The Supreme Court
State of Washington

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December 31, 2021

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Via mail: jay.inslee@gov.wa.gov

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Dear Governor Inslee, Chairs, Vice Chairs and Ranking Members of the Law & Justice Committee and Civil Rights & Judiciary Committee:

Article IV, § 25 of our state constitution directs us to advise the governor of any "defects and omissions in the laws" judges believe exist. I have enclosed a report from the Superior Court Judges Association noting such defects and omissions. For the last few years, I have been working on a list of statutes that have been held unconstitutional that are still part of our statutory law. I am pleased that three statutes I called out in my letter last year have been amended or repealed in the last session. Among those that remain are:

RCW 2.42.120(4) and (5). These provisions required appointment of qualified interpreters when law enforcement interviewed or arrested people with hearing impairments. These provisions were attached to an unrelated bill in violation of the subject-in-title and anti-logrolling requirements of the Washington State Constitution in *Patrice v. Murphy*, 136 Wn.2d 845, 855 (1998) (citing WASH. CONST. art. II, § 19).

RCW 2.42.120(3). This provision required the appointment of a qualified interpreter whenever a hearing-impaired defendant participated in a court ordered program or activity. It was enacted in the same bill examined in *Patrice* and was found to suffer from the same constitutional infirmity in *State v. Harris*, 97 Wn. App. 647, 655 (1999).

RCW 2.43.040(4) allowed trial courts to impose the cost of interpreters onto criminal defendants as part of court costs. Those with hearing impairments were not subject to similar costs. Former RCW 2.42.120(1) (1985). The court held this violated equal protection in *State v. Marintorres*, 93 Wn. App. 442, 451-52 (1999) and again in *State v. Diaz-Farias*, 191 Wn. App. 512, 515 (2015).

RCW 2.48.190 and .210 limited admission to the bar to United States citizens. This requirement was found to unconstitutionally intrude on the court's power to set the requirements to practice law. *In re Chi-Dooh Li*, 79 Wn.2d 561, 566 (1971).

RCW 4.16.190(2) carved out medical malpractice claims from the general rule that statutes of limitations are tolled for minors. This carve out was found to violate the privileges and immunities clause of the state constitution in *Schroeder v. Weighall*, 179 Wn.2d 566, 569 (2014) (citing WASH. CONST. art. I, § 12).

RCW 4.56.250(2) capped noneconomic damages in wrongful death suits by a formula based on the victim's age and wages. This cap was found to violate the right to a jury trial. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646 (1989) (citing WASH. CONST. I, § 21).

RCW 6.25.030(10) authorized seizure of property before a judgment in contract actions without prior notice or ability to object in some circumstances. It was held to violate due process of law in *Lucas v. Stapp*, 6 Wn. App. 971, 972 (1972) (citing WASH. CONST. art. I, § 3).

RCW 6.25.070(2) authorized attachment of real property without notice under certain circumstances. It was held to violate due process of law in *Van Blaricom v. Kronenberg*, 112 Wn. App. 501, 513 (2002) and *Tri-State Dev. v. Johnston*, 160 F.3d 528, 534 (9th Cir. 1998).

RCW 7.48.050 through .100 classified certain adult entertainment facilities as nuisances and authorized courts to enter preliminary injunctions against them. This was found to violate the First Amendment in *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138-39 (9th Cir. 1980).

RCW 9.68.060 through .080 made it a criminal offense to sell, distribute, or exhibit erotic materials to minors. Its procedures were found unconstitutional as a prior restraint on speech, overbroad, and a violation of due process in *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 778 (1994).

RCW 9.81.070 required public employees to sign loyalty oaths attesting that they are not communists and do not belong to subversive organizations. The United States Supreme Court held this unconstitutional in *Baggett v. Bullitt*, 377 U.S. 360, 366-67 (1964).

RCW 9.81.082 defined subversive organizations as organizations designated so by the attorney general of the United States under Executive Order 9835. This was found to be an unconstitutional delegation of power, among other things, in *Nostrand v. Balmer*, 53 Wn.2d 460 (1959), *vacated on other grounds sub nom. Nostrand v. Little*, 362 U.S. 474 (1960).

RCW 9.91.180 made it illegal to sell or rent violent video games to children. This was found to violate the First Amendment in *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1191 (W.D. Wash. 2004).

RCW 9.92.100 allows a judge to order certain people sterilized. The constitutionality of this act is at least questionable under *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

RCW 9.94A.530(2) provided, in part, that criminal defendants must either object to the State's description of their criminal history or be deemed to have admitted it. This was found to unconstitutionally shift the burden of proof to the defendant in *State v. Hunley*, 175 Wn.2d 901, 915 (2012).

RCW 9A.46.020(1)(a)(iv) made it a crime to threaten to maliciously do an act that will substantially harm another's mental health or safety. "Mental health" is not defined in the chapter. The court found that the undefined term left the statute both unconstitutionally vague and unconstitutionally overbroad in *State v. Williams*, 144 Wn.2d 197, 212 (2001).

RCW 9A.68.050(1) criminalizes trading in special influence. It was held to be unconstitutionally vague and facially overbroad by a trial court as noted in *State v. Pelkey*, 109 Wn.2d 484, 486-87 (1987) (affirming the trial court on other grounds).

RCW 10.05.030 authorizes judges, with the concurrence of the prosecuting attorney, to continue an arraignment pending drug or mental health treatment. Vesting prosecutors with an essential veto power was found to violate separation of powers in

State ex rel. Schillberg v. Cascade Dist. Court, 94 Wn.2d 772, 781 (1980).

RCW 10.52.100 exempted the names of child victims of sexual assault from disclosure. This blanket rule was found to violate the open courts provision of the Washington State Constitution. *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 207 (1993) (citing WASH. CONST. art. I, § 10).

RCW 10.58.090 made evidence of a defendant's prior sex crimes automatically admissible if they satisfy ER 403. This was found to violate separation of powers in *State v. Gresham*, 173 Wn.2d 405, 432 (2012).

Major portions of chapter 10.95 RCW authorized and regulated capital punishment for aggravated first degree murder. This was found unconstitutional for failing to protect against racial disproportionality in *State v. Gregory*, 192 Wn.2d 1, 19 (2018) (citing WASH. CONST. art. I, § 14).

RCW 10.95.035(3)—part of the *Miller*-fix statute—gave certain juvenile offenders the right to resentencing but not the right to appeal the new sentence. This was found to violate the right to appeal in criminal cases. *State v. Delbosque*, 195 Wn.2d 106, 130 (2020) (citing WASH. CONST. art. I, § 22).

RCW 10.95.030(3)(a)(ii) was another part of the *Miller*-fix statute. This provision gave judges' discretion to sentence certain juveniles who had committed aggravated first-degree murder to life in prison without the possibility of parole. Sentencing juveniles to life without parole was found unconstitutional in *State v. Bassett*, 192 Wn.2d 67, 77 (2018) (citing WASH. CONST. art. I, § 14).

RCW 13.04.030(1) purports to give juvenile courts exclusive original jurisdiction over specified matters relating to juveniles. While not held unconstitutional, it was held ineffective to deprive superior courts of their constitutional and statutory authority over children and felonies. *State v. Posey*, 174 Wn.2d 131 (2012); *State v. Werner*, 129 Wn.2d 485, 496 (1996).

RCW 18.108.190 allowed law enforcement personnel to inspect massage businesses at any time without a warrant. This was found to violate the Fourth Amendment in *Wash. Massage Found. v. Nelson*, 87 Wn.2d 948, 954 (1976).

RCW 21.20.380 authorized administrative subpoenas of customer banking records from financial institutions without notice to the customer. This was found to violate article I, § 7 of the state constitution in *State v. Miles*, 160 Wn.2d 236, 244 (2007).

RCW 29A.80.061 required political parties to elect, rather than appoint, their legislative district chairs. This was found to violate the First Amendment in *Pilloud v. King County Republican Cent. Comm.*, 189 Wn.2d 599, 600 (2017).

RCW 35.13.165 allowed property owners to block annexation by filing a petition opposing annexation with the boundary review board. This special privilege for property owners was found unconstitutional under the federal equal protection clause and article I, § 19 of the state constitution in *Seattle v. State*, 103 Wn.2d 663, 672-73 (1985).

Chapter 36.105 RCW authorized the creation of "community councils" in counties made up entirely of islands with an unincorporated population in excess of 30,000 people (a.k.a., Island County). These councils would have direct input on the community comprehensive plans and zoning. This was found to be unconstitutional special legislation in *Island County v. State*, 135 Wn.2d 141 (1998).

Chapter 39.88 RCW, the Community Redevelopment Financing Act of 1982, attempted to create a mechanism for cities to issue bonds, secured by a portion of property tax, to fund public improvements. The funding mechanism was found to violate article IX, § 2 and to not be severable in *Leonard v. City of Spokane*, 127 Wn.2d 194, 201-02 (1995) (citing WASH. CONST. art. IX, § 2).

RCW 41.20.110 terminated the pension benefits of certain police officers convicted of a felony, among other things. This was found to be an unconstitutional forfeiture of estate under the state constitution in *Leonard v. Seattle*, 81 Wn.2d 479, 490 (1972) (citing WASH. CONST. art. I, § 15).

RCW 41.56.0251 limited the collective bargaining rights of charter school employees. This was found to violate the state constitution's requirement that any act that effectively amends another must explicitly show how the act relates to the statute it effectively amends. *El Centro de la Raza v. State*, 192 Wn.2d 103, 132 (lead op. of Yu, J.,) & 142 (Wiggins, J., dissenting) (2018).

RCW 46.55.360 required officers to impound cars when arresting drivers for DUI without an individualized consideration of reasonable alternatives. This was found to violate article I, § 7 of the state constitution in *State v. Villela*, 194 Wn.2d 451 (2019) (citing WASH. CONST. art. I, § 7).

RCW 47.44.030 required the department of transportation to reimburse franchisees the cost of relocating or removing public utility facilities along highways under certain circumstances. This was found to violate the state

constitution's prohibition on gifts of public funds in *Wash. State Highway Comm'n v. Pac. Nw. Bell Tel.* Co., 59 Wn.2d 216, 224 (1961) (citing WASH. CONST. art. VIII, § 5).

RCW 49.32.072, .073, and .074 limited the power of the courts to issue injunctions in labor disputes. This was found to be an unconstitutional encroachment on judicial power in *Blanchard v. Golden Age Brewing* Co., 188 Wash. 396, 412 (1936).

RCW 49.60.040(11) exempts religious and nonprofit sectarian organizations from Washington's Law Against Discrimination. This was found to be unconstitutional if applied to a non-ministerial employee in *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 251 (2021) under this state's privileges and immunities' clause.

RCW 66.24.480 and .481 made operating an unlicensed bottle club a misdemeanor. Bottle clubs allow members to keep and consume their own liquor on the bottle club's premises. There was no mechanism to license bottle clubs. The court found that it violated due process of law to create a criminal penalty for failing to meet a requirement that cannot be met in *Derby Club v. Becket*, 41 Wn.2d 869, 877 (1953).

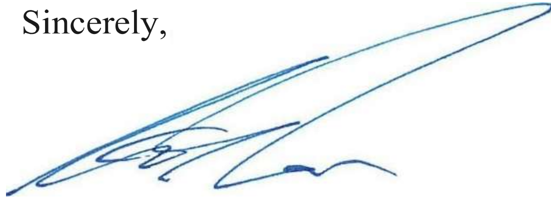
RCW 66.28.080 required a local license before any place with a liquor license could allow music, dancing, or entertainment, with some exceptions. This was permanently enjoined as an unconstitutional prior restraint on speech in *Jersey's All-Am. Sports Bar v. Wash. State Liquor Control Bd.*, 55 F. Supp. 2d 1131, 1139 (W.D. Wash. 1999).

RCW 73.04.050 and .060 granted some honorably discharged veterans the privilege of peddling goods without a local license. This was found to violate the privileges and immunities clause of the state and federal constitutions in *Larsen v. City of Shelton*, 37 Wn.2d 481, 489 (1950).

RCW 85.05.130 allowed diking districts to assess fees on benefited land outside of the specific district. This was found to violate the privileges and immunities clause of the state constitution in *Malim v. Benthien*, 114 Wash. 533, 539 (1921).

I am also concerned the officially published version of our state constitution still labels article IX, section 1 a “preamble.” Our founders did not designate section 1 a preamble and labeling it that way in the official codification minimizes its substantive importance. *See Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 499 (1978).

Sincerely,



Chief Justice Steve González

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November 10, 2021

Honorable Steven C. González
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Dear Chief Justice González :

The Superior Court Judges' Association (SCJA) surveyed its member judges in accordance with Art IV, Sec 25 of the Washington State Constitution. Following are observations provided by SCJA members.

1. **RCW 9A.72.160 Intimidating a judge – Superior Court Judge Bryan Chushcoff, Pierce County**

Below is the statute relating to intimidating a judge. Note that the word "threat" is defined in another statute, to-wit: RCW 9A.04.110(25). However, the actual definition is at RCW 9A.04.110(28). As the Reviser's note (see below) makes clear, this occurred due to amendments causing renumbering to RCW 9A.04.110 over the years. But the Intimidating a Judge statute, RCW 9A.72.160, was never amended to account for the legislative renumbering to RCW 9A.04.110. So RCW 9A.72.160(2)(b) should be changed to read "(b) Threats as defined in RCW 9A.04.110(28)."

RCW 9A.72.160. **Intimidating a judge**
(1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.
(2) "Threat" as used in this section means:
(a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
(b) Threats as defined in *RCW 9A.04.110(25).
(3) Intimidating a judge is a class B felony.

***Reviser's note:** RCW 9A.04.110 was amended by 2005 c 458 § 3, changing subsection (25) to subsection (26); was subsequently amended by 2007 c 79 § 3, changing subsection (26) to subsection (27); and was subsequently amended by 2011 c 166 § 2, changing subsection (27) to subsection (28). (emphasis added)

RCW 9A.04.110 (in pertinent part):

(28) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or
(b) To cause physical damage to the property of a person other than the actor; or
(c) To subject the person threatened or any other person to physical confinement or restraint; or
(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or
(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
(f) To reveal any information sought to be concealed by the person threatened; or
(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or
(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or
(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships;

2. **HB 2567 from 2020 Legislature – Superior Court Judge Christopher Culp, Okanogan County**

Please consider this as an error in a law that needs review and correcting. Last month (September 2021), all PJs received the below email from AOC about courts needing to report law enforcement who entered courthouses—even though we are not in charge of security. The statute needs to be clarified to make clear who is to report the intended purposes of the law i.e. ICE agents who may be there for reasons other than court appearances. You can see that I reached out to AOC about this already and so my hope is that between this email and Ms. Gregory's efforts, change can be made. I have no time or ability to comply with the law and I don't think its intent was for me (and other judges) to have to make such reports; however, the practical effect seems to be that we do given Ms. Gregory's response. (Please see Ms. Gregory's response below)

Hello Judge Culp,
Unfortunately, the statute directs AOC to collect this information from the courts. I would just report any information you have on when law enforcement was present. At this time we're not requiring courts to report law enforcement that is present at the courthouse for strictly security purposes or present to respond to an emergency. I am encouraging courts to report when law enforcement is present for other purposes, even if there was no action taken. I have scheduled a meeting with the primes sponsor of the bill to get additional information on what type of information the legislature would like collected, and who should be collecting that information. I'm happy to follow up after that conversation to clarify a court's responsibilities under the reporting requirement. (Brittany Gregory, J.D.| Associate Director of Judicial and Legislative Relations)

3. RCW 11.88.040 – Superior Court Judge Jennifer Forbes – Kitsap County

Notice and hearing, when required—Service—Procedure. (Effective until January 1, 2022.) Before appointing a guardian or a limited guardian, notice of a hearing, to be held not less than ten days after service thereof, shall be served personally upon the alleged incapacitated person, if over fourteen years of age, and served upon the guardian ad litem.

Before appointing a guardian or a limited guardian, notice of a hearing, to be held not less than ten days after service thereof, shall be given by registered or certified mail to the last known address requesting a return receipt signed by the addressee or an agent appointed by the addressee, or by personal service in the manner provided for services of summons, to the following:

(1) The alleged incapacitated person, or minor, if under fourteen years of age.

Seems to me like notice of a hearing would go to kids OVER 14 years of age. Why would we give notice to a 2 year old but not a 15 year old?

I realize that this law is effectively "repealed" as of January 2022, but the new laws allow the old laws to be used if the Court makes certain findings (RCW 11.130.910). And, I think, that this might be a potential issue (in theory) if a title 11 guardianship of a minor is already established, and a new guardian becomes necessary before the child turns 18 and the court determines that it is appropriate to continue under 11.88 for the duration of the guardianship when appropriate under RCW 11.130.910.

The SCJA respectfully asks the Court to propose the Legislature adopt the proposed modification:

#1 - RCW 9A.72.160(2)(b) should be changed to read "(b) Threats as defined in RCW 9A.04.110(28)."

#2 –HB 2567 is an error in a law that needs review and correction.

#3 – RCW 11.88.040 is an error in a law that needs review and correction.

Sincerely,

Judge Rachelle E. Anderson, President
Superior Court Judges' Association

cc: SCJA Board of Trustees
Judge Bryan Chushcoff
Judge Christopher Culp
Judge Jennifer Forbes
Ms. Crissy Anderson