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**SUPREME COURT OF THE STATE OF WASHINGTON**

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DANIEL MADISON, SEBRINA MOORE, LARENCE BOLDEN,  
BEVERLY DUBOIS AND DANNIELLE GARNER,

Respondents/Cross Appellants,

v.

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

Appellants/Cross Respondents.

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**REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS STATE  
OF WASHINGTON, CHRISTINE O. GREGOIRE AND SAM REED**

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## I. ARGUMENT

### A. Respondents' Equal Protection Analysis Is Fundamentally Flawed

Respondents' equal protection challenge to Washington's felon disenfranchisement law gives short shrift to the constitutional grounding for felon disenfranchisement, and to the terms of Washington's felon disenfranchisement law. Respondents virtually ignore the unique constitutional context in which their equal protection challenge arises, and they gloss over the actual terms of Washington's felon disenfranchisement statute. As a result, Respondents' equal protection analysis is deeply flawed.

In advancing their equal protection claim, Respondents accord virtually no legal significance to the fact that felon disenfranchisement is explicitly authorized by the federal and state constitutions.<sup>1</sup> Yet these constitutional provisions, as significant as any others (*Richardson v. Ramirez*, 418 U.S. 24, 55, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974)), lead to the well-recognized principle that felons have no fundamental right to vote, and that states may regulate the franchise with respect to felons so long as those regulations are rationally related to a legitimate state interest. *Id.*; see also *Clingman v. Beaver*, 544 U.S. 581, 586-87, 125 S. Ct. 2029,

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<sup>1</sup> U.S. Const. amend. XIV, § 2; Wash. Const. art. VI, § 3.

161 L. Ed. 2d 920 (2005) (noting the states' broad authority for enacting statutes governing the electoral process). Washington's law readily satisfies this rationality standard.

Respondents similarly turn a blind eye to the actual content and context of the felon disenfranchisement statute that they challenge, and analyze their equal protection claim as though it was challenging an entirely different law. RCW 9.94A.637(1)(a) requires the completion of all of the terms of a felony sentence, regardless of the nature of those terms, before a convicted felon may seek restoration of civil rights. In advancing their equal protection claim, however, Respondents treat Washington's law as though it imposes a generalized requirement to pay money in order to vote.

Respondents again ignore the reality of Washington's law when they claim that they "do not challenge the State's power to disenfranchise felons" but the "State's decision to redistribute the restoration of voting rights to ex-felons in a manner that makes payment of LFOs a voter qualification." Respts.' Br. at 25. This is pure fiction. Under Washington law, felon disenfranchisement begins with a felony conviction, RCW 29A.08.520(1), and extends until completion of the terms of the felony sentence, RCW 29A.08.520(2). The Supreme Court in *Richardson* declined to draw the false distinction between disenfranchisement and

restoration of voting rights, even though the California law under consideration in that case provided means for restoration of civil rights following completion of the sentence. *Richardson*, 418 U.S. at 29-30. Respondents' so-called "voter qualification" for "redistribut[ion]" of the vote is nothing more or less than completion of the felon's sentence, the term of the disenfranchisement.<sup>2</sup>

As the following discussion demonstrates, Respondents' disregard for the unique constitutional authority to disenfranchise felons, and the actual terms and context of Washington's felon disenfranchisement statutes, result in an equal protection analysis that is ungrounded in the law.

**1. Felon Disenfranchisement Laws Do Not Implicate A Fundamental Right And Are Not Subject To Strict Scrutiny**

In *Richardson*, the United States Supreme Court rejected essentially the same approach that Respondents take in this case. In

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<sup>2</sup> RCW 29A.08.520 provides in pertinent part:

(1) Upon receiving official notice of a person's conviction of a felony in either state or federal court, if the convicted person is a registered voter in the county, the county auditor shall cancel the defendant's voter registration[.]

(2) The right to vote may be restored by, for each felony conviction, one of the following:

(a) A certificate of discharge issued by the sentencing court, as provided in RCW 9.94A.637;

(b) A court order restoring the right, as provided in RCW 9.92.066;

(c) A final order of discharge issued by the indeterminate sentence review board, as provided in RCW 9.96.050; or

(d) A certificate of restoration issued by the governor, as provided in RCW 9.96.020.

*Richardson*, challengers to California’s law disenfranchising felons absent restoration of civil rights relied on decisions of the United States Supreme Court that had invalidated other state-imposed voting restrictions under the Equal Protection Clause. Based on those decisions, the challengers in *Richardson* asserted that California was required to demonstrate a compelling state interest before it could “justify exclusion of ex-felons from the franchise.” *Richardson*, 418 U.S. at 54. Respondents do the same. None of the cases on which they rely for their equal protection challenge to Washington’s felon disenfranchisement law concerns felon disenfranchisement. The *Richardson* Court rejected reliance on cases from other contexts, explaining that “the understanding of those who adopted the Fourteenth Amendment” as reflected in its language and in judicial decisions, “is of controlling significance in distinguishing such laws from . . . other state limitations on the franchise.” *Id.* With respect to the “judicial decisions” of “controlling significance in distinguishing [felon disenfranchisement] from . . . other state limitations on the franchise”, (*id.*) *Richardson* first referred to earlier United States Supreme Court decisions that had indicated approval of state laws

excluding some but not all felons from the franchise. *Id.* at 53.<sup>3</sup> *Richardson* next noted the Court’s “strong suggestion” in dicta that “exclusion of convicted felons from the franchise violates no constitutional provision.” *Id.*<sup>4</sup> In addition, the Court catalogued its summary affirmance of district court decisions that rejected constitutional challenges to state laws disenfranchising felons.<sup>5</sup> In none of these cases did the Court apply strict scrutiny or suggest that a fundamental right to vote was implicated. None provides any support for Respondents’ view that the force of the state’s constitutional authority to deny felons the vote essentially vanishes once a state determines to restore civil rights to any

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<sup>3</sup> The Court referred to two of its cases approving the exclusion of bigamists and polygamists from the franchise under the territorial laws of Utah and Idaho, *Marphy v. Ramsey*, 114 U.S. 15, 5 S. Ct. 747, 29 L. Ed. 47 (1885) and *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

<sup>4</sup> The *Richardson* Court explained:

In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959), where we upheld North Carolina’s imposition of a literacy requirement for voting, the Court said, *id.*, at 51, 79 S.Ct., at 990:

“Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345--347, 10 S.Ct. 299, 301--302, 33 L.Ed. 637) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.”

<sup>5</sup> The Court cited *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *aff’d*, 411 U.S. 961, 93 S. Ct. 2151, 36 L. Ed. 2d 681 (1973) and *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff’d*, 396 U.S. 12, 90 S. Ct. 153, 24 L. Ed. 2d 11 (1969). It further observed that “[b]oth District Courts relied on *Green v. Board of Elections*, 380 F.2d 445 (1967), cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840 (1968), where the Court of Appeals for the Second Circuit held that a challenge to New York’s exclusion of convicted felons from the vote did not require the convening of a three-judge district court” for want of a substantial federal question. *Richardson*, 418 U.S. at 53-54.

class of felons.<sup>6</sup> None supports Respondents' view that, under those circumstances, the right to vote springs up anew as fundamental for such felons. And none supports Respondents' view that a state therefore may draw disenfranchisement classifications only to the extent that the classification is narrowly tailored to a compelling state interest.

Instead, as the Fifth Circuit recognized in *Sheperd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978), *Richardson* correctly read, concludes that "section 2 of the fourteenth amendment blunts the full force of section 1's equal protection clause with respect to the voting rights of felons." In addition to the judicial decisions discussed above and cited in *Richardson* which support this reading, the Fifth Circuit in *Shepherd* recognized that "although the analysis [in *Richardson*] focuses on a state's power to disenfranchise persons convicted of a felony generally, the specific holding of the Court was that a state may deny the franchise to that group of 'convicted felons who have completed their sentences and paroles.'" *Sheperd*, 575 F.2d at 1114 (quoting *Richardson*, 418 U.S. at 56). In addition, the *Richardson* Court "responded to arguments that a state should reenfranchise felons once they have served their terms by saying

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<sup>6</sup> *Richardson*, 418 U.S. at 29-30 ("California provides by statute for restoration of the right to vote" but the restoration provisions did not mean a process distinct from disenfranchisement).

that such arguments should be directed to the state legislatures.” *Sheperd*, 575 F.2d at 1114. In this regard, *Richardson* explained:

Pressed upon us by the respondents, and by amici curia, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the exfelon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

*Richardson*, 418 U.S. at 55.

In each of these respects, “the [*Richardson*] Court clearly envisioned that a state could grant the right to vote to some persons convicted of a felony while denying it to others.” *Sheperd*, 575 F.2d at 1114. For these reasons, the Fifth Circuit properly concluded that section 2 of the Fourteenth Amendment “grants to the states a realm of discretion in disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens.” *Id.*

To the same effect is *Owens v. Barnes*, 711 F.2d 25 (3rd Cir. 1983). There, the Third Circuit rejected an equal protection challenge to

Pennsylvania's law permitting unincarcerated felons to vote, while denying the vote to incarcerated felons. The Third Circuit correctly concluded that, the argument that felons have a fundamental right to vote requiring strict scrutiny of felon voting classifications "was precisely the argument rejected in *Richardson*." *Id.* at 27.

Nonetheless, Respondents persist in asserting that felons have a fundamental right to vote that is subject to strict scrutiny equal protection analysis. Respts.' Br. at 27-32. Without citation to any authority for the proposition, Respondents boldly claim that "the right to vote cannot be fundamental for one person but not another." Respts.' Br. at 31. This claim is groundless. It is directly contrary to "the implicit authorization of section 2 [of the Fourteenth Amendment] to deny the vote to citizens 'for participation in rebellion, or other crime,'" (*see, Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985)), and to the Court's holding in *Richardson* that felon disenfranchisement is not subject to strict scrutiny.<sup>7</sup> Indeed, in continuing to press this fundamental right/strict scrutiny argument, Respondents rely on two of the very cases that *Richardson* declined to apply in the context of felon

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<sup>7</sup> Respondents' reliance upon *Hunter* for the proposition that the equal protection clause prohibits what the Fourteenth Amendment elsewhere expressly sanctions is misplaced. *Hunter* stands only for the unremarkable proposition a statute enacted for the purpose of intentionally discriminating based on race is void. *Id.* at 227-28. *See also* Appellants' Opening Br. at 12 n.9.

disenfranchisement: *Kramer v. Free Union School District 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969) and *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Respts.' Br. at 28-31. *Richardson* instructs that, as to restrictions on the franchise with respect to felons, such cases are not apposite:

We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of s[ection] 2 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.

*Richardson*, 418 U.S. at 54. Respondents simply ignore this holding of *Richardson*.

Similarly, there is no basis in the law or in reality for Respondents' related view that, once any class of felons is enfranchised, other felons shed their status as felons and that, with respect to them, a fundamental right to vote springs to life. For purposes of the franchise, a felon remains a felon and remains subject to disenfranchisement as the federal and state constitutions themselves contemplate. The only constitutional question is whether there is a rational basis for distinguishing between felons who are enfranchised and those who are not. As discussed below, it is wholly

rational for the state to require felons to complete the terms of their criminal sentences prior to restoring to them the right to vote.

**2. It Is Entirely Rational For The State To Require Felons To Complete Their Sentences Before Restoring Their Civil Rights**

Under rational basis equal protection analysis, a law establishing classifications must be upheld unless the “classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives”. *Habitat Watch v. Skagit Cy.*, 155 Wn.2d 397, 414, 120 P.3d 56 (2005) (quoting *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.2d 738 (2004)). To hold a statute invalid under this test, the challenger ““must show, beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so changed as to render the classification arbitrary and obsolete.”” *Seeley v. State*, 132 Wn.2d 776, 795-96, 940 P.2d 604 (1997) (quoting *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869 (1980)); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (The equal protection clause “allows the States wide latitude” when social or economic legislation is at stake.).

Respondents assert that there is no rational basis for Washington’s requirement that felons complete all of the terms of their sentences before they receive a certificate of discharge; a prerequisite to restoring their civil

rights, including the right to vote. On this score, Respondents largely invent their own rationales for Washington's law and then knock them down.<sup>8</sup> The legitimate state interests rationally served by the law receive virtually no attention from Respondents, and plainly satisfy equal protection.

Conviction of a felony brings about the lawful retraction and limitation of many privileges and rights. *Tuten v. United States*, 460 U.S. 660, 664, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983). It is rational for the legislature to require a person who chooses to commit a felony and who thereby chooses to forfeit those rights to complete the terms of his or her sentence—to fully pay his debt to society and to rectify the harm that he has caused by virtue of his criminal behavior—prior to being allowed to fully participate in the political process. Although Respondents fail to appreciate the rationality of such a requirement and can only address it by

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<sup>8</sup> Respondents' treatment of the state's interest in excluding those individuals whose conduct has demonstrated their unwillingness to abide by the laws from political participation illustrates this "strawman" tactic. As the Second Circuit explained, "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967). Respondents treat this point as if the State were arguing that a felon's failure to pay LFOs, in and of itself, was the conduct that demonstrated an unwillingness to follow the law. Rather clearly, however, it is the felon's individual choice to commit a felony that demonstrates his or her unwillingness.

Respondents similarly err in contending that felons who pay LFOs under a payment schedule fully complete their sentences in doing so. Respts.' Br. at 18. Most terms of a felony sentence are completed over time. Making progress toward completion of a sentence is not the same as actually completing it.

calling it “circular”, in analogous circumstances the Third Circuit concluded that the rational basis for such a requirement “[was] apparent on its face.” *Owens*, 711 F.2d at 27. In *Owens*, Pennsylvania’s law distinguished between incarcerated and unincarcerated felons, extending the franchise to the latter while withholding it from the former. The Third Circuit concluded that the state “could rationally determine that those . . . who had served their debt to society and had been released from prison . . . stand on a different footing” from incarcerated felons “and should therefore be entitled to participate in the voting process.” *Owens*, 711 F.2d at 28.

It also is rational for the legislature to believe that conditioning restoration of civil rights on completion of all sentence terms would serve as an incentive to felons to fully pay their debt to society.<sup>9</sup> Respondents’ contention to the contrary rings hollow. On the one hand, Respondents find it “difficult to imagine how the denial of the right to vote makes any difference in the collection of LFOs” (Respts.’ Br. at 20), suggesting that securing the right to vote is hardly important enough to promote payment

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<sup>9</sup> Respondents continue their misplaced reliance on decisions having nothing to do with felon disenfranchisement, when they assert that, “[t]he use of the franchise to compel compliance with other, independent state objectives is questionable in any context”, citing *Hill v. Stone*, 421 U.S. 289, 299, 95 S. Ct. 1637, 44 L. Ed. 2d 172 (1975). *Hill* concerned an equal protection challenge to laws that limited voting in city bond elections to persons who held taxable property. *Hill* did not purport to consider the contours of equal protection with respect to felon disenfranchisement laws.

of the financial components of their criminal sentences. On the other hand, the right to vote provides sufficient incentive for Respondents' litigation.<sup>10</sup>

For these reasons, Washington's felon disenfranchisement statute is rationally related to legitimate state interests and satisfies equal protection.

### **3. Cases Cited By Respondents For The Proposition That Wealth Cannot Be A Voting Qualification Are Inapposite**

Respondents rely heavily on *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), to support their equal protection claim. They assert that Washington's statute requiring completion of all sentence terms prior to restoration of civil rights draws a wealth-based classification that, under *Harper*, violates equal protection. Respondents are incorrect.

First, like all of the cases that Respondents cite in support of this claim, *Harper* does not concern felon disenfranchisement or the payment

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<sup>10</sup> Respondents also suggest that the state should be required to collect LFOs through the time-consuming costly legal processes available to collect run-of-the-mill civil debts. Respts.' Br. at 19-20. LFOs are not run-of-the-mill debts. LFOs are a direct consequence of Respondents' criminal behavior, reflect the harm that their criminal behavior has caused to individual victims and society generally, and are part of their criminal sentences. Respondents' suggestion in this respect demonstrates a lack of appreciation for the significance of their obligation to pay LFOs, and their responsibility for creating that criminal liability. Moreover, Respondents do not explain how the debt collection mechanisms that they suggest would be useful as to felons who lack significant financial resources.

of money as a term of a felony sentence. It therefore does not consider the unique constitutional or statutory context in which they press their equal protection claim. As *Richardson* instructs, such cases are inapposite. *Richardson*, 418 U.S. at 54-55.

Rather, *Harper* considered only the validity of a poll tax, a direct and generalized requirement to pay a fee as a prerequisite to voting. Washington's law is decidedly different. It imposes no general requirement to pay a fee as a condition of voting. It simply requires felons to complete all of the terms of their sentences before being restored to their civil rights, regardless of whether those terms concern the payment of money. Despite Respondents' effort to paint *Harper* as adjudicating the validity of statutes regulating the franchise apart from poll taxes, *Harper* was explicit as to the circumstances that it was addressing, and in recognizing that context matters. The Court held: "In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause." *Harper*, 383 U.S. at 668 (citations omitted). Respondents' argument that *Harper* even informs the validity of Washington's law regulating the franchise with respect to felons, let alone determines the validity of such a law, is baseless. Respts.' Br. at 12-15.

Second, although Respondents cast Washington's felon disenfranchisement law as a wealth-based voting qualification, they offer no authority for this label, just the label itself. Respts.' Br. at 12-15. The only classification drawn by RCW 9.94A.637(1)(a) is between the class of felons who have completed all of the terms of their felony sentences and those felons who have not. It makes no difference under the statute whether the sentencing term is financial or nonfinancial, whether it is incarceration, probation, parole, or payment of a fine or legal financial obligation ("LFO"). The statute differentiates only between felons who have completed their sentences and those who have not. A wealthy felon who has not completed the terms of his felony sentence remains disenfranchised, just as an indigent felon does. And an indigent felon who has completed the terms of his sentence is eligible to have his civil rights restored just as a wealthy felon is.

At most, Washington's statute has a disparate impact on felons who cannot satisfy the monetary terms of their felony sentences as quickly as other felons. But a disparate impact on persons of lesser means does not make the class drawn by the statute either wealth-based or a violation of equal protection. "The equal protection clause does not require a state to eliminate all inequalities between the rich and the poor." *In re Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993) (quoting *Riggins v. Rhay*, 75

Wn.2d 271, 283, 450 P.2d 806 (1969)). Indeed, even if one were to equate a monetary payment required as part of a felony sentence to a fee, “fee requirements ordinarily are examined only for rationality.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 123, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996).<sup>11</sup> “States are not forced by the Constitution to adjust all tolls to account for ‘disparity in material circumstances.’” *Id.* at 123-24 (quoting *Griffin v. Illinois*, 351 U.S. 12, 23, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (Frankfurter, J., concurring in judgment)). *M.L.B.* recounts the circumstances where the Court has made an exception to this rule and emphasizes the limited nature of those exceptions. *M.L.B.*, 519 U.S. at 110-27.

Respondents point to a handful of cases where the United States Supreme Court has held that statutes requiring payment violate equal protection or due process with respect to persons who are indigent.<sup>12</sup> Some concern payment required to access the judicial process that finally determines criminal guilt, or whether parental rights should be terminated.

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<sup>11</sup> Of course, the two are not the same. In contrast to a fee, legal financial obligations are imposed only as a consequence of criminal behavior and conviction, and are directly tied to the harm that a felon’s criminal misconduct has caused to society generally and victims personally.

<sup>12</sup> As is explained below, these cases are inapt for many reasons. In addition, it should be noted that in relying on these cases, Respondents would have the Court treat the trial court’s order as though it invalidated Washington’s law as to *indigent* felons whose indigency precludes payment of LFOs. The trial court specifically rejected an indigency standard, exempting instead the nebulous category of felons who “due to their financial status, are unable to pay their financial obligations immediately.” CP 433.

*Griffin v. Illinois*, 351 U.S. 12 (state may not condition appellate review of the ultimate validity of a criminal conviction on payment for a transcript of proceedings), is a case of this sort, as is *Douglas v. People of California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (indigent entitled to counsel on first direct appeal). The same is true of *M.L.B.* (state may not condition appellate review of a judicial decision terminating parental rights on the payment of costs for preparing the trial court record). The interests of the criminal defendants in *Griffin* and *Douglas*, and of the mother whose parental rights were at stake in *M.L.B.*, differ substantially from those of Respondents in this case. Convicted felons enjoy no constitutionally protected right to vote. U.S. Const. amend, XIV, § 2; Wash. Const. art. VI, § 3. The interest of criminal defendants in effective pursuit of an appeal, or of a parent to his or her relationship to a child, clearly differ from those of a convicted felon seeking restoration of a right that the constitution does not extend.

Other cases cited by Respondents concern payment required as a condition of exercising a fundamental right. They are inapposite. Voting is a fundamental right as to *nonfelons*. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) (voting is a fundamental right, “preservative of all rights.”). Felons, however, possess no fundamental right to the franchise. *Richardson*, 418 U.S. at 55.

Respondents cite but fail to explain the significance to this case of *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970). *Williams* involved the fundamental liberty interest in freedom from criminal confinement and held “only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine . . . since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly.” *Id.* at 243. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (A citizen’s right to be free from involuntary confinement without due process is fundamental). There is no such interest at stake in this case. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 206, 76 L. Ed. 2d 221, (1983), cited by Respondents, also concerned loss of liberty, and held only that the state may not revoke probation for failure to pay a fine and make restitution, absent finding of responsibility for the failure.

At the same time that Respondents rely on these cases, they try to discount *United States v. Loucks*, 149 F.3d 1048 (9th Cir. 1998), on the basis that it concerns a claim under the due process clause, rather than the equal protection clause. In fact, the Ninth Circuit noted that *Louck’s* due process claim was intertwined with an equal protection claim. *Id.* at 1050, n.1. In any event, unlike the cases Respondents cite, *Loucks* properly

informs the instant case because the court sustained Washington's requirement to pay LFOs prior to restoration of civil rights where a fundamental liberty interest—the interest in freedom from physical confinement—was at stake. No fundamental interest is at stake in this case.

Loucks, an indigent criminal defendant, was convicted of making a false statement to acquire a firearm by denying a prior felony conviction, a federal crime punishable by imprisonment. 18 U.S.C. § 922(a)6; 18 U.S.C. § 924(a)(2). At the time Loucks was charged, he had served his term of incarceration and community supervision from a prior felony conviction, but had not paid his LFO. As a result, under Washington's law, he was not eligible to have his civil rights restored. Such restoration would have allowed Loucks to truthfully state on his firearm application that he had not previously been convicted of a felony, and ultimately, would have allowed him to avoid the new charge. The issue was “whether the State of Washington denied Loucks due process by not restoring his civil rights when his failure to complete payment of his LFO was due to his indigency.” *Loucks*, 149 F.3d at 1050. Based on alternatives available in Washington's law for restoration of civil rights, alternatives that Loucks had not pursued, the court rejected his claim. Thus, even in the face of Loucks' fundamental interest in freedom from imprisonment based on

nonpayment of LFOs, the Court held that Washington’s requirement to pay such obligations did not violate Louck’s due process rights. If Washington’s requirement to pay LFOs prior to restoration of civil rights does not violate due process when the fundamental liberty interest in avoiding imprisonment is at stake, it is difficult to see how such a requirement can violate equal protection in the context of felon voting—when no fundamental interest is at issue at all.

Moreover, unlike the circumstances in the cases that Respondents rely upon, Washington’s felon disenfranchisement statute does not seek to impose any new sentence, let alone criminal incarceration, for failure to satisfy sentence terms. As the federal and state constitutions authorize, the statute simply requires completion of the original felony sentence prior to issuing a certificate of discharge and restoring civil rights. None of the cases cited by Respondents supports their argument that Washington’s felon disenfranchisement statute is an impermissible wealth-based classification that violates equal protection.<sup>13</sup>

To the extent that Washington’s law requiring felons to complete all sentence terms disparately impacts less well-to-do felons, it is subject

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<sup>13</sup> Respondents also cite *Edwards v. People of California*, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941). Not only is *Edwards* unrelated to felon disenfranchisement, it also does not concern equal protection. *Edwards* held *only* that a California law prohibiting transportation of indigents into that state imposed an unconstitutional burden on interstate commerce. *Id.* at 177.

only to rational basis scrutiny under the equal protection clause. *Loucks*, 149 F.3d at 1050. For reasons previously discussed, Washington's challenged statute readily satisfies such scrutiny.<sup>14</sup>

**B. Respondents' Claim Of Greater Protection Based On The State Privileges And Immunities Clause Fails Because The State Constitution Denies The Right To Vote To Convicted Felons And State Law Grants No Privilege To A Favored Minority**

This Court has previously applied the privileges and immunities clause of the state constitution in a manner independent of federal equal protection analysis only when a state law affords a special privilege or immunity to a minority to the detriment of the majority. *Grant Cy. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004). In the absence of a special privilege granted to an especially favored minority, state privileges and immunities and federal equal protection are applied through the same analysis. *State v. Thorne*, 129 Wn.2d 736, 771 n.9, 921 P.2d 514 (1996); *In re Detention of Turay*, 139 Wn.2d 379, 412, 986 P.2d 790 (1999).

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<sup>14</sup> Apparently trying to portray themselves as victims of an unfair system, Respondents complain that the cost of their criminal misconduct has increased. Respts.' Br. at 9. This lament underscores Respondents' failure to accept personal responsibility for their circumstances. Respondents are not victims. Respondents created victims when they chose to commit their crimes. They harmed individuals, they harmed society, and they now attack a law that simply requires them to rectify the harm that they chose to cause before they are discharged from their conviction and restored to their civil rights.

Respondents also complain that the process for restoring civil rights is "complicated and burdensome." Respts.' Br. at 8. No respondent is eligible or has endeavored to invoke the process and the process is not at issue in this case.

This Court has previously explained that the privileges and immunities clause should be applied independently—that it has a “harder bite”<sup>15</sup>—only where “a small class is given a special benefit, with the burden spread among the majority.” *Grant County*, 150 Wn.2d at 807 (internal quotation omitted). Respondents’ attempt to shoehorn this case into the Court’s prior analysis by asserting that “wealthy felons” (*see Respts.* Br. at 36) constitute such a privileged minority strains this Court’s logic, and the language of the state constitution,<sup>16</sup> beyond recognition.

“[O]ur framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than oppression by the majority.” *Id.* at 808 (citations omitted). The Court has considered the privileges and immunities clause in light of a concern that corporations might use wealth to wring special favoritism from government at the expense of ordinary citizens. *Id.* The suggestion that “wealthy felons” are an especially privileged class that might be equated with the railroads of the late nineteenth century, for example, or

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<sup>15</sup> *Grant County*, 150 Wn.2d at 807 (internal quotation omitted).

<sup>16</sup> Wash. Const. art. VI, § 3 (“All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise”).

that they might somehow translate wealth into political power, strains credulity.<sup>17</sup>

Respondents can only make the suggestion that “wealthy felons” are a specially privileged class by considering convicted felons in isolation, ignoring the rest of the population. They assert that “wealthy felons” are a minority among felons and, based on that truncated classification, assert that they are a privileged minority. Respts.’ Br. at 36. Under the Washington Constitution, citizens of sufficient age are generally qualified to vote. Wash. Const. art. VI, § 1. Those who are convicted of felonies or judicially declared mentally incompetent, lack the right to vote. Wash. Const. art. VI, § 3. Washington law grants no special favor to those felons who fully comply with their sentence terms; rather, such individuals are simply restored to the same right enjoyed by the vast majority of Washington citizens. Washington law does not affect a “privileged minority” of “wealthy felons”; state law disenfranchises convicted felons whose civil rights have not been restored.

Even if it were somehow reasonable to regard “wealthy felons” as privileged minority, this case must be considered within its unique

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<sup>17</sup> Respondents apparently use the term “wealthy” to describe felons who have the means to pay LFOs immediately rather than over time. Such an encompassing definition of “wealthy” also further removes such felons from the realm of concern of the state privileges and immunities clause that a “privileged minority” will receive special treatment at the expense of the majority.

constitutional context. The federal constitution explicitly denies felons a constitutionally protected right to vote. U.S. Const. amend. XIV, § 2. The state constitution goes farther, not merely *authorizing* felon disenfranchisement but *commanding* it. Wash. Const. art. VI, § 3. The state constitution denies the right to vote to those “convicted of infamous crime unless restored to their civil rights”. *Id.* While the federal constitution is permissive, allowing states to disenfranchise felons without requiring them to do so, the state constitution embodies Washington’s choice as a matter of fundamental law that the right to vote does not extend to felons. Rather than merely authorizing the denial of the right to vote, the state constitution affirmatively denies it to convicted felons and then entrusts the decision as to when or how to restore the franchise to the sound discretion of the legislature. *Id.* The privileges and immunities clause accordingly cannot be read to prohibit what article VI, section 3, commands: the disenfranchisement of convicted felons whose civil rights have not been restored.

Respondents’ privileges and immunities argument ultimately fails because it depends upon the same mistaken premise as their federal theory. Respondents maintain that convicted felons possess a fundamental right to vote. The state constitution expressly denies them that right. Wash. Const. art. VI, § 3. The state constitution cannot impliedly

guarantee a right, through a generally phrased privileges and immunities clause, that the same document expressly denies outright in another provision.

Respondents' reliance upon the state constitution's provision for free and equal elections similarly fails to support a claim to a constitutional right that the constitution expressly denies. Nothing in the state constitution's mandate of free and equal elections contradicts the constitution's exclusion of convicted felons from the franchise. Wash. Const. art. I, § 19. Respondents err in relying upon this Court's decision in *Foster v. Sunnyside Valley Irrigation District*, 102 Wn.2d 395, 687 P.2d 841 (1984), for a contrary view. In that case, this Court concluded that a law requiring ownership of land dedicated to agricultural uses as a qualification for voting in an irrigation district election was unconstitutional. *Id.* at 411. People who do not own land, however, are hardly on the same constitutional footing as convicted felons. The state constitution expressly denies the right to vote to convicted felons,<sup>18</sup> and article I, section 19, protects the voting rights only of "all constitutionally qualified citizens." *Id.*, at 407.

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<sup>18</sup> Wash. Const. art. VI, § 3.

**C. Respondents' Cross-Appeal Should Be Denied**

**1. Respondents Are Not "Aggrieved Parties" And Lack Standing To Pursue Their Cross Appeal**

The trial court limited its ruling to the restoration of voting rights for 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. Respondents' cross appeal objects to the court's limitation of its ruling based on the "financial status" of a convicted felon. They contend that even those felons who are able to pay, but refuse to do so, must be permitted to vote. Respts.' Br. at 44.

The Respondents to this action do not find themselves in that circumstance. All of the Respondents are indigent. CP 437. As the trial court explained the facts: "Each plaintiff is currently making regular monthly payments towards their LFOs. However, because each is indigent, none is able to pay more than \$10-\$20 per month." CP 437. The trial court ruled that all of the Respondents, by name, "are entitled to register to vote." CP 434.

Only an aggrieved party can appeal a trial court's ruling. RAP 3.1. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *Breda v. B.P.O. Elks Lake City*, 120

Wn. App. 351, 353, 90 P.3d 1079 (2004) (citations omitted). Since Respondents received full relief, they are not aggrieved by the trial court's ruling and may not pursue an appeal designed only to address the circumstances of others, who are not parties to this action.<sup>19</sup>

The prevailing party before the trial court is not entitled to seek appellate review merely because of a disagreement over the reasoning that the trial court employed. *City of Tacoma v. Taxpayers*, 108 Wn.2d 679, 685, 743 P.2d 793 (1987). A party's mere disagreement with the trial court's analysis does not render that party "aggrieved" within the meaning of RAP 3.1. *See State v. Taylor*, 114 Wn. App. 124, 126, 56 P.3d 600 (2002) (mere "hurt feelings" did not entitle a party to whom the trial court granted relief to appeal).

Given the absence of an interest of their own in the arguments raised on cross appeal, the Respondents ask this Court to step "into the prohibited area of advisory opinions." *Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). It is axiomatic that courts decide the cases before them, and do not render advisory decisions

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<sup>19</sup> Respondents did not pursue this litigation as a class action and they lack standing to challenge Washington's law based on the alleged rights of third parties. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (plaintiffs must show a direct and substantial, as opposed to potential, theoretical or academic, interest in the challenged statute).

regarding issues not presented by the facts. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 716, 911 P.2d 389 (1996) (general rule against advisory opinions). The Court should accordingly dismiss Respondents' cross appeal. RAP 3.1.

**2. Respondents' Challenge As To Felons Able to Pay Their LFOs Immediately Fails For The Same And Additional Reasons As Their Claim Regarding Felons Unable To Make Immediate Payment**

Respondents devote the bulk of their brief before this Court to the proposition that Washington's law disenfranchising convicted felons until their felony sentences are completed impermissibly discriminates against felons of limited means. In the last few pages of their brief, however, Respondents shift their position. They argue that a felon's financial status is irrelevant, that felons fully able to pay their LFOs immediately may freely choose not to do so, and nonetheless, are constitutionally entitled to a discharge from their convictions and restoration of their civil rights. Even if Respondents possessed standing to assert this claim on cross appeal, their position is plainly incorrect.

Respondents' broader claim fails for the same fundamental reasons that their narrower claim fails with respect to felons unable to immediately pay their LFOs. Felons have no fundamental right to vote; Washington's law requiring completion of all sentence terms including payment of LFOs

is subject to rational basis analysis; and Washington's law readily satisfies such scrutiny. The same analysis and the same result apply with even greater force as to the broader group of felons whose interests Respondents seek to champion.

In addition, however, it is worth noting that, as one might expect, even the inapposite cases that Respondents rely on for their unsound, wealth-based discrimination claim do not stand for the proposition that state-imposed payment requirements are constitutionally offensive as to those able to pay. *See, e.g., Williams v. Illinois*, 399 U.S. at 242 n.19 (“We wish to make clear that nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs.”) The Court reiterated this point in *Bearden* (quoting *Williams*) and then emphasizing that the distinction as to the reasons for non-payment are “of critical importance.” *Bearden*, 461 U.S. at 668. If the felon “has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified” in not excusing the failure to pay. *Id.* This should hardly be surprising. The logical consequence of concluding that a law impermissibly discriminates based on wealth, is to preclude the

application of that law to the indigent, not to preclude its application to all.<sup>20</sup>

To the same effect, in the arena of voting and elections, is *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315, 39 L. Ed. 2d 702 (1974). In that case, when the United States Supreme Court concluded that a state law requiring the payment of a filing fee in order for a candidate to appear on the ballot violated the right of an indigent candidate to seek office, it held the law unconstitutional only as applied to indigents. *Id.* at 718. The Court did not conclude that the impact of filing fees on indigent candidates precluded their application to *anybody*; the Court merely concluded that the state could not apply them to the indigent. *Id.*

Respondents rely primarily on *Harper* for the proposition that all felons must be allowed to vote before completing the terms of their sentences requiring payment of LFOs, without regard to their ability to pay. In this respect, Respondents again misapply and then overstate the Court's conclusion in *Harper*. First, of course, *Harper* did not relate to convicted felons whose ineligibility to vote is a constitutionally sanctioned consequence of their own choice to commit a felony. Second,

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<sup>20</sup> An example is found in the rules of this Court. RAP 5.1(b) requires the payment of a filing fee in order to perfect an appeal. Recognizing the impact of such a requirement on the indigent, the rule also provides for the entry of orders of indigency and the waiver of such charges. RAP 15.2. Such relief is not available to those who are not indigent.

Respondents erroneously maintain that the Court in *Harper* concluded that the payment of money cannot be required as a precondition for voting, no matter what the individual's financial status. Respts.' Br. at 43-44. *Harper* does not stand for such a proposition, as the Virginia law at issue provided no exception to the poll tax requirement for indigents. *Harper*, 383 U.S. at 665 n.1. The Court criticized the poll tax because it made voters' affluence a qualification for voting. *Id.* at 668. The Court did not reach the question, because it was not presented, of whether a state could apply a poll tax to those able to pay. In that the federal constitution was amended to expressly preclude the payment of poll taxes as a requirement for voting in presidential elections, that issue is unlikely to arise.<sup>21</sup> U.S. Const. amend. XXIV.

In advancing their broader claim, Respondents acknowledge that the ruling of the trial court is ill-defined and unworkable. Respts.' Br. at 46. Indeed, the troublesome nature of the line drawn by the trial court seems at least in part to drive Respondents to their broader claim—more or less in search of a workable line. Although the State shares Respondents' view that the trial court decision is unwieldy and wholly

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<sup>21</sup> By the time that the Court decided *Harper* in 1966, the twenty-fourth amendment had already been ratified. This meant that the poll tax had been prohibited as a qualification for voting in federal elections, and abolished by the states themselves in all but four states for state elections. *Harper*, 383 U.S. at 680 (Harlan, J., dissenting).

ambiguous in invalidating Washington's felon disenfranchisement law as to felons "who due to their financial circumstances, are unable to pay their legal financial obligations immediately", CP 433, this problem surely is secondary to the trial court's fundamental error in invalidating Washington's felon disenfranchisement statute at all. In any event, the unworkability of the trial court decision hardly justifies compounding the decision's error by expanding its already erroneous reach.

## II. CONCLUSION

For these reasons and the reasons expressed in the State's Opening Brief, this Court should reverse the decision of the trial court and should dismiss Respondents' cross appeal.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of June, 2006.

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