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**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

NICOLE BEDNARCZYK and CATHERINE SELIN, individually
and on behalf of all others similarly situated,

Appellants/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

**BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

One by one, potential jurors answered as the judge asked whether serving a three-week trial would be a hardship. One woman, a sales clerk, answered, “I’m the only one working in my household, and I can’t afford to miss that much work.” “I just paid rent and don’t have enough money this time of month to pay for gas and parking downtown for the trial,” responded another man who worked as a day laborer. On it went, with the judge’s response the same in each case, “Thank you. You may be excused.” When the jury was finally selected, 12 relatively prosperous White men and women sat ready to decide the fate of the accused.

This hypothetical, but all too real, scenario replays itself in Washington jury venires with shocking regularity, as the failure to pay jurors more than a token *per diem* effectively bars those from lower income brackets—who are disproportionately African American and other people of color—from jury service simply because they cannot endure the economic strain of serving. This reality stands in stark contrast to Washington’s obligation to minimize the burden of jury service, which necessarily entails an obligation to compensate jurors fairly.

Current juror compensation rates are so low that they cannot sustain jurors who are uncompensated by their employers during their service, or who otherwise cannot afford to serve, thwarting any efforts to

achieve racial and economic diversity in Washington jury venires, and thus, representative juries.

It is against this backdrop that the American Civil Liberties Union of Washington (“ACLU”) urges the Court to adopt Appellants’ reading of the State’s Minimum Wage Act to find coverage for jurors. From a policy perspective, minimum wage coverage is also the most effective tool for ensuring fair compensation for jurors and achieving more diverse juries in Washington.¹

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU is a statewide, nonpartisan, nonprofit organization with over 80,000 members and supporters dedicated to the constitutional principles of liberty and equality. The ACLU has long been dedicated to protecting the constitutional right to a trial by a jury selected free of racial bias. It has submitted amicus briefs in numerous cases where that right is at stake. Additionally, it has proposed a court rule to reduce racial bias in peremptory challenges in Washington, and a seat serving on the Minority and Justice Commission’s Jury Diversity Task Force.

The undersigned counsel has read the parties’ briefs and is familiar with the parties’ arguments and has not unduly repeated them.

¹ Pursuant to RAP 10.6(b), the ACLU respectfully moves for leave to file an amicus brief in this matter in a separately filed motion this same day.

III. ISSUES ADDRESSED BY AMICUS

1. Why is juror diversity significant in civil and criminal trials?
2. Does low juror compensation present a practical bar to achieving more representative, and thus, diverse juries?
3. Is jury compensation a neglected issue in Washington given that the very low rate of compensation has not changed in decades?
4. Does case law support compensating jurors as employees for the time they spend doing work for the government?

IV. ARGUMENT

A. Juror Diversity Serves Significant Public Interests.

Juries should be drawn from a cross-section of the community, not just one segment. *In re Yates*, 177 Wn.2d 1, 19, 296 P.3d 872 (2013) (“[A] criminal defendant has a right to “a jury drawn from a fair cross section of the community.”) (*quoting Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)); *see* 28 U.S.C. § 1861 (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”). The Supreme Court, in extolling the virtues of the fair cross-section requirement, has stated:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found **in every stratum of society**. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard [sic] it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Thiel v. S. Pac. Co., 328 U.S. 217, 220, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (emphasis added).

The quest for representative juries reflects not only the generally accepted view that the jury is a democratic institution, but that “representativeness (1) improves the quality of jury decision-making; (2) enhances the jury’s political legitimacy as a democratically inclusive institution; and (3) serves to educate jurors from the various represented groups about the nature and importance of civic participation.” Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 Vand. L. Rev. 353, 361 (1999) (footnotes omitted).

First, with respect to the quality of jury-decision making, the jury's fact-finding function may be enhanced by a diverse composition in several ways. To start, representation of different groups serves to minimize the effect of any individual bias by balancing the biases of some jurors against those of others. *Id.* at 361-62 (footnote omitted). Indeed, “[y]ears of empirical studies of mock and actual juries show that racially mixed panels minimize the distorting risk of bias.” Tanya E. Coke, *Lady Justice May Be Blind, But Is She A Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U.L. Rev. 327, 351 (1994). It follows, then, that the deliberations of a broadly representative jury can be marked by a “diffused impartiality.” Forde-Mazrui, *supra*, at 362 (footnote omitted). Moreover, studies have shown that diverse groups are typically more thorough and competent than homogenous ones in that diverse juries spend more time deliberating, discussing a wider range of case facts and personal perspectives, and making fewer factual errors. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, *Journal of Personality and Social Psychology*, Vol. 90, No. 4, 597-612 (2006), at 608; see Shamena Anwar, *et al.*, *The Impact of Jury Race in Criminal Trials*, *Quarterly Journal of Economics*, 127, 2, 1017-1055 (2011), available at [http://www.courts.wa.gov/subsite/mjc/docs/2017/The%](http://www.courts.wa.gov/subsite/mjc/docs/2017/The%20Impact%20of%20Jury%20Race%20in%20Criminal%20Trials.pdf)

[20Impact%20of%20Jury%20Race%20in%20Criminal%20Trials.pdf](#) (last visited Mar. 7, 2018).

Next, diverse juries are more likely to carry political legitimacy in the eyes of both litigants and the public. Forde-Mazrui, *supra*, at 363 (footnote omitted). “Even if there is no difference between verdicts from representative and non-representative juries, verdicts from the former may have greater legitimacy.” *Id.* (footnote omitted). “The need for legitimacy is at its greatest in a highly charged, potentially racially-polarizing case. The all-White [sic] jury that acquits White police officers who commit violence on an African American (Rodney King, for example), is the archetypal case of this type.” Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 Mich. J. Race & L. 5, 37-38 (2004). For the jury to carry out its role in meting out the public’s justice with meaningful legitimacy, it must speak for all segments of society. And when the jury fails to represent certain groups—whether it be African Americans or low-income persons—members of those groups may justifiably doubt whether the “system” represents their interests, respects their judgments, or welcomes their participation.

Along these same lines, representativeness enhances the educational function of jury service by providing an opportunity for

citizens to participate in and exercise the power of self-government. Forde-Mazrui, *supra*, at 364 (footnote omitted). The inclusion of people from diverse backgrounds within a community provides the chance for every group to participate in administering justice. *Id.* As one commentator put it, “Through deliberation with jurors from different groups or classes, jurors on representative panels learn to work together toward the shared goal of determining guilt or innocence in accordance with law and the community’s sense of justice.” *Id.* at 364.

At bottom, diverse juries are a testament to the idea that impartiality is *not* limited to a single juror “type” or “ideal,” but rather it is achieved through cross-pollinating a range of views and experiences. In this way, the issue of jury diversity is less about whether Whites, Blacks, or people earning a low income have a greater or lesser capacity for impartial decision-making, but whether the optimum conditions for that deliberative process exist. As it turns out, the more representative a jury is, the more the verdict can be trusted by the parties and the public at large as accurate, consistent with community values, and legitimate.

B. Juror Diversity is Lacking in Washington Jury Venires.

It is no secret that racial and ethnic minorities, as well as the poor, are consistently underrepresented in most state court jury pools and venires. *See* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial*

Disenfranchisement in the Jury and Jury Selection System, 13 Nat'l Black L.J. 238, 263-66 (1994) (noting underrepresentation of the poor, the less educated, daily wage earners, and minorities, particularly Black and Hispanic women in jury service). Washington is not somehow inoculated from this phenomenon. A recent study by Washington's Administrative Office of the Courts and professors at Seattle University found that underrepresentation of people of color and the poor was prevalent in this state. Hon. Steve Rosen, *et al.*, *Juror Data Issues Affecting Diversity and Washington Jury Demographic Survey Results*, available at <https://www.courts.wa.gov/subsite/mjc/docs/2017/Juror%20Data%20Issues%20Affecting%20Diversity%20and%20WA%20Jury%20Demographic%20Survey%20Result%20-%20Judge%20Rosen%20and%20SU.pdf> (last visited Mar. 7, 2018). The survey was designed to capture juror demographic data, and largely mirrored the U.S. Census questions about race and ethnicity. Over the course of a year beginning in February 2016, the survey was given to potential jurors statewide across “a diverse group of courts: rural, urban, suburban, college town, agricultural, geographically spread out, etc.” In all, 64,753 useable surveys were collected for an average response rate of 83.74 percent across the various courts. *Id.*

Researchers concluded from the data that “[w]ith limited exception, findings suggest that racial/ethnic minority populations are underrepresented in most jurisdictions.” *Id.* For instance, Black or African Americans were represented a little more than half the expected rate in King County relative to their actual percentage within the population. *Id.* The numbers were much, much worse for other counties. *Id.*

C. The Low Rate of Juror Compensation is a Practical Bar to More Diverse Juries.

Despite the history of racial discrimination in jury service and the legal gains that have been attained to stop such practices,² the reality is that juror pay remains a practical barrier to jury service felt disproportionately by African Americans, other people of color, and low-income people in Washington. *See generally* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010) at p. 25, available at <https://eji.org/sites/default/files/illegal-racial->

² The United States has an ignoble history of discrimination in jury service and is continuing to work on removing legal barriers for racial minorities and women from serving on juries. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303, 310, 25 L.Ed. 664 (1879) (holding that racial minorities may not be excluded from jury service); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (holding that preemptory challenges may not be used to exclude jurors based on sex); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (holding that private litigant in a civil case may not use preemptory challenges to exclude jurors because of race); *Batson v. Kentucky*, 476 U.S. 79, 89-90, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (same in criminal trial).

[discrimination-in-jury-selection.pdf](#) (last visited Mar. 7, 2018). Even as the benefits of diverse juries have become nearly universally accepted, *see State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) (recognizing constitutional implications and benefits of diverse juries), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), little to nothing has been done to remove this barrier.

1. Despite its importance, juror compensation has been a neglected issue in Washington.

Jury service has been regarded as both a privilege and an honor that all citizens should have the opportunity to engage in as a bedrock function of our democracy. *Powers v. Ohio*, 499 U.S. 400, 407, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (“[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”); *Peters v. Kiff*, 407 U.S. 493, 499, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (“[T]he exclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the ‘privilege of participating equally ... in the administration of justice.’” (quoting *Strauder*, 100 U.S. at 308)).

Less discussed, however, is the fact that jury service is a binding obligation imposed by the government. RCW 2.36.093 (authorizing jury summons when “the public business requires a jury term to be held”) and

.170 (“A person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor.”). Because they cannot, in theory at least, refuse to participate when summoned, jurors sacrifice their time, potential earnings and, in some cases, already scarce financial resources during their time of service to the justice system.

For this reason, jurors have been compensated in America since the nation’s independence from British rule. The first federal jury fee was roughly equivalent to the average laborer’s *daily* wages, an amount that surely limited the financial burdens faced by less wealthy jurors called into service. Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U.J. Legis. & Pub. Pol’y 289, 385 (2002) (citing Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 217 (prescribing fifty cents jury fee for nation); *see id.* at 352 (Figure 3) (depicting federal jury compensation in relation to laborers’ daily earnings during colonial era).

Similarly, Washington has adopted a policy of minimizing the burden of jury service on prospective jurors and their families since its early days in the Union by reimbursing jurors for expenses. *See* Laws of 1893 § 2086 (“Each grand and petit juror shall be allowed for each day’s attendance on a court of record ... [\$]3[.]00.”); RCW 2.36.072(2) (“It is

the policy of this state to minimize the burden on the prospective jurors, [and] their families ... resulting from jury service.”).

Juror expense payments have hardly budged since this time, however, with many Washington counties neglecting any type of raise for decades, or in the case of King County, generations. Indeed, King County has not increased juror expense payments since 1959, when the State increased the minimum *per diem* to \$10. *Compare* Laws of 1959, ch. 73, § 1 (“Each grand and petit juror shall receive for each days attendance upon the superior or any inferior court in the state of Washington, besides mileage, ten dollars...”.) with *Jury Service – Frequently Asked Questions* available at <https://www.kingcounty.gov/courts/superior-court/juror-information/FAQ.aspx> (“Jurors currently earn \$10.00 per day of service.”) (last visited Mar. 7, 2018). Though it has never compensated jurors for the *time* they spend in service, the \$10 daily rate from 1959 was substantial at the time it was implemented and would have equaled \$85.47 in today’s dollars, adjusted for inflation. Nearly 60 years later, however, this amount lags far behind juror compensation provided in many states, *see* Evan Bush, *How Washington compares when it comes to paying jurors*, Seattle Times, Aug. 9, 2016, available at <https://www.seattletimes.com/seattle-news/how-washington-compares-when-it-comes-to-paying-jurors/> (last visited Mar. 7, 2018) (surveying national jury pay), and remains flat even

as the costs of living continue to rise. Bureau of Labor Statistics, *Consumer Price Index Seattle Area – December 2017*, available at https://www.bls.gov/regions/west/news-release/consumerpriceindex_seattle.htm (last visited Mar. 7, 2018) (reflecting consumer prices up 3.5 percent from preceding year).

2. Low juror pay disproportionately affects those facing financial hardship and African Americans and other people of color.

Because race and socioeconomic status are so intertwined, the effect on jury pools is that disproportionately fewer minorities serve as jurors. Paula Hannaford-Agor, *Systemic Negligence In Jury Operations: Why The Definitions of Systemic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 774 n.3 (Spring 2011). There is no dispute that, regrettably, the wealth and income levels of African Americans and other racial and ethnic minorities lags behind that of Whites; thus, the financial burden posed by jury service is felt heaviest by those with modest economic means and African Americans. *See* Francesca Murnan & Alice Park, *Understanding King County Racial Inequities: King County Racial Disparity Data* at 8-11 (King County United Way Nov. 2015), available at https://www.uwkc.org/wp-content/uploads/ftp/RacialDisparityDataReport_Nov2015.pdf (last visited Mar. 7, 2018). This burden is further compounded by the fact that Washington does not

require employers to cover the difference between the pay jurors receive for their service and the salary they would have received in the course of their ordinary employment. That is, employers cannot retaliate against employees on jury duty, but there is no attempt to encourage such service RCW 2.36.150(2) (“An employer shall not deprive an employee of employment or threaten, coerce, or harass an employee, or deny an employee promotional opportunities because the employee receives a summons, responds to the summons, serves as a juror, or attends court for prospective jury service.”). In any event, unemployment rates for African Americans and other racial and ethnic minorities are twice that of whites. Murnan & Park, *supra*, at 24. And that is nothing to say of jurors who are unemployed and forced to expend precious resources they otherwise would have conserved in the name of civic duty (*e.g.*, obtaining childcare).

This issue is not new, as various commissions and studies in Washington have recognized the practical barrier that low-juror compensation presents to jury service for low-income people and persons of color. For example, in 1999, a variety of legal and judicial organizations banded together to form the Washington State Jury Commission to tackle issues of underrepresentation and low summons response rates for jurors. The Commission created a detailed report with a series of recommendations aimed to “improve the jury process while

maintaining access to justice and a fair trial.” Washington State Jury Commission Report (2000) at p. iii, available at http://www.courts.wa.gov/committee/pdf/jury_commission_report.pdf (last visited Mar. 7, 2018).

The Commission concluded, among other things, that juror compensation in Washington was “unacceptable,” and recognized that the rates paid “do not remotely approach minimum wage.” *Id.* at p. 23. “The Commission view[ed] a fee increase as its highest priority, [because] [c]itizens required to perform jury service should be compensated fairly and appropriately.” *Id.* at p. x (Executive Summary); *see id.* at p. 3 (“[S]pecial efforts should be made to increase the participation in jury service by sectors of society that traditionally have not participated fully, particularly young people and minority communities.”). In the nearly 18 years that have passed since the Commission issued its report, juror pay has remained flat in King County. *See supra* p. 10.

More recently, the Equal Justice Initiative, led by widely acclaimed civil rights lawyer Bryan Stevenson, issued a report in 2010 calling on state and local justice systems to provide jurors an adequate daily wage “to increase the likelihood that low-income wage earners can serve on juries.” Equal Justice Initiative Report, *see supra*, at p. 49.

The current fee structure must be changed to address the risk of excluding a disproportionate number of African-American jurors and low-income peoples who are most affected by juror pay stagnation.³

D. Several States, including Washington, Have Found Jurors to Be Entitled to Certain Traditional Employment Benefits.

Before 1990, only Ohio considered jury duty to be a form of employment for the purposes of workers' compensation. *See, e.g., Indus. Comm'n of Ohio v. Rogers*, 171 N.E. 35 (Ohio 1930). In 1990 alone, however, the number of cases supporting this perspective grew three-fold. The supreme courts of North Dakota, *see Holmgren v. N.D. Workers Comp. Bureau*, 455 N.W.2d 200 (N.D. 1990), Idaho, *see Yount v. Boundary Cty.*, 796 P.2d 516 (Idaho 1999), and Washington, *see Bolin v. Kitsap Cty.*, 114 Wn.2d 70, 785 P.2d 805 (1990), challenged the prevailing view and began a trend with which at least one more state appellate court has aligned. *See Waggener v. Cty. of Los Angeles*, 39 Cal. App. 4th 1078, 46 Cal. Rptr. 2d 141 (Cal. Ct. App. 1995). The underlying bases for these decisions have varied.

³ As retired Washington Supreme Court Justice Gerry Alexander succinctly commented about the rate of jury compensation, "It just isn't fair." Jeff Vanderford, *Pay jurors more, state Supreme Court justice says*, The South Whidbey Record, Jan. 7, 2006 ("[Justice] Alexander thinks paying at least the minimum wage ... is reasonable."), available at https://www.courts.wa.gov/programs_orgs/pos_bja/cftf/20060111_SWhidbey.pdf (last visited Mar. 7, 2018).

In *Industrial Comm’n of Ohio v. Rogers*, the Ohio Supreme Court focused on the similarity in the source of fees provided to jurors and other types of public officials who were unquestionably employees of the state. 171 N.E. 35, 36 (Ohio 1930). In *Holmgren v. North Dakota Workers Comp. Bureau*, the North Dakota Supreme Court highlighted the fact that a juror serves the county as long as required to reach a verdict; thus, jury service resembles the continuity of an official appointment. 455 N.W.2d at 203. In *Yount v. Boundary Cnty.*, one Idaho Supreme Court Justice analyzed the importance of the duties performed by the juror as indistinguishable from that of any other full-time court employee and the liberal construction of Idaho’s workers compensation act. 796 P.2d at 527 (Towles, J., concurring) (“The tremendous responsibility thrust upon jurors as a result of such public service qualifies them as public officials in the highest order and no less important to the success of the judicial system than the judges, clerks, bailiffs, court reporters, and other full-time employees of the state or county.”). And in *Bolin*, the Washington Supreme Court held that “[j]urors are employees of the county” for purposes of workers’ compensation. 114 Wn.2d at 75-76.

Regardless of the differences in the courts’ rationale, each case provides a reason to view jury service as an official appointment deserving of the traditional benefits afforded to part-time or temporary employees.

Moreover, these cases collectively indicate that jurors play multiple roles simultaneously, girding Appellant's position that, in Washington, there is a statutory basis for finding an employment relationship. The important functions performed by jurors are akin to a wage earner putting in an honest day's work in return for a fair wage.⁴

V. CONCLUSION

The minimal amount of compensation jurors receive for their services is among the most evident hurdles to achieving truly representative juries in Washington, as a disproportionate number of African Americans, other people of color, and low-income people are simply unable to afford the cost of jury service. The fact is, as some Washingtonians have found it harder to make ends meet in the face of the rising cost of living, jury compensation has progressed at a snail's pace, remaining unchanged for decades in many counties. The state of the law supports coverage for jurors under the State's minimum wage laws, which

⁴ At least one state, New Mexico, ties juror compensation to the minimum wage and pays jurors based on their hours served rather than the days served. N.M. Stat § 38-5-15 (1996 through 1st Sess. 50th Legis.) ("Persons summoned for jury service and jurors shall be compensated for their time in attendance and service at the highest prevailing state minimum wage rate."). And for a time, Oregon followed suit. *See* Act of Sept. 1, 1999, ch. 1085, § 4, 1999 Or. Laws 1085 (basing jury fees after first two days on minimum wage, subject to ceiling of fifty dollars per day) (amended 2002).

also supports the important policy gains accompanying more diverse juries.

DATED this 16th day of March, 2018.

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