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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS MOTION

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I. INTRODUCTION

Plaintiffs do not challenge the power of the State to disenfranchise felons. What Plaintiffs do challenge is the constitutionality of the State's voluntary decision to re-distribute the right to vote to ex-felons in a manner that makes the payment of money a voter qualification. Though the practice of felon disenfranchisement is affirmatively sanctioned in the text of the Fourteenth Amendment, there is no similar textual support for the State's wealth based vote distribution scheme. As such, strict scrutiny is the appropriate standard of review, and Washington's re-enfranchisement scheme cannot survive such review under either the Federal Constitution or the Washington State Constitution. Even if the lower rational basis standard is applied, Washington's statutory scheme still fails the constitutional test.

Plaintiffs seek summary judgment declaring the Washington statutes that condition the restoration of Plaintiffs' (and other ex-felons') voting rights on the payment of outstanding LFOs unconstitutional as violative of the Federal Equal Protection Clause and Washington's Privilege and Immunities Clause. Granting Plaintiffs' motion necessarily requires the denial of Defendants' Cross-Motion for Summary Judgment.

II. ARGUMENT

A. The State Did Not Challenge Plaintiffs' Factual Allegations, And Both Parties Agree That This Case Should Be Decided On Summary Judgment.

Both the State and Plaintiffs agree there is no dispute of material fact and that the issues presented in this case are appropriately resolved on summary judgment. *Brower v. State*, 137 Wn.2d 44, 52, 969 P.2d 42 (1998). Because the State has not challenged Plaintiffs' factual allegations, they are deemed admitted. These facts include, but are not limited to, the following:

- Plaintiffs have completed all terms of their sentences, with the exception of the full payment of their individual Legal Financial Obligations ("LFOs").
- Each Plaintiff is currently making the monthly LFO payment set by the sentencing court in their cases, but because they are indigent they are unable to pay the full amount due.

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- Even if Plaintiff Beverly DuBois continues to comply with the $10 a month payment schedule established by the sentencing court, her annual payments are insufficient to cover the annual interest that accrues on her LFOs.

B. *Richardson v. Ramirez* Does Not Address The Question At Issue In This Case.

The State's response rests almost entirely on its flawed assumption that *Richardson v. Ramirez*, 418 U.S. 24 (1974), requires this Court to subject Washington's re-enfranchisement scheme only to rational basis scrutiny. The Supreme Court's decision not to apply traditional strict scrutiny analysis in *Ramirez*, however, was based on the explicit textual recognition of the power of a state to disenfranchise felons in Section Two of the Fourteenth Amendment of the Federal Constitution.[1] *Ramirez* is not relevant to the issues before this Court because Plaintiffs do not challenge the State's power to disenfranchise felons. What Plaintiffs challenge is the constitutionality of the State's voluntary decision to re-distribute the right to vote to ex-felons in a manner that makes wealth or the payment of money a voter qualification. No state laws re-distributing the right to vote to ex-felons are referenced in the Fourteenth Amendment, let alone state laws re-distributing that right based on wealth. Because no similar "affirmative sanction" exists for the State's wealth based vote distribution scheme in the text of the Constitution, *Ramirez* does not save the State from having to justify the law under strict scrutiny in this Court.

The leap that is the foundation of the State's entire argument—namely, the assertion that the explicit recognition of felon disenfranchisement in the Fourteenth Amendment also somehow permits the State to re-distribute the vote to ex-felons in ways traditionally prohibited by the Equal Protection Clause—lacks any legal or logical support. The State fails

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[1] In its Cross Motion for Summary Judgment ("Cross-Motion"), the State acknowledges that the "affirmative sanction" of exclusion of felons from the franchise was "of controlling significance" in the *Ramirez* Court's decision not to apply strict scrutiny. Cross Motion at p. 6.

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to cite even a single case for this proposition.[2] Instead, the State's argument rests on an assumption that the general power of the State to disenfranchise felons completely, as recognized in *Ramirez*, also allows it to implement that power any way it sees fit, regardless of restrictions contained elsewhere in the Constitution. This is where the State's analysis fails.

That a state may have the constitutional power to regulate in a particular area does not mean that the methods chosen by the state to effectuate that power are somehow immune from other fundamental constitutional principles. *See, e.g., Granholm v. Heald*, 125 S.Ct. 1885, 1890 (2005) (holding that "the Twenty-first Amendment does not supersede other provisions of the Constitution" and, in particular, the Dormant Commerce Clause). The State itself accepts as much when it recognizes that the Supreme Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), struck down Alabama's disenfranchisement law after subjecting it to heightened equal protection scrutiny. Cross Motion at p. 6 n.4. Though the State attempts to limit the reach of *Hunter*, and the Constitution more broadly, it once again fails to provide any applicable or persuasive case law to support its position.

The State first cites the dissent of a single judge from a denial of rehearing en banc for the proposition that the constitutional scrutiny displayed in *Hunter* is limited only to disenfranchisement laws "with an invidious, racially discriminatory purpose."[3] See Cross Motion at p. 7 n. 4 (citing *Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc)). The opinion cited, however, discusses the presumptive constitutionality of felon *disenfranchisement* statutes in light of the fact that they are specifically referenced in the text of the Fourteenth Amendment. As is

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[2] In its Cross Motion, the Sate cited to a number of cases, all of which simply affirm *Ramirez's* basic holding that states have the power under the Federal Constitution to disenfranchise felons. Cross Motion at pp. 7-8. That is not the issue presented in this case.

[3] The State makes no effort to address *Hobson v. Power*, 434 F. Supp. 362 (N.D. Ala. 1977) (striking down a state disenfranchisement statute that discriminated against female felons after reviewing it under heightened scrutiny and distinguishing *Ramirez* because the relevant question was not whether the State can disenfranchise felons, but rather "whether the state may exclude people from the franchise by treating on sex differently from the other." *Id.* at 366-367.) *See* Plaintiffs' Motion at p. 25.

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common with all the cases cited by the State, this analysis is simply a restatement of the holding in *Ramirez* and irrelevant to the question of how traditional constitutional standards apply to laws and classifications that are not explicitly referenced in the Fourteenth Amendment.

The State also cites to *Johnson v. Bush*, 405 F.3d 1214, 1223-27 (11th Cir. 2005) (en banc), noting that it "similarly" limits the application of *Hunter*. Cross-Motion at p. 7 n. 4. In fact, *Johnson* does no such thing. Rather, the court in *Johnson* simply found that the disenfranchisement statute in question was not instituted with the intentional racial animus that was present in *Hunter*. This is not a limitation of *Hunter*, or a limitation on the relevance of the Constitution outside of the context of racial classifications, but rather a finding that the plaintiffs in that case had simply not proven their case of racial discrimination.

Because the State has failed to establish that the express sanction of disenfranchisement in the Fourteenth Amendment also grants the State power to re-distribute the right to vote to ex-felons in ways traditionally prohibited by the Constitution, the State's attempt to evade strict scrutiny in this case fails.

C. The State Has Failed To Put Forward Any Argument As To Why Its Re-Enfranchisement Scheme Should Survive Strict Scrutiny Analysis.

This Court must subject Washington's re-enfranchisement scheme to strict scrutiny because such scrutiny is required of all state laws that selectively distribute the franchise. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Because the right to vote "is preservative of other basic civil and political rights," it has long been deemed by the Supreme Court to be a "fundamental political right." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). In particular, "*statutes distributing the franchise* constitute the foundation of our representative society." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (emphasis added). Thus any "unjustified discrimination in determining who may participate in political affairs...undermines the legitimacy of representative government." *Id.* Though a state is not constitutionally required to grant the right to vote to its citizens for every office or issue, "once the franchise is granted to the

electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

Because of the dangers posed to representative government by statutes that selectively distribute the right to vote, laws like Washington's re-enfranchisement scheme that do so are subject to strict scrutiny. *Kramer*, 395 U.S. at 627. Under this standard of review, the Court must determine "whether the exclusions are necessary to promote a compelling state interest." *Dunn*, 405 U.S. at 337. Classifications in distributing the right to vote must be "drawn with 'precision,'" and must be "tailored" to serve their legitimate objectives. *Id.* at 343. If other means exist to achieve the State's interests that do not burden the right to vote, those "less drastic means" must be adopted by the State instead. *Id.*

Plaintiffs' Motion contained extensive discussion as to why Washington's re-enfranchisement scheme—treating ex-felons who can afford to pay their LFOs in full differently from ex-felons who could not for purpose of determining voter qualifications—could not withstand strict scrutiny. Plaintiffs' Motion pp. 14-22. First, the State's re-enfranchisement scheme violates the basic tenant of *Harper*, being that "[w]ealth or fee paying," has "no relation to voting qualifications," and that considerations of such factors in distributing the right to vote was both "capricious" and "irrelevant" because "wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Harper*, 383 U.S. at 668, 670. Second, the classifications in question are both under and over-inclusive and thus not sufficiently narrowly tailored to achieve either the State's interest in limiting participation in the political process by "those who have proven themselves unwilling to abide by the laws" or in serving the public functions served by LFOs. The flaws in the State's tailoring are amplified by the fact that the State has failed to make the sort of individualized determinations into willfulness of non-payment that are already practiced by the State in other contexts, pursuant to *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (requiring an individualized determination that a failure to pay a fine and restitution was willful before probation can be revoked). *See also Dunn*, 405 U.S. at 350-51 (holding that "conclusive presumption" is not permitted to serve as basis for classifications involving the distribution of

the vote if "more precise tests" based on individualized determinations are available).

The State makes no effort to justify its statutory scheme under strict scrutiny, resting entirely on its erroneous argument that strict scrutiny is not applicable here. The State does not respond to Plaintiffs' arguments regarding narrow tailoring, nor does it respond to arguments about less restrictive means that are available to the State to achieve its stated interests. In fact, the State appears to have abandoned any effort to justify its classification as a collection device mechanism,[4] having made no mention of it in its Cross Motion. Because the State has failed to make any showing as to why the classifications in question are "necessary to promote a compelling state interest," the State's re-enfranchisement scheme fails for the reasons described in Plaintiffs' Motion. *Dunn*, 405 U.S. at 337.

D. The State Cannot Avoid Its Burden By Re-Classifying The Classification Being Challenged.

The State falsely suggests that the classification Plaintiffs challenge does not even exist in the relevant statutes. Washington's re-enfranchisement scheme conditions the restoration of ex-felons' civil rights on their full payment of LFOs. RCW 9.94A.637(1)(a), (4). In so doing, *the statute itself* creates two classes of ex-felons for the purpose of voting qualifications: (i) those who have completed all aspects of their sentence, including the full payment of their LFOs, and who are therefore deemed qualified to vote; and (ii) those who have completed all aspects of their sentence except the full payment of LFOs and who are therefore deemed unqualified to vote by the State. This wealth based classification, currently standing as the sole obstacle blocking Plaintiffs, and at least 46,500 other Washington citizens, from gaining equal access to the right to vote, is the classification challenged by Plaintiffs. Plaintiffs' Motion, Danelo Decl., Ex. C at 3 (Department of Corrections, Agency Fiscal Note for Senate Bill 6519 (2002)).

The State attempts to avoid confronting Plaintiffs' arguments by positing and defending entirely different classifications that are not being challenged in this case. One

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[4] A justification it offered in an interrogatory answer. Plaintiffs' Motion, Danelo Decl., Ex. A at 11-12 (Response to Interrogatory No. 18).

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example is the State's baseless contention that "[p]laintiffs seem to view felons whose only remaining requirement consists of legal financial obligations as somehow being similarly situated to those members of our community who have never chosen to commit a felony in the first place." Cross Motion at pp. 10-11, 13. Plaintiffs never argued any such thing, and have always recognized that the Fourteenth Amendment allows the State to disenfranchise felons. Another example is the State's repeated attempt to reclassify the key statutory distinction as being between "those who have completed all of the terms of their sentences and those who have not." See Cross Motion at pp. 9-10, 12. This is another misrepresentation of Plaintiffs' actual argument: for the purposes of voting qualifications, Plaintiffs, and others who have completed all the requirements of their sentence except for the full payment of LFOs, are similarly situated to other ex-felons who were able to pay their LFO balance off in full.

Recognition of the actual classification at issue here is important because, despite the State's assertion that "[t]here is no constitutional basis to assert that this element [payment of LFOs] alone compels different treatment with respect to...restoration of civil rights," (Cross Motion at p.10) wealth based distinctions in determining voter qualifications were specifically condemned by the Supreme Court in *Harper*. In *Harper*, the Supreme Court held that the sole interest of the State when it comes to voting "is limited to the power to fix qualifications." *Harper*, 383 U.S. at 668. "[W]ealth or fee paying," however, has "no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670. Thus, "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. For Plaintiffs, and at least 46,500 other Washington citizens, the statutory classification challenged in this case represents an effort by the State to make affluence or payment a qualification for voting. As such, it cannot survive any level of scrutiny under the Fourteenth Amendment.

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

Unable to confront Plaintiffs' strict scrutiny argument head-on, the State instead relies

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almost exclusively on *Ramirez* to assert that its classifications should not be subject to heightened constitutional scrutiny at all. As described in Section II(B), the State is unable to put forward any case law or other support to advance its novel theory that the affirmative recognition of felon disenfranchisement in the text of the Fourteenth Amendment also somehow grants the State the power to re-distribute the right to vote to ex-felons using wealth-based voting qualifications that have long been held by the Supreme Court to be constitutionally infirm. Absent such support, the State instead attempts to justify its position by resting on two assertions that are erroneous or irrelevant. First, the State argues "neither the federal nor the state constitutions grant convicted felons the right to vote." Cross Motion at p. 8. Second, the State claims that *Ramirez* stands for the proposition that the right of convicted felons to vote is not fundamental. *Id.* Both assertions miss the constitutionally significant issue in this case.

The question is not whether a "right to vote" exists in the Constitution, but rather when the State elects to distribute the right to vote to its citizens (or in this case re-distribute that right), can it then distribute that right unequally based on constitutionally infirm classifications. No general "right to vote" existed in the Federal Constitution for the citizens electing the school board in *Kramer*. *Kramer*, 395 U.S. at 622-23 (though the rural school board at issue in *Kramer* was elected directly by the people, the same state legislation provided that school board members in large cities were to be appointed by the mayor or city council). Nor did citizens of Florida have a constitutionally-imposed and irrevocable "right to vote" for presidential electors in *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."). In both cases, the state legislatures could have chosen alternative, non-election, methods of filling the positions at issue.

Nevertheless, as both *Kramer* and *Gore* concluded, once a state has decided to grant the right to vote to some of its citizens, that right must be distributed in a way consistent with the Equal Protection Clause. The Supreme Court summarized the constitutional principle of

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voting as a "fundamental right" as follows: "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper*, 383 U.S. at 665; *see also Gore*, 531 U.S. at 105 (citing this quote from *Harper*); *Kramer*, 395 U.S. at 626-27 ("[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling a state interest.").[5] Here, the State was never constitutionally obligated to grant the right to vote to ex-felons, but once it decided affirmatively to do so, it could not choose to re-distribute that right based on the payment of money. *See Harper*, 383 U.S. at 670 ("[W]ealth or fee paying," has "no relation to voting qualifications.").[6] Applying this equal protection principle is not incompatible with the holding of *Ramirez*.

F. The State Has Failed To Provide Even A Rational Basis To Defend The Statutory Scheme In Question.

Even if a classification is not found to be subject to heightened scrutiny, the Equal Protection Clause nevertheless prohibits a State from relying on "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). As discussed earlier, the classification at issue in this case is the State's distinction, for the purpose of determining voting qualifications, between ex-felons who have completed all aspects of their sentence, including the full payment of LFOs, and those who have completed

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

[6] In the State's constitutional world, if the right to vote were not "fundamental" in the context of distributing the right to vote in this case, the poll tax at issue in *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663 (1966), the property-ownership restrictions in *Kramer*, and the residency requirements at issue in *Dunn v. Blumstein*, 405 U.S. 330 (1972), would all also be constitutional as long as they were applied in the process of re-enfranchising felons. Of course, the Supreme Court found all of these voter qualification statutes unconstitutional.

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all aspects of their sentences except for the full payment of LFOs.

The State discusses at length the reasons why someone who "makes the conscious decision to break the law can fairly be regarded as having abandoned the right to further participate in making the law." Cross Motion at p. 12. The State also asserts it is rational that "perpetrators of serious crimes shall not take part in electing 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." *Id.* What the State utterly fails to explain is why it is rational to deem Plaintiffs unqualified to vote for these reasons, while deeming other ex-felons qualified to vote simply because they had the financial resources to pay their LFO balance in full.[7]

As is discussed at length in Plaintiffs' Motion, and is uncontested by the State, Plaintiffs are all in compliance with their sentencing obligations and all are making monthly payments in accordance with the schedule determined by the sentencing court in light of their financial resources. Plaintiffs' Motion at pp. 8-12. The fact that Plaintiffs' are making bona fide efforts to pay their LFO obligations demonstrates a "willingness to pay" their "debt to society" and "an ability to conform" their "conduct to social norms." *Bearden*, 461 U.S. at 670. To deem Plaintiffs unqualified to vote "for failing to do that which they cannot do"—in this case, to pay their entire LFO balances in full—is irrational and cannot survive any level of judicial scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 394 (1978) (Stewart, J., concurring).

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[7] Beyond lack of financial resources, there are numerous reasons why ex-felons may not be able to pay their LFOs that have nothing to do with a "willingness to abide by the law." Plaintiffs' Motion at p. 23. One such reason is the enormously complex and confusing process that must be navigated to complete one's LFO payment successfully. Thus, despite the State's assertion that "the process for issuing a certificate of discharge" and "the procedure for restoring civil rights" bears no relationship to Plaintiff's theory of the case (Cross Motion at p. 4 n. 2), the description of the overly complex and disorganized system for collecting and registering LFO payments is directly relevant to the State's character assessments of those who are not able to pay off their LFOs in full. Plaintiffs also believe it is useful to provide the Court with the necessary background concerning the State's complex felon re-enfranchisement machinery.

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

The State frames its response to Plaintiffs' Privileges and Immunities Clause argument under the misleading heading: *"The Felon Disenfranchisement Clause Of The State Constitution Is Not Rendered Unconstitutional By The State Privileges And Immunities Clause."* Cross Motion at p. 11. As noted above, the matter at issue in this litigation is not whether the State has the constitutionally sanctioned right to disenfranchise felons – it does. Instead, the relevant question is whether the State, having elected to restore voting rights to ex-felons, can distribute that right based on wealth and still be in compliance with Washington's Privileges and Immunities Clause. Just as the State's re-enfranchisement scheme violates the Federal Constitution, it also violates Washington's Constitution because it fails strict scrutiny analysis.

Initially, the State argues that Plaintiffs' voting rights are not a fundamental right subject to protection under Washington's Privileges and Immunities Clause. However, the State concedes that the right to vote is "a basic right available to all citizens [of Washington]." *Id.* at p. 13. As such, the right to vote one is of the "'*fundamental rights which belong to the citizens of the state by reason of such citizenship*'" and is protected under Washington's Privileges and Immunities Clause. *Id.* at p. 14 (quoting from *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812-813, 83 P.2d 419 (2004) ("Grant County II")) (emphasis added). Here, the State's re-enfranchisement scheme infringes upon Plaintiffs' fundamental right to vote. Because the scheme infringes on a "fundamental attribute of an individual's national or state citizenship," it is subject to strict scrutiny analysis. *See City of Seattle v. State*, 103 Wn.2d 663, 670, 694 P.2d 641 (1985).

The State further argues that the Privileges and Immunities Clause does not because the re-enfranchisement scheme "confers no special privilege to any class of potential voters based upon whether they have or have not paid their [LFO's]." Cross Motion at p. 13. Despite the State's purported belief that "convicted felons who fully comply with all sentence

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requirements . . . are not bestowed a special privilege," the facts show otherwise. *Id.* Put simply, the State has voluntarily taken it upon itself to re-distribute "a fundamental right," the right to vote, to ex-felons. In doing so, the State utilizes a statutory scheme that confers a special privilege—the right to vote—to a select group, those wealthier ex-felons who pay in full their LFOs. It is this unequal distribution of a "*fundamental attribute of an individual's national or state citizenship*" based on the payment of money that is subject to strict scrutiny analysis under Washington's Privileges and Immunities Clause. *Grant County II*, 150 Wn.2d at 813 (emphasis added).

Under strict scrutiny analysis, the State's re-enfranchisement scheme must be necessary and narrowly tailored to serve the State's purported interest in "limiting participation in the political process" for ex-felons. First, as discussed in detail in Plaintiffs' Motion, any voting qualification requirement based on wealth is not "necessary." Plaintiffs' Motion at pp. 15-16. Basing the right to vote on an individual's ability to pay is precisely the type of grant of a special privilege based on wealth that is strictly prohibited by Washington's Privileges and Immunities Clause. *See Grant County II*, 150 Wn.2d at 808.

Second, the State's re-enfranchisement scheme is not narrowly tailored because it is both impermissibly under-inclusive and over-inclusive. The statutory scheme is under-inclusive in that it hinders the State's interest by allowing certain ex-felons, who by virtue of having committed a felony have "proven themselves unwilling to abide by the laws," the right to vote based solely on their financial ability to pay their LFOs. Plaintiffs' Motion at pp. 16-17. Conversely, the statutory scheme is also incredibly over-inclusive by precluding at least 46,500 Washington citizens from voting based on the unsupported, and constitutionally infirm, presumption that the failure of ex-felons to pay off their LFOs shows that they are "unwilling to abide by the laws." *Id.* at pp. 17-20. As shown by Plaintiffs, there are numerous Washington citizens who have affirmatively demonstrated their willingness to abide by the laws by paying off their LFOs on a schedule approved by their sentencing court, but who are denied their "fundamental right" to vote based on their poverty. These flaws in the State's scheme are accentuated by the State's failure to make the required individualized

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determination of the circumstances behind an individual's reasons for not paying off his or her LFOs. *See Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002) ("Washington law...follows *Bearden* in requiring the court to find a defendant's failure to pay a fine is intentional before remedial sanctions may be imposed."). For these reasons, the current statutory scheme cannot survive the strict scrutiny required by Washington's Privileges and Immunities Clause.

Finally, the State's re-enfranchisement scheme also fails under a "reasonable grounds" analysis because it grants a fundamental privilege to ex-felons on an unequal basis without reasonable justification. As discussed in detail in Section II(F) above, the ability of ex-felons to pay their LFOs is not a "reasonable ground" for unequally granting the franchise to them. *See also* Plaintiffs' Motion at pp. 30-31. As such, the State's re-enfranchisement scheme violates Plaintiffs' rights under the Washington Constitution.

III. 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. For the same reasons, Defendants' Cross Motion for Summary Judgment should be denied.

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DATED: January 6, 2006

Respectfully submitted,

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On behalf of the
American Civil Liberties Union of Washington

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON
Aaron H. Caplan, WSBA #22525

THE VOTING RIGHTS PROJECT OF THE
AMERICAN CIVIL LIBERTIES UNION
Neil T. Bradley, admitted *pro hac vice*

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NO. 04-2-33414-4 SEA

CERTIFICATE OF SERVICE

I, Kristen M. Oxwang, an employee with the law firm of HELLER EHRMAN LLP, hereby certify under penalty of perjury under the laws of the State of Washington that on January 6, 2006, I caused to be served the following documents upon counsel of record in the manner described below:

Via E-Mail and Federal Express

To: Jeffrey T. Even
Deputy Solicitor General
ROB McKENNA
Attorney General of the State of Washington
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- Plaintiffs' Opposition to Cross Motion For Summary Judgment/Reply in Support of Summary Judgment
- Certificate Of Service

Signed at Seattle, Washington, this 6th day of January, 2006.

Kristen M. Oxwang

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