No. 78598-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

---

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

Respondents,

v.

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

Appellants.

---

# BRIEF OF AMICI CURIAE JUSTICE WORKS!, WASHINGTON STATE SAFE COMMUNITIES COLLABORATIVE, THE WESTERN PRISON PROJECT, THE WASHINGTON DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE WESTERN WASHINGTON FELLOWSHIP OF RECONCILIATION, LEGACY OF EQUALITY, LEADERSHIP AND ORGANIZING, PEOPLE OF COLOR AGAINST AIDS NETWORK, THE FRIENDS COMMITTEE ON WASHINGTON STATE PUBLIC POLICY, THE AFRICAN AMERICAN/JEWISH COALITION FOR JUSTICE, AND THE STATEWIDE POVERTY ACTION NETWORK

---

PRESTON GATES & ELLIS LLP
William Gleeson, WSBA #32006
Jay Carlson, WSBA # 30411
Attorneys for Amicus Curiae
JusticeWorks!

PRESTON GATES & ELLIS LLP
925 Fourth Avenue
Suite 2900
Seattle, WA 98104
(206) 623-7580

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

**Statutes**



**Other Authorities**

## I. SUMMARY OF ARGUMENT

The State of Washington's re-enfranchisement law places a dollar sign on the right to vote and, by doing so, can delay or deny the restatement of voting rights to indigents, but not to the wealthy. The answer to the question -- *why can't many indigent ex-felons vote?* -- is simple but unacceptable -- *Because they are poor*. Unlike most states, in Washington felon disenfranchisement may extend well beyond the period of incarceration and community supervision such as probation or parole. Indeed, in Washington thousands of ex-felons remain disenfranchised for one simple reason: they have not paid in full the Legal Financial Obligation ("LFO") imposed upon them as part of their criminal sentence. They still owe money to the State.

Washington's re-enfranchisement scheme substantially undermines the ability of ex-felons to successfully reintegrate into society. By imposing a wealth-based barrier to civic participation, the State is perpetuating a cycle of stigma and isolation from civic society that increases the risks of recidivism. By conditioning the return of voting rights on the payment of money, Washington has discriminated against the indigent -- both those paying their LFOs over time because they cannot pay in a lump sum and those who cannot afford to pay at all -- and run afoul of the Equal Protection Clause of the United States Constitution and

the Privileges and Immunities Clause of the Washington Constitution. This wealth-based requirement for the restoration of voting rights serves no legitimate State interest.

We do not argue that the State is without the power to force ex-felons to pay LFOs, and it may be that the burdens of such criminal law will fall unequally on the rich and poor. We rather argue that the State cannot enact a law on voting that puts a price tag on re-enfranchisement and unfairly discriminates based on wealth. The State cannot delay re-enfranchisement for those whose resources permit only payment over time, while granting re-enfranchisement immediately to those whose personal wealth permits immediate payment.

## II. IDENTITY AND INTEREST OF AMICI

Amici include national and state organizations that focus on civil rights and that share an interest in maintaining an inclusive and tolerant democracy. Amici support voting rights and oppose laws such as Washington's disenfranchisement statute that disproportionately and negatively impact the poor and minority groups. Amici also include groups that work directly with ex-felons and formerly incarcerated persons to assist them with reintegration into society, and that consider ex-felons to be part of their constituency. Amici recognize that the stigma and political isolation associated with felon disenfranchisement undermines

the ability of formerly incarcerated persons to reintegrate into civil society.

JusticeWorks! is a Washington-based grassroots organization dedicated to helping formerly incarcerated persons successfully reintegrate into society. The organization provides a wide array of support services designed to ensure a safe and successful transition from prison life back into society. JusticeWorks! is therefore well situated to provide a unique and important perspective to this Court in evaluating the impact of Washington's felony disenfranchisement statute.

Washington State Safe Communities Collaborative's mission is to create change by redirecting public funds from mass incarceration to investment in people, communities, housing, employment, education, health care, and other social needs.

The Western Prison Project exists to coordinate a progressive response to the criminal justice system, and to build a grassroots, multi-racial movement that achieves criminal justice reform and reduces the over-reliance on incarceration in the western states of Oregon, Washington, Idaho, Montana, Utah, Wyoming and Nevada.

The Washington Defender Association (WDA) is a not-for-profit membership organization of more than 850 public defenders and assigned counsel throughout the State of Washington. Since its inception, members

of WDA have represented indigent adult felony offenders in criminal proceedings.

The National Association of Social Workers (NASW) is the largest membership organization of professional social workers in the world, with 153,000 members. NASW works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies.

The Western Washington Fellowship of Reconciliation seeks to replace violence, war, racism and economic injustice with nonviolence, equality, peace and justice. It is affiliated with the national Fellowship of Reconciliation and the international Fellowship of Reconciliation. The Fellowship of Reconciliation is a faith-based, interfaith, pacifist organization that works on a variety of peace and justice issues.

Legacy of Equality, Leadership and Organizing ("LELO") is a 33 year old nonprofit organization focusing on racial and economic justice for workers. As an organization led by ordinary workers, LELO develops leadership among those most marginalized in our society: people of color, working class women, recent immigrants and sexual minorities.

People of Color Against AIDS Network ("POCAAN") is a multi-cultural AIDS prevention organization created in response to the devastating impact that HIV/AIDS continues to have on communities of

color. In Washington State, POCAAN brings people of color together across differences of race, gender, class and sexual orientation to achieve its mission. POCAAN also provides direct services to assist formerly incarcerated persons to successfully reintegrate into society.

The Friends Committee on Washington State Public Policy ("FCWPP") seeks to engage in the positive, continuing process of interpreting to government leaders FCWPP's convictions on the moral and spiritual values that should underlie government and law. FCWPP has spearheaded the creation of the Transition and Reentry Reform Coalition, a coalition that works to remove barriers to social reentry for formerly incarcerated persons. FCWPP seeks to encourage spirit-led decision making on legislative matters.

The mission of the African American/Jewish Coalition for Justice is to increase mutual understanding and cooperation of African Americans and Jews in the pursuit of economic and social justice.

Statewide Poverty Action Network ("Poverty Action") works to eliminate the root causes of poverty in Washington. Poverty Action's voter campaign works to ensure people with lower incomes receive the same level of encouragement and engagement in the electoral process. In 2004, Poverty Action launched a pilot project that increased voter participation by 16% among people with lower incomes. Poverty Action

also advocates for changes in voting laws to better enable systems to be open and responsive to the needs of people with low incomes.

## III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case of Plaintiffs-Respondents.

## IV. ARGUMENT AND AUTHORITY

### A. Washington's Disenfranchisement Statute Is Unconstitutional Because It Conditions the Right to Vote on the Payment of Money to the State

Ex-felons face widespread social and cultural obstacles. Beyond the obvious sanctions of incarceration, probation or parole, a felony conviction carries with it numerous "collateral sanctions." These sanctions -- both formal and informal -- include impacts on parental rights, restrictions on public housing, limited access to education and student loans, denial of public assistance, limits on military service, prohibitions against jury service, impacts on immigration status including possible deportation, discrimination in employment, and social stigma. *See, e.g.*, Marc Mauer and Meda Chesney-Lind., eds., *Invisible Punishment, The Collateral Consequences of Mass Imprisonment* (New York, New Press, 2002); Journal of Contemporary Criminal Justice 21 (February 2005), special issue, *Collateral Consequences of Criminal Sanctions*. This panoply of collateral sanctions creates a daunting legal and social context within which formerly incarcerated people must attempt to reintegrate into

society.

Washington's felony re-enfranchisement scheme, RCW 9.94A.760; RCW 9.94A.637, which denies the right to vote until court imposed LFOs are paid in full, is a particularly pernicious collateral sanction. In the case of the indigent or those with limited financial resources, the length of the sanction is based solely on an individual's ability to pay money to the State and satisfy the full amount of the LFO. Until the LFO is paid in full, an ex-felon cannot acquire the Certificate of Discharge necessary for the restoration of civil rights, including the right to vote. RCW 9.94A.637 (1) - (4). This contravenes one of the most fundamental tenants of the American system: that the government cannot deny anyone the right to vote because they are poor.

For indigent people, this means that despite an exemplary record in prison and the successful completion of parole or probation conditions, the right to vote will continue to be denied, in some cases indefinitely.[1] This is the case with some of the present plaintiffs. By contrast, similarly situated individuals who have adequate financial resources can pay the LFO and have their civil rights restored. A wealthy white-collar criminal can purchase the right to vote by paying the LFO immediately, while an

[1] This is particularly true because Washington imposes a 12% interest charge on all LFO judgments. Therefore, the amount owed on the LFO can increase at a greater pace than an ex-felons' ability to pay, rendering them unable to reduce the amount of the principal

indigent ex-felon can only purchase the same right to vote at some later time through monthly installments, if ever.[2]

The State argues that this wealth-based scheme is constitutional because the State may legitimately distinguish between felons and non-felons in distributing the right to vote. State's Opening Brief at 7-15 (relying primarily on *Richardson v. Ramirez*, 418 U.S. 24 (1974)). However, this case is not about the removal of voting rights as the result of a criminal sentence. Rather, it is about the method used to *return* such rights to ex-felons and the fairness and legality of that method. The issue is whether the state may unfairly discriminate among former felons -- all of whom are citizens and entitled to equal treatment under the law -- based solely upon wealth.

Here, Washington has chosen to allow wealthy ex-felons to elect the immediate return of return voting rights, but has denied that election to the indigent or those with limited resources. Washington's statute creates two classes of ex-felons: those who can pay their LFOs in full, and those who cannot.

By conditioning the right to vote on the payment of money, the State has run afoul of the Equal Protection clause of the United States

---

due on the LFO.

[2] We do not argue that a requirement to pay LFOs is an improper criminal sanction. Rather, we assert that it is unconstitutional to link a wealth-based criminal sanction to the

Constitution and Washington's Privileges and Immunities Clause. First, it is well established that poll taxes are unconstitutional.[3] The United States Supreme Court has held that wealth or fee based voting requirements violate the Equal Protection Clause of the Fourteenth Amendment. "[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." *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 668 (1966). "Voting cannot hinge on ability to pay[.]" *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 n.14 (1996). "[A] State violates the Equal Protection Clause of the Fourteenth Amendment *whenever it makes the affluence of the voter or payment of any fee an electoral standard*." *Harper*, 383 U.S. at 666 (emphasis added).

Second, the courts have repeatedly recognized that when a statute imposes a criminal sanction based on the failure to pay a fine or fee, there must be a finding that the non-payment was willful or intentional. *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that it was fundamentally unfair to revoke probation for non-payment of fines without an inquiry for the reasons for non-payment); *United States v. Parks*, 89 F.3d 570, 572-73 (9th Cir. 1996) (imposition of additional

---

right to vote.

[3] Indeed, the Twenty-Fourth Amendment to the United States Constitution provides that the right to vote for federal offices "shall not be denied or abridged by the United States

criminal history points for failure to pay LFO violated *Bearden* because there was no willfulness inquiry); *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485 (2002). Yet Washington's re-enfranchisement scheme provides for no such finding. It is a blunt instrument that withholds voting rights without any consideration of willfulness.

In *Williams v. Illinois*, 399 U.S. 235 (1970), the United States Supreme Court held unconstitutional an Illinois law under which an offender was continued in confinement beyond the maximum prison term because indigence prevented him from satisfying the money portion of his sentence. The *Williams* Court explained that because the additional sanction was "applicable only to those without the requisite resources to satisfy the money portion of the judgment," it was unconstitutional. *Id*, *399 U.S.* at 242. Washington's re-enfranchisement scheme, much like the statute in *Williams*, imposes different treatment upon two classes of offenders based solely on financial criteria. This is unconstitutional.

### B. The Judiciary Has Long Recognized that Indigence Cannot Justify the Denial of Basic Rights of Citizenship

The courts have long recognized that wealth-based classifications cannot act to deprive an individual of constitutionally protected rights. *See State v. Rutherford*, 63 Wn.2d 949, 953, 389 P.2d 895 (1964). This

---

or any State by reason of failure to pay any poll tax or other tax."

fundamental precept has been recognized throughout numerous levels of the criminal and civil justice system. For example, an indigent defendant in a criminal proceeding is entitled to the due process guaranty of fundamental fairness, including the provision of defense counsel paid for by the state. *In re Brown*, 143 Wn.2d 431, 445, 21 P.3d 687 (2001). Put differently, due process guarantees the right of an indigent defendant to a reasonably fair equality with those defendants who have adequate financial means to protect their rights. *U.S. v. Hartfield*, 513 F.2d 254, 258 (9th Cir. 1975) (abrogated on other grounds by *U.S. v. Sneezer*, 900 F.2d 177 (9th Cir. 1990)).[4]

Moreover, an indigent criminal defendant has the right, under the due process clause, to have a free transcript of trial proceedings. *Griffin v. Illinois*, 351 U.S. 12 (1956), 19-20 ; *see also Rutherford*, 63 Wn.2d 949 (defendant convicted of eight counts of violating the Securities Act sought to have furnished to him at public expense a statement of facts and transcript of his trial). Indigent criminal defendants represented by private counsel are entitled to expert assistance necessary to an adequate defense.

[4] In proceedings to terminate parental rights, an indigent individual has a right counsel to ensure the "full panoply of due process safeguards." *In re Welfare of J.M.*, 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (quoting *In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974)) (the "right to the custody, control, and companionship of one's children is a fundamental right that the State may not abridge without the complete protection of due process"). This right to state appointed counsel "derives from the due process guaranties of article I, section 3 of the Washington Constitution as well as the Fourteenth Amendment." *Id.* In forma pauperis civil proceedings further demonstrate the

*State v. Punsalan*, 2006 WL 1215378, --- P.3d ---- (Wash. 2006). And on appeal, "[t]he State must provide indigent criminal defendants with the means of presenting their contentions on appeal which are as good as those available to nonindigent defendants with similar contentions." *State v. Giles*, 148 Wn.2d 449, 450, 60 P.3d 1208 (2003).

Under Washington's felon disenfranchisement provision, the right to vote is withheld as part of a criminal proceeding against a criminal defendant. Yet the statute allows this penalty to be continued based solely on differences in wealth. Such wealth-based classifications run counter to the traditions of fundamental fairness and due process that underlie the American justice system.

### C. There is No Legitimate Policy Rationale for Washington's Disenfranchisement Rule

#### 1. Washington's policy discriminates against responsible but indigent ex-felons who are attempting to repay their LFOs

In attempting to justify the constitutionality of its re-enfranchisement scheme, the State argues that RCW 9.94A.637 furthers the goal of compelling offenders to satisfy all elements of their sentence, including the payment of fines and restitution. State's Opening Brief at 23-25. Yet the re-enfranchisement scheme is not rationally related to this goal. For example, Washington's LFO statute requires those who do not

---

accommodations provided to indigent individuals to protect their constitutional rights.

pay their LFOs in full to pay in ongoing monthly installments. RCW 9.94A.760(1), (5)-(6). Indigent ex-felons who satisfy this monthly payment schedule remain in compliance with the LFO law. Yet the re-enfranchisement provision, RCW 9.94.637(1), makes no distinction between such individuals who make their timely monthly payments and those who willfully choose to pay nothing. For the purpose of voting rights, ex-felons who make regular payments are treated exactly the same as willful scofflaws.[5] Neither will have their voting rights restored.

By failing to distinguish between willful non-payment and non-payment based on indigence or other factors (such as substantial child support, substantial debt payments, etc.), Washington's scheme actually punishes those who act responsibly and who are working to have their voting rights restored so they can participate in the political process. They are treated exactly the same as ex-felons who ignore their LFO and who don't care about reacquiring their voting rights. Therefore, the re-enfranchisement scheme is an ineffective and irrational way to encourage payment; it punishes the responsible. There is no legitimate policy rationale for such an approach.

---

[5] Willful scofflaws will face additional sanctions, however. The payment of the monthly LFO assessment is considered a "condition or requirement of a sentence," and noncompliance may subject an offender to additional criminal penalties. RCW 9.94A.760(10).

### 2. Washington's policy undermines the ability of formerly incarcerated persons to successfully reintegrate into society

Washington's re-enfranchisement scheme also undermines the State's interest in successfully reintegrating ex-felons into society. Although systematic study of this issue is just beginning, early research suggests that there is a significant correlation between voting behavior and criminal activity. A brief discussion of this research may be useful to the Court by way of background regarding disenfranchisement and its impacts on the criminal justice system.[6]

In the book *Locked Out, Felon Disenfranchisement and American Democracy*, Professors Jeff Manza and Christopher Uggen discuss the results of the Youth Development Study ("YDS"). This panel study of former public school students from Minnesota is the only available source of data that includes information about criminal behavior as well as political participation and attitudes. Jeff Manza and Christopher Uggen, *Locked Out, Felon Disenfranchisement and American Democracy*, 114 (Oxford University Press, 2006).

Data derived from the YDS "shows clear differences in arrest and incarceration by levels of political participation." *Locked Out* at 131.

[6] This discussion is not offered as additional factual support, outside the record, regarding the merits of this Appeal. It is offered only by way of background that may be useful to the Court in understanding recent social scientific evidence regarding disenfranchisement

Simply put, voters are less likely to commit crime, to be arrested, and to be incarcerated than are non-voters. For example, when comparing voters and non-voters from the 1996 election, the authors found that fully 15.6% of non-voters were arrested between 1997 and 2000, while only 5.2% of voters were arrested during that period. 12.4% of non-voters were incarcerated, while only 4.7% of voters were incarcerated. The voting effect was also observed for self-reported criminal behavior. *Id.* at 133. These statistically significant differences were present even after the results were corrected to account for prior criminal history, suggesting a further link between voting and recidivism. *Id.* at 131-33. While the authors acknowledge that much of the observed link between voting and crime may be attributable to other factors (i.e., race, gender, education levels and criminal history), *id.* at 134-35, the YDS data do demonstrate that "those who vote are less likely to be arrested and incarcerated, and less likely to report committing a range of property and violent offenses." *Id.* at 133.

Professors Manza and Uggen have theorized that a relationship between voting and crime exists because voting is "one of the defining elements of citizenship in a democratic polity and participation in democratic rituals such as elections affirms membership in the larger

---

policies

community for individuals and groups." Christopher Uggen and Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 Colum. Hum. Rts. Rev. 193, 195 (2004-05). "[V]oting can be viewed as a proxy for other kinds of civic engagement associated with the avoidance of illegal activity." *Id.* Voting ties a citizen more closely to his or her community, increasing "desistance" to criminal behavior.

Professors Manza and Uggen further argue that felony disenfranchisement interferes with what they call "civic reintegration," the ability of ex-felons to fully reintegrate into the "political community of citizens." *Locked Out* at 125. "If citizenship implies 'full membership' in society, what happens when felons lose the basic rights and capacity to perform the duties of citizenship, such as the right to vote, the right to hold elective office, and to serve on juries?" *Id.* The authors suggest that disenfranchisement undermines civic reintegration by consigning felons into an extended period of less-than-full civil status. "As these barriers are experienced and recognized, it becomes difficult, and sometimes impossible, for former felons to see themselves at the table with other citizens in good standing." *Id.* at 126. This interferes with reintegration, increasing the risks of recidivism.

One inmate named Susan, who was interviewed for the *Locked Out*

book, put it this way:

> Right now I'm in prison. Like society kicked me out. They're like, 'okay, the criminal element. We don't want them in society, we're going to put them in prisons.' Okay, but once I get out, then what do you do? What do you do with all these millions of people that have been in prison and released? I mean, do you accept them back? Or do you keep them as outcasts? And if you keep them as outcasts, how do you expect them to act?

*Id.* at 152-53.

Obviously, the State of Washington has the right to adopt public policies -- even bad public policies -- that may interfere with the civic reintegration of ex-felons. There are legitimate interests that might justify such policies. However, Washington's re-enfranchisement statute is not rationally related to any legitimate interest. Rather, the re-enfranchisement scheme is based solely on wealth, conditioning the fundamental right to vote on the payment of money to the State. Given that voting may play a role in helping ex-felons reintegrate into the workforce and into society at large, Washington's re-enfranchisement scheme is doubly cursed: it is bad public policy that is also unconstitutional.

## V. CONCLUSION

For the reasons stated above, Amici respectfully request that the

Court affirm the decision of the trial court below.

DATED this 30th day of May, 2006.

PRESTON GATES & ELLIS LLP

By _____
William Gleeson, WSBA #32006
Jay Carlson, WSBA # 30411
Attorneys for Amici Curiae

P:\JJ1C\JJ1C00U