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SUPREME COURT OF THE STATE OF WASHINGTON

DANIEL MADISON, BEVERLY DUBOIS and DANNIELLE
GARNER,

Respondents/Plaintiffs,

v.

STATE OF WASHINGTON; CHRISTINE O. GREGOIRE,
Governor;
and SAM REED, Secretary of State, in their official capacities,

Appellants/Defendants.

BRIEF OF RESPONDENTS/CROSS APPELLANTS DANIEL
MADISON, BEVERLY DUBOIS AND DANNIELLE GARNER

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I. ASSIGNMENT OF ERROR

The King County Superior Court declared that:

Washington's law governing disenfranchisement of felons following a felony conviction is invalid as to all felons who have satisfied the terms of their sentences except for paying legal financial obligations, and who, due to their financial status, are unable to pay their legal financial obligations immediately.

CP 433 (Order Granting Plaintiffs' Motion for Summary Judgment). The court's declaration is generally correct, but the court erred by limiting the scope of its declaratory relief to those "who, due to their financial status, are unable to pay their legal financial obligations immediately." *Id.* All felons who have satisfied the terms of their sentences except for the full payment of legal financial obligations should be entitled to vote.

II. ISSUES PRESENTED

1. Regarding the State's Appeal: Was the trial court correct in concluding that Washington's felon vote restoration scheme violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Privileges and Immunities Clause of the Washington Constitution when it makes restoration of the vote contingent on the payment of legal financial obligations?

2. Regarding Plaintiff's Cross-Appeal: In light of the rule announced by the United States Supreme Court in *Harper v. Virginia State*

Board of Elections, 383 U.S. 663, 668 (1966), that a state acts unconstitutionally “whenever it makes...payment of any fee an electoral standard,” did the trial court err by making restoration of voting rights turn on whether particular felons are financially unable to pay their legal financial obligations immediately?

III. STATEMENT OF CASE

Plaintiffs Daniel Madison, Beverly DuBois, and Dannielle Garner are ex-felons who have completed all terms of their sentences, with the exception of the full payment of legal financial obligations (“LFOs”). Each is making monthly LFO payments as set by their sentencing court, but because they are indigent they are unable to pay the full amount due. Indeed, because of the 12% interest charged and administrative fees associated with their LFOs, some Plaintiffs LFOs have increased during the time that they have been making monthly payments. Because Washington’s statutory scheme requires persons convicted of a felony to pay their LFO balance in full before having their right to vote restored, RCW 9.94A.637, Plaintiffs have been unable to vote in any elections since the date of their convictions--and they might never be allowed to vote again.

On cross-motions for summary judgment, the King County Superior Court concluded that the State’s felon vote restoration procedure,

“which denies the right to vote to one group of felons, while granting that right to another, where the sole distinction between the two groups is the ability to pay money,” violated the Equal Protection Clause of the Fourteenth Amendment. CP 421-22 (Memorandum Decision). The court arrived at its decision after noting substantial United States Supreme Court precedent to support the notion that “in the area of voting rights, the lack of a rational relationship between wealth and one’s ability to intelligently participate in the electoral process is well established.” CP 421. The court also concluded that the State’s proffered interests did not have a rational relationship to the classification challenged by Plaintiffs. *Id.*

A. Plaintiffs’ Background Facts

1. Plaintiff Daniel Madison.

Plaintiff Daniel Madison was convicted of third degree assault in King County, Washington in August 1996. CP 21. Mr. Madison’s original sentence included an order to pay LFOs totaling \$583.25, including \$483.25 for restitution and \$100 for a victim assessment fee, though State records show an additional \$100 victim assessment fee¹ and \$100 court cost added, thus increasing his total LFOs to \$783.25. CP 22,

¹ The authority for charging an additional \$100 victim assessment fee (over and above the original \$100 victim assessment fee) is unclear. At the time of Mr. Madison’s conviction, RCW 7.68.035 authorized a victim assessment fee of only \$100.

295. Despite a court order specifically setting his monthly payment obligations at \$15, Mr. Madison continued to receive monthly statements incorrectly identifying his monthly obligation as being \$25 or \$50. CP 23. After contacting the King County Clerk's Office to address the error, he was told that the court's order did not affect his minimum monthly payment obligations. *Id.*

Mr. Madison, who is indigent and has no regular monthly income other than his social security payments, has now completed all nonfinancial terms of his sentence, and is currently making monthly \$15 payments toward his LFOs. CP 22-24. Mr. Madison normally makes his monthly payments in person at the Clerk's Office with cash, because the Clerk's Office will not accept payment by credit card or personal check. CP 24.

Before his convictions, Mr. Madison voted regularly. He is interested in regaining his right to vote so that he can have some say in how his state and country are run. *Id.*

2. Plaintiff Beverly DuBois.

Plaintiff Beverly DuBois was convicted of manufacture and delivery of marijuana in Stevens County, Washington in 2002. CP 101. Ms. DuBois' sentence included an order to pay LFOs totaling \$1,610, including a \$500 victim assessment fee, \$110 in court costs, and \$1,000 to

the Stevens County Drug Enforcement Fund. CP 101, 106-18.

Ms. DuBois has completed all nonfinancial terms of her sentence (including serving time in the county jail), and, since her conviction, has made monthly \$10 payments toward her LFOs. CP 102.

Ms. DuBois is unable to work due to a permanent disability resulting from injuries sustained in a car accident in 2001. *Id.* Nonetheless, she has continued to make regular monthly payments of \$10 since her release from DOC custody, despite the fact that she has no regular monthly income other than social security payments, state disability payments, and food stamps. *Id.* Ms. DuBois currently makes her monthly payments by obtaining money orders (usually from a local grocery store at a cost of \$.50 to \$1.50 per order) and mailing them to the Stevens County Clerk's Office. *Id.*

To date, Ms. DuBois, who is indigent, has paid at least \$190 toward her LFOs, but with accrued interest Ms. DuBois still owes approximately \$1,895.69. CP 102, 120. Although Ms. DuBois' monthly payments of \$10 comply with the payment plan set by the sentencing court, her payments are insufficient to cover the interest that accrues on her LFOs. CP 103. Despite the fact that she has been making regular monthly payments since the date of her conviction, her total LFOs have

increased. *Id.* She thus faces permanent disenfranchisement by virtue of her inability to satisfy her LFOs.

3. Plaintiff Danielle Garner.

Plaintiff Danielle Garner was convicted of forgery in Skagit County, Washington in 2003. CP 69. Ms. Garner's sentence included an order to pay LFOs totaling \$610, including a \$500 victim assessment fee and \$110 in court fees. CP 74-82. Ms. Garner is permanently disabled as a result of mental illness and has no monthly income other than social security payments. CP 70. Despite the fact that Ms. Garner is indigent, she has continued to make monthly payments toward her LFOs since her release from DOC supervision. *Id.* She has now completed all nonfinancial terms of her sentence, and is making monthly \$10 payments toward her LFOs. *Id.* To date, Ms. Garner has paid at least \$250 toward her LFOs, but still owes at least \$360. CP 70-71. Ms. Garner would like to regain her right to vote so that she can become "a true American." CP 71.

B. Washington's Disenfranchisement And Vote Restoration Scheme.

1. Disenfranchisement In Washington

The number of ex-felons who are currently disenfranchised due to their failure to pay LFOs is unknown. The State was unable to identify the

current number of felons in Washington with outstanding LFOs, and was unable to provide any information regarding the percentage of felons who complete payment of their LFOs while in custody or under the supervision of the DOC. CP 182-84 (Responses to Interrogatory Nos. 5 and 6). However, in 2001, the DOC estimated that 46,500 ex-felons were disenfranchised solely by virtue of their failure to pay outstanding LFOs. CP 224 (Department of Corrections, Agency Fiscal Note for Senate Bill 6519 (2002)).² The system for removing convicted felons from voting rolls is very efficient. County auditors must cancel a voter's registration upon receiving notice of a state or federal felony conviction, RCW 29A.08.520, and must retain records of the cancellation, RCW 29A.08.540. Recent statutory amendments require the secretary of state to create a statewide voter registration database, but each quarter it must be purged of any persons with disqualifying convictions whose rights have not been restored. RCW 29A.08.520(1). As seen below, there is no comparable efficiency in the state's system for restoration of voting rights.

² 90% of offenders appearing before a sentencing court for failure to pay LFO obligations qualify for a public defender. See Jill E. Simmons, *Beggars Can't Be Voters*, 78 Wash. L. Rev. 297, 306 (2003).

2. Washington's Vote Restoration Statute

For Plaintiffs and other ex-felons whose convictions are governed by the Sentencing Reform Act ("SRA") of 1981, restoration of voting rights is governed by RCW 9.94A.637.³ This section provides that "[w]hen an offender has completed all requirements of the sentence, including any and all legal financial obligations," the sentencing court will issue a certificate of discharge, which "shall have the effect of restoring all civil rights lost by operation of law upon conviction."

RCW 9.94A.637(1)(a), (4).

Despite this simple-sounding statute, in reality the process of restoring the right to vote is extraordinarily complicated and burdensome. As a practical matter, the requirement of the full payment of LFOs operates as a permanent disenfranchisement for the vast majority of ex-felons in Washington. Two factors contribute to this problem: the steady increase in LFOs associated with felony convictions, and the administrative hurdles faced by ex-felons attempting to satisfy their LFOs and obtain certificates of discharge.

³ Persons convicted of a felony before the implementation of the SRA can have their civil rights restored only by the governor upon recommendation by the indeterminate sentencing review board. RCW 9.95.260. Persons convicted of a federal felony or a felony outside of Washington can have their right to vote (but not their other civil rights) restored by the clemency and pardons board. RCW 9.94A.885(2).

3. LFOs Assessed Against Felons.

Over the past 20 years, the State has gradually been adding to the list of costs assessed against felons as LFOs. RCW 9.94A.030(28) specifically references restitution to the victim, statutory crime victims' compensation fees, court costs, county or interlocal drug funds, court-appointed attorneys' fees, costs of defense, expenses relating to emergency response, and various fines. Other potential LFOs include the costs of incarceration, community supervision, and putting one's DNA into the state database. *See* RCW 9.94A.760(2); RCW 9.94A.780; RCW 43.43.7541. Beyond this ever-growing number of LFOs, the size of LFOs has also increased. For example, the required payment into the victim compensation fund has risen from \$25 in 1977 to \$500 today. RCW 7.68.035. Not surprisingly, the costs of incarceration and community supervision have increased as well.⁴ RCW 9.94A.760(2).

Interest accrues on unpaid LFOs at an annual rate of 12%.

RCW 10.82.090(1); RCW 4.56.110(3); RCW 19.52.020(1). At this rate,

⁴ In addition to the LFOs assessed by the court as part of a felon's judgment and sentence, county clerks impose charges and fees on outstanding LFO balances. For example, King County is authorized to assess \$100 per year, per court case, for the collection of outstanding LFOs. CP 231-35 (KCC 4.71.160). Thurston County's Fee Schedule allows a similar \$100 fee on LFO statements, as well as a \$50 collection fee. CP 236-47. (Thurston County Fee Schedule). King County charges a \$10 fee for any payments of over \$25. CP 249-53. (King County Fee Schedule). Additional fees may also be imposed if the LFO payments are made electronically. CP 259-60 (KCC 4.100.020); *see also* RCW 9.94A.760(8).

even ex-felons with relatively small LFOs often have difficulty covering the accrued interest, and are unable to reduce the amount of the principal LFO due. As mentioned above, Ms. DuBois currently faces this situation. CP 103. Sentencing courts have little discretion to waive or reduce interest. *See State v. Claypool*, 111 Wn. App. 473, 45 P.3d 609 (2002) (holding that RCW 10.82.090(1) prohibits waivers of interest); RCW 10.82.090(2) (post-*Claypool*, interest can be waived only in narrow situations after burdensome procedures).

4. Obtaining Certificates of Discharge.

An offender who has completed all terms of his or her sentence, including payment of all LFOs, is eligible for a certificate of discharge that has the effect of restoring civil rights. RCW 9.94A.637(1)(a), (4).⁵ Only a small percentage of ex-felons actually receive a certificate of discharge. The State reports that only 970 certificates of discharge were recorded for all of 2004, despite the fact that more than 32,000 felons were

⁵ The sentencing court has the responsibility for entering certificates of discharge into the criminal court record, RCW 9.94A.637(1)(b), but in practice, the statutorily-required notifications often fall through the cracks. For an ex-felon who wishes to pursue the matter, the process of obtaining verification from all of the relevant state agencies and then noting an appropriate motion for a court hearing is extremely burdensome. *See generally*, ACLU of Washington, "How Ex-Felons Can Restore Their Right to Vote in Washington" (December 2005), available online at <http://www.aclu-wa.org/detail.cfm?id=394>; Amicus Brief of ACLU of Washington in *Borders v. King County*, No. 05-2-00027-3 (April 20, 2005), available online at http://www.aclu-wa.org/library_files/2005-04-20-ChelanVRAmicus.pdf.

released or transferred from DOC supervision or jurisdiction during that year. CP 179-80 (Response to Interrogatory No. 2).⁶ Indeed, for each year between 1985 and 2004, the number of recorded certificates of discharge is a very small fraction of the number of felons released or transferred from DOC supervision or custody. *Id.* These statistics demonstrate that a significant majority of ex-felons are disenfranchised solely because they have not yet paid their LFO balance.

The litigation surrounding the governor's race in 2004 brought to light many of the problems inherent in Washington's re-enfranchisement scheme, highlighting the difficulties faced by Washington election officials in determining whether an ex-felon who has been released from custody is eligible to vote. As noted by Defendant Secretary of State Reed, "We clearly have a problem in the state of Washington as to identify who can vote and who can't vote." CP 286-88 (Rachel LaCorte, *Groups fighting for Washington ex-felons to get voting rights restored*, The Associated Press, June 27, 2005). This concern was echoed by various

⁶ The data for re-enfranchisement of persons convicted of out-of-state or federal felonies are even more startling: since 1989, only 80 persons convicted of federal offenses or out-of-state felonies have had their civil rights restored by the Clemency and Pardons Board. CP 182 (Response to Interrogatory No. 4). The number of pardons or clemencies granted since 1984 totals only 93. CP 181-82 (Response to Interrogatory No. 3).

county auditors and election officials. CP 290-93 (*Felon-voting laws confusing, ignored*, Seattle Times, May 22, 2005).

IV. ARGUMENT

A. **The Trial Court Correctly Found That The State's Wealth-Based Classification Has No Rational Relationship To The State's Claimed Interests.**

1. **It Is Never Rational For The State To Use Wealth As A Voter Qualification.**

The trial court correctly concluded that “[i]n the area of voting rights, the lack of a rational relationship between wealth and one’s ability to intelligently participate in the electoral process is well established.” CP 421. Put simply, “[v]oting cannot hinge on ability to pay.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 124, n.14 (1996). Because the sole interest of the State, when it comes to voting, “is limited to the power to fix qualifications,” *Harper*, 383 U.S. at 668, Washington’s wealth-based classification cannot withstand any level of scrutiny under the Equal Protection Clause, regardless of the interests the State claims are advanced by such a classification.

The United States Supreme Court has made it clear that “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.” *Harper*, 383 U.S. at 668. In *Harper*, the Supreme Court found Virginia’s \$1.50 poll tax to be a violation of the Equal Protection Clause of the Fourteenth

Amendment. Because “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process,” the Court held that “a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever it makes the affluence of the voter or payment of any fee an electoral standard.*” *Id.* at 666, 668 (emphasis added).

As in *Harper*, Washington’s vote restoration scheme violates the Equal Protection Clause because it has made affluence a voter qualification for ex-felons who have completed all non-financial requirements of their sentence. Washington law denies the right to vote to one group of ex-felons, while granting that right to the other, where the sole distinction between the two groups is payment of money. *See United States v. Parks*, 89 F.3d 570, 573 n. 5 (9th Cir. 1996) (“[t]he application of Washington state’s LFOs as a criminal justice sentence...creates two classes of defendants for federal sentencing purposes: those who can afford to pay their state law fines immediately, and those who require a period of time to do so.”). Because such monetary standards have been explicitly prohibited by the United States Supreme Court, Washington’s law is unconstitutional regardless of the interests asserted by the State.

Although the poll tax from *Harper* provides a highly persuasive analogy, the trial court’s reasoning does not hinge on whether payment of

LFOs is legally identical to a tax. Rather, the trial court relied upon the reasoning of *Harper* and the long line of cases preceding and following it. The trial drew on a broad range of United States Supreme Court decisions to support the propositions that “there is simply no rational relationship between the ability to pay and the exercise of constitutional rights,” and that “discrimination on the basis of wealth and property has long been disfavored.”⁷ Naturally enough, many of these cases—such as *Edwards*, *Griffin*, and *Douglas*—were cited in *Harper* to support its conclusion that “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.” *Harper*, 383 U.S. at 668. The constitutional principles espoused in *Harper* are in no way limited to the context of a poll tax.

The State seeks to distinguish *Harper* by arguing that, unlike a poll tax, “[t]he cause of disenfranchisement is simply the felon’s choice to engage in criminal behavior.” Brief of Appellants at 23. This argument

⁷ These cases included *Edwards v. People of State of California*, 314 U.S. 160 (1941) (state law criminalizing those who help transport indigent people into the state is unconstitutional), *Griffin v. Illinois*, 351 U.S. 12 (1956) (states must provide trial records to inmates unable to buy them, because there was no rational relationship between the ability to pay for a transcript and a defendant’s guilt or innocence), *Douglas v. People of State of California*, 372 U.S. 353 (1963) (counsel must be appointed to give indigent inmates a meaningful appeal from their convictions), and *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Stewart, J. concurring) (state could not condition right to marry on payment of past child support obligations, because “...a person’s ability to pay money demanded by the State does not justify the total deprivation of a constitutionally protected liberty.”).

mistakenly focuses on the question of disenfranchisement, rather than on the question of vote restoration. Both wealthy felons and poor felons are disenfranchised as a result of criminal behavior; what the state must justify is its choice to restore the franchise only to those who pay their LFO balance. Plaintiffs are not indigent by choice. Plaintiffs pay their LFO balances over time in accordance with court-ordered payment schedules because that is all that they are capable of doing. Because the United States Supreme Court has explicitly prohibited tying the right to vote to the payment of money, Washington's law is unconstitutional regardless of the State's claimed interests.

2. The Trial Court Correctly Found That Washington's Felon Vote Restoration Scheme Has No Rational Relationship To The State's Claimed Interests.

Even if *Harper* did not dispose of the issue alone, the State's wealth-based voter qualification classification must be rejected on Equal Protection grounds because the State cannot "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, 446 (1985).

In interrogatory answers, the State claimed that the challenged law furthers three interests:

- “[L]imiting participation in the political process” for those “who have proven themselves unwilling to abide by the laws that result from that process.”
- The “important public functions” served by LFOs.⁸
- Requiring the completion of all sentence elements before the right to vote is restored.

CP 185-86 (Response to Interrogatory No. 18). As is established below below, none of these purported rationales provides a rational basis for the State’s distribution of the right to vote based on the payment of money.

a. The State’s Asserted Interest In “Limiting Political Participation Of Those Unwilling To Abide By The Laws” Does Not Provide A Rational Basis For The Challenged System.

The State’s invocation of a Lockian social contract theory may explain the reasons for felony disenfranchisement, but it is not a rational basis for selective vote restoration. On the state’s theory, both rich felons and poor felons are “perpetrators of serious crimes” who have “proven themselves unwilling to abide by the laws” and thus “can fairly be regarded as having abandoned the right to further participate in making the law.” Brief of Appellants at 21. It is not rational to deem Plaintiffs unqualified to vote for these reasons, while deeming other ex-felons

⁸ The State appears to have abandoned this interest on appeal, as it was not asserted in either its summary judgment briefing or in its briefing to this court.

qualified to vote simply because they had the financial resources to pay their LFO balance in full.⁹

A law lacks a rational basis when it disadvantages one group of citizens based on reasons that apply equally well to other groups who are not subject to the same disadvantages. In *City of Cleburne*, 473 U.S. at 449, the city required special use permits for group homes for the mentally disabled. The Supreme Court rejected as irrational the City's proffered justification that mentally disabled persons would be threatened in that location because it was on a flood plain:

This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit.

Id. at 449.

Plaintiffs are barred from voting because of their financial status. Plaintiffs' financial status, however, is completely unrelated to what the State refers to as the "conscious decision to commit a criminal act." Brief of Appellants at 21. The trial court correctly concluded that a system that

⁹ As the trial court also noted, "obtaining a certificate of discharge in no way implies that an offender has been rehabilitated or is otherwise better able to participate in the electoral process." CP 420, n.3 (citing RCW 9.94A.637(A), "[a] certificate of discharge is not based on a finding of rehabilitation.").

makes payment of LFOs an insurmountable obstacle to acquiring the right to vote cannot withstand even rational basis scrutiny under the Fourteenth Amendment. CP 419-22.

Nor can the State credibly argue that persons who do not pay LFOs in a single lump sum are not complying with the law. The State authorizes payment plans for LFOs, through the scheduling of set monthly payments and a statutorily-imposed interest rate. RCW 9.94A.760(1), (5)-(6). The State does not dispute that all three Plaintiffs are making regular monthly payments in accordance with their court-determined payment schedules. Though the State now labels Plaintiffs and any individual who “chooses” this alternative structure as “unwilling to abide by the laws,” the reality is that ex-felons lawfully can either pay their LFOs in one lump sum or over time.

In fact, the State’s characterization of the commitment to the law of Plaintiffs’ and other ex-felons runs directly contrary to the Supreme Court’s conclusion in *Bearden v. Georgia*, 461 U.S. 660, 670 (1983):

a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, *has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms.*

(emphasis added). It was precisely this reasoning that the trial court recognized when it observed that:

there is no logic in the assumption that a person in possession of sufficient resources to pay the obligation immediately is the more law-abiding citizen, indeed, the better example of respect for our justice system may very well be the indigent who manages for years to make monthly payments toward the obligation.

CP 443-44.¹⁰ To deem Plaintiffs unqualified to vote “for failing to do that which they cannot do”—in this case, paying their LFO balance in full—is irrational and cannot survive any level of judicial scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 394 (1978) (Stewart, J., concurring).¹¹

b. The State’s Asserted Interest In Collection of LFOs Does Not Provide A Rational Basis For The Challenged System.

Though it is well established that “the use of the franchise to compel compliance with other, independent state objectives is questionable in any context,” *Hill v. Stone*, 421 U.S. 289, 299 (1975), the State in its initial interrogatory responses asserted an interest “in the important public functions” served by LFOs. CP 185-86. For good reason, the State has apparently now abandoned this justification. In light

¹⁰ It should also be noted that a wealthy ex-felon’s LFO balance could be satisfied as a result of the State’s collection efforts wholly independent of that ex-felon’s “willingness to abide by the laws.” See *infra* notes 12 and 13.

¹¹ See also *Bearden*, 461 U.S. at 671 (“the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.”).

of the vast array of other collection devices available to the State,¹² including imprisonment for those who willfully fail to meet their financial obligations,¹³ it is difficult to imagine how the denial of the right to vote makes any difference in the collection of LFOs. As the trial court correctly noted, “[d]enying plaintiffs the right to vote does not enhance their ability to pay any more quickly than the monthly payments they are already making.”¹⁴ CP 420. Accordingly, this asserted basis for the challenged system does not pass constitutional muster.

¹² The collection devices are extensive. The State can seek to enforce LFOs using traditional civil enforcement mechanisms such as payroll deductions, wage assignments, or seizure of assets held by third parties. RCW 9.94A.7602-.7605; RCW 9.94A.760(9); RCW 9.94A.7701 through 9.94A.771; and RCW 9.94A.7606 through 9.94A.761. Third parties who are owed restitution can also pursue civil remedies for collecting these debts. RCW 6.17.020(4); RCW 9.94A.753(9); RCW 9.94A.760(4). Unlike civil judgments, which are subject to a ten year period for collection under RCW 6.17.020(1), courts effectively retain jurisdiction to enforce and collect LFOs forever. RCW 9.94A.760(4). According to the DOC, LFOs are also non-dischargeable in bankruptcy. CP 283.

¹³ Willful noncompliance with a monthly payment obligation can trigger additional community service, electronic home monitoring, jail time, or other sanctions. RCW 9.94A.634; RCW 9.94A.737; RCW 9.94A.740.

¹⁴ Defendant Secretary of State Reed voiced agreement with this proposition while voicing support for allowing ex-felons who had completed all aspects of their sentence except for the full payment of LFOs to vote: “If I thought restoring rights to felons would make a difference in victims getting restitution, I wouldn’t advocate it.” CP 339-40.

c. The State's Asserted Interest In "Requiring The Entire Sentence To Be Completed Before The Right To Vote Is Restored" Is Merely A Restatement of The Challenged Rule, And Does Not Provide A Rational Basis For It.

The State also argues that "[t]he legislature's policy judgment that civil rights should be restored upon completion of all terms of a felony judgment and sentence" bears a rational relationship to the State's interest in conditioning restoration of civil rights "upon the payment of legal financial obligations that stem from the original conduct underlying the conviction." Brief of Appellants at 24. On its face, this argument appears wholly circular. If the State were allowed to justify otherwise unconstitutional laws simply by asserting its interest in having its laws followed, any law, no matter how irrational, would be constitutional.

While the State may have other interests in ensuring that felons complete all the terms of their sentences, its sole legitimate interest when it comes to voting "is limited to the power to fix qualifications." *Harper*, 383 U.S. 668. Yet *Harper* has categorically and authoritatively rejection the notion that there is any rational relationship between wealth and one's ability to intelligently participate in the electoral process. *Id.* at 666, 668.

The State cites *United States v. Loucks*, 149 F.3d 1048, 1049 (9th Cir. 1998), for the proposition that the government can require the full payment of LFO obligations before restoring the right to vote. Brief of

Appellants at 25-26. That is not a fair reading of the case. Perhaps most important, *Loucks* did not arise in the context of voting or of even imprisonment for failure to pay LFOs. *Loucks*, 149 F.3d at 1049. Instead, it arose when an ex-felon falsely stated on a federal firearms application that he had no felony conviction. *Id.* As a defense to the charge of false statements, *Loucks* asserted that his statement was not really false because he would have had his right to carry firearms restored if only the state did not require full payment of LFOs. *Id.* Quite simply, none of the fundamental issues of this case was before the court in *Loucks*.

Loucks is also inapposite here because the Court there relied solely on due process, while this case involves a challenge under the Equal Protection Clause. *Id.* at 1050 n.1. Equally important, the discussion of procedural alternatives in *Loucks* (e.g., applying for a pardon) was not necessary to the resolution of that case, because even if *Loucks* had exhausted those remedies he would still not have a right to lie on a firearms application. In any event, these alternatives would not address the constitutional infirmities identified by Plaintiffs here. The statutory alternatives identified by the court for reducing fees and court costs are limited, the alternatives noted for reducing restitution payments are no

longer good law,¹⁵ and a pardon is completely discretionary.¹⁶ In *Bearden*, the Supreme Court held that indigent persons could not be incarcerated for failure to pay fines if nonpayment was not willful; the Court did not consider it relevant that defendants could seek pardons. *Bearden*, 461 U.S. 660. *Loucks* simply cannot support the weight that the State places on it.

There are two other distinct problems with the State's claimed interest in requiring the completion of all aspects of a sentence before restoring the right to vote, both of which stem from the State's mischaracterization of its vote restoration scheme. The first involves the State's mistaken attempt to recast the classification at issue as somehow wealth-neutral. Brief of Appellants at 19. As the Supreme Court noted in *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (quoting *Griffin v. Illinois*, 351 U.S. 12 (1956)), "a law nondiscriminatory on its face may be grossly discriminatory in its operation." In *Williams*, the Supreme Court found that imprisonment beyond the statutory maximum period resulting from an involuntary nonpayment of a fine or court costs was impermissible discrimination that rested on ability to pay and was a violation of the

¹⁵ As noted by the court in *Loucks*, after 1995 RCW 9.94A.142(1) precludes courts from reducing restitution.

¹⁶ See *supra* note 6 (only 93 pardons or clemencies granted since 1984).

Equal Protection Clause. The Court held that while on its face the statute afforded an equal opportunity for all to avoid additional incarceration for nonpayment of LFOs simply by satisfying the money judgment, the option was “an illusory choice for...any indigent who, by definition, is without funds.” *Id.* Because only a convicted person with funds could avoid the increased jail time, the statute “in operative effect” exposed only indigent individuals to the risk of additional jail time. *Id.* By making the punishment contingent “upon one’s ability to pay” the Court found that the state had “visited different consequences on two categories of person” in violation of the Equal Protection Clause. *Id.*

The second flaw in the State’s argument is its erroneous characterization of the full payment of LFO’s as “nothing more than a description of the period of disenfranchisement – a description of its duration.” Brief of Appellants at 10. For those ex-felons who have completed all aspects of their sentence except for the full payment of LFOs, the amount of time they are denied access to the vote restoration process is directly correlated to their ability to pay. If the state sentencing guidelines said that judges should sentence wealthy felons to five years incarceration followed by immediate restoration of rights and sentence poor felons to five years incarceration followed by lifetime disenfranchisement, the equal protection problem would be apparent. The

current statutes produce the same result. Plaintiff Dubois, for example, faces lifetime disenfranchisement because she cannot keep up with interest payments. *See supra* Section III.A.2. A wealthy ex-felon who was in all other respects similarly situated to Ms. DuBois would have regained the right to vote immediately upon release from supervision. As this simple comparison shows, the current system impermissibly bases access to the vote on an individual's ability to pay.

3. Richardson v. Ramirez Does Not Resolve The Constitutional Questions Surrounding Washington's Vote Restoration Scheme.

Neither *Richardson v. Ramirez*, 418 U.S. 24 (1974), nor any of the other cases upholding the general power of a state to disenfranchise felons HAS ever considered the question presented by Washington's wealth-based restoration of the franchise. The Supreme Court's decision in *Ramirez* was based on the explicit textual recognition of the power of the state to disenfranchise felons in Section Two of the Fourteenth Amendment. *Ramirez*, 418 U.S. at 54. The case is irrelevant here because Plaintiffs do not challenge the State's power to disenfranchise felons. What Plaintiffs challenge is the constitutionality of the State's decision to re-distribute the restoration of voting rights to ex-felons in a manner that makes payment of LFOs a voter qualification.

Ramirez itself made clear that its holding (*i.e.*, that the Fourteenth Amendment permits disenfranchisement for “rebellion or other crime”) was based on the unique status of disenfranchisement laws:

We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [Section Two] and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

Ramirez, 418 U.S. at 54. Because the Constitution provides no similar affirmative sanction for wealth-based vote restoration schemes, *Ramirez* does nothing to assist the State in defending its unconstitutional statutory scheme.

It is well established that the constitutional powers of government must be exercised consistently with other fundamental requirements of the Constitution. *See, e.g. Granholm v. Heald*, 125 S.Ct. 1885, 1890 (2005) (holding that “the Twenty-first Amendment does not supersede other provisions of the Constitution” and, in particular, the Dormant Commerce Clause).¹⁷ That this principle applies in the context of felon voting was

¹⁷ By analogy, the Twenty-Sixth Amendment to the United States Constitution clearly authorizes the states to deny the vote to seventeen-year-olds. But if Washington were to give the right to vote only to those 17 year olds who owned sufficient amounts of property, it would clearly violate the central holding of *Kramer v. Union Free School* (Footnote continued)

made unmistakably clear in *Hunter v. Underwood*, 471 U.S. 22 (1985), where the Court rejected the contention that the power to disenfranchise as recognized in *Ramirez* also included the power to allocate the voting rights of felons in a discriminatory fashion.¹⁸ Because Washington's felon re-enfranchisement scheme also runs contrary to traditional equal protection principles, *Ramirez* is inapposite.

B. Washington's Statutory Scheme To Re-Distribute The Right To Vote, A Fundamental Right Under The Equal Protection Clause, Is Subject To Strict Scrutiny.

The trial court found for Plaintiffs because the law preventing the restoration of their voting rights lacked a rational basis. Plaintiffs agree that it lacks a rational basis. However, to ensure the coherent development of the law in this area, this Court should clarify that a higher level of scrutiny applies to wealth-based distributions of the right to vote. At the very least, this Court's opinion should not preclude the use of strict scrutiny in later cases.

Strict scrutiny is required of all state laws that selectively distribute the franchise. Because the right to vote "is preservative of other basic

District No. 15, 395 U.S. 621, 632-33 (1969) which struck down the use of such property requirements in most elections.

¹⁸ Other courts have reached similar conclusions in the context of felon voting. See *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977) (state law disenfranchising men, but not women, convicted of spousal abuse, violated Equal Protection Clause).

civil and political rights," it has long been deemed by the United States Supreme Court to be a "fundamental political right." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). In particular, "*statutes distributing the franchise constitute the foundation of our representative society.*" *Kramer*, 395 U.S. at 626 (emphasis added). Thus any "unjustified discrimination in determining who may participate in political affairs...undermines the legitimacy of representative government." *Id.* As the United States Supreme Court noted in *Harper*, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." 383 U.S. at 665.

Because of the dangers posed to representative government by statutes that selectively distribute the right to vote, laws that do so, like Washington's vote restoration scheme, are subject to strict scrutiny. *See Kramer*, 395 U.S. at 627. Under this standard of review, the Court must determine "whether the exclusions are necessary to promote a compelling state interest." *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).

Classifications in distributing the right to vote must be "drawn with 'precision,'" and must be "tailored" to serve their legitimate objectives. *Id.* at 343. If other means exist to achieve the State's interests that do not

burden the right to vote, those “less drastic means” must be adopted by the State instead. *Id.*

A State’s classification for distributing the vote will not meet the “exacting standard of precision” required by the Equal Protection Clause if it is impermissibly under-inclusive or over-inclusive. *See Kramer*, 395 U.S. at 632 (requirement that voters in school district election own or lease taxable property or be parents of school children was insufficiently “tailored” to achieve the state goal because it impermissibly excluded many citizens with a direct interest in the election, while also including in the election many others with no substantial interest in school affairs at all); *see also Dunn*, 405 U.S. at 357-358.

As in *Kramer*, Washington’s classification of ex-felons for the purposes of vote restoration is insufficiently “tailored” to its stated interests in barring those who have “proven themselves unwilling to abide by the laws.”¹⁹ To the extent the State claims that it is a felony conviction that demonstrates an unwillingness to abide by the laws, the classification for vote restoration is vastly under-inclusive as Washington still allows ex-

¹⁹ As discussed above in Section IV.A.2.c the State’s interest in requiring the completion of all aspects of a sentence is circular. To the extent that it is substantive it is difficult to distinguish from its claimed interest in barring those “unwilling to abide by the laws” from the restoration process. As such, the strict scrutiny analysis is largely the same.

felons to regain the right to vote once they are released from custody if they have paid their LFO balance in full. If the State's classification is instead based on a presumption that ex-felons demonstrate an unwillingness to abide by the laws when they are released from custody and do not pay their LFO balance in full, then it is far too over-inclusive to meet the requirements imposed by the Equal Protection Clause. Since paying LFOs over time under a court-approved schedule is perfectly legal, *see supra* Section IV.A.2.a, the classification is both impermissibly over and under-inclusive with respect to the State's interest in barring those "unwilling to abide by the laws" from the vote restoration process, it cannot survive strict scrutiny.

The same holds true for the State's interest in LFOs. The State cannot burden fundamental voting rights if there are alternative devices available to achieve the State's interests. *Dunn*, 405 U.S. at 343. In this case, the State has a myriad of alternative devices available to it when seeking to collect unpaid LFOs. *See supra* Section IV.A.2.b. The classification is also impermissibly over-inclusive in seeking to collect LFOs, as it makes no effort to account for individuals who do not pay simply because they cannot pay. *See Zablocki*, 434 U.S. at 389-90.

The State attempts to avoid strict scrutiny by arguing that "the right of convicted felons to vote" is not fundamental. Brief of Appellant at

18, citing *Owens v. Barnes*, 711 F.3d 25, 27 (3rd Cir. 1983). Yet the right to vote cannot be fundamental for one person but not another. Once a state decides to grant the right to vote (or in this case, restore that right) to some of its citizens, that right must be distributed in a way consistent with the Equal Protection Clause. *Harper*, 383 U.S. at 665. This “fundamental” right derives from the Equal Protection Clause, and is thus best understood as a right to equal distribution of the franchise rather than an absolute right to vote in all circumstances. The Supreme Court summarized this constitutional principle of voting as a “fundamental right” as follows: “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Harper*, 383 U.S. at 665; *see also Bush v. Gore*, 531 U.S. 98, 105 (2000) (citing this quote from *Harper*); *Kramer*, 395 U.S. at 626-27.²⁰ This fundamental right to equal distribution is not implicated by *Ramirez*, nor is the recognition of such a right incompatible with the holding of *Ramirez*.

²⁰ This principle of equal distribution is commonly applied in Equal Protection Clause jurisprudence. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) (summarizing *Griffin* line of cases regarding an indigent’s access to appellate review: “This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”).

For all the reasons described above, strict scrutiny is the proper standard for reviewing the State's wealth-based vote restoration scheme. Because the restoration process is not narrowly tailored to serve compelling state interests, the State's vote restoration scheme cannot survive such scrutiny.

C. Washington's Re-Enfranchisement Statute Violates The State Constitution.

It is the unique role of this Court to enforce and interpret the meaning of Washington's Constitution. For this reason, it is important that this Court not just consider and evaluate the State's felon vote restoration scheme under the federal Equal Protection Clause, but it should also conduct a separate and independent inquiry into the constitutionality of the law under Washington's Constitution. *See Mesiani v. City of Seattle*, 110 Wn. 2d 454, 456, 755 P.2d 775, 776. When this inquiry is conducted, it becomes apparent that Washington's re-enfranchisement scheme violates the Privileges and Immunities Clause (Article I, Section 12) of the Washington Constitution as well as the federal constitution.

In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), this Court set forth a nonexclusive, multi-factor test for determining whether the Washington Constitution is sufficiently different from the Federal

Constitution to require a Washington-specific constitutional analysis.²¹ Once it is determined that a Washington-specific constitutional analysis is appropriate, the Court should “interpret and apply” the Washington Constitution to “develop a body of independent jurisprudence.” Mesiani, 110 Wn.2d at 457, 755 P.2d at 776.

The trial court properly concluded that its judgment was based on both the state and federal constitutions, but it declined to perform a *Gunwall* analysis in support of that conclusion. Because a *Gunwall* analysis in this case leads to a finding of adequate and independent grounds for affirming the trial court’s decision under the Washington Constitution, this Court should conduct such an analysis to allow for the further development of privileges and immunities jurisprudence. *Id.*; cf. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (if “the adequacy and independence of any possible state law ground” is clear on the face of an opinion a decision is not appropriate for federal review).

²¹ The “*Gunwall* analysis” evaluates six nonexclusive factors: (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806, 83 P.3d 419, 425 (2004) (*Grant County II*).

**1. Washington's Privileges And Immunities Clause
Requires A Separate And Independent Analysis
From That Of The Federal Constitution.**

The Privileges and Immunities Clause prohibits the State from granting “privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Wash. Const. art. I, § 12. It protects the fundamental rights of Washington citizens, including the right to vote in “free and equal” elections secured by Article I, Section 19. Applying the analysis set forth in *Gunwall*, the Washington Supreme Court recently held that the Privileges and Immunities Clause should be analyzed separately and independently from the federal Equal Protection Clause in a case involving the right to petition for annexation. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant County II*). Applying the *Gunwall* factors here, it is equally clear that independent Washington constitutional analysis is appropriate when considering statutes—such as Washington’s re-enfranchisement statutory scheme—that infringe upon Washington citizens’ fundamental right to vote in “free and equal” elections.

As to the first two *Gunwall* factors—the language of Washington’s Constitution and the extent to which that language differs from that of the Federal Constitution—this Court has recognized that the language of Washington’s Privileges and Immunities Clause is substantially different

from the language of the federal Equal Protection Clause.²² *Id.* at 805 n.10. While the language of the federal constitution is concerned primarily “with majoritarian threats of invidious discrimination against nonmajorities,” the state constitution also seeks to protect “against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Id.* at 806-07. According to the Court in *Grant County II*, “the difference in emphasis between the two constitutional provisions suggests that it is necessary to analyze the state provision separate from the federal provision.” *Id.* at 807.

The constitutional history of Washington’s Privileges and Immunities Clause also weighs in favor of finding that “the framers of the Washington constitution intended to confer different protection than is offered by the federal constitution.” *Id.* at 807 (citing *Gunwall*, 106 Wn.2d at 61). Unlike the Equal Protection Clause, Article 1, Section 12 reflects in part “[o]ur framers’ concern with avoiding favoritism towards the wealthy,” *Grant County II*, 150 Wn.2d at 808, and “prevention of favoritism and special treatment for a few,” *id.* at 809 (quoting *State v.*

²² The Privileges and Immunities Clause provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Wash. Const. Art. I, § 12. In contrast, the Equal Protection Clause provides that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

Smith, 117 Wn.2d 263, 283, 814 P.2d 652 (1991)). This concern is especially evident in matters involving political representation, because “our framers were concerned with undue political influence exercised by those with large concentrations of wealth.” *Id.* at 808. As such, “the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism.” *Id.* at 809.

The statutes at issue here concern favoritism. Washington’s vote restoration scheme applies only to a limited group of Washington citizens: those who have been convicted of a felony. Within that group, Washington’s law favors those felons who are wealthy enough to be able to pay their LFOs in full. Their right to vote is restored immediately upon release from supervision. The majority of ex-felons cannot afford to pay off their LFO’s in full, and therefore must do so over time in accordance with their court-determined payment schedule, which may mean a lifetime of disenfranchisement.²³ Because Washington’s restoration scheme confers the privilege of fair and equal vote restoration to only a wealthy minority within the subset of felons seeking restoration, independent

²³ Only 970 certificates of discharge were recorded for all of 2004, despite the fact that 32,000 felons were released or transferred from DOC supervision or jurisdiction in 2004. Because the certificates of discharge are supposed to be automatically issued upon completion of all aspects of a felon’s sentence, the conclusion to be reached from these numbers is that the vast majority of ex-felons are denied access to the vote

(Footnote continued)

analysis of Washington's Privileges and Immunities Clause is appropriate here.

An examination of preexisting state law—the fourth *Gunwall* factor—further bolsters the conclusion that an independent analysis of Washington's Privileges and Immunities Clause is warranted. Courts have long recognized that the Washington Constitution is more protective of the right to vote than the federal constitution. *See Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841, 846-47 (1984) (“The Washington Constitution, unlike the federal constitution, specifically confers upon its citizens the right to ‘free and equal’ elections.”). In addition to Article I, Section 19, which specifically protects an individual's right to free and equal elections, other constitutional provisions require affirmative state action to protect the right to vote against state interference. *See* art. VI, §§ 4-7 (providing for residency contingencies, preventing arrest during attendance at elections, requiring secret ballots, and requiring voter registration laws). RCW 29A.04.205 expresses the state's public policy to encourage all “eligible” persons to register and vote. Further, Washington courts have repeatedly recognized the State's strong interest in giving voice to the electorate. *See Foster*,

restoration process due to their inability to pay their LFO balances immediately. *See supra* Section III.C.2.

102 Wn.2d at 404, 687 P.2d at 846-47 (1984); *Knowles v. Holly*, 82 Wn.2d 694, 513 P.2d 18 (1973); *State v. Fawcett*, 17 Wn. 188, 49 P. 346 (1897). The initiative and referendum clauses, which are important parts of the Washington Constitution but not the federal constitution, explain that “the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls.” Art II, § 1.

The fifth and sixth factors similarly support an independent analysis. The fifth *Gunwall* factor—the “structural differences” between the federal and state constitutions—will always support an independent analysis. *Grant County II*, 150 Wn.2d at 811(citing *Smith*, 117 Wn.2d at 286, and *Seeley v. State*, 132 Wn.2d 776, 790, 940 P.2d 604 (1997)). The sixth factor, in turn, “favors independent analysis if the matters at issue are of particular state interest or local concern.” *Grant County II*, 150 Wn.2d at 811 (citing *Gunwall*, 106 Wn.2d at 62). The law of restoring ex-felons’ right to vote is unquestionably a matter of state and local concern. It is the unique duty of the states “to establish, on a nondiscriminatory basis, and in accordance with the Constitution . . . qualifications for the exercise of the franchise.” *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

As demonstrated by all six *Gunwall* factors and other additional considerations,²⁴ Washington's Privileges and Immunities Clause should be interpreted independently from the Federal Constitution in the context of wealth-based vote restoration procedures. As discussed below, Washington's vote restoration scheme cannot survive any level of scrutiny under Washington's Constitution.

2. Washington's Felon Re-Enfranchisement Scheme Violates Plaintiffs' Rights Under The Privileges And Immunities Clause Of The Washington Constitution.

Applying the independent analysis required by Washington's Constitution, the felon vote restoration scheme violates the Privileges and Immunities Clause because it grants the right to vote to those ex-felons who have the financial resources to pay their LFOs immediately, while at the same time denying the right to those who require a period of time to do so. Washington's vote restoration scheme thus affords the right to vote in

²⁴ The *Gunwall* factors are not exclusive, and the Court may consider other considerations that favor an independent analysis. Unlike the federal constitution, where the Bill of Rights was added through a series of amendments, the Washington constitution devotes its first Article to a Declaration of Rights. The first right listed, that of Political Power, states that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Art. I, § 1. This is a powerful statement about the supreme role of voters in our state system, and of the government's obligations to protect the individual rights of "the governed," a term that clearly embraces persons with felony convictions. The security of these individual rights and "the perpetuity of free government" itself is to be protected through "frequent recurrence to fundamental principles." Art. I, § 32.

free and equal elections—a privilege secured by Article I, Section 19 of the Washington Constitution—only to those felons who can afford to pay their LFOs in full. This is precisely the type of grant of a special privilege to the wealthy that is forbidden by Washington’s Privileges and Immunities Clause, which reflects “[o]ur framers’ concern with avoiding favoritism towards the wealthy[.]” *Grant County II*, 150 Wn.2d at 808 (citations omitted). None of the State’s purported interests are sufficient to justify this favoritism. As such, Washington’s re-enfranchisement statutory scheme fails under the Privileges and Immunities Clause of the Washington Constitution.

a. **The Right To Vote Is A Fundamental Privilege Protected By The Privileges And Immunities Clause Of The Washington Constitution.**

The fundamental right to vote in “free and equal” elections—protected by Article I, Section 19 of the Washington Constitution—is one of the privileges protected by Washington’s Privileges and Immunities Clause. *Foster*, 102 Wn.2d 395, 404, 687 P.2d 841, 846-47. Unlike the right of annexation discussed in *Grant County II*, the right to vote in “free and equal” elections is a “fundamental attribute of an individual’s national or state citizenship” that falls within the scope of privileges protected by

the Privileges and Immunities Clause. *Grant County II*, 150 Wn.2d at 813; *see also State v. Vance*, 29 Wn. 435, 458, 70 P. 34 (1902).

b. Washington's Felon Re-Enfranchisement Statute Cannot Survive Constitutional Scrutiny Under The State Constitution.

Because the right to vote is fundamental, laws abridging that right are subject to strict scrutiny. *See City of Seattle v. State*, 103 Wn.2d 663, 670, 694 P.2d 641 (1985) (holding that any statute that “infringes on or burdens the right to vote is subject to strict scrutiny.”). For a law to survive strict scrutiny under state law, the governmental purpose must be “compelling” and “the law must be necessary to accomplish that purpose.” *See State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994); *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). As discussed above in Sections IV.A, B in the context of the federal constitution, Washington’s felon vote restoration scheme is neither necessary nor sufficiently tailored to serve the State’s purported interests. Washington’s re-enfranchisement scheme therefore fails strict scrutiny analysis under the Washington Constitution for the same reasons that it fails strict scrutiny under the Federal Constitution.

Even if strict scrutiny did not apply, legislation that grants a privilege on an unequal basis cannot pass muster under Article 1, Section 12 unless “there [are] reasonable grounds for distinguishing

between those who fall within the class and those who do not, and . . . the disparity in treatment [is] germane to the object of the law in which it appears.” *United Parcel Serv., Inc. v. Dep’t of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984). Washington’s re-enfranchisement scheme fails because this standard because the State’s purported interests are not “reasonable grounds” upon which to justify the distinction between ex-felons who have satisfied their LFOs and those who have not. At a minimum, for the same reasons discussed above in section IV.A, the State has not shown any rational relationship between its stated goals and the classification at issue in this case. An inability to pay LFOs in full is simply not a sufficient basis to justify the unequal grant of the right to vote. As such, Washington’s re-enfranchisement scheme fails under even a “reasonable grounds” analysis.

3. Washington’s Constitution Does Not Sanction Wealth-Based Voter Qualifications.

Aside from the question of the need for an independent analysis under Washington’s Privileges and Immunities Clause, the State attempts to immunize its wealth-based voter qualification from scrutiny under the Washington Constitution by arguing that the vote restoration scheme in question does “nothing more than reflect the exclusion from voting established by article VI, section 3.” Brief of Appellants at 17, 29-30. Yet

the central question here is whether the State, having elected to restore voting rights, may lawfully distribute that right based on payment of money. The State has offered no support for the proposition that Article VI, Section 3 allows the restoration of voting rights to be done in a way that is inconsistent with the other provisions of the Constitution. Instead, the State merely asserts that the constitution “leaves it to the legislature to determine when civil rights should be restored.” Brief of Appellants at 29-30. While it is true that the legislature determines the mechanism for the restoration of civil rights, it must do so consistently with all relevant constitutional provisions. The felon vote restoration scheme clearly fails that requirement.

V. CROSS-APPEAL

Though the trial court was correct in concluding that “Washington’s law governing disenfranchisement of felons following a felony conviction is invalid as to all felons who have satisfied the terms of their sentences except for paying legal financial obligations,” it erred when it limited the scope of its declaratory judgment to those “who, due to their financial status, are unable to pay their legal financial obligations immediately.” CP 433. Under *Harper*, 383 U.S. 663, statutes that make the payment of money an electoral standard are unconstitutional regardless of the individual financial situation of the individuals impacted by the

standard. Therefore, Washington's felon vote restoration scheme is unconstitutional as applied to ex-felons who can afford to pay their LFOs as well as those who cannot; any ex-felons who have satisfied all terms of their sentences except for the payment of LFOs are entitled to vote.

A. Under *Harper*, Wealth Or Payment Of A Fee Is Unacceptable As A Voter Qualifications Regardless Of A Particular Ex-Felon's Financial Status.

The United States Supreme Court in *Harper* held that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper*, 383 U.S. at 666. The Court reasoned that "to introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor." *Id.* at 668. Importantly, the Court was explicit in stating that its holding was not contingent on the particular reason for the citizen's failure to pay the fee: "We say the same whether the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Id.*

By requiring the full payment of LFOs before the right to vote can be restored, the State has made the payment of money an electoral requirement. Under *Harper*, this, on its own, is a violation of the Equal Protection Clause. *Harper* made it clear that the relative financial situation of the particular individual impacted by the standard was

irrelevant to the constitutional analysis. While requiring the full payment of LFOs may be a legitimate extension of the State's power to collect LFOs, such interests are irrelevant in evaluating the State's use of LFO payments in determining which of its citizens is "qualified" to vote. "[T]he interest of the State, when it comes to voting, is limited to the power to fix qualifications." *Id.*

B. Making The Constitutionality Of The State's Vote Restoration Scheme Hinge On The "Financial Status" Of Individual Ex-Felons Will Cause Significant Administrative Confusion.

As a matter of public policy, the trial court's declaration will be unworkable in practice. As noted by the State, there is "uncertainty as to precisely what 'financial status' the trial court may have found sufficient to justify the failure" to pay an entire LFO balance.²⁵ Brief of Appellants at 22 n.12. Nor is it clear how the State would go about identifying what ex-felons it believed had not paid their LFO balance in full due to "financial status." Such administrative confusion runs the risk of undermining Washington's stated public policy of encouraging voter registration and political participation by all eligible persons.

RCW 29A.04.205.

²⁵ The meaning of the term "immediately" in the trial court's order is also unclear. How extensive would the inquiry be into whether an ex-felon could immediately pay their entire LFO balance? Would such a standard require sale of all assets?

Though the trial court did not address the question directly, case law and relevant statutes indicate that under the trial court's order, an ex-felon who only had LFO obligations remaining in their sentence would be entitled to register to vote until a court made an individualized determination that their failure to meet their LFO obligations was willful. *See State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213, 1220 (1997) (requiring courts to conduct an individualized inquiry into ability to pay before "any sanction" is imposed for nonpayment of LFOs); *cf. Bearden v. Georgia*, 461 U.S. 660 (1983).²⁶ Furthermore, the State would bear the initial burden of establishing that a particular ex-felon was not in compliance with their LFO payment schedule. *See State v. Gropper*, 76 Wn. App. 882, 887, 888 P.2d 1211, 1214 (1995); RCW 9.94A.634.

Given the complexity and disorganization of the State's current system for collecting and registering LFO payments, *see infra* Section III.C, it is unclear how the State would implement such a system in a way that properly protected the rights of eligible voters. In fact, it is likely that adding additional administrative requirements would only lead to more problems in the LFO administration and vote registration process. Such

²⁶ In the absence of individualized determinations in similar contexts, courts have held that punishment or other remedial action for failure to pay LFOs is "fundamentally unfair." *See United States v. Parks*, 89 F.3d 570, 573 (9th Cir. 1996); *see also Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002).

confusion will inevitably cause some eligible persons not to participate, either because they doubt their status or they lack the wherewithal to withstand and finance litigation over the matter.²⁷

By contrast, the rule advocated by plaintiffs would be far easier to administer. So long as an applicant with a felony conviction is not under the supervision of the DOC, they may register to vote. The answer to the supervision question may be determined by a single inquiry from the Secretary of State to the DOC (such an inquiry is already required under the recently enacted RCW 29A.08.651). This would be far easier to administer than the present system, which requires collection of data from courts of conviction and county clerks, cross-referenced with DOC data. And it is far simpler than the method envisioned by the trial court, where an ex-felon's ineligibility to vote could only be clearly established after the State initiated a court hearing to establish that the failure to pay LFOs was not a result of the particular ex-felon's inability to pay. For this reason as well, the Court here should hold, as required by *Harper*, that restoration of the right to vote cannot be conditioned on either the payment of money or the ability to pay money.

²⁷ RCW 29A.04.079 requires all voters to affirm that they are "not presently denied...civil rights as a result of being convicted of a felony." Ambiguity as to who would be eligible to vote under the trial court's standard of "financial status" could cause otherwise eligible voters not to register due to confusion over their status.

VI. ATTORNEYS FEES

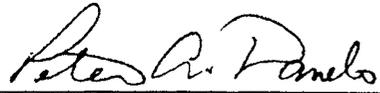
As a prevailing party in an action under 42 U.S.C. § 1983, Plaintiffs are entitled to attorneys fees pursuant to 42 U.S.C. § 1988. *See Jacobsen v. City of Seattle*, 98 Wash.2d 668, 676-77 (1983) (a prevailing party in an action under 42 U.S.C. § 1983 “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”).

VII. CONCLUSION

For the reasons set forth above, Plaintiffs seek a declaration from this Court that Washington’s statutory scheme for restoring the vote to ex-felons violates the federal and state constitutions, as restoration of the right to vote cannot be conditioned on the payment of money. This right to vote extends to all ex-felons who have completed all terms of their sentence other than payment of LFOs. As the prevailing party in an action taken under 42 U.S.C. § 1983, Plaintiffs also seek an award of reasonable attorney fees pursuant to 42 U.S.C. § 1988.

RESPECTFULLY SUBMITTED this 30th day of May, 2006.

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THE VOTING RIGHTS PROJECT OF
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