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SUPREME COURT
STATE OF WASHINGTON
5/21/2019 3:20 PM
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NO. 96990-6

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

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

Petitioners/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

**AMICI CURIAE MEMORANDUM OF
AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON, THE FRED T. KOREMATSU CENTER
FOR LAW AND EQUALITY, AND THE KING COUNTY
DEPARTMENT OF PUBLIC DEFENSE IN SUPPORT OF
PETITION FOR REVIEW**

Jamal N. Whitehead
whitehead@sgb-law.com
SCHROETER GOLDMARK &
BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Tel: (206) 622-8000

Nancy Talner
talner@aclu-wa.org
ACLU OF WASHINGTON
FOUNDATION
901 5th Avenue, Suite 360
Seattle, Washington 98164
Tel: (206) 624-2184

ACLU-WA Cooperating Attorney

Robert S. Chang, WSBA #44083
changro@seattleu.edu
Melissa R. Lee, WSBA #38808
leeme@seattleu.edu
Jessica Levin, WSBA #40837
levinje@seattleu.edu
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4025

Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW
AND EQUALITY

Anita Khandelwal, WSBA #41385
anita.khandelwal@kingcounty.gov
KING COUNTY DEPARTMENT OF PUBLIC
DEFENSE
710 Second Ave., Suite 200
Seattle, WA 98104
Tel: (206) 296-7662

Counsel for Amicus Curiae
KING COUNTY DEPARTMENT OF PUBLIC
DEFENSE

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The motion for leave to participate as amicus describes the identity and interest of amici.¹

II. ISSUES TO BE ADDRESSED BY AMICI

1. Whether juror diversity is an issue of substantial public interest warranting review under RAP 13.4(b)(4).

2. Whether low juror compensation is an issue of substantial public interest warranting review, because it is a practical bar to achieving more representative, and thus, diverse juries, and is a neglected issue in Washington, because the very low rate of compensation has not changed in decades?

III. STATEMENT OF THE CASE

Petitioners/Plaintiffs Nicole Bednarczyk and Catherine Selin were summoned for jury duty in King County. Ms. Bednarczyk did not work for an employer that compensated employees for jury service, and she requested and obtained an economic hardship excusal from the court. Ms. Selin served on a King County jury for 11 days, but like Ms. Bednarczyk, she did not receive compensation from her employer for jury service.

¹ Pursuant to RAP 10.6(b) and 13.4(h), the amici respectfully move for leave to file an amicus brief in this matter in a separately filed motion this same day.

Petitioners filed suit against King County, alleging the negligible amount paid to jurors had the effect of excluding people of low and moderate economic status from jury service at a disproportionate rate in violation of the juror exclusion law, RCW 2.36.080(3). Appellants also sought a declaratory judgment that jurors are “employees” within the meaning of the Minimum Wage Act (“MWA”), RCW 49.60 et seq., and an injunction requiring King County to pay jurors for their time if they are not already compensated by an employer.

A divided Court of Appeals affirmed the summary judgment granted to Respondent King County, in a published opinion, holding that (1) Appellants could not bring a disparate impact claim—either implied or expressed—based on economic status, (2) jurors are *not* employees under the MWA, and (3) Appellants lacked standing to seek declaratory judgment. *See Rocha v. King Cty.*, ___ Wn. App. ___, 435 P.3d 325 (2019). For the reasons stated in the dissent, the petition for review, and below, amici urge this Court to grant review.

IV. ARGUMENT

In their Petition for Review, Petitioners ably explain why the RAP 13.4 grounds for review are met and why the Court of Appeals’ ruling is erroneous. Amici write separately to further explain why this case

presents an issue of substantial public interest meriting review under RAP 13.4(b)(4).

A. Juror Diversity Serves Significant Public Interests, And The Lack of Juror Diversity in Washington Jury Venires Is a Matter of Significant Public Interest.

Whether juries are drawn from a cross-section of the community, and not just one segment, is a matter of substantial public interest. *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 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).

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 decisionmaking, but whether the optimum conditions for that deliberative process exist. Thus the issues in the case at bar are a prime example of a matter of substantial public interest that should be taken up by the Supreme Court.

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 May 3, 2019). 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.*

B. The Low Rate of Juror Compensation Is a Practical Bar to More Diverse Juries and a Matter of Substantial Public Interest.

Low 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-discrimination-in-jury-selection.pdf> (last visited May 3, 2019). Even as the benefits of diverse juries have become nearly universally accepted, little to nothing has been done to remove this barrier. *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).

1. Low juror pay disproportionately affects those facing financial hardship, 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 May 3, 2019). 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 is 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, however, 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 May 3, 2019).

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.

Likewise, 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.

More recently, the Minority and Justice Commission convened a taskforce to examine a range of policy proposals that might increase minority representation on Washington State Juries, and it recently identified “economic hardship” as a significant factor causing minority underrepresentation on juries. Minority and Justice Commission Jury Diversity Task Force 2019 Interim Report at p. 1, available at http://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20190405_p.PDF (last visited May 3, 2019). Data collected by the Task Force found that financial hardship was the second highest reason to excuse potential jurors, behind only undeliverable summonses. *Id.* at pp. 2-3. The Task Force went on to recognize that “lower income and minority populations are *disproportionately affected by the financial hardships of jury service*,” and it unanimously recommended “increase[d] juror compensation statewide.” *Id.*

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.²

² As retired Washington Supreme Court Justice Gerry Alexander succinctly commented about the rate of jury compensation, “It just isn’t

V. CONCLUSION

For the foregoing reasons, the amici respectfully request that the Court grant review, as this case presents a prime issue of substantial public interest.

DATED this 21st day of May, 2019.

SCHROETER GOLDMARK & BENDER

s/ Jamal N. Whitehead

Jamal N. Whitehead, WSBA #39818
whitehead@sgb-law.com
810 Third Avenue, Suite 500
Seattle, WA 98104
Tel: (206) 622-8000
Fax: (206) 682-2305

ACLU OF WASHINGTON FOUNDATION
Nancy Talner, WSBA #11196
talner@aclu-wa.org
901 5th Avenue, Suite 360
Seattle, Washington 98164
Tel: (206) 624-2184

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/20060111SWhidbey.pdf (last visited May 3, 2019).

Robert S. Chang, WSBA #44083
Melissa R. Lee, WSBA #38808
Jessica Levin, WSBA #40837
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4025
changro@seattleu.edu
leeme@seattleu.edu
levinje@seattleu.edu
Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW AND
EQUALITY

Anita Khandelwal, WSBA #41385
KING COUNTY DEPARTMENT OF PUBLIC
DEFENSE
710 Second Ave., Suite 200
Seattle, WA 98104
Tel: (206) 296-7662
anita.khandelwal@kingcounty.gov
Counsel for Amicus Curiae
KING COUNTY DEPARTMENT OF PUBLIC
DEFENSE

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on May 21, 2019, I caused to be delivered via email a true and correct copy of this document together with any supporting pleadings and attachments thereto, addressed to the following counsel of record:

Toby Marshall
Terrell Marshall Law Group PLLC
936 North 34th Street, Suite 300
Seattle, WA 98103

Jeffrey Needle
Law Office of Jeffrey L. Needle
119 First Avenue South, Suite 200
Seattle, WA 98104

Attorneys for Petitioners

Co-Counsel for Petitioners

Karen Pool Norby
Janine Joly
Heidi Jacobsen-Watts
King Co.
Prosecuting Attorney's Office
500 Fourth Avenue, Suite 900
Seattle, WA 98104

Attorneys for Respondent

DATED at Seattle, Washington this 21st day of May, 2019.

s/ Sheila Cronan

SHEILA CRONAN, Paralegal
SCHROETER GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104

SCHROETER GOLDMARK BENDER

May 21, 2019 - 3:20 PM

Transmittal Information

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Appellate Court Case Title: Nicole Bednarczyk, et al. v. King County
Superior Court Case Number: 16-2-10105-0

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- jpitre-williams@frankfreed.com
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- whitehead@sgb-law.com

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Sender Name: Sheila Cronan - Email: cronan@sgb-law.com

Filing on Behalf of: Jamal N. Whitehead - Email: whitehead@sgb-law.com (Alternate Email:)

Address:
810 Third Ave.
Suite 500
Seattle, WA, 98104
Phone: (206) 622-8000

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