unable to meet his or her basic needs or those of his or her family. *Id.* Using these guidelines, court staff may excuse potential jurors, but in practice will first offer a deferral. *Id.* Once potential jurors appear in response to their summonses, anyone seeking to be excused from service must make their

request to a judge. They may ask the judge to excuse them for a variety of circumstances, including economic hardship. In response to a juror's request, judges have discretion to excuse jurors and have a statutory duty to do so if a juror is not fit to serve. CP 129, 144; RCW 2.36.110.

As to the plaintiffs before this Court, Plaintiff Selin was summonsed as a juror in 2015, served on a jury, and was paid for her service as required by law. CP3; CP 45. Plaintiffs have not alleged and there is no evidence to indicate that Selin sought to be excused from service or that she claimed at the time she served to be entitled to be paid minimum wage for her service.

Plaintiff Bednarczyk was summonsed for jury duty in King County in 2012. CP 46. She requested to be excused on the basis of financial hardship and the request was granted. CP 46. Plaintiffs have not alleged and there is no evidence to indicate that Bednarczyk claimed at the time she sought to be excused that she was entitled to be paid minimum wage for her service, or that she *could serve* if paid minimum wage.

B. PROCEDURAL FACTS

This suit was filed against King County in Pierce County as a putative class action with three putative classes, all alleging to be eligible to serve as jurors in King County. The lead plaintiff was Ryan Rocha, who was the sole plaintiff in the "Black and African-American Racial Disparity

Class.” CP 5. Extensive discovery was produced by King County. No class was ever certified.

King County moved for summary judgment on all claims against all plaintiffs. CP 83-126. 7. The Honorable Gretchen Leanderson heard oral argument on King County’s summary judgment motion on August 4, 2017 and granted King County’s motion, dismissing the complaint.² CP 675-678. Plaintiffs filed a timely appeal.

IV. LEGAL ARGUMENT

A. STANDARD OF REVIEW

In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). “All questions of law are reviewed de novo.” *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001). An appellate court “may use any valid ground to affirm the trial court's conclusion, even if our reasoning

² On the eve of summary judgment, plaintiffs voluntarily moved to dismiss Plaintiff Rocha, because he had moved to Florida and was no longer eligible to serve on a King County jury. CP 693-97. All claims related to Rocha were dismissed without prejudice and are not part of this appeal. CP 677.

differs from that of the trial court.” *City of Lakewood v. Pierce Cty.*, 106 Wn. App. 63, 70, 23 P.3d 1, 5 (2001). Indeed, this Court may “affirm on any ground supported by the record” even if it was not argued below. *Syrovoy v. Alpine Res., Inc.*, 80 Wn. App. 50, 54–55, 906 P.2d 377, 379 (1995).

B. RCW 2.36.150 UNEQUIVOCALLY LIMITS THE AMOUNT THAT COUNTIES CAN PAY JURORS.

Juror pay in Washington is governed by RCW 2.36.150(2), which provides that:

Jurors shall receive for each day's attendance, besides mileage at the rate determined under RCW 43.03.060, the following expense payments: . . . (2) Petit jurors may receive up to twenty-five dollars but in no case less than ten dollars.

Washington’s counties administer juror pay for the courts and are bound by the terms of this statute.

The language of this statute is plain and unambiguous. A county “shall” pay jurors for service, but jurors “may receive” no less than ten and no more than twenty five dollars (plus mileage). When the words in a statute are clear and unequivocal, this Court is required to assume the legislature meant exactly what it said and apply the statute as written. *Duke v. Boyd*, 133 Wn.2d 80, 87–88, 942 P.2d 351 (1997).

The meaning of this statute has been long understood. In 1901, this Court held that juror pay was limited by the terms of the juror pay statute.

State v. Lamping, 25 Wash. 278, 282, 65 P. 537 (1901). In *Lamping*, jurors sought additional per diem compensation because they could not return home on days that the court was not in session. The Court rejected the jurors' position because it would allow compensation beyond the statute – jurors were not “in attendance” within the meaning of the law on Saturdays, and therefore were not owed pay for those days. *Id.* at 282. As this Court held, “[t]he statute prescribes the compensation for services of a juror, and his compensation cannot be extended beyond its terms, even though some slight inconvenience or actual hardship may be visited upon the juror.” *Id.*

In *Lamping*, the Court further recognized that although it should not construe statutory language so as to result in absurd or strained consequences, neither should it question the wisdom of a statute even though its results seem unduly harsh. *Id.* at 87 (citations omitted). *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991)). The Court noted that “jury duty might be imposed, and is in some jurisdictions, without compensation at all.” *Id.* Under *Lamping*, Plaintiffs' claim must be rejected because juror compensation cannot be extended beyond the statute, no matter how harsh the results may seem.

In a 1957 opinion, the Attorney General also recognized that juror pay is strictly controlled by statute. Wash. Att'y Gen. Op. 1957-58 NO. 87-A (1957). The question considered by the Attorney General was whether grand jurors' lunches could be paid from funds appropriated by the county commissioners. *Id.* The Attorney General answered the question in the negative citing to the prior version of RCW 2.36.150 and a well-established rule of statutory construction. The Attorney General stated:

In view of the above provision [former 2.36.140 and .150] which limits the compensation of a grand juror to a per diem, plus mileage, and the additional provision setting forth specifically when meals are to be provided for jurors, the rule of statutory construction is applicable that the expression of one thing in a statute excludes others not expressed.

Id. at 6 (citing *State v. Thompson*, 38 Wn.2d 774 (1951)).

When recent reforms to juror pay were sought, this was also accomplished by statutory amendment. In 2006, the legislature amended RCW 2.36.150 to provide that for the fiscal year ending June 30, 2007, jurors participating in pilot projects in superior, district, and municipal courts may receive juror fees of up to sixty-two dollars for each day of attendance in addition to mileage reimbursement at the rate determined under RCW 43.03.060. *See* 2006 Ch. 372, S.S.B. 6836. This process – amending the statute for a pilot study – is further recognition that juror pay is a matter within the Legislature's prerogative and that juror

compensation cannot exceed the statutory limits. The amendment to allow for the pilot project would be unnecessary if juror pay was discretionary, not statutory.

Plaintiffs argue that the payments allowed to jurors under RCW 2.36.150 were expanded by *Bolin v. Kitsap Cty.*, 114 Wn.2d 70, 785 P.2d 805 (1990). *See* Br. of Appellants at 16. Although *Bolin* allowed jurors access to workers' compensation, the case offers no support for plaintiffs' claim that *Bolin* implicitly amended RCW 2.36.150.

First, the question of how RCW 2.36.150 limits juror pay was not raised in *Bolin* or considered by the Court. There is nothing in *Bolin* that establishes industrial insurance coverage as a supplemental payment for juror service under RCW 2.36.150. Because the Court did not address RCW 2.36.150, plaintiff's effort to derive a holding on this statute from *Bolin* overreaches the scope of the case.

Second, the limitations on juror pay in RCW 2.36.150 and the availability of workers' compensation are two entirely different things. Workers' compensation is industrial insurance. It is not taxed as a wage. *See* 26 U.S.C. §104, I.R.C. §104 (1)(a). The fact that a juror may be eligible for industrial insurance coverage following an injury does not mean that the per diem established in RCW 2.36.150 can be increased beyond the amounts allowed in that statute.

Finally, RCW 2.36.150 limits the amounts that counties may pay jurors for service on a per diem basis. Workers' compensation payments generally come out of the state industrial insurance fund, which is paid by the state.³ Whatever the availability of workers' compensation benefits, this does not authorize counties to pay jurors more. In sum, plaintiffs' claims run into the insurmountable barrier of RCW 2.36.150. The plain and unequivocal language of this statute limits juror compensation – what jurors “may receive” – to no less than \$10.00 and no more than \$25.00 per day plus mileage. In accord with this statutory directive, the trial court correctly held that King County is not permitted to pay jurors more than the amount set forth in RCW 2.36.150 and that ruling should be affirmed.

C. KING COUNTY VIOLATED NO PROVISION OF RCW 2.36.080(3) BY FOLLOWING THE REQUIREMENTS OF RCW 2.36.150.

Calling RCW 2.36.080(3) the “juror rights statute,”⁴ plaintiffs appear to claim a private right of action under this statute. There is no indication that this statute was intended to confer a private right of action on jurors, but even it was, nothing in this record shows that either plaintiff was “excluded from jury service” due to her economic status.

³ Large employers and municipal corporations like King County may be self-insured. *See* Ch. RCW 51.14.

⁴ There is no other statute or case, or legislative history that refers to subsection 3 of RCW 2.36.080 as the “juror rights statute.” Plaintiffs' creative designation of the statute has been invented out of whole cloth.

1. RCW 2.36.080(3) Does Not Establish a Private Right of Action.

The purpose of RCW 2.36.080 is to establish state policy guidance for the exclusion of jurors. There is no basis for concluding that this statute establishes a private right of action against courts or counties enforcing the terms of RCW 2.36.150. In order to

determine whether the legislature intended to imply a private right of action, a reviewing court applies a three-part test established in *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). First, we determine whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether the explicit or implicit legislative intent supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation. *Id.*

Wright v. Lyft, Inc., 406 P.3d 1149, 1153 (Wash. 2017).

On the first factors, it is not at all clear that plaintiffs are the class of individuals intended to benefit from this statute. Juror selection impacts not only prospective jurors, but importantly, the rights of litigants and the dignity of the courts. There is no indication that RCW 2.36.080(3) intended to confer an “especial benefit” on jurors. It is more likely that limits on jury selection were intended to benefit the rights of litigants, including criminal defendants. The second and third factors also fail to support a private right of action. Plaintiffs have pointed to no explicit or implicit legislative intent to support the creation of a remedy, nor have

they explained how such a remedy would be consistent with a jury selection statute.

Perhaps the primary reason to reject a private right of action under the circumstances of this case is that it would place RCW 2.36.080 in direct conflict with RCW 2.36.150. King County's actions in adhering to the direct command of the statute proscribing juror pay should not support a private cause of action against the county under RCW 2.36.080(3). If this were the case, plaintiffs would effectively be using one statute to nullify another.

There is no judicial review doctrine that allows a court to use the commands of one statute to nullify those of another statute; this is not how our system works. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S. Ct. 1421, 1427, 182 L. Ed. 2d 423 (2012) (When statutory interpretation is apparent, "the only real question for the courts is whether the statute is constitutional."). To the contrary, a court is obligated to read conflicting statutes in a manner that gives effect to both statutes. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 437, 858 P.2d 503, 509 (1993) (Statutes must "be read harmoniously rather than in conflict."). This Court should reject plaintiffs' effort to create a private right of action against King County for following the commands of another, constitutionally valid statute. Any other result makes no sense.

2. Plaintiffs Have No Facts Supporting a Violation of RCW 2.36.080(3)

Plaintiffs claim that RCW 2.36.080(3) is violated because the “disparate impact” of low jury pay discourages service from low income individuals without an employer-sponsored jury service benefit. Even if this is true, such facts fail to establish any conceivable cause of action under RCW 2.36.080(3).

The statute states that a “citizen shall not be excluded from jury service in this state on account of . . . economic status.” RCW 2.36.080(3). The key word is “excluded,” which means “the act or instance of excluding.” Webster’s Ninth New Collegiate Dict. at 433. The word “exclude” means “to prevent or restrict the entrance of” or “to bar from participation, consideration, or inclusion.” *Id.* Thus, in the context of the statute, exclusion requires an affirmative act (by someone) to prevent a juror from participating or being considered for juror service.

The obvious example of a juror being “excluded” due to economic status is the Supreme Court case of *Thiel v. Southern Pacific* where daily wage earners were “intentionally and systematically excluded” from the master lists used for jury service. 328 U.S. 217, 223, 66 S.Ct. 984, 90 L.Ed.2d 1181 (1946). In *Thiel*, a purposeful action of the government removed/excluded a class of potential jurors based on economic status.

But here, plaintiffs make no challenge to King County's master jury service lists or how they are generated. Rather than showing systematic exclusion due to economic circumstances, plaintiffs place great reliance on the fact that a number of jurors were *excused* from juror service after the juror requested to be dismissed from service due to a hardship. A juror's request to be *excused* from jury service hardly means that the juror was *excluded* from service.

In a recent unpublished decision, Division II of the Court of Appeals held that excusal does not equate with exclusion for purposes of RCW 2.36.080(3). *State v. Lazcano*, 198 Wn. App. 1016 (March 16, 2017) (unpublished decision). In *Lazcano*, just before opening statements, a juror told the court that his employer had asked for him to be excused. The juror explained that his employer did not pay him for jury duty, he was moving, had a vehicle payment, and could not miss three weeks of pay around Christmas. The court excused him on the ground of hardship. *Lazcano* argued the trial court violated RCW 2.36.080(3) for excusing the juror on account of economic status. The Court of Appeals rejected the claim and held that although his economic status may have motivated the juror to seek removal, the trial court did not expressly or intentionally excuse the juror for this reason. Although this reasoning does not bind a decision in this case, it is sound and should be followed.

Moreover, plaintiffs lack standing to imagine the exclusion of others. One plaintiff actually served on a jury and therefore has no possible injury due to exclusion. The other plaintiff requested to be excused from jury service and the request was granted. This too does not represent an exclusion for any purpose. Although this second plaintiff claims that her choice was influenced by economic circumstance, there is no action that King County took to exclude her from service. Because neither plaintiff presents facts that fall within the ambit of RCW 2.36.030 – even if a private cause of action existed under this statute – summary judgment was properly granted for King County.⁵

D. PLAINTIFFS ARE NOT EMPLOYEES AND CANNOT CLAIM A RIGHT TO MINIMUM WAGE

The fundamental flaw in plaintiffs’ position with regard to minimum wage is the direct command of the statute proscribing juror pay. The specific statute for juror pay cannot be overridden by the minimum wage statute. As noted above, in such a circumstance, the more specific

⁵ Because no class was ever certified and no class is before this Court, plaintiffs’ causes of action rise or fall on the basis of their own circumstances. Indeed, if plaintiffs’ own factual circumstances do not support a cause of action, they cannot serve as class representatives and there could be no class in any event. A class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011)). To justify a departure from this rule, “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *Wal-Mart Stores*, 564 U.S. at 348–49.

statute controls. Moreover, plaintiffs' claims fail because jurors are not "employees" for purposes of the minimum wage statute.

Many of the claims raised by plaintiffs are dependent on their faulty assertion that jurors are "employees" of the County. Their claims under RCW 49.46 (minimum wage act), 49.48 (payment of wages), and 49.52 (wage rebate act), all must fail because the requirements of the statutes apply only to employees and it is clear that the legislature never intended to make jurors employees of the counties in which they serve. Additionally, the case on which plaintiffs almost exclusively rely to argue in favor of an employment relationship is based on a definition of "employee" not applicable here.

1. Jurors are excluded from the WMWA's definition of employee.

For purposes of the Washington Minimum Wage Act (WMWA), "employee" is defined as:

Any individual employed by an employer but shall not include... Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization *where the employer-employee relationship does not in fact exist* or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW.

RCW 49.46.010(3)(d).

By this definition, even if an individual is employed by an employer, he or she is not an “employee” for purposes of minimum wage if “an employer-employee relationship does not in fact exist.” Such is the case with jurors.

Courts that have addressed the issue of juror compensation in the context of minimum wage laws have rejected claims for minimum wage, finding that no employment relationship exists. For example, in *Brouwer v. Metro Dade County*, 139 F.3d 817, 819 (11th Cir. 1998), a former juror sued the county on behalf of herself and all other similarly situated jurors, alleging that failure to pay jurors for jury service violated the Fair Labor Standards Act (FLSA). The Eleventh Circuit held that the relationship between a juror and the county was not an employment relationship covered by FLSA. *Id.*

“Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power.” *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 222–24, 66 S.Ct. 984, 987, 90 L.Ed. 1181 (1946). This duty and privilege does not amount to employment. *See generally North Carolina v. Setzer*, 42 N.C.App. 98, 256 S.E.2d 485, 488 (1979) (“[J]ury duty is not a form of employment....”).

We see the relationship between Plaintiff (and those similarly situated) and Dade County as the district court did. The district court described the true relationship of jurors to the county:

Jurors are completely different from state [or county] employees. Jurors do not apply for employment, but are

randomly selected from voter registration lists. Jurors are not interviewed to determine who is better qualified for a position; the State summons all available persons who meet the basic requirements.... Jurors do not voluntarily tender their labor to the state, but are compelled to serve. Jurors are not paid a salary, rather they receive a statutorily mandated sum regardless of the number of hours worked. Jurors are not eligible for employment benefits, do not accrue vacation time, annual or sick leave and do not qualify for health or life insurance. The state does not have the power to fire jurors for poor performance, but must accept their verdict. In short, there is no indicia of an employment relationship between state court jurors and Dade County.

District Court Order at 7–8; *see generally Johns v. Stewart*, 57 F.3d 1544, 1558–59 (10th Cir.1995) (using similar considerations such as lack of application by plaintiff for employment, lack of sick or annual leave, no job security, no Social Security or pension benefits). We agree with the district court's analysis of the circumstances. No employment relationship existed in this case; and, thus, Plaintiff is entitled to no minimum wage under the FLSA.

Id. at 819.

The relationship between King County and its jurors is the same as the juror-county relationship described by the court in *Brouwer* and as in *Brouwer*, there is no employment relationship.

Other courts have similarly rejected claims for minimum wage for jurors also citing to the lack of an employment relationship. *See North Carolina v. Setzer*, 256 S.E.2d 485, 488 (N.C. 1979) (state statute provided jurors shall receive eight dollars per day; "jury duty is not a form of employment, but a responsibility owed by a citizen to the State"); *St. Clair v. Com.* 451 S.W.3d 597 (Ky. 2014) (there is no employer-employee

relationship between the state and jurors when jurors carry out their civic duty of jury service).

We sympathize with the plight of jurors, especially those with family obligations, who must forego their usual compensation and receive the minimal statutory compensation in order to serve as jurors. In Florida the legislature has provided for jurors to receive ten dollars per day and fourteen cents per mile for travel expenses while in attendance at court. s 40.24, Fla.Stat. (1979). To receive far less than the federal minimum wage, particularly in an extended trial situation, undoubtedly imposes a severe financial hardship on many jurors. A juror's right to compensation, however, is purely statutory and a matter of legislative and not judicial prerogative. *See Maricopa County v. Corp.*, 44 Ariz. 506, 39 P.2d 351 (1934); 50 C.J.S. Juries s 207 (1947). Therefore, the legislature may find it prudent to re-examine the statutory compensation for jurors.

Patierno v. State, 391 So.2d 391, 392-93 (Fla.Dist.Ct.App. 1980).

The Attorney General has also addressed the issue of minimum wage for jurors. In response to the question “Must jurors be paid at least the minimum wage set forth in RCW 49.46.020 for time spent on jury duty?” the Attorney General answered in the negative, noting that “[t]he Legislature, of course, may choose to amend the relevant statutes to provide for payment of the minimum wage to jurors. However, it has not as yet done so.” April 2, 1990 letter from Assistant Attorney General Trautman to State Senator Rasmussen.⁶

⁶ Formal attorney general opinions are generally “entitled to great weight.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308–09, 268 P.3d 892 (2011). Although attorney general letters are generally accorded little weight, they may be helpful legal authority when the question to which the letter responds is known, as it is here. *Cf. Spokane Research & Def. Fund v. Spokane Cty.*, 139

As further evidence that the legislature did not intend jurors to be employees, RCW 2.36.165 requires employers to provide employees with sufficient leave to serve when summonsed for jury duty. Here again, plaintiffs' interpretation would render the statutes meaningless or if given meaning, would produce absurd results. If the juror was the county's employee, the county could not comply with RCW 2.36.165's mandate to provide those jurors with leave from the very activity that plaintiffs argue makes them county employees. *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012) (when interpreting statutes, the court has a duty to avoid absurd results). The conclusion that jurors are not county employees is also supported by the fact that county governments that pay benefit-eligible employees their regular pay for jury service do not also pay them the juror per diem.⁷

Plaintiffs cite to *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012), and argue that the decision sets forth the test for determining whether a person is an "employee" for purposes of the WMWA. Br. of Appellants at 34. In fact, the issue in *Anfinson* was whether FedEx drivers were employees under the WMWA or independent

Wn. App. 450, 459, 160 P.3d 1096 (2007), *as amended on reconsideration* (Oct. 23, 2007).

⁷ See, e.g. King County Code 3.12.240; Chelan County Code 1.20.870; Grant County Code 2.40.060; Pierce County Code 3.76.010; Snohomish County Code 3A.06.060, Wahkiakum County Code 2.60.020.

contractors. The Court interpreted the WMWA’s definition of “employee” for purposes of this question only and in analyzing the statutory definition of “employee” specifically stated that it was “subject to multiple exceptions not relevant here.” *Anfinson*, 174 Wn.2d at 867. In the present case those exceptions are relevant, specifically as explained above, the exception where no employer-employee relationship exists. For that reason, *Anfinson* is inapposite.

However, even if the test in *Anfinson* was applicable, jurors are still not employees for purposes of the WMWA. In *Anfinson*, the Court held that “the relevant inquiry is ‘whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.’” *Anfinson*, 174 Wn.2d at 871 (quoting *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)).

Jurors are not, and cannot be, economically dependent on a court that summons them for service. Prospective jurors are drawn at random from eligible community members and there is no guarantee of serving on a jury, or the length of service.⁸ They do not voluntarily serve, but are compelled to do so. Considering these and other factors in the context of the economic realities test, as discussed *infra*, the court in *Brouwer* held

⁸“The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal juror service is one day or one trial, whichever is longer.” RCW 2.36.080(2).

“there is no indicia of an employment relationship between state court jurors and [the] county.” *Brouwer*, 139 F.3d 817 (11th Cir. 1998).

Plaintiffs’ reliance on *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 139 P.3d 817 (2014) is similarly misplaced. As it did in *Anfinson*, the Court recognized there were exceptions to the WMWA’s definition of “employee” that were not applicable to the issue before it. *Becerra* at 194. Here, those exceptions apply. Moreover, like *Anfinson*, in *Becerra* the issue was whether plaintiffs were misclassified as independent contractors. The Court looked at regulatory and common law factors for the “economic reality” test. The factors were nonexclusive and included things such as the degree of supervision of the work; the power to determine pay rates; the right to hire, fire or modify the employment conditions; whether the services require a special skill; whether there is permanence in the working relationship; and whether the service rendered is an integral part of the alleged employer’s business. *Becerra* at 196-97.

Save for the fact that jury service is an integral part of the judicial system, as applied to the present case none of the factors discussed in *Becerra* indicate an employer-employee relationship between jurors and the county. The county does not supervise a juror’s work. It does not have the power to determine pay rates, or hire or fire jurors. Jury service does not require a special skill. Jurors are not entitled to profit or loss. And

there certainly is no permanence in jury service.

Instead, a juror's association with the judicial system is similar to that of a subpoenaed witness. Witnesses receive a per diem payment for their services as well as mileage. *See* RCW 2.40.010. If Plaintiffs' arguments prevail, a subpoenaed witness would also be an "employee" of the County. But neither are. The obligations of both a juror and a witness stem, not from any purported employment relationship, but from the obligation of citizenship and the governing statutes. Plaintiffs' arguments must therefore fail.

a. The Legislature adopted a specific juror payment statute.

As further evidence of why the WMWA does not apply to jurors and as discussed above, the Legislature provided a specific statute for juror payment in RCW 2.36.150(2). There is no mention of the WMWA in the juror payment statute, even by cross-reference. If, as plaintiffs argue, jurors are employees who must receive minimum wage, it would render RCW 2.36.150 superfluous as there would be no need to pay a per diem to an "employee" to whom the County is paying a wage for jury service. Plaintiffs' argument also violates a well-established rule of statutory construction.

As explained above, the WMWA is not applicable to jurors because they are excluded from the WMWA's definition of "employee." However,

even if jurors were not excluded by that definition, the principle of statutory interpretation for general versus specific laws would still preclude the WMWA's application. When two statutes apply, a specific statute will supersede a general one. *Bowles v. Washington Dept. of Retirement Systems*, 121 Wn.2d 52, 78, 847 P.2d 440 (1993) (general statute providing that judgments bear interest superseded by specific statute stating that untimely pension payments are not subject to interest); *see also Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). In this case, even if there was an argument that the wage provisions of the WMWA could be applied to jurors, RCW 2.36.150 is a very specific statute governing juror pay. It would supersede the general wage provisions of the WMWA, an act that does not refer to jurors at all.

2. *Bolin* does not control because the Legislature defined "employees" under the Industrial Insurance Act differently than under the WMWA.

In their arguments for minimum wage, plaintiffs rely heavily on *Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990). However, the *Bolin* decision is limited to the Industrial Insurance Act (IIA), which defines "employees" differently than the WMWA. Compare RCW 51.08.178 with RCW 49.46.010(3). And nothing in the opinion suggests that any other employment statute applies to jurors.

In *Bolin*, the juror "was an employee" of Kitsap County solely

under the IIA definition of “employee” in order to provide coverage to a juror who had been seriously injured in an automobile accident on his way home from jury duty. Notably, the Court observed that, as a result of the doctrine of judicial immunity, the plaintiff’s only redress for the harm suffered was through the IIA. *Id.* at 74. That concern does not exist here as jurors are provided payment pursuant to RCW 2.36.150 and to the extent an individual has a financial hardship, they may ask to be excused from jury service or have their service deferred. Plaintiffs’ assertion that jurors have no remedy outside the WMWA is without foundation.

Moreover, the IIA’s definition of “employee” does not include the statutory exception in the WMWA applicable to jurors. As discussed above, even if an individual is “employed by an employer,” that individual is excluded from the provisions of the WMWA if no employer-employee relationship exists. RCW 49.46.010(3)(d). Plaintiffs’ citation to *Bolin*, which addresses the IIA’s definition of “employee,” does nothing to diminish this exclusion under the WMWA.

While plaintiffs are correct that the legislature did not modify the IIA following the *Bolin* decision, neither did it modify any other legislation to provide employment status to jurors for any other purpose. Jurors receive payment for jury service pursuant to RCW 2.36.150 and plaintiffs’ attempt to amend the statute through this lawsuit improperly

expands the reach of *Bolin* and circumvents the legislative process.⁹

Additionally, in arguing for minimum wage, Plaintiffs' speculate that increased pay would increase participation. First of all, this is a policy argument that plaintiffs should direct to the legislature. Second, it is not what plaintiffs argued below and they cannot now claim it was an issue of fact. Br. of Appellants at 5, n 2. And even setting those issues aside, there is insufficient evidence that increased jury compensation will improve jury summons-response rates. Existing data from counties that have experimented with increased juror pay is still questionable based on regional differences and varied living conditions. Correlation is not causation, and while research methods have improved measurably in the social sciences, simply observing how attendance and jury fees have correlated over time can never account for all of the factors that explain the juror's decision to appear. Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U.J. Legis. & Pub. Pol'y 289, 380 (2002); *see also* CP 108-126 (Washington Center for Court Research, *Juror Research Project Report to the Washington State Legislature* at 13 (Dec. 24, 2008)).

⁹ Since plaintiffs' arguments that they are entitled to minimum wage fail, their claims under RCW 49.52 (double damages may be awarded to an "employee" for a willful withholding of "wages" due under a statute, ordinance, or contract) and RCW 49.48 (wages are due at the end of the established pay period) must also fail because they are premised on the theory that jurors are employees for purposes of the WMWA.

Finally, plaintiffs' contention that jurors should receive minimum wage also ignores important policy considerations and risks tainting the jury system. For example, it is unclear whether unemployed jurors or jurors who work part-time are included in plaintiffs' definition of those who do not work for employers who compensate for jury service. If so, those jurors would receive a windfall for jury service and would have incentive to prolong a trial, or they might be overly sympathetic to the state, which provides them with compensation for their time, in a criminal case. *Seamone*, at 378. Paying all jurors the same per diem gives an appearance of neutrality and fairness. It takes little to imagine an indigent criminal defendant's perception that his trial is unfair if the county pays the wages of the judge, prosecutor, his attorney, *and* his finder of fact. Moreover, minimum wage for those who do not work for employers who compensate for jury service is not a panacea and will not help commissioned salespeople, sole practitioners, or other self-employed higher wage earners with commensurately higher living expenses. The trial court properly rejected plaintiffs' claims for minimum wage and that ruling should be affirmed.

E. PLAINTIFFS' CLAIMS OF DISCRIMINATION UNDER RCW 2.36.080 WERE PROPERLY DISMISSED.

It would truly be odd and unprecedented to declare King County in violation of RCW 2.36.080(3) solely because the county properly executed RCW 2.36.150. Plaintiffs never explain, and cannot explain, how the law could countenance such a result. Nevertheless, though Plaintiff Bednarczyk is being given the same opportunity for jury service as all other eligible citizens, she claims to be a member of a protected class and subject to discrimination by the County.¹⁰ The trial court properly rejected these claims as the statute does not create a protected class based on economic status and it does not confer a cause of action for disparate impact. CP 676.

1. Economic status is not a protected class.

The Washington Law Against Discrimination (WLAD), chapter 49.60 RCW guarantees the following to the citizens of this state:

The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right.

RCW 49.60.040(1).

¹⁰ On its face, “economic status” is neutral and could mean disadvantaged, affluent, or anything in between. Plaintiffs refer to “low or lower” economic status, but the Legislature has not qualified economic status in RCW 2.36.080(3).

The classes listed in the statute are the protected classes in this state as adopted by the legislature. While plaintiffs originally brought claims under the WLAD based on race, they voluntarily dismissed those claims when they dismissed Plaintiff Rocha.¹¹ Thus, it is undisputed that plaintiffs have no claims under the WLAD.

Now on appeal, plaintiffs argue that state law sets out another protected class, not referenced in any way by the WLAD. Plaintiff Bednarczyk argues that she is a member of the purported “economic disparity class” and that it is a protected class under state law.¹² As the Complaint states, the purported class is made up of not simply low-income individuals who are eligible for jury service; it is made up of low-income individuals eligible for jury service but whose employers do not pay them for such service. CP 5. There is no such protected class in state law.

The purpose of the WLAD is set forth in the statute and is in “fulfillment of the provisions of the Constitution of this state concerning civil rights.” RCW 49.60.010. While the legislature did not seek to limit the type of civil rights actions that could be brought under state law, it did limit the classes protected by state law.

¹¹ As stated above, Plaintiffs voluntarily dismissed all claims under the WLAD when former Plaintiff Rocha was dismissed from the lawsuit. CP 693-97.

¹² Plaintiff Selin does not claim to be a member of the purported “economic disparity class.” CP 5-6. As a result, claims regarding RCW 2.36.080’s proscription on exclusion for economic status are brought only by Plaintiff Bednarczyk. CP 26-29.

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.020.

And to further the purposes the law, the legislature created a state agency to implement the law, making it clear the state policy for eliminating and preventing discrimination applied to the protected classes listed in the statute.

A state agency is herein created with powers with respect to elimination and prevention of discrimination in *employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions* because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

Id. (emphasis added).

In support of their argument for a new protected “economic disparity class,” plaintiffs rely on case law related to age discrimination in employment. However, the case law is inapposite because it involves a

protected class set forth in the WLAD. Moreover, the WLAD's purpose is to prevent discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions, none of which are applicable here. Plaintiffs' arguments must be rejected.

Plaintiffs rely upon *Bennett v. Hardy*, which involved claims of discrimination and wrongful discharge based on age. 113 Wn.2d at 912. At the trial court level, plaintiffs were unable to prevail on claims for age discrimination under the WLAD because their employer did not meet the WLAD definition that included only firms employing at least eight individuals. *Id.* at 916-17. However, the Court held that a cause of action for age discrimination was implied under RCW 49.44.090, which makes age discrimination an unfair employment practice but does not create a remedy. *Id.* at 921.

The present case is not analogous to *Bennett* because in that case, the plaintiffs were employees and were members of a class already protected by the WLAD. RCW 49.60.180 makes it an unfair employment practice to discriminate based on age. In *Bennett*, the Court did not recognize a new protected class outside the WLAD; it recognized a cause of action for individuals who already fell within a WLAD protected class.

Plaintiffs' reliance on *Thiel v. Southern Pac. Co.* to assert that RCW 2.36.080 creates a protected economic class is also misplaced. *Thiel* involved a litigant seeking a new trial based on a jury panel in which daily wage earners were deliberately and intentionally excluded from the source list for prospective jurors. 328 U.S. 217. While the Court held that such exclusion was not justified under state or federal law, it did not create a protected class for prospective jurors based on economic status; it held that litigants are entitled to juries selected without exclusions for economic status. *Id.* 223-24. Under *Thiel*, a county must compile its jury source lists without regard to economic status. It is undisputed that King County's master jury source list, from which jurors are randomly selected, complies with *Thiel*. See CP 128.

The other cases cited by plaintiffs are also distinguishable from the present case because they involved challenges based on race, a class already protected under state and federal law. See *Hardin v. City of Gadsen*, 837 F.Supp. 1113 (N.D. Ala. 1993) (civil litigants challenged federal judicial district jury plan as disproportionately excluding black individuals from the opportunity to be considered for jury service); see also *Brogan v. State*, 811 So.2d 286 (Miss. Ct. App. 2001) (criminal defendant alleged prosecution engaged in racially discriminatory jury selection).

With the dismissal of former Plaintiff Rocha, all claims for discrimination based on membership in a protected class disappeared from this lawsuit. The trial court properly rejected plaintiffs' attempt to revive those claims and to expand that list of protected classes under state law.

2. Plaintiffs have no cause of action for disparate impact.

As discussed above, RCW 2.36.080 provides State policy regarding jury service. Contrary to plaintiffs' assertion, it is not a general discrimination statute that provides an individual right of action. Disparate impact claims arise whenever a facially neutral policy or practice has an adverse impact on members of a protected class (such as racial minorities or older workers). Such claims are recognized under Title VII, *see Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988), the Americans with Disabilities Act, *see Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 645–46, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), the Age Discrimination in Employment Act, *see Mangold v. California Public Utilities Commission*, 67 F.3d 1470 (9th Cir.1995), the Fair Housing Act, *see Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182 (9th Cir. 2006), and state anti-discrimination statutes, such as the WLAD, *see Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986).

Nonetheless, plaintiffs claim that “King County’s neutral practice of failing to compensate jurors has a disproportional impact on people of low economic status.” Br. of Appellants at 28. But plaintiffs’ claim is another example of their attempt to circumvent a constitutional challenge to RCW 2.36.150 because counties’ ability to compensate jurors is constrained by statute, not by policy or practice. Therefore, plaintiffs’ means to claim disparate impact for juror pay is to challenge the constitutionality of the statute under the Fifth and Fourteenth Amendments, which they have taken pains to avoid.

Additionally, a plaintiff has an extra burden to challenge a statute for disparate impact: without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 207, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). This is especially true where, as here, RCW 2.36.080 does not create a new protected class. “The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class. A fortiori* it does not do so when ... the classes complaining of disparate impact are not even protected.” *State v. Johnson*, 194 Wn. App. 304, 308, 374 P.3d 1206 (2016) (citations omitted, emphasis in original).

Plaintiffs' disparate impact claim must be rejected for several reasons. First, and foremost, as discussed above, disparate impact requires a showing of discrimination against a protected class, which economic status as referenced in RCW 2.36.080 is not. And as stated above, RCW 2.36.080 provides that qualified persons have the *opportunity* to serve. Jurors who request a hardship excusal are not excluded or disparately impacted by any policy or practice of the courts; they have declined their opportunity to serve. Moreover, it is absurd that the legislature would have enacted RCW 2.36.150(2) if it gave rise to a disparate impact claim under RCW 2.36.080.

Plaintiffs' disparate impact claim also fails because there is inadequate statistical data to support it. "[T]o make out a prima facie case of disparate impact ... plaintiffs [must] employ an 'appropriate measure' for assessing disparate impact." A court may not find the existence of disparate impact "on the sole basis of [a statistic] unless it reasonably [finds] that [the statistic] would be a reliable indicator of a disparate impact." "[C]ourts [and] defendants [are not] obliged to assume that plaintiffs' statistical evidence is reliable." *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988))

(internal citations omitted)). Neither the AOC survey, nor the Defender Association survey collected data on jurors' economic status.

Plaintiffs attempt to find support for their discrimination claim by analogizing juror pay to a poll tax. The analogy fails for a couple of reasons. First, a qualified voter has a fundamental right to vote, but eligibility for jury service is not a fundamental right protected by the constitution. *United States v. Flores–Rivera*, 56 F.3d 319, 326 (1st Cir.1995). A citizen's right to jury service is limited to being included in the jury selection plan of a district; there is no right to serve as a juror. *United States v. Cannady*, 54 F.3d 544, 548 (9th Cir.1995). Second, a poll tax is a prerequisite to vote, stripping a voter of her right if she could not afford the tax. Plaintiffs are on King County's master list; if summonsed for jury duty, they may serve or defer to a later time. They may also request a hardship exemption, but that is a choice regarding an opportunity, not a burden or condition on a right. Third, unlike jurors, voters are not paid to exercise their civic duty. Finally, as discussed throughout, to the extent plaintiffs' argue Equal Protection, they needed to serve the Attorney General with a constitutional challenge, rather than sue King County.

Plaintiffs failed to set forth a cause of action under RCW 2.36.080 because economic status is not a protected class and because the statute

confers no cause of action for disparate treatment. Moreover, as the statute requires, the County is giving plaintiffs the opportunity to serve. The trial court dismissal of plaintiffs' claims under RCW 2.36.080 should be affirmed.

F. PLAINTIFFS LACK STANDING TO BRING CLAIMS UNDER THE UDJA AND THE SIXTH AMENDMENT.

Plaintiffs argue on appeal that they have standing to bring claims under the Uniform Declaratory Judgment Act (UDJA) related to RCW 2.36.080, the WMWA, and the Seattle Minimum Wage Ordinance, SMC 14.19.030.A. Additionally, since they devote a significant portion of their brief to the issue of racial disparity in juries, they seem to be asserting standing with regard to a criminal defendant's Sixth Amendment right to a fair trial. Plaintiffs lack standing under both laws.

1. The UDJA.

Plaintiffs assert that because the trial court did not reach the merits of their claims for equitable relief under the UDJA, it necessarily concluded they had standing to bring such claims. Br. of Appellants at 16, 41. Absent a right, status, or other legal relation, the UDJA does not apply. *See* RCW 7.24.010. Since the trial court held that plaintiffs had no claims under 2.36.080 or the minimum wage laws, it properly declined to reach the

UDJA claims. However, in any event, plaintiffs cannot meet the requirements to proceed under the UDJA.

In order to establish standing to bring a claim under the UDJA, courts employ a two part test: (1) the interest asserted must be arguably within the zone of interests to be protected or regulated by the statute in question, and (2) the challenged action must have caused injury in fact, economic or otherwise, to the party seeking standing. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011).

Plaintiff Bednarczyk asserts she has standing under the UDJA with respect to RCW 2.36.080 because she is qualified to serve as juror in King County, but will not serve because her employer does not pay her for jury service. The purpose of RCW 2.36.080 is not to ensure that all qualified citizens are *able* to participate in jury service; it is to ensure that all qualified citizens have the *opportunity* to be considered for jury service. *See* RCW 2.36.080(1). Plaintiff Bednarczyk is on the master list and has the same opportunity to serve as every other qualified citizen in King County. If she is summonsed, she may request to be excused for economic hardship just as others will request excusal because they are self-employed, work on commission, or cannot afford child care. If plaintiff is excused, she will not have been *excluded* from service by the County; she will have been *excused* from service at her request. She is not within the

zone of interests to be protected under RCW 2.36.080(3) because she has not been denied the *opportunity* to serve.

With respect to the minimum wage laws, the WMWA and SMC 14.19.030¹³ protect employees. As explained above, jurors are not employees of the County for purposes of these laws. As result, the fact that either plaintiff may serve in the future, does not put them within the zone of interests to be protected by minimum wage laws.

In addition to not being within the zone of interests for relief under the UDJA, plaintiffs cannot meet the injury in fact requirement. With respect to RCW 2.36.080(3), Plaintiff Bednarczyk argues she has standing based on a threatened injury that she will be excluded from participation in jury service on account of her economic status. As explained above, it is undisputed that plaintiff has the same opportunity to be called for jury service as any other eligible citizen in the County. If she believes the sacrifices that accompany jury service are too great, she may request deferral or excusal. She is free to make that choice, but it does not amount to a threat of injury by exclusion by the County.

¹³ Similar to the definition of employee under the WMWA, SMC 14.19.030 also incorporates a definition of employee with an exclusion for situations where the employer-employee relationship does not exist. *See* SMC 12A.28.200. As a result, the reasons that jurors are not employees under the WMWA discussed *infra* also apply to SMC 14.19.030.

And under RCW 2.36.080 and the minimum wage laws, even if there was a threat of injury, it certainly is not immediate. Plaintiffs assert threatened and immediate injury because they *may* be called for jury service at some time in the future and not be paid minimum wage. As explained above, there is no guarantee that either plaintiff will be summonsed for jury service in the near future or ever again. There simply is no basis for asserting that the alleged harm is immediate and plaintiffs therefore do not have standing.

It is important to note that standing is just one of four requirements that must be met to proceed under the UDJA. In order to invoke jurisdiction under the act, Plaintiffs must show:

- (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 27 P.3d 1149 (2001) (all elements of the justiciable controversy must be met to proceed under the UDJA).

Since it is unknown when or if plaintiffs will be summonsed, they cannot show an actual, present, and existing dispute. For the same reason, the alleged interests are not direct and substantial, they are potential and

theoretical. And a judicial determination would not be final since plaintiffs sued only one of the 39 counties in this state that must pay jurors in compliance with RCW 2.36.150. Plaintiffs cannot meet the justiciable controversy requirements to proceed under the UDJA as to RCW 2.36.080 or the minimum wage laws.

Recognizing that they will fail to meet the standing requirements discussed above, plaintiffs argue that the nature of their claims are of such serious public import that the Court should nonetheless find the standing requirements are met. This case is not analogous to those cited by plaintiffs. *Farris v. Munro* involved a challenge to a state statute. The plaintiff would have had standing but for the fact that he failed to first request that the attorney general bring the suit on behalf of all taxpayers. *Farris v. Munro*, 99 Wn.2d 326, 329, 662 P.2d 821 (1983). The Court found standing regardless in part because the attorney general was involved in the suit already and it found significant public interest in the claims because the case “raised an issue vital to the state revenue process” that could have affected a measure on an upcoming ballot. *Id.* at 330.

In the present case, the only immediate claim raised by plaintiffs is whether Plaintiff Selin was entitled to be paid minimum wage for her past service on a jury. All other claims are completely speculative since there is no guarantee that either plaintiff will be called for jury service in King

County in the future. Unlike *Farris*, in this case plaintiffs chose not to challenge the state law regarding juror pay and instead brought a lawsuit as two individuals against only one county in this state. As result, its outcome will have a direct bearing only on the two plaintiffs and only in King County.

2. The Sixth Amendment

In support their arguments that this case raises issues of serious public import, plaintiffs appear to assert that the purpose of their suit is to raise the compensation provided to jurors in order to address the problem of racial disparity in juries. As discussed above, that is not the case plaintiffs filed.

Plaintiffs do not represent any class and they certainly do not represent a race-based class that has been denied the opportunity to participate in jury service under RCW 2.36.080. Additionally, the claim that juries lack necessary racial diversity is not plaintiffs' claim to make. They are not criminal defendants and do not have standing to assert the Sixth Amendment rights of such individuals. Even if they did have standing, the United States Supreme Court has not recognized socio-economic groups as "distinctive" for purposes of fair cross section analysis. Moreover, the Court has suggested that hardship exemptions or excusals would likely survive a fair-cross-section challenge.

To establish a prima facie violation of the fair-cross-section requirement, a criminal defendant must prove that: (1) a group qualifying as “distinctive” (2) is not fairly and reasonably represented in jury venires, and (3) “systematic exclusion” in the jury-selection process accounts for the underrepresentation. *Berghuis v. Smith*, 559 U.S. 314, 327, 130 S.Ct. 1382, 175 L.Ed.2d 249 (2010) (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)). In *Smith*, a criminal defendant attempted to show underrepresentation in his jury pool by alleging among other factors, that the county’s practice of excusing people who merely alleged hardship or failed to show for jury service was a systematic cause of underrepresentation. 559 U.S. at 332. The Supreme Court rejected his argument, holding:

[The] Court has never “clearly established” that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim. In *Taylor*, we “recognized broad discretion in the States” to “prescribe relevant qualifications for their jurors and to provide reasonable exemptions.” And in *Duren*, the Court understood that hardship exemptions resembling those Smith assails might well “survive a fair-cross-section challenge[.]”

Smith, 559 U.S. at 333 (internal citations omitted).

So while the issue of racial disparity in juries is one of serious public import, it is not plaintiffs’ to raise and it is not the issue in this case.

Plaintiffs cannot meet standing requirements under the Sixth Amendment or the UDJA.

V. CONCLUSION

Based on the foregoing, King County respectfully asks this Court to affirm the superior court's summary judgment dismissal of Selin and Bednarczyk's Complaint with prejudice.

DATED this 26th day of January, 2018.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, NADIA RIZK, hereby certify that on January 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the Washington Supreme Court by using the Washington State Appellate Courts' web portal system.

I certify that all participants in the case are registered electronic users and that service will be accomplished by the appellate portal system.

Dated this 26th day of January, 2018 at Seattle, Washington.

/s/ Nadia Rizk
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Office

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

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