The Honorable Michael S. Spearman
Trial Date: April 10, 2006
Hearing Date: January 20, 2006
Hearing Time: 10:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

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

Defendants.

Case No.: 04-2-33414-4SEA

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs Daniel Madison, Beverly DuBois, and Dannielle Garner (together, "Plaintiffs") are ex-felons who have completed all terms of their sentences, with the exception of the payment of Legal Financial Obligations ("LFOs") associated with their sentences. Each of the Plaintiffs is currently making monthly payments toward his or her LFOs, but because they are indigent, Plaintiffs are unable to pay the full amount due. Indeed, because of the 12% interest charged and administrative fees associated with their LFOs, some of the 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 make full payment on LFOs before being re-enfranchised, Plaintiffs have been unable to vote in any elections since the date of their convictions. Under Washington's current statutory scheme, Plaintiffs will be unable to vote in any future elections, and will be permanently disenfranchised, unless they are able to pay the full amount of their LFOs (in addition to interest and fees associated with LFOs).

Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," it has been characterized by the Supreme Court as 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)). By denying the vote to those who have not paid their LFOs, the State of Washington distributes this fundamental right on the constitutionally impermissible basis of wealth. Washington's re-enfranchisement scheme creates two classes of ex-felons in Washington: those ex-felons who are able to pay their LFOs and regain the right to vote, and those ex-felons who are unable to pay their LFOs and remain permanently disenfranchised. By requiring payment of all LFOs as a condition for re-enfranchisement, the State effectively imposes a poll tax upon Plaintiffs and all other ex-felons. This violates both the Federal and State Constitutions.

Plaintiffs seek summary judgment declaring that the Washington statutes that condition the restoration of Plaintiffs' (and other ex-felons') voting rights on the payment of outstanding

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LFOs are unconstitutional as violative of the Federal Equal Protection Clause and Washington's Privilege and Immunities Clause. Further, Plaintiffs seek judgment declaring that they are entitled to register to vote and are eligible to sign the oath required by RCW 29A.08.230.

II. STATEMENT OF FACTS

A. Washington's Disenfranchisement Scheme.

Like many other states, Washington disenfranchises persons who have been convicted of a felony. Article VI, Section 3 of the Washington Constitution provides that "[a]ll persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise." An "infamous crime" is defined as "a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility," and includes all felonies. RCW 29A.04.079; RCW 9A.20.021(1). Until persons convicted of a felony have had their civil rights restored, they are precluded from voting in state or federal elections. When a registered voter is convicted of a felony, that voter's registration is cancelled by the county auditor upon notification of a felony conviction. RCW 29A.08.520(1).[1] Felons not previously registered to vote are prevented from registering by RCW 29A.08.230, which requires registrants to sign an oath swearing that "I am not presently denied my civil rights as a result of being convicted of a felony." RCW 29A.08.230.

Many tens of thousands of people in Washington are disenfranchised by virtue of a felony conviction. According to Defendants State of Washington, Christine O. Gregoire, and Sam Reed (together, "the State"), more than 50,000 disenfranchised felons are currently under the supervision or custody of the Department of Corrections ("DOC"). Declaration of Peter A. Danelo ("Danelo Decl."), Ex. A at 8 (Response to Interrogatory No. 7). This number apparently does not account for those felons who have been released from DOC custody or

[1] New legislation effective January 1, 2006 provides for a quarterly comparison of "a list of known felons with the statewide voter registration list." RCW 29A.08.520(1). When a match is found, either the secretary of state or county auditor is authorized to confirm the match using the voters' date of birth, and to suspend the voter registration from the official state voter registration list, pending notice to the voter. *Id.*

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supervision, but who have not yet been re-enfranchised, either because of their failure to pay LFOs or for other reasons. In fact, the number of Washingtonians disenfranchised by virtue of a felony conviction may be far higher: According to a study done in 1998 by The Sentencing Project, more than 150,000 Washington residents were disenfranchised by virtue of a felony conviction.[2] *See* Danelo Decl., Ex. B at 10 (Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project (1998)).

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. Danelo Decl., Ex. A at 6-8 (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. Danelo Decl., Ex. C at 3 (Department of Corrections, Agency Fiscal Note for Senate Bill 6519 (2002)).

B. Washington's Re-enfranchisement Scheme.

For Plaintiffs and other ex-felons whose convictions are governed by the Sentencing Reform Act ("SRA") of 1981[3], the mechanism for re-enfranchisement—the restoration of civil rights—is governed by RCW 9.94A.637. 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).

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[2] While not directly relevant to the legal arguments made here, it is important to note the likely disparate impact that such disenfranchisement has upon persons of color. For example, the Sentencing Project estimates that more than one third of the total disenfranchised population are African American men. Danelo Decl., Ex. B at 1, 8-9.

[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).

Although Washington's re-enfranchisement scheme appears to be relatively simple and straightforward, in reality the process of restoring one's civil rights and regaining the right to vote is extraordinarily complicated and burdensome. As a practical matter, the requirement to pay 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 nightmare faced by ex-felons attempting to satisfy their LFOs and obtain certificates of discharge.

C. Legal Financial Obligations.

1. LFOs Assessed Against Felons.

LFOs are defined as "a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations." RCW 9.94A.030(28). In the past 20 years, the State has gradually been adding to the categories of costs that are 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. RCW 9.94A.030(28). Other potential LFOs include the costs of incarceration, community supervision, and putting one's DNA into the state database.[4] *See* RCW 9.94A.760(2); RCW 9.94A.780; RCW 43.43.7541.

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. *See* RCW 7.68.035. Not surprisingly, the costs of incarceration and community supervision have increased as well. RCW 9.94A.760(2).

Interest accrues on unpaid LFOs at a rate of 12% from the date of entry of judgment. RCW 10.82.090(1); RCW 4.56.110(3); RCW 19.52.020(1). At this rate, even ex-felons with relatively small LFOs often have difficulty covering the interest that accrues on an annual basis, and are unable to reduce the amount of the principal LFO due. Plaintiff Beverly DuBois

[4] For ease of reference, an appendix outlining potential LFOs and their statutory authority is attached as Appendix A.

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currently faces this situation. *See* Declaration of Beverly DuBois ("DuBois Decl."), ¶ 8. While sentencing courts previously entered sentences that waived or deferred the accrual of interest, in 2002 the Washington State Supreme Court held that RCW 10.82.090(1) required interest to accrue from the date of judgment. *State v. Claypool*, 111 Wn. App. 473, 45 P.3d 609 (2002). In 2004, the legislature enacted RCW 10.82.090(2) to give judges discretion to waive or reduce interest, but only after a hearing in which the Court determines that the ex-felon has made a good faith attempt at payment of the full amount with interest.

In addition to the LFOs assessed by the court as part of a felon's judgment and sentence, and the 12% annual interest accruing on the LFOs, 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. Danelo Decl., Ex. D (KCC 4.71.160). Thurston County's Fee Schedule allows a similar $100 fee on LFO statements, as well as a $50 collection fee. *See* Danelo Decl., Ex. E (Thurston County Fee Schedule). King County charges a $10 fee for any payments of over $25. *See* Danelo Decl., Ex. F (King County Fee Schedule). Additional fees may also be imposed if the LFO payments are made electronically. *See* RCW 9.94A.760(8); Danelo Decl., Ex. G (KCC 4.100.020).

With interest and collection fees, a felon's LFOs often accumulate at a rate higher than a felon's payment schedule set by the court. For example, a felon who owes $500 and pays $10 per month will have paid $120 by the end of the year, but accrued interest of $60 and collection fees of $100 would total $160, leaving the felon with a higher outstanding LFO than when the LFO was originally assessed.

2. Procedures For Paying/Collecting LFOs.

Once LFOs have been imposed as part of a judgment and sentence, a sentencing court is to set a monthly payment schedule for the offender. RCW 9.94A.760(1). If the court fails to set the payment schedule, the schedule may be set by either the DOC or county clerk.[5] *Id.*

[5] Some counties set these schedules by court rule. *See* Danelo Decl., Ex. H (Wa. R. Elma. Mun. Ct. 14) ("All legal financial obligations shall be paid at the rate of $50.00 per month or the total

(Footnote Continued)(Footnote Continued)

For payments made while the felon is in custody or under community supervision, the DOC is in charge of collecting the LFOs. RCW 9.94A.760(8). After the period of custody or supervision, responsibility for collecting LFOs transfers to the county clerks. *Id.* Whether the LFO payments are made to the DOC or county clerks, the county clerks are to keep track of the amount paid and the amount still owed. *Id.*

When a felon is still in custody or under DOC supervision, LFO payments are made directly to the DOC, either paid directly from the inmate's prison account, or withheld from salaries paid through any prison industry or work release program. RCW 9.94A.760(9), (12); Danelo Decl., Ex. I at 69 (DOC Policy Directive DOC 200.000). Once a felon is released from custody, however, the DOC's responsibility for collecting LFOs stops, and this responsibility transfers to the county clerks. RCW 9.94A.760(4), (8). Currently, RCW 9.94.760(11)(b) provides that the administrative office for the courts will send out monthly billing statements to the ex-felons specifying how payments are to be made.

Under RCW 9.94A.760(10), "[t]he requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence," and the offender is therefore subject to penalties for noncompliance that include additional community service, electronic home monitoring, jail time, or other sanctions. RCW 9.94A.634; RCW 9.94A.737; RCW 9.94A.740. In addition to imposing penalties for failing to make payment on LFOs, the State can also 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. *See also* Danelo Decl., Ex. J (DOC Policy Directive 200.380 discussing "collection tools" available to Community Corrections Officers when post-SRA offenders are in non-compliance with their payment schedule). 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).

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amount due divided by the number of probation months, not to exceed twelve months, whichever amount is greater, unless a different payment schedule is expressly approved by the Court.").

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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. For crimes committed after July 1, 2000, "the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with the payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime."[6] RCW 9.94A.760(4). According to the DOC, LFOs are non-dischargeable in bankruptcy. Danelo Decl., Ex. J.

3. Obtaining Certificates of Discharge.

As noted above, once an offender has completed all terms of his or her sentence, including payment of all LFOs, the ex-felon is eligible for a certificate of discharge. RCW 9.94A.637(1)(a), (4). If the felon pays off the LFOs and completes all terms of the sentence while under DOC supervision, the DOC is responsible for notifying the sentencing court of this fact. RCW 9.94A.637(1)(b)(i). Alternatively, if satisfaction of the LFOs is made after release from DOC custody or supervision, the county clerk is responsible for notifying the sentencing court that the offender has satisfied all terms of the judgment and sentence and is eligible for a certificate of discharge. RCW 9.94A.637(1)(b)(ii). In 2004, the legislature added RCW 9.94A.637(1)(c), which allows a felon to petition the court with "adequate verification" that he or she has satisfied all terms and conditions of the sentence. New legislation also provides for notice to be provided to county auditors when a felon has completed all the requirements of his or her sentence. *See* RCW 29A.08.660.

Although Washington's statutory scheme provides a mechanism for re-enfranchisement by obtaining a certificate of discharge, in practice 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 released or transferred from DOC supervision or jurisdiction during 2004. *See*

[6] For crimes committed before July 1, 2000, a court could extend the criminal judgment for an additional ten years from date of release from total confinement or the date of entry of the judgment and sentence, whichever period ended later. RCW 9.94A.760(4).

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Danelo Decl., Ex. A at 4-5 (Response to Interrogatory No. 2).[7] Indeed, for each year between 1985 and 2004, the number of recorded certificates of discharge pales in comparison to the number of felons released or transferred from DOC supervision or custody. *Id.* This leaves the great majority of ex-felons disenfranchised until completing payment of their LFOs.

The governor's race in 2004 brought to light many of the problems inherent in Washington's re-enfranchisement scheme. In particular, the litigation surrounding the governor's race highlighted 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 Secretary of State Sam Reed, "We clearly have a problem in the state of Washington as to identify who can vote and who can't vote." Danelo Decl., Ex. K (Rachel La Cote, *Groups fighting for Washington ex-felons to get voting rights restored*, The Associated Press, June 27, 2005). This concern was echoed by various county auditors and election officials. Danelo Decl., Ex. L (*Felon-voting laws confusing, ignored*, Seattle Times, May 22, 2005).

D. Background Facts Re Plaintiffs.

1. Plaintiff Daniel Madison.

Plaintiff Daniel Madison was convicted of third degree assault in Washington in August 1996. Declaration of Daniel Madison ("Madison Decl."), ¶ 2. Mr. Madison's sentence included an order to pay LFOs totaling $583.25, including $483.25 for restitution and $100 for a victim assessment fee. Madison Decl. ¶ 2, Ex. A. Although Mr. Madison's judgment and sentence and order of restitution provide that his total LFOs are $583.25, DOC records indicate that additional amounts may have been added to his LFOs after the time of sentencing. Madison Decl. ¶ 3; Danelo Decl., Ex. M. Records produced by the State in response to discovery requests in this matter indicate an additional $100 victim assessment

[7] The statistics 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. Danelo Decl., Ex. A at 6 (Response to Interrogatory No. 4).

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fee[8] and $100 court cost added to Mr. Madison's LFOs, thus increasing his total LFOs to $783.25. Danelo Decl., Ex. M. Monthly statements from the King County Clerk's Office also indicate that his total sentenced LFOs were $783.25. Madison Decl., Ex. C.

After entry of his judgment and sentence, Mr. Madison made regular monthly payments of $15-$20 in cash directly to the King County Superior Court. Madison Decl. ¶ 4. Mr. Madison, who is indigent and has no regular monthly income other than his social security payments, continued to make monthly payments toward his LFOs after his release from DOC supervision. Madison Decl. ¶ 5.

Some time after 1999, Mr. Madison stopped receiving monthly restitution statements from the DOC, even though he had provided the DOC with notice of his address change. Madison Decl. ¶ 6. Because Mr. Madison stopped receiving these statements soon after the victim of his crime died (for unrelated causes), he assumed that he was no longer responsible for the outstanding restitution balance. Madison Decl. ¶ 6. For this reason, Mr. Madison stopped making his monthly payments. Madison Decl. ¶ 6. In late 2003 or early 2004, the court issued an order to show cause relating to Mr. Madison failing to pay his LFOs. However, because the court used an incorrect address for Mr. Madison, he was not aware of the order for several months, and a bench warrant issued for failure to appear. Madison Decl. ¶ 7.

In March 2004, Mr. Madison appeared at a hearing before Judge Ramsdell. At the hearing, the Court quashed the bench warrant and issued an order modifying Mr. Madison's sentence to waive interest on his LFOs and strike all previously assessed interest. The court ordered Mr. Madison to make minimum monthly payments of $15. Madison Decl. ¶ 8, Ex. C. Despite the fact that the bench warrant was ultimately quashed, the Social Security Administration determined that Mr. Madison was not eligible for the $4,992.60 of benefits he received while the warrant was outstanding. Madison Decl. ¶ 9, Ex. D. As a result, this

[8] 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.

amount is currently being deducted from Mr. Madison's monthly social security payments. *Id.*

Mr. Madison has now completed all nonfinancial terms of his sentence, and is currently making monthly payments in the amount of approximately $15 toward his LFOs. Madison Decl. ¶ 11. 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. Madison Decl. ¶ 11.[9] Although the Court's order specifically sets Mr. Madison's monthly obligations at $15, he receives monthly statements indicating that his monthly obligation is $25, and recently received a monthly statement showing his monthly obligation is $50. Madison Decl. ¶ 10, Ex. B, E. Mr. Madison has attempted to contact the King County Clerk's Office to remedy this discrepancy, but has been told that the court's order does not affect his minimum monthly obligations. Madison Decl. ¶ 10.

To date, Mr. Madison has paid at least $285 toward his LFOs; however, he still owes more than $200. Madison Decl. ¶ 12. Mr. Madison has been unable to vote in any elections since his conviction in 1996, and under Washington's current statutory scheme, will be unable to vote in any future elections unless and until he satisfies his LFOs. Madison Decl. ¶ 14. 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. Madison Decl. ¶ 14.

2. Plaintiff Beverly DuBois.

Plaintiff Beverly DuBois was convicted of manufacture and delivery of marijuana in Stevens County, Washington in 2002. DuBois Decl. ¶ 2. 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. DuBois Decl. ¶ 2, Ex. A. Ms. DuBois has completed all nonfinancial terms of her sentence (including serving time in the county jail), and since her conviction, has made monthly payments in the amount of approximately $10 toward her LFOs. DuBois Decl. ¶¶ 3, 5.

[9] In the past, Mr. Madison attempted to make his LFO payments using a money order, but found that the Clerk's Office's delay in processing the money orders prevented him from fully complying with the Court's payment schedule. Madison Decl. ¶ 11.

Ms. DuBois is unable to work due to a permanent disability resulting from injuries sustained in a car accident in 2001. DuBois Decl. ¶ 4. 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. DuBois Decl. ¶ 5. 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. DuBois Decl. ¶ 6, Ex. B (September 2005 Statement from Stevens County Office of County Clerk). Although Ms. DuBois' monthly payments of $10 comply with the payment plan set by the sentencing court, her annual payments are insufficient to cover the interest that accrues on her LFOs on an annual basis. DuBois Decl. ¶ 8. Despite the fact that she has been making regular monthly payments since the date of her conviction, her total LFOs have increased. *Id.* Ms. DuBois has been unable to vote in any elections since her conviction in 2002, and under Washington's current statutory scheme, will be unable to vote in any future elections until she satisfies her LFOs. DuBois Decl. ¶ 9. Given that Ms. DuBois' current monthly payments are insufficient to cover the interest accruing on her LFOs, she faces permanent disenfranchisement by virtue of her inability to satisfy her LFOs.

3. Plaintiff Dannielle Garner.

Plaintiff Dannielle Garner was convicted of forgery in Skagit County, Washington in 2003. Declaration of Dannielle Garner ("Garner Decl."), ¶ 2. Ms. Garner's sentence included an order to pay LFOs totaling $610, including a $500 victim assessment fee and $110 in court fees. Garner Decl., Ex. A. Ms. Garner is permanently disabled as a result of mental illness and currently has no monthly income other than social security payments. Garner Decl. ¶ 3. Despite the fact that Ms. Garner is indigent, she has continued to make monthly payments toward her LFOs since her release from DOC supervision. Garner Decl. ¶ 5. She has now completed all nonfinancial terms of her sentence, and is currently making monthly payments

in the amount of approximately $10 toward her LFOs. Garner Decl. ¶ 5. Ms. Garner's monthly payments are made by her mother, who is listed as the payee for Ms. Garner's social security payments. Garner Decl. ¶ 5. Using online banking, Ms. Garner's mother arranges for Ms. Garner's bank to transmit $10 to the Skagit County Clerk's Office on a monthly basis. Garner Decl. ¶ 5.

In December 2004, Ms. Garner received a notice for allegedly failing to comply with her monthly payment schedule. Garner Decl. ¶ 6, Ex. B. Despite the fact that she was current with her total payment obligations for 2004, the State held a hearing regarding compliance because she had, on several occasions, missed a monthly payment and later made that monthly payment up in a subsequent month. Garner Decl. ¶ 6. For example, Ms. Garner failed to make a monthly payment in January, but paid $20 toward her LFOs in February. Garner Decl. ¶ 6; Danelo Decl., Ex. N. At the hearing, the Court entered an order requiring Ms. Garner to make her monthly $10 payments, and ordering that interest would be waived on her LFOs once she paid the principal in full. Garner Decl. ¶ 7, Ex. B.

To date, Ms. Garner has paid at least $250 toward her LFOs, but still owes at least $360. Garner Decl. ¶ 8. Even assuming that the Court agrees to waive accrued interest once Ms. Garner has paid her principal LFO obligation in full, on her current payment schedule it will be at least three years before Ms. Garner is eligible for re-enfranchisement. Garner Decl. ¶ 8. She has been unable to vote in any elections since her conviction in 2002, and under Washington's current statutory scheme, will be unable to vote in any future elections until she satisfies her LFOs. Garner Decl. ¶ 10. Ms. Garner would like to regain her right to vote so that she can become "a true American." Garner Decl. ¶ 10.

III. STATEMENT OF ISSUES

1. Whether Washington's re-enfranchisement scheme violates the Equal Protection Clause of the United States Constitution by distributing the fundamental right to vote to some citizens and not to others based solely on the payment or non-payment of money.

2. Whether Washington's re-enfranchisement scheme violates the Privileges and Immunities Clause of the Washington State Constitution.

IV. EVIDENCE RELIED UPON

Plaintiffs rely upon the accompanying declarations of Peter A. Danelo, Daniel Madison, Beverly DuBois, and Dannielle Garner, the exhibits attached thereto, and the records and files in this case.

V. LEGAL ARGUMENT

A. The Right To Vote Is Fundamental Under Both The Federal And State Constitutions.

The right to vote has long been held to be a foundational element of the United States Constitution. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," it has been characterized by the Supreme Court as 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)). Its fundamental role in the functioning of America's democratic institutions means that "[a]ny unjustified discrimination" in the distribution of the franchise "undermines the legitimacy of representative government." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

Washington courts have also recognized that the right to vote is fundamental under Washington's Constitution. *City of Seattle v. State*, 103 Wn.2d 663, 670 (1985). In fact, the Washington Supreme Court has held that the Washington Constitution is more protective of the right to vote than the federal constitution. *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 404, 407 (1984). "The Washington Constitution, unlike the federal constitution, specifically confers upon its citizens the right to 'free and equal' elections." *Id.* Article I, Section 19 of the Washington Constitution states that "[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

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B. Washington's Statutory Scheme For Ex-Felon Re-Enfranchisement Unconstitutionally Burdens The Fundamental Right To Vote.

1. Statutes That Distribute The Vote To Some Citizens, But Not Others, Are Subject To Strict Scrutiny Analysis.

Because the right to vote is fundamental, state statutes that distribute the vote to some citizens while denying it to others are subject to strict scrutiny. *Kramer*, 395 U.S. at 627. Such classifications "cannot be upheld unless . . . supported by sufficiently important state interests" that are "closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *see also Kramer*, 395 U.S. at 627 (exclusions from the franchise must be "necessary to promote a compelling state interest"); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). If there are alternative means to achieve the State's interests without burdening the right to vote, the State must choose those "less drastic means." *Dunn*, 405 U.S. at 343.

It is clear that Washington's re-enfranchisement system distributes the right to vote to some citizens while denying it to others. This disparate treatment creates two classes of ex-felons for the purposes of voting: those who are immediately re-enfranchised upon release from supervision because they are able to pay off their LFO balance in full, and those who are barred from the re-enfranchisement process because they have not paid their LFOs. *Cf. United States v. Parks*, 89 F.3d 570, 573 n. 5 (9th Cir. 1996) ("[t]he application of Washington state's LFO as a criminal justice sentence … creates two classes of defendants for federal sentencing purposes: those who could afford to pay their state law fines immediately, and those who required a period of time to do so."). Because Washington's re-enfranchisement scheme distributes the right to vote to some ex-felons and not to others, the Court must subject it to strict scrutiny.

The State, in an interrogatory answer addressed to the point, has put forward only two interests it claims are served by these classifications. First, the State asserts that it has a legitimate interest in "limiting participation in the political process" for those "who have proven themselves unwilling to abide by the laws that result from that process." Danelo Decl., Ex. A at 11-12 (Response to Interrogatory No. 18). Secondly, the State claims an interest in the "important public functions" served by LFOs. *Id.* Though each of these state interests

may or may not be "important" on its own, the exclusion from the re-enfranchisement process is neither narrowly tailored to, nor necessary for the promotion of, such interests. As such, the current system violates the Equal Protection Clause of the Fourteenth Amendment.

a. The State's Interest In Limiting The Political Participation Of Those Who Have Proven Themselves Unwilling To Abide By The Laws Does Not Justify Denying The Fundamental Right To Vote To Ex-Felons Who Have Completed All Aspects Of Their Sentence Except The Full Payment Of LFOs.

The State contends that denying the right to vote to the class of ex-felons who have completed all requirements of their sentence except the payment of LFOs serves the state interest of limiting participation in the political process by "those who have proven themselves unwilling to abide by the laws." Danelo Decl., Ex. A at 11-12 (Response to Interrogatory No. 18). Even if such an interest were sufficiently important to withstand strict scrutiny (which it is not), it would not save the constitutionality of Washington's statutory scheme, because denying the right to vote to this class of citizens is neither closely tailored nor necessary to the advancement of such an interest.

Payment or non-payment of a fee is constitutionally irrelevant to determinations of voter qualifications. As such, "voting cannot hinge on ability to pay." *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 n.14 (1996). The Supreme Court has held that the sole interest of the State, when it comes to voting, "is limited to the power to fix qualifications." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966). 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. *Id.* "[W]ealth or fee paying," has "no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670. Considerations of wealth or fee paying are "capricious" and "irrelevant" because "wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668. As such, 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 (emphasis added). The Court in *Harper* held that the

constitutional analysis would be the same regardless of whether the individuals in question could ultimately pay the fee or not. *Id.* at 668 ("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.").

As in *Harper*, Washington's re-enfranchisement scheme violates the Equal Protection Clause because it has made the payment of LFOs an electoral standard for ex-felons who have otherwise completed all requirements of their sentence. Under Washington law, the sole distinction between ex-felons who are given access to the ballot and those who are denied access is the payment of money. Because such monetary standards have been explicitly prohibited by the Supreme Court, Washington's law is unconstitutional.

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; *see also Dunn*, 405 U.S. at 357-358 (holding durational residency requirement for state and county elections to be impermissibly over and under-inclusive of the state's claimed interests). In *Kramer*, the Supreme Court held that the Equal Protection Clause prohibited New York from limiting access to school district elections to those who owned or leased taxable property or were parents of school children. *Id.* at 632-33. New York attempted to justify the law by arguing that the classification was necessary to advance its interest of having only those "primarily interested" in, and knowledgeable of, school issues voting on important school matters. *Id.* at 632. The Supreme Court held that such a classification 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. *Id.*

As in *Kramer*, Washington's classification of ex-felons for the purposes of re-enfranchisement is insufficiently "tailored" to its stated interest of barring those who have "proven themselves unwilling to abide by the laws." All felons have obviously been convicted of a crime and have shown, in that way, an unwillingness to abide by the laws. To the extent that the State claims that it is a felony conviction that demonstrates an unwillingness to abide

by the laws, the classification for re-enfranchisement is vastly under-inclusive, because Washington still allows ex-felons to regain the right to vote once they are released from custody if they have paid their LFO balance in full. By re-enfranchising ex-felons who have paid their LFOs, Washington's statutory scheme does not advance its claimed interest, but rather hinders that interest by permitting convicted felons -- who, by definition, have "proven themselves unwilling to abide by the laws"--to regain the right to vote by simply paying their LFOs. Washington's statutory scheme is thus too imprecise to survive strict scrutiny.

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. For such a classification to be narrowly tailored there would have to actually be a demonstrable correlation between a non-payment of LFOs in full and an "unwillingness to abide by the laws." The reality is that the failure to pay an LFO balance *in full* can be the result of any number of factors, many of which have absolutely no relation to one's attitude toward abiding by the laws. For many ex-felons, the reason for non-payment is simple -- they do not have the financial resources available upon release from supervision to completely pay off often substantial LFOs. *See* Danelo Decl., Ex. O (Jill E. Simmons, *Beggars Can't Be Voters*, 78 Wash. L. Rev. 297, 306 (2003)) (approximately 90% of offenders appearing before a sentencing court for failure to pay their LFO obligations qualify for a public defender).

The State itself has created a legal alternative to the full payment of LFOs upon release from supervision by creating a mechanism, through the scheduling of set monthly payments and a statutorily imposed interest rate, that allows for payment of LFOs over time. RCW 9.94A.760(1), (5)-(6). Thus, ex-felons can be in full compliance with the law regardless of whether they pay their LFOs in one lump sum payment or over time. In fact, many, such as all three Plaintiffs, fulfill their legal obligations under this alternative payment structure by making regular monthly payments that the sentencing court has determined are the most these individuals can pay given their financial resources. RCW 9.94A.760(5)-(6). Though ex-

felons in theory could avoid being barred from the re-enfranchisement process by paying their LFOs in full, rather than over time, this is "an illusory choice for . . . any indigent who, by definition, is without funds." *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Because only an ex-felon with access to funds can immediately regain access to the right to vote, Washington's statutory scheme "in operative effect exposes only indigents" to the prospect of being denied the ability to regain the right to vote. *Id.* Though the State now labels any individual who "chooses" this alternative structure as "unwilling to abide by the laws," the reality is that ex-felons can either pay their LFOs in one lump sum or over time and still be fully compliant with state law.

It is particularly unjust for the State to label those who are simply unable to make their LFO payments in full as "unwilling to abide by the laws." This conclusion 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).

Even assuming the current classification somehow kept a negligible number of ex-felons who may be "unwilling to abide by the laws" from gaining access to the franchise, in so doing it also excludes many more citizens who exhibit no such unwillingness. In fact, the State's classification excludes many, such as Plaintiffs, who have demonstrated an affirmative willingness to abide by the laws by making every effort to meet their monthly LFO payment obligations. Such imprecise "conclusive presumptions" are not permitted to serve as the basis for classifications involving the distribution of the vote if "more precise tests" based on individualized determinations are available to the State. *Dunn*, 405 U.S. at 350-51.

Because more accurate individualized tests are available to the State to determine whether a failure to pay LFOs may actually reflect an "unwillingness to abide by the laws," the current over-broad classification restricting the distribution of the franchise cannot stand. *Dunn*, 405 U.S. at 351. Federal and state courts have long been accustomed to the process of

differentiating between offenders who do not pay their LFOs because of a willful disregard of their obligations, and those who are unable to meet their obligations because of financial hardship. Such tests were constitutionally mandated in similar contexts after the Supreme Court held in *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), that it was "fundamentally unfair" for a state to revoke probation for nonpayment of fines and restitution where the sentencing court had made no inquiry into the reasons for the failure to pay.[10] *See also United States v. Parks*, 89 F.3d 570 (9th Cir. 1996) (holding that the imposition of additional criminal history points for failure to pay Washington State LFO in full was in violation of Supreme Court's holding in *Bearden* because no inquiry was made into whether the failure to pay was willful or not). The Washington Supreme Court also recently reiterated the importance of the constitutional concerns of *Bearden*: "Washington law . . . follows *Bearden* in requiring the court to find that a defendant's failure to pay a fine is intentional before remedial sanctions may be imposed." *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002); *see also State v. Blank*, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997) ("[W]e hold that before enforced collection or *any sanction is imposed for nonpayment*, there must be an inquiry into ability to pay.") (emphasis added).

In *Bearden*, the Court specifically acknowledged that punishing an individual for a failure to pay LFOs, without first doing an individualized inquiry into the reasons for the failure, would run the constitutionally unacceptable risk of "punishing a person for his poverty." *Bearden*, 461 U.S. at 671. Such risks are equally present, and no more constitutionally defensible, when non-payment of LFOs results in a denial of access to the ballot without any individualized determination. Because less restrictive means are available to the State to meet its interests in ways that do not unnecessarily burden the fundamental right to vote, the State's denial of access to all ex-felons who have not paid their LFOs is

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[10] *See also Williams v. Illinois*, 399 U.S. 235, 241-242 (1970) (a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine); *Tate v. Short*, 401 U.S. 395, 398 (1971) (a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full).

unconstitutional.

Nor can the State dodge its constitutional requirements simply because the current presumption provides "the administrative convenience of avoiding difficult factual determinations." *Dunn*, 405 U.S. at 350-51. "Administrative convenience" or the presence of some "remote administrative benefit to the State" cannot justify a conclusive presumption against access to the ballot where individualized determinations are available to effectuate the State's interest. *Id.*

b. The State's Interest In The Public Functions Served By LFOs Does Not Justify Denying The Fundamental Right To Vote To Ex-Felons Who Have Completed All Aspects Of Their Sentence Except The Full Payment Of LFOs.

The State also asserts an interest "in the important public functions" served by LFOs. Plaintiffs do not challenge the importance of such functions, nor do Plaintiffs challenge the State's right to impose and collect LFOs. However, such interests do not, by their mere importance, justify the complete deprivation of voting rights. As explained above, the State must demonstrate that the exclusion from the franchise is necessary to effectuate such interests. *Kramer*, 395 U.S. at 627. 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. Because Washington's refusal to re-enfranchise is neither necessary, nor narrowly tailored to meet the goal of collecting LFOs, it is not permissible under the Fourteenth Amendment.

Because there are a myriad of alternative means for the State to collect LFOs without burdening the right to vote, the denial of access to the ballot as a collection device cannot stand. *Id.*; s*ee also Tate v. Short*, 401 U.S. 395, 399-400 (1971) (discussing alternative collection methods that serve state's interest in enforcing the payment of fines without resorting to unconstitutional deprivations of rights). As explained in Section II.C.2., the State has a number of powerful tools at its disposal to collect outstanding LFO balances. These include 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; RCW 9.94A.7606 through

9.94A.761. The State can also imprison ex-felons who willfully fail to make their required LFO payments by initiating contempt proceedings against them. RCW 9.94A.634(c). Victims who are owed restitution can pursue civil remedies to collecting these debts. RCW 6.17.020(4), RCW 9.94A.753(9) and RCW 9.94A.760(4). Assuming that the State were to utilize all of the devices above to collect LFOs, it is difficult to imagine what additional financial resources could be accessed by depriving offenders participation in the re-enfranchisement process. Even Defendant Secretary of State Reed agrees that the denial of access to the re-enfranchisement process is an ineffective means to collect LFOs. Danelo Decl., Ex. P (Dan Jenkins, *State czar for voting: Let felons cast ballots*, Columbian, June 8, 2005, at A1) ("If I thought restoring rights to felons would make a difference in victims getting restitution, I wouldn't advocate it.").

Similarly, the State's re-enfranchisement classification is impermissibly over-inclusive. As described above, the State's classification makes no effort to account for individuals who do not pay their LFOs because they simply cannot pay. As such, the State's interest in LFO collection cannot survive strict scrutiny. In *Zablocki v. Redhail*, 434 U.S. 374, 389-90 (1978), the Supreme Court held unconstitutional, on equal protection grounds, a Wisconsin statute that denied the fundamental right to marry to individuals who had, at the time they sought to marry, outstanding child support obligations. The Court found that the state law denying access to a fundamental right could not be justified merely because that law may, in some instances, provide an incentive for individuals to make support payments. *Id.* In finding the state's "collection device" rationale to be over-inclusive, the Court noted that, "with respect to individuals who are unable" to pay any additional funds, the "statute merely prevents the applicant from getting married, without delivering any money" to the applicant's children. *Id.* Justice Stewart, in his concurring opinion, noted that "[t]he fact remains that some people simply cannot afford to meet the statute's financial requirements," and that denying them the fundamental right to marriage simply "penalizes them for failing to do that which they cannot do." *Zablocki*, 434 U.S. at 394 (Stewart, J., concurring). Defendant Governor Gregoire herself has characterized the current system as a "virtual debtors prison." Danelo Decl., Ex. L

(*Felon-voting laws confusing, ignored*, Seattle Times, May 22, 2005, at A18). Because the State's re-enfranchisement regime is also over-inclusive with respect to the State's interest in LFO collection, it cannot survive strict scrutiny.

It is for all of the above reasons that the Supreme Court has repeatedly recognized 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); *see also Carrington v. Rash*, 380 U.S. 89, 96 (1965) ("[s]tates may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."); *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) ("constitutional deprivations may not be justified by some remote administrative benefit to the State."). The State's denial of the franchise is no less questionable in this context. Though the State may have important state interests in collecting LFOs, such interests cannot, under the Equal Protection Clause of the Fourteenth Amendment, justify the total denial of the franchise to a significant population of citizens if such a deprivation is neither necessary nor narrowly tailored to the advancement of that interest.

C. Even If This Court Concludes That Rational Basis Is The Proper Level Of Scrutiny, The Requirement Of A Payment Of Money Prior To Re-Enfranchisement Lacks A Rational Basis.

Even if this Court finds that heightened scrutiny is not appropriate in this case, the State's classification must still be rejected on Equal Protection grounds because it is not rationally related to any State interest. As the Supreme Court explained in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985), even in the absence of heightened scrutiny, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

The State's re-enfranchisement classification is not rationally related to the State's interest in barring from the electoral process citizens who have "proven themselves unwilling to abide by the laws." This is because there is no rational connection between the full payment of LFOs and a citizen's respect for the laws. Ex-felons, such as Plaintiffs, who are paying their monthly LFO payments are fully compliant with State law, and thus there is no reason to believe they are any less willing to abide by the laws than the class of ex-felons that the State

has allowed to vote. *See City of Cleburne*, 473 U.S. at 449. (City Council's requirement that a group home for mentally retarded obtain a special building permit based on policy concerns that would be equally applicable to others not included in the classification lacked a rational basis and was invalid under the Equal Protection Clause). Nor is there any reason to believe that the non-payment of an often sizeable financial obligation immediately upon release from supervision can in any way be used as a proxy for determining a citizen's commitment to abide by the laws. This is especially true because of the many hurdles faced by ex-felons in navigating the elaborate, and often confusing, labyrinth toward payment of LFOs and restoration of civil rights. *See* Section II.C.2. Because the State cannot articulate any rational justification for its classification as it relates to the State's interest in barring those "unwilling to abide by the laws," the classification must be rejected by the Court.

Nor is the State's re-enfranchisement classification rationally related to the State's interest in LFOs. In light of the vast array of other collection devices available to the State, including imprisonment for those who willfully fail to meet their financial obligations, it is difficult to imagine how the denial of the fundamental right to vote makes available any additional financial resources that are not already otherwise accessible. This is particularly true with regard to those who are indigent. As recognized by the Supreme Court, to deny a citizen access to a fundamental right "for failing to do that which they cannot do" is irrational and cannot survive under any level of judicial scrutiny. *Zablocki v. Redhail*, 434 U.S. 374 at 394 (Stewart, J., concurring); *see also Bearden v. Georgia*, 461 U.S. 660, 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."); *M.L.B. v. S.L.J*, 519 U.S. 102, 123-24 (1996). Because the relationship between the State's re-enfranchisement classification and its asserted goals is attenuated at best, the classification cannot be found to have a rational basis.

Washington's re-enfranchisement scheme unnecessarily locks out a substantial number of its citizens from the procedures available to regain the fundamental right to vote. Because

this restriction cannot survive strict, or even rational basis, scrutiny, it is in violation of the Fourteenth Amendment's Equal Protection Clause and cannot stand.

D. *Richardson v. Ramirez* Does Not Resolve Constitutional Questions Surrounding Washington's Re-Enfranchisement Scheme.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the United States Supreme Court reversed a California Supreme Court decision that found the felon disenfranchisement provision of the California Constitution to be in violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court held that felon disenfranchisement "has affirmative sanction" in Section Two of the Fourteenth Amendment and was therefore not subject to the heightened scrutiny required of other state limitations on the franchise.[11] *Id.* at 54-55.

Ramirez is not relevant to the analysis required in this case, because it does not speak to the distinct question of what constitutional standards should be applied to felon *re-enfranchisement* laws. *See Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 175-76 (2d Cir. 1969) (the question presented by felon re-enfranchisement—"once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can [the state] then deny access to this relief, solely because one is too poor to pay the required fee"—is distinct from the question posed in *Ramirez*). Rather, *Ramirez* rests on the premise that the text and history of Section Two of the Fourteenth Amendment specifically acknowledge and affirm the existence of felon *disenfranchisement* statutes. The Court in *Ramirez* made it clear that the textual and historical foundation of its opinion dealt specifically with the unique status of disenfranchisement laws:

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[11] Section Two of the Fourteenth Amendment provides: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." (emphasis added).

> 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, U.S. 418 at 54 (emphasis added).

Nothing in *Ramirez* indicates that a constitutionally infirm voting scheme, such as the one here, would have similar affirmative sanction in the text of the Fourteenth Amendment. Though both types of laws concern felon voters, disenfranchisement statutes are substantially distinct from re-enfranchisement statutes in both purpose and results. In light of the fundamental role that the right to vote plays in the legitimacy of America's representative system, extensions of the State's narrow constitutional authority to abrogate that right should not be recognized unless specific textual support for such exemptions can be found in the Constitution. The Fourteenth Amendment contains no such language.

Nor does *Ramirez* insulate the State from challenges to deprivations of the vote that have traditionally been found to impinge on the basic values enshrined in the Equal Protection Clause. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977) (state law disenfranchising men convicted of spousal abuse, but not women, violated Equal Protection Clause). In *Hunter*, a unanimous Supreme Court struck down a facially neutral Alabama felon disenfranchisement statute that was found to have been enacted with discriminatory intent. Because Washington's felon re-enfranchisement scheme also runs contrary to traditional equal protection principles enshrined in the Fourteenth Amendment, it is not shielded from constitutional scrutiny by *Ramirez*.

E. Washington's Re-Enfranchisement Statute Violates The Washington Constitution.

Even assuming that Washington's re-enfranchisement statutory scheme could survive scrutiny under the Federal Constitution, it cannot survive the heightened scrutiny that is appropriate under Washington's Constitution. To the contrary, Washington's re-enfranchisement scheme violates both the Privileges and Immunities Clause, Article I,

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Section 12, and the Voting Clause, Article I, Section 19, of the Washington Constitution.

1. Washington's Privileges And Immunities Clause Requires An Analysis That Is Separate And Independent From the United States 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 *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), 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 a separate 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 *State v. Gunwall*, the Washington Supreme 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. The "*Gunwall* analysis" evaluates factors such as the textual and structural differences between the two constitutions, state constitutional and common law history, and matters of particular state or local concern to determine whether, in certain contexts, provisions of Washington's Constitution require a separate and independent constitutional analysis from analogous provisions under the Federal Constitution. *Grant County II*, 150 Wn.2d at 806.

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—the Washington Supreme 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. *Id.* at 805 n.10.[12] The language of the federal constitution "is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well 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, "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). As noted by the Court in *Grant County II*, Article 1, Section 12, unlike the Equal Protection Clause, reflects in part "[o]ur framers' concern with avoiding favoritism towards the wealthy," and "prevention of favoritism and special treatment for a few." *Grant County II*, 150 Wn.2d at 808-09 (citing *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991)). As such, "the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism." *Id*. at 809. Just as in *Grant County II*, the statutes at issue here concern favoritism rather than discrimination. Washington's re-enfranchisement scheme favors wealthier felons who are able to pay their LFOs. Only this small class of felons is entitled to special treatment; in this case, re-enfranchisement. *See* RCW 9.94A.637. All other felons are permanently disenfranchised. Because Washington's re-enfranchisement scheme favors the minority group of felons who are able to satisfy their LFOs, independent analysis of Washington's Privileges and Immunities Clause is appropriate here.

An examination of preexisting state law—the fourth *Gunwall* factor—further bolsters

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[12] 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.

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the conclusion than an independent analysis of Washington's Privileges and Immunities Clause is warranted when considering statutes that infringe upon a Washington citizen's right to vote. Washington law has long protected an individual's right to vote. In addition to Article I, Section 19, which specifically protects an individual's right to vote, 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 v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984); *Knowles v. Holly*, 82 Wn.2d 694, 513 P.2d 18 (1973); *State v. Fawcett*, 17 Wn. 188, 49 P. 346 (1897). Given the high degree of protection that Washington law has afforded the right to vote in the past, an independent analysis of Washington's Privileges and Immunities Clause in this context is appropriate.

The Washington Supreme Court has held that the fifth *Gunwall* factor—the "structural differences" between the federal and state constitutions—"will always support an independent analysis," and that "[t]he structural difference between the federal and state constitutions is apparent."[13] *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)). For that reason, factor five also supports an independent analysis.

Finally, the sixth *Gunwall* factor "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 felon re-enfranchisement 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). Because felon re-

[13] "[T]he federal constitution is a grant of enumerated powers, [whereas] the state constitution serves to limit the sovereign power[.]" *Grant County II*, 150 Wn.2d at 811.

enfranchisement is a matter of state or local interest, an independent analysis of Washington's Privileges and Immunities Clause is appropriate here.

As demonstrated by all six *Gunwall* factors, Washington's Privileges and Immunities Clause should be interpreted independently from the Federal Constitution in the context of re-enfranchisement. As discussed below, even if Washington's re-enfranchisement scheme passes muster under the Federal Constitution, it cannot survive 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 appropriate under Washington's Constitution, the felon re-enfranchisement scheme violates the Privileges and Immunities Clause because it grants the right to vote to those ex-felons who have satisfied their LFOs, while at the same time denying the right to vote to those ex-felons who are unable to pay their LFOs. In doing so, Washington affords the right to vote—a privilege secured by Article I, Section 19 of the Washington Constitution—on an unequal basis. 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.

The fundamental right to vote—protected by Article I, Section 19 of the Washington Constitution—is one of the privileges protected by Washington's Privileges and Immunities Clause. Unlike the right of annexation discussed in *Grant County II*, the right to vote 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.

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."). In order for a law to survive strict scrutiny, the state's 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). Under strict scrutiny analysis, statutes must be narrowly tailored to promote a compelling state interest. *See, e.g., In re M.G.*, 103 Wn. App. 111, 11 P.3d 335 (2000). Because Washington's re-enfranchisement scheme infringes upon Plaintiffs' (and other ex-felons') fundamental right to vote in a manner that is neither necessary nor narrowly tailored to serve the State's purported compelling interests, it fails under strict scrutiny analysis.

As discussed above at Section V.B.1., Washington's re-enfranchisement scheme is neither necessary nor sufficiently tailored to serve the State's purported interests—"limiting participation in the political process" for those "who have proven themselves unwilling to abide by the laws that result from that process," and the "important public functions" served by LFOs. *See* Danelo Decl., Ex. A at 11-12 (Response to Interrogatory No. 18). 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, Washington's re-enfranchisement scheme nonetheless fails 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, 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). In this case, neither limiting the political participation of ex-felons who are unable to pay their LFOs nor the "important public functions" served by LFOs justify the disparity in treatment between ex-felons who have paid their LFOs and those who have not. The sole difference between those ex-felons who are eligible for re-enfranchisement and Plaintiffs (and other ex-felons who are unable to satisfy their LFOs) is that the former have paid the LFOs assessed against them at the time of sentencing. 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.

VI. CONCLUSION

By denying the right to vote to ex-felons who have not paid their LFOs, Washington unconstitutionally burdens Plaintiffs' (and other ex-felons') fundamental right to vote. For this reason, Washington's re-enfranchisement scheme cannot withstand scrutiny under either the Federal or Washington Constitutions. Plaintiffs are therefore entitled to a judgment (a) declaring that Washington's re-enfranchisement scheme, which denies re-enfranchisement to ex-felons based solely upon their failure to pay LFOs, violates Plaintiffs' (and other ex-felons') rights under the Federal and Washington Constitutions; and (b) declaring that Plaintiffs are entitled to register to vote and are eligible to sign the oath required by RCW 29A.08.230.

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DATED: December 8, 2005

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12/8/05 5:55 PM ()