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Via email to supreme@courts.wa.gov

The Honorable Susan L. Carlson
Clerk of the Washington State Supreme Court
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

907 Pine Street
Suite 500
Seattle, WA 98101

T 206-682-9552
F 206-682-9556

LegalVoice.org

Re: Legal Voice Comments Regarding Proposed Changes to GR 36-Jury Selection

Dear Honorable Justices:

We appreciate the opportunity to submit comments on proposed changes to General Rule 36. Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a nonprofit public interest legal organization that seeks to advance the law for women, girls, and LGBTQ people in the Pacific Northwest. Legal Voice is a regional expert on law and policy relating to gender-based violence, including domestic violence, and discrimination based on gender, sexual orientation, and gender identity. We write to express our strong support for the proposed changes to GR 36 that seek to ensure that race discrimination plays no role in jury selection in Washington State. We also suggest that the proposed changes include gender, sexual orientation, and gender identity, as explained below.

Legal Voice Supports Amending General Rule 36 to Be More Protective Against Discrimination than the *Batson* Rule

We agree with the comments previously submitted by the ACLU of Washington, and this Court's analysis in *State v. Saintcalle*, 178 Wn.2d 34 (2013), explaining the failures of the rule expressed in *Batson v. Kentucky*, 476 U.S. 79 (1986), to adequately prevent discrimination against prospective jurors of color. We are particularly concerned that, in an environment where overt antagonism against women of color, immigrant women, and women who are Muslim or perceived as Muslim is on the rise, exclusion on the basis of race and ethnicity is a very real risk that Washington's courts must seek to eliminate. *Batson* and its implementation have, as documented by the ACLU of Washington and recognized by this Court, failed to fully achieve the promise of eliminating bias in jury selection. For those reasons, we strongly support the proposed changes to GR 36.

The Rule Should Also Protect Against Gender Discrimination

In addition, we write to support changes to GR 36 that include protection against the exercise of peremptory challenges based on gender. Excluding women from juries because they are women is an unfortunate aspect of our legal history (*see, e.g., Hoyt v. Florida*, 368

Women's rights. Nothing less.

U.S. 57 (1961)) that was practiced either openly or through peremptory challenges until 1994. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

Currently, anecdotal evidence suggests that such discrimination lingers in jury trials that are perceived to affect women's issues. For example, there are reports that women have been excluded from juries in trials involving domestic violence. The idea that a juror, because of gender, is unable to fulfill the responsibilities jury service entails is antiquated and must be rejected. See *J.E.B.*, 511 U.S. at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.") For that reason, we strongly support the ACLU of Washington's amended proposal that includes protection for gender-based discrimination.

The Rule Should Protect Against Discrimination Against Transgender People

While we wholeheartedly support the ACLU of Washington's proposed alternative that includes gender, we also believe it is critical that the rule protect people who face discrimination because of their gender identity. Transgender and gender non-conforming people – especially transgender people of color – are among the most discriminated against in every aspect of our society.¹ Unfortunately, such discrimination includes discriminatory exclusion of transgender people and gender-nonconforming people from juries.

Legal scholars argue that *J.E.B.* and *Batson* must be extended to include transgender individuals, because the same heightened scrutiny that applies to race and gender discrimination applies to discrimination against transgender people.² Indeed, just last week, in a different context, a federal court in Pennsylvania applied heightened scrutiny to a school district's requirement forbidding transgender students from using the restroom facility appropriate to their gender identities. *Evancho v. Pine-Richland School District*, 2017 U.S. Dist. LEXIS 26767 (W. Dist. Penn. Feb. 27, 2017).

However, transgender and gender non-conforming people should not have to wait for a court decision for protection from bias in jury selection in Washington State. There are additional compelling reasons to expressly include transgender and gender non-conforming people in this court rule – namely, that Washington State law and policy reject discrimination on the basis of gender identity. See RCW 49.60.030; RCW 49.60.040(26).

GR 36 Should Also Protect Against Sexual Orientation Discrimination

Finally, as the Ninth Circuit Court of Appeals held in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 489 (9th Cir. 2014), the Equal Protection Clause also protects people from discrimination in jury selection based on sexual orientation. The *Batson* rule governs such discriminatory preemptory strikes in the same way it protects potential jurors and litigants from race discrimination in jury selection. Given this Court's recognition of the limitations of *Batson*, it is important to extend protective court rules to cover sexual orientation discrimination. Such an extension would also comport with

¹ See, e.g., Jack Harrison-Quintana & Sharon Lettman Hicks, *Injustice at Every Turn: A Look at Black Respondents in the National Transgender Discrimination Survey*, National Black Justice Coalition et al. (2011).

² See, e.g., Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J. L. & Gender 407 (2014); Julia C. Maddera, *Batson in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 Colum. L. Rev. 195 (2016).

Washington State law and policy. See RCW 49.60.030; see also *State of Washington v. Arlene's Flowers, Inc., et al*, __ Wn.2d __ (2017).

Conclusion

As the ACLU of Washington has so eloquently expressed, *Batson* is broken, and a new court rule is urgently needed to truly eliminate bias in jury selection. Legal Voice strongly supports the proposed rule submitted by the ACLU of Washington that includes protection against race and gender discrimination; we urge the Court to adopt that rule, with the inclusion of gender identity and sexual orientation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sara Ainsworth', with a long horizontal flourish extending to the right.

Sara L. Ainsworth
Advocacy Director

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, March 08, 2017 8:13 AM
To: Tracy, Mary
Subject: FW: Comments of Legal Voice on proposed changes to GR 36
Attachments: Legal Voice Comments on GR 36 3.7.17.pdf

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From: Sara L. Ainsworth [mailto:sainsworth@LegalVoice.org]
Sent: Tuesday, March 07, 2017 5:39 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments of Legal Voice on proposed changes to GR 36

Please find attached a letter with Legal Voice's comments supporting proposed changes to GR 36.

Thank you for your consideration.

Sara L. Ainsworth

Advocacy Director

Pronouns: she/her

Legal Voice

Women's rights. Nothing less.

206-682-9552 x103

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