October November 2, 2024

Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

RE: Reply to Acting Clerk's Motion to Strike Flarity's Reply to the Comity Issue

Dear Honorable Justices Hearing No. 1033222:

This letter is intended to replace a legal filing per *State v. Gentry*, 356 P.3d 714, 183 Wash. 2D 749 (2015), to prevent a strike so Flarity might rebut the State's theory that comity supersedes 42 USC § 1983 in ALL situations. The word count is 1849 words and within the words limit for Replies. Meaning no disrespect to any party, titles are shortened to save word count. All emphasis is my own, unless otherwise noted.

THIS IS THE AUTHORIZED REPLY. This is a personal letter mailed to you directly by overnight mail as a precaution. Acting Clerk Pendleton seems extremely prejudiced to Strike our Reply. We filed a Motion to Modify the letter warning of the hidden Strike Motion. In our Motion, we specifically noted it was NOT the Reply she authorized. Yet the Motion provoked another letter on October 28, 2024 with this statement:

> The objection filed [by] the Petitioner on October 28, 2024, will therefore be submitted to the Justices **as a response to the Clerk's motion to strike** reply along with the petition for review.

It is a daunting obstacle to face a cherished member of the Supreme Court family as an opponent who is also the Chief Staff Attorney with this statement as the only visible legal argument:

> As explained in the Court's letter on October 24, 2024, the reply **does not appear** to be permitted under RAP 13.4(d) as the answer to the petition for review does not **seek review** of issues not raised in the petition for review.

Given the overwhelming precedents available, the only reasonable explanation that the Chief Staff Attorney is not aware that issues are "raised" **even if buried in a footnote**, is bad faith. *Blaney v. International Ass'n of Machinists* 87 P. 3d 757, 151 Wash. 2d 203 - Wash: Supreme Court, 2004:

> The rules **merely require** that the issue be raised. The issue **was raised** in a lengthy **footnote** to Ms. Blaney's answer….

The use of *merely* is significant here, because it is a legal term.[1] If the issue is in the brief--it has been raised. The Motion to Strike is bending the rules of civil procedure to impact the outcome that Marc Elias warned was becoming disturbingly common in U.S. courts.[2]

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1 Black's Law Dictionary, 5th Edition, Merely: "Without including anything else." Such as **seek review.** Black's Law cites *Plymouth Motor Corporation,* Cust.&Pat.App., 46 F.2d 211,212.

NO PRECEDENT SUPPORTS STRIKE. Obviously, it is a tremendous advantage to the State to be allowed to bring up new issues, argue at length in support of the new issues, and then have the Clerk strike all rebuttals. Here is an absurd unfairness no court should allow in the "interests of justice."

There are 37 results of Supreme Court decisions concerning RAP 13.4(d) in Google Scholar.[3] Not a single case points to an allowed strike to a Reply rebutting a new issue "raised" in an Answer. A strike here would establish a new precedent and should be published.

Assuming now a subservient tag team role in the combined effort to strike Flarity's compelling rebuttal to the new issue he raised, AAG Krawczyk cites *State v. Miller*, 156 Wn.2d 23, 32 & n.5, 123 P.3d 827 (2005)--resting on **a footnote in the ruling**. Besides the judicial practice of discounting any precedent authority from footnotes, *Miller* does not apply. Miller's Motion to strike the State's *supplemental brief* was denied. In addition, the Panel's denial did not curtail Miller's ability to respond to the new issues as the Acting Clerk hopes to accomplish here. Footnote 5 of *Miller:*

> [5] Miller moves this court to strike the larger part of the State's Supplemental Brief on the theory that it raises new issues.

Certainly the lengthy argument invoking comity the State put forth greatly exceeded the definition of a "raised issue" provided in *Blaney.*

STRIKE SUCCESS WOULD DEFY PRECEDENT. Success of the Motion would overturn numerous precedents, with the most important that of J. Madsen's *State v. Barker*, 25 P. 3d 423 – Wash:

> A respondent **must raise** in an answer to the petition for review any issue that the respondent wants this court to address. RAP 13.4(d). This court ordinarily will not review issues not presented in the petition for review **or the answer**. RAP 13.7(b); *see State v. Bobic,* 140 Wash.2d 250, 258, 996 P.2d 610 (2000) (respondent's failure to raise issue precluded review of issue); *Estate of Jordan v. Hartford Accident & Indem. Co.,* 120 Wash.2d 490, 496, 844 P.2d 403 (1993) (same); *Honcoop v. State,* 111 Wash.2d 182, 193, 759 P.2d 1188 (1988) (same).

Clearly by *Barker*, if the issue is included in the petition **or the Answer**, it was "raised." Comity would not be a topic of discussion at all, except that it has been "raised" by the State in their Answer, although RAP 13.7(b) invoked by *State v. Bobic*, 996 P. 2d 610, gives the Panel authority to take up comity anyway:

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2 Elias Law Group and founder of Democracy Docket: "Civil procedure is the key. If you change the rules, you effect the outcome. Clark Nealy of the Cato Institute: "...it's important to understand that the judiciary really does invent and blatantly misapply various avoidance doctrines to help insure the judges' former colleagues in the other branches rarely have to account for themselves."

3 https://scholar.google.com/scholar?hl=en&as_sdt=4%2C248&q=%2213.4%28d%29%22&oq=

> The Supreme Court may limit the issues to one or more of those **raised by the parties**. If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

STRIKE FALLS BELOW FEDERAL STANDARDS: Due process for a Reply to a new issue is also protected by Federal precedents and the Panel should give that due process *floor* "great weight."[4] *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir.1992):

> We consider an argument not raised in an opening brief if: (1) there is "good cause shown," or "failure to do so would result in manifest injustice"; (2) **the issue is raised in the appellee's brief**....

INTERFERENCE WITH FLARITY'S LEGAL STRATEGY. Pendleton's Motion seeks to mitigate a State tactic that gifted Flarity the legal equivalent of a royal flush. Comity does not apply because Flarity does not challenge the constitutionality of the tax or invoke the Commerce Clause that defeated the carriers in *Trucking.*[5] Flarity protests the unconstitutional "methods" of the BTA, which Flarity's Reply delineated in detail rights protected by 42 USC § 1983 and the historical disassociation of core rights with comity.

The State's main legal arguments: 1) the AG will be allowed the role of scofflaw[6] for service, and 2) that there is no "cause of action" for civil rights abuses from state law. The AG then added on a calculated long shot by "raising" the doctrine of comity in their Answer. But the comity doctrine is a fatal flaw to their scofflaw theory of service and opened the door for numerous other cases. *Estate of Toland v. Toland*, 286 P.3d 60, 170 Wash. App. 828 (Ct. App. 2012):

> When considering a comity issue, we ask whether:
>
> there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or **voluntary appearance of the defendant...**

Comity also demands justice in the lower courts. *Haberman*, 109 Wash.2d at 160, 750 P.2d 254:

> ...and under a system of jurisprudence **likely to secure an impartial administration of justice**...

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4 *State v. Gregory*, 192 Wn.2d 1, 16, 427 P.3d 621 (2018). ("the United States Constitution establishes a floor below which state courts cannot go to protect individual rights."). *Rozner v. City of Bellevue*, 116 Wn.2d 342, 804 P.2d 24 (Wash. 1991)

5 *WASHINGTON TRUCKING v. EMPLOYMENT SEC. DEPT*, 393 P.3d 761, 188 Wash. 2D 198 (2017): The plaintiffs in *Fair Assessment* brought a section 1983 action in federal court, seeking a refund and punitive damages for allegedly **unequal taxation of their real property**....In *National Private Truck,* the Supreme Court built on *Fair Assessment* to explain...for taxes that **allegedly violated the commerce clause**.

6 *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2D 415 (2006).

Since Wilson boldly stated that dismissal was "inevitable."[7] Flarity was the target of a prejudiced court from the first appearance. *Nowell v. Nowell*, Tex.CivApp., 408 SW 2d,550,553:

> ...the application of comity vests in the **sound discretion of the tribunal of the forum**.

Further, the extreme prejudice Wilson demonstrated in assigning a sanction based on a State motion that was never served is further demonstration the "tribunal" was void of "sound discretion."

TO RECAP, the Comity Doctrine serves to protect Flarity on several fronts that should be before the Panel. The Motion to Strike will undo the problems the State inflicted on its broader legal arguments without buffering the State's comity argument in any way.

HIDING JUDICIAL EMBARRASSMENT. The AG raised an issue that some of Flarity's Reply does not concern comity. This argument is in conflict with previous Clerk rulings for this case when separate comments were ordered to be included in the filings and be constrained by word count restrictions, which Flarity observed in the Reply.

A significant collateral damage to the people is that the Clerk's Strike Motion will also delete comments—when the Clerk has already eliminated comments filed separately. Prior to the Open Records Act,[8] the judiciary was bound by the similar principles in the Judicial Code of Conduct. At a minimum, striking a vital Reply gives the *appearance of impropriety*, Rule 1.2, and abuses the confidence and prestige of the judiciary. By striking the entire Reply with the associated comments, the Motion seeks to violate the peoples' right to be heard, Rule 2.6. Rather than give pro se plaintiffs leniency on the rules the code allows, with AG concurrence on enhanced pro se protections, the Strike Motion does the opposite and so violates Rule 2.2.

TYRANNICAL ABUSE OF POWER. The Motion's success would be a demonstration of the tyrannical abuse of power. How are the people served by hiding what should be a public record that defies its own precedents? Striking would be an obvious "forearm on the scale of justice."[9] Because the Motion has no basis in the law, success of the strike is a "made up immunity" the ACLU described as an anathema to 42 USC § 1983. [10] And an insult to the State founders intent by Art. 1, Sec. 32.

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7 VRP 1-25-2023, P7.

8 From 1.1 of Public Records Act. "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination **may cause inconvenience or embarrassment to public officials or others.**

9 *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 143 S. Ct. 890, 215 L. Ed. 2D 151 (2023).

10 The ACLU's DC chapter expressing the power of 42 U.S.C. § 1983 at the 150 anniversary: "On April 20, 1871, President Ulysses S. Grant signed one of the most important civil rights laws in U.S. history: the Ku Klux Klan Act. Section 1 of that law ....And we continue to fight to ensure that the law isn't watered down with **made-up immunities that give a free pass to government officials to violate the Constitution.**"

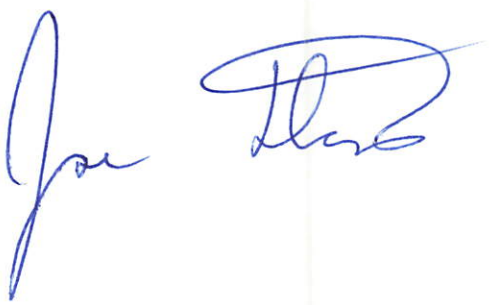
TYRANTS HIDE THE TRUTH. In the light of *State v. Towessnute, 486 P. 3d 111, 197 Wash. 2d 574 - Wash: Supreme Court, 2021*, this Panel in particular understands that a record is vital for future panels to examine the historical jurisprudence of this Panel's reign.

Without the record, future legal experts would likely conclude that pro se plaintiffs deserved their poor results because they were so terrible at legal tactics. They might very well conclude that Flarity failed to offer any rebuttal to the new issue of comity.

How did ex-Police Chief Covey receive a jury trial and "similarly situated" Flarity and prisoner Daniel Simms did not? When was the people's "inviolate" right to a jury destroyed? How and when did Art. 1 Sec. 32 get flipped into a weapon for retribution on civil rights challengers? *Time is always on the side of the truth*, said Ezra Taft Benson. The record is vital to the people who seek to restore the full measure of rights protected in both constitutions.

CONCLUSION. The silver lining here is that Pendleton feels Flarity's Reply is so compelling she is willing to risk personal political capital to remove it from the record. It is obvious that the Panel's top lawyer does not make a valid legal argument. Therefore, the Motion is the equivalent of kissing the ring of the king and degrades the judicial institution. But there is still hope for the courts if officials can feel the sting of shame. These psychic wounds will not heal until the abuses cease.

Thank you for considering my argument to preserve a vital public record, the Panel's precedents, and the honor of the court of last resort. I respectfully request the Panel deny the Motion and leave Flarity's Reply on the record for future discussions of comity's impact on 42 USC § 1983.



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