No. 87009-8

SUPREME COURT
OF THE STATE OF WASHINGTON

ABEDA JAFAR,

Petitioner,

v.

WILLIAM DOUGLASS WEBB,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan and nonprofit organization with more than 20,000 members that is dedicated to preserving and defending civil liberties, including access to justice and due process rights. The ACLU also submitted a comment letter to the Supreme Court supporting passage of General Rule 34 ("GR 34") because the ACLU believed that passage of the rule was essential to preserving access to justice.

II. INTRODUCTION

Consistent with Washington's proud history of protecting the rights of indigent litigants to access the State's court system, this Court adopted GR 34 in 2010. GR 34 provides a uniform standard for determining whether an individual is indigent, and authorizes a waiver of all court fees and surcharges for individuals who meet this standard. As discussed in more detail below, GR 34 is an important safeguard to preserve indigent litigants' access to justice in Washington.

The trial court's denial of a full fee waiver in this case is inconsistent with the purposes behind GR 34, and has potentially serious repercussions for court access. In particular, requiring individuals who are indigent to pay court fees and surcharges has potentially devastating consequences for victims of domestic violence, who have an exceptionally

acute need for court access. Further, because racial and ethnic minorities are over-represented in poverty, failing to waive court fees and surcharges will have a disproportionate impact upon these minorities' access to justice. For these reasons, the ACLU respectfully requests that the Court vacate the trial court's order and remand with instructions to issue a full fee waiver.

III. ARGUMENT

A. The Trial Court's Refusal to Grant a Full Fee Waiver Under GR 34 Violates Indigent Litigants' Right to Court Access Involving Essential Legal Proceedings Such as Parenting Plan Petitions.

Washington courts have a longstanding history of protecting indigent litigants' right of access to courts. *See O'Connor v. Matzdorff*, 76 Wn.2d 589, 605, 458 P.2d 154 (1969) ("The proper and impartial administration of justice requires that these doors be kept open to the poor as well as to those who can afford to pay the statutory fees."); *Iverson v. Marine Bancorporation*, 83 Wn.2d 163, 167, 517 P.2d 197 (1973) ("[F]inancial inability to pay the costs of pursuing a legal remedy will not operate to bar one from this state's system of justice."); *Bullock v. Roberts*, 84 Wn.2d 101, 105, 524 P.2d 385 (1974) ("It is within the inherent power of a court exercising common law jurisdiction, which the superior court does, to make such orders as are necessary to protect the rights of the poor to access to the judicial system."). Indeed, Washington

courts have repeatedly recognized that "'[f]ull access to the courts ... is a fundamental right'" guaranteed by Article I, Section 10 of the Washington Constitution. *In re Marriage of King*, 162 Wn.2d 378, 390, 174 P.3d 659 (2007) (alteration in original) (quoting *Bullock v. Superior Court for King Cnty.*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974)). *See also In re Det. of Mitchell*, 160 Wn. App. 669, 675 n.6, 249 P.3d 662, 664 (2011).

GR 34 was passed based on the Supreme Court's recognition that conditioning access to the State's judicial system upon the payment of court fees and other surcharges creates potentially insurmountable barriers to court access. The Court enacted GR 34 to eliminate this barrier and to ensure that indigent litigants' right to access the State's judicial system would continue to be protected. The Court also made clear that the courts of this State have a *duty* to ensure and protect the right of access to justice: "Each court is responsible for the proper and impartial administration of justice which includes ensuring that meaningful access to judicial review is available to the poor as well as to those who can afford to pay." GR 34, Comment (a). To that end, GR 34 permits indigent litigants to obtain a complete fee waiver after a Court determines that an individual is indigent, as defined in GR 34(a)(3). Moreover, GR 34(b) protects an indigent litigant's right to obtain judicial relief in an expeditious manner by

permitting the original petition to be presented at the same time as the initial fee waiver request. GR 34(b).

The relief afforded by GR 34 is essential to protect the rights of indigent litigants in Washington to access justice through the State's court system. Indeed, GR 34 was lauded by the Conference of State Court Administrators in a recent policy paper, "Courts Are Not Revenue Centers." In the paper, the administrators adopted several principles to serve as "guideposts" to frame the discussion about "competing interests and forces that result in the establishment of various revenue vehicles within the court system." Conference of State Court Administrators, 2011-2012 Policy Paper Courts Are Not Revenue Centers at 7, http://cosca.ncsc.dni.us/WhitePapers/CourtsAreNotRevenueCenters-Final.pdf. One such principle was that "[f]ees and miscellaneous charges cannot preclude access to the courts and should be waived for indigent litigants." *Id.* at 8. The administrators specifically cite to GR 34 as one example of a measure to ensure that fees and miscellaneous costs do not serve as a bar to judicial relief. *Id.*

Interpreting GR 34 to allow only a partial fee waiver for a clearly indigent litigant, as the trial court did here, effectively undermines the entire purpose and intent of GR 34. The question of whether GR 34 permits partial fee waivers when litigants can afford to pay a reduced fee

simply is not before the Court. In Ms. Jafar's case, the trial court correctly found that Ms. Jafar was indigent and therefore lacked *any* ability to pay a fee. The trial court nevertheless required her to pay a fee as a condition of accessing the court to obtain a parenting plan.

GR 34 sets forth specific standards for indigency; a court's determination that an individual meets those standards is a finding that the individual cannot afford to pay the filing fees and surcharges necessary to seek judicial relief. Requiring the litigant to pay a smaller amount of fees or to pay fees at a later date simply is not consistent with the access to justice problem that spurred the adoption of GR 34. Given the Court's own findings regarding Ms. Jafar's income and expenses, there is no basis to believe that Ms. Jafar would be more able to cover the court costs after 90 days than she was when she originally sought court access. Yet, under the trial court's order, Ms. Jafar's request for judicial relief in the form of a parenting plan is subject to dismissal if she fails to pay the costs and fees that the court declined to waive. Ms. Jafar will thus be deprived of court access just as if the court had refused to waive any of the required court fees.

Refusing to issue a complete waiver in this case is particularly egregious given the judicial relief sought by Ms. Jafar—a parenting plan. By law, the state has created a specific forum for resolving child custody

matters: filing exactly the kind of petition Ms. Jafar filed in Superior Court. This legal remedy is not available without accessing the court. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 383, 91 S. Ct. 780 (1971) ("The requirement that these [individuals seeking a marital dissolution] resort to the judicial process is entirely a state-created matter."). However, instead of recognizing the fundamental importance of this right, as GR 34 requires, the trial court essentially ruled that the court's interest in revenue trumps Ms. Jafar's right to access the court. It is the imposition of a partial fee obligation in this situation, *regardless* of indigency, that violates GR 34.

It cannot be disputed that courts throughout the United States are facing a budget crisis. Courts have been required to reduce their hours of service, eliminate special court programs, lay off and/or furlough court staff, and eliminate travel budgets. *See* Amanda Terkel, *Liberty and Justice for Some: State Budget Cuts Imperil Americans' Access to Courts*, Huffington Post, Aug. 2, 2011, www.huffingtonpost.com/2011/08/02/state-budget-cuts-access-courts_n_898190.html.; Editorial, *State Courts at the Tipping Point*, N.Y. Times, Nov. 24, 2009, www.nytimes.com/2009/11/25/opinion/25weds1.html. Courts in Washington have implemented creative and innovative solutions to address budget cuts, including implementing policies to share resources

such as interpreters, and transitioning to electronic filing systems. *See* Chief Justice Barbara Madsen, State of the Judiciary Address Jan. 23, 2013. These financial difficulties were the main focus of the comments submitted in opposition to GR 34. *See, e.g*, Comments from Jefferson County Clerk Ruth Gordon; Comments from the Washington Association of County Officials, Washington State Association of Counties, and Washington Association of Prosecuting Attorneys.

But harming indigent litigants' access to the courts is simply not a constitutionally valid solution to solving these financial difficulties. *See Boddie*, 401 U.S. at 380-81 (refusing to waive appellants' filing fees in marital dissolution is "the equivalent of denying them an opportunity to be heard ... and ... a denial of due process.") The Supreme Court rejected similar arguments in *Boddie*, noting that considerations of court resources are not sufficient to override "the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages." *Id.* at 381.

This is particularly true when the budget crisis facing the courts mirrors the crises faced by many Washington families. In November 2012, Washington's unemployment rate fell below eight percent for the first time since January 2009. *Washington's State Unemployment Rate Falls to 7.8 Percent*, Union Bulletin, Dec. 20, 2012, http://union-

bulletin.com/news/2012/dec/20/washington-states-unemployment-rate-falls-to-78/. An estimated 121,273 Washingtonians have run out of unemployment benefits since extended benefits were activated in July 2008. *Id.* Unemployment and other economic hardships create additional stress for Washington families, and can lead to other problems, such as marital dissolution and domestic violence, that may necessitate access to Washington's courts.

In a survey conducted of domestic violence programs in Washington on September 15, 2011, one respondent reported that the numbers of victims sheltered, served, and relocated in the first nine months of 2011 was 114% higher than in the same time period in 2010—but noted that 2010 had been one of the busiest years ever. National Network to End Domestic Violence, *Domestic Violence Counts: 2011 Washington Summary*, http://nnedv.org/docs/Census/DVCounts2011/DVCounts11_StateSummary_WA.pdf. The budget crisis faced by the courts thus comes at a time when indigent families have increased need to access court remedies like parenting plans, and can least afford even partial court fee debts.

An additional harmful impact of approving the trial court's erroneous interpretation of GR 34 is that the burden of reduced access to justice will fall heavily upon racial and ethnic minorities, who make up the

majority of individuals living in poverty in Washington. According to the Kaiser Family Foundation, the percentage of individuals living in poverty in Washington in 2010-2011 was 41% African American, 29% Hispanic, and 12% White. *See* http://www.statehealthfacts.org/profileind.jsp?rgn=49&ind=14 (22% of people living in poverty identified themselves as belonging to "other" when asked about race and ethnicity). The percentage of Washingtonians living in poverty who are African American is even higher than the national average—41% in Washington, compared to 35% nationwide. *Id.* *See also* http://www.statehealthfacts.org/comparebar.jsp?ind=14&yr=274&typ=2&rgnhl=49. GR 34 thus serves a particularly important purpose in fostering court access for racial and ethnic minorities, who may otherwise be unable to seek justice in Washington's court system.

For these reasons, the trial court's ruling—which significantly weakened, if not rendered meaningless, the protections of GR 34—has potentially devastating consequences for the rights of indigent litigants to court access. Consistent with Washington's distinguished history of protecting such court access, the trial court's order must be reversed, and Ms. Jafar must be afforded a full fee waiver.

B. The Trial Court's Interpretation of GR 34 Has Potentially Dangerous Consequences for Victims of Domestic Violence, and Is Inconsistent With Washington's Public Policy to Protect Such Victims.

The trial court's refusal to grant a complete fee waiver in this case is not only inconsistent with GR 34 and Washington's history of protecting indigent litigant's rights to court access, but it is inconsistent with Washington's public policy of preventing domestic violence and protecting its victims.

The legislative, judicial, and executive branches of Washington's government have repeatedly recognized a clear public policy of preventing domestic violence by encouraging domestic violence victims to escape violent situations, and protecting domestic violence victims and their children. *See, e.g., Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 221, 193 P.3d 128 (2008); RCW 70.123.010. In Chapter RCW 10.99, the Legislature passed a comprehensive set of reforms designed to improve the criminal justice system's response to domestic violence. *See* RCW Ch. 10.99. These statutes, and others, reflect the understanding that victims of domestic violence face significant barriers to taking steps necessary to remove themselves from the violence and to protect themselves and their families. The Legislature has tried to minimize these barriers by, for example, enacting legislation in RCW Ch. 26.50 that

provides "simple direct process for victims of domestic violence to access the court and obtain the court's protection." *Gourley v. Gourley*, 158 Wn.2d 460, 473, 145 P.3d 1185 (2006) (Quinn-Brintnall, J., concurring).

Requiring victims of domestic violence to pay court fees and surcharges in order to obtain a parenting plan, after a court finds them to be indigent under GR 34, is directly contrary to the Legislature's intention to *minimize* barriers to court access for these individuals. Along with abuse and intimidation by their abusers, financial constraints are among the most serious of the barriers faced by victims of domestic violence; refusing to waive court fees and surcharges thus prevents such victims from accessing the court system that was designed by the Legislature to protect them and their children. Significantly, domestic violence victims often have *no choice* but to utilize the civil courts in order to secure their own safety and the safety of their children. Victims who wish to divorce an abusive spouse must go to court. In the absence of a protective order establishing residential provisions, victims who have a child in common with their abusers require a parenting plan to establish custody and visitation schedules. Just as in cases involving parents who are divorcing, Washington State law requires that unmarried parents "comply with complicated legal procedures in a Washington State court of law" to

resolve disputes over their child's care and placement. *King*, 162 Wn.2d at 403 (Madsen, J., dissenting).

Requiring victims such as Ms. Jafar to pay fees in order to seek judicial assistance for a parenting plan will ultimately discourage women in her situation from taking the steps necessary to protect their children. The Washington State Parenting Act permits a court to restrict a parent's contact or involvement with his or her children if necessary to protect the child. RCW 26.09.191. Requiring the payment of fees and costs effectively deprives victims of domestic violence of the opportunity to take advantage of this legislatively-approved mechanism for protecting their children.

Not only is the trial court's refusal to issue a complete fee waiver in accordance with GR 34 inconsistent with Washington's public policy, but it has potentially dangerous consequences for domestic violence victims and their children.

IV. CONCLUSION

While preserving court resources is an important goal, that goal should not be achieved at the expense of conditioning court access on payment of fees by indigent litigants who have no choice but to use the court to obtain legal protection for their and their children's rights. For the reasons stated herein and in the petitioner's briefs, the ACLU requests that

the Court vacate the Superior Court's order and remand this case with instructions to waive all mandatory fees and surcharges in accordance with GR 34.

RESPECTFULLY SUBMITTED this 8th day of February, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served a true and correct copy of the foregoing document upon on the following in the manner indicated below:

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DATED this 8th day of February, 2013.

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