,

_____COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. , Defendant.	NO. MOTION IN OPPOSITION TO PRETRIAL CONDITIONS OF RELASE

COMES NOW , by and through the undersigned attorney, of the Snohomish County Public Defender Association, and hereby moves the Court to strike any conditions

…..pay for any conditions that this Court imposes as a result

DATED this _____ day of _____, 2020.

_____
, WSBA #
Attorney for

SNOHOMISH COUNTY PUBLIC
DEFENDER ASSOCIATION
2722 COLBY AVE #200 EVERETT, WA

DECLARATION

I, , am over the age of 18 and competent to make this declaration.

1. I am the attorney of record for and make this declaration in that capacity.
2. On March 22, 2020, Governor Inslee issued the "Stay Home, Stay Healthy" order.
3. Because many establishments in the State of Washington were shuttered under the order, many Washingtonians lost their jobs and their livelihoods.
4. As a result, Ms. _____ lost her job.
5. Ms. X is charged with_____.
6. Pursuant to RCW 10.21.055, the Court imposed alcohol monitoring as a condition of pretrial release at Ms. X's first court hearing.
7. Under RCW 10.21.055, an accused person must pay for pretrial alcohol monitoring at their own expense.
8. Ms. X is and is unable to pay for the costs associated with this Court's pretrial conditions.
9. Ms. _____, filed out a financial declaration outlining her current financial state and it is clear from the declaration that Ms. _____, does not have the means to pay for any court ordered conditions. Please see Exh. A (financial declaration)
10. Because Ms. _____ cannot afford SCRAM or any kind of mandatory alcohol monitoring, she respectfully requests that the Courts pay for such monitoring or in the alternative to strike the condition.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

SIGNED in Everett, Washington, this _____ day of _____, 2020.

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, WSBA #
Attorney for

MEMORANDUM OF LAW

People charged with crimes who cannot afford to pay for the pre-trial conditions of release courts impose should not be imprisoned. The COVID 19 crisis has highlighted the inequities that exist between those who are indigent and those who are not. According to a recent study published by the New York Times, "39 percent of former workers living in a household earning $40,000 or less lost work, compared with 13 percent in those making more than $100,000, a Fed official said."[1] The unemployment numbers are staggering. The current rate of unemployment is the highest it has been since the great depression. [2] Both the Covid 19 health crises and the massive rise in unemployment are unprecedented in our times.

When Governor Inslee issued the Stay Home, Stay Healthy order on March 23, 2020, tens of thousands of Washington residents lost their jobs. To add fuel to the file, persons with criminal convictions already had a very difficult time finding a job. Even though Washington passed a "ban the box" statute requiring employers to assess potential employees' qualifications prior to asking about criminal convictions, employers are still allowed to run background checks and ask for arrest, charge, and conviction data. Poor people caught up in the criminal justice

[1] https://www.nytimes.com/2020/05/14/business/economy/coronavirus-jobless-unemployment.html (Last visited May 15, 2020)
[2] https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/ (last visited May 15, 2020)

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system are particularly vulnerable in the current climate since the rate of Covid 19 is higher amongst indigent population and the greater risk of unemployment. (CITE)

I. THE IMPOSTION OF MANDATORY PRETRIAL CONDITIONS THAT THE ACCUSED CANNOT AFFORD RESULTS IN DISPROPORTINATE PRETRIAL INCARCERATION OF POOR PROPLE AND VIOLATES ART 1, § 12 OF THE WASHINGTON CONSTITUTION, THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The court must apply the privileges and immunities clause to Ms. X's case.

The imposition of pre-trial costs that the accused cannot afford violates the Privileges & Immunities Clause of the Washington Constitution. Under Article I, § 12 of the Washington State Constitution, the Privilege and Immunities Clause, "[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."

The Washington State Supreme Court has defined the term "privileges and immunities" as "pertain[ing] alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *State v. Vance,* 29 Wash. 435, 458 (1902). While the precise confines of what constitutes a privilege remain unclear, the Washington Supreme Court has said that privileges are "those fundamental rights which belong to the citizens of the state by reason of their state citizenship." *Madison v. Sta*te, 161 Wn.2d 85, 95 (2007) (*quoting State v. Vance,* 29 Wn. 435, 458 (1902)) (internal alterations omitted). Under art. I, § 3, liberty is a fundamental right. Art, 1, § 3 provides that "no person shall be deprived of life, liberty, or property without due process of law."

When a litigant claims protection under the privileges and immunities clause, the court must determine whether the right implicated constitutes a privilege or immunity. For a violation

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of article I, § 12 to occur, the law, or its application, must confer a privilege to a class of citizens." *Grant County Fire Protection Dist. No.5*, 150 Wn.2d 791, 812 (2004) (*Grant II).* The privileges and immunities clause requires an independent analysis from, and provides broader protection than, the federal equal protection clause in instances involving a grant of privilege or immunity, or of positive favoritism. *Grant II*, 150 Wn.2d 791 (2004).

1. The privileges and immunities clause applies because RCW 10.21.055 confers favoritism on accused people who can afford the cost of pretrial alcohol monitoring while requiring accused people who cannot afford pretrial alcohol monitoring to go to jail.

When a litigant asserts that the privileges and immunities clause provides more protection than the United States Constitution, the court engages in a two step inquiry. *Madison v. State*, 161 Wn.2d 85 (2007). First, the court must first determine whether the privileges and immunities clause requires an analysis independent of that under the equal protection clause. Second, it must determine whether the privileges and immunities clause provides greater protection in the context asserted.

Turning to the first step of the analysis, the court is required make a determination regarding whether art. 1 § 12 should be given independent analysis from its federal counterpart using a *Gunwall* analysis:

> First, we determine whether "a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision." This first analysis considers the six nonexclusive, neutral *Gunwall* factors: (1) the textual language of the state constitution, (2) differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) pre-existing state law, (5) structural differences between the federal and state constitutions, and (6) matters of particular state or local concern. (*internal citations omitted)*

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"Once a court has established that a state constitutional provision warrants an analysis independent of a particular federal provision, it is unnecessary to engage repeatedly in further *Gunwall* analysis simply to rejustify performing that separate and independent constitutional analysis." *Madison v. State,* 161 Wn.2d 85, 94-95 (2007) (internal citations omitted). Because the Washington State Supreme Court has previously determined that Article I, § 12 of the Washington State Constitution requires an independent constitutional analysis from the equal protection clause of the Federal Constitution, the first step of the two step analytical process is satisfied. *Id.*

When a court determines that independent analysis is warranted, it must then engage in a subsequent analysis to determine whether art. 1 § 12 provides greater protections to the citizens of Washington. *State v. McKinney*, 148 Wn.2d at 20, 26 (2002). Turning to the second part of the two step inquiry, the *Madison* Court found:

> This second analysis focuses on whether our state constitution provision is more protective of the claimed right in the particular context than is the federal constitution provision, and the scope of that protection. Such an "analysis involves, among other things, an examination of the language of the provision its relationship to other constitutional provisions, the existing and preceding statutory and common law at the time it was adopted, and other historical context," Concurrence (Madsen, J.) at 3. The six Gunwall factors parallel interpretive inquiries made when determining "whether the state constitution ultimately provides greater protection than its corresponding federal provision. *Id.* 161 Wn. At 93-94. (internal citations omitted).

In enacting the privileges and immunities clause, the Washington framers were concerned with "undue political influence exercised by those with large concentrations of wealth and

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avoiding favoritism toward the wealthy." *Madison*, (citing *Grant II*, 150 Wn.2d at 808) (internal alterations omitted). The statute that requires the court to impose a pretrial condition of release that Ms. X could not afford, RCW 10.21.055, confers favoritism upon the non-indigent accused. Restated, indigent accused people must go to jail if they cannot afford the costs of their pretrial conditions while wealthier accused people enjoy the benefits of liberty because they can pay those costs.

2. The privileges and immunities clause applies because Ms. X is similarly situated to more wealthy accused people.

In *Madison* people with felony convictions challenged the statutory scheme that disqualified them from voting until they paid off their outstanding legal financial obligations (LFOs), asserting that it violated the privileges and immunities clause. The Washington Supreme Court disagreed, holding that the disenfranchised plaintiffs were comparing apples to oranges since they were disenfranchised felons and not disenfranchised citizens. *Madison*, 161 Wn.2d 85.

In the case at bar, the defendant is not comparing people with felony convictions to citizens without convictions. She is comparing people who have been accused of crimes and who cannot afford the cost of pre-trial conditions with people who have been accused of crimes and who can afford the costs of pretrial conditions. Thus, Ms. X makes an apples to apples comparison. She compares groups of accused people—some who can afford pretrial conditions of release and others who cannot.

B. The privileges and immunities clause requires the court to apply intermediate scrutiny because Ms. X's case involves an important right of a semi-suspect class.

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When a Washington court applies the privileges and immunities clause to a challenged law, it will use one of three levels of scrutiny: strict scrutiny, intermediate scrutiny or rational basis. Strict scrutiny requires a law be narrowly tailored to satisfy a compelling government interest. Rational basis requires a law be rationally related to a legitimate state interest. A law will meet intermediate scrutiny if it is substantially related to a legitimate government purpose. *State on Behalf of Sigler v. Sigler,* 85 Wn.App. 329 (1997).

The United States Supreme Court has used intermediate scrutiny in the equal protection context primarily when evaluating gender discrimination. However, under the Washington Constitution's privileges and immunities clause intermediate scrutiny applies when a court evaluates an important right of a semi-suspect class. *Sigler,* 85 Wn.App. at 335–36 ("The United States Supreme Court applies this test to gender based classifications, and our [Washington] Supreme Court uses it in classifications involving an important right of a semi-suspect class"); *See also Yim v. City of Seattle,* 194 Wn.2d 682, 690 (2019) ("[T]his court has a duty to recognize heightened constitutional protections as a matter of independent state law in appropriate cases").

Statutes related to incarceration of poor people implicate an important right of a semi-suspect class. The right to liberty is an important right. *See State v. Smith,* 117 Wn.2d 263, 277–78 (1991) (right to liberty not implicated because juveniles were not in custody during revision process they challenged); *State v. Phelan,* 100 Wn.2d 508, 514 (superseded by statute on other grounds) (denial of credit for presentence jail time served implicated the right to liberty). A semi-suspect class is one that is cannot be held accountable for its status. *Sigler,* 85 Wn.App. 329, 335–36 (1997). The poor are a semi-suspect class. *Id.*

i. Requirements of Intermediate Scrutiny

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As explained above, the intermediate scrutiny test requires that law be "substantially related to the achievement of an important government interest." *City of Seattle v. Evans,* 182 Wn.App. 188, 197 (2014). Put another way, a challenged law must "fairly be viewed as furthering a substantial interest of the State." *Westerman v. Cary*, 125 Wn.2d 277, 294–95 (1994) (quoting *Phelan,* 100 Wash.2d at 512, 671 P.2d 1212).

A law is not substantially related to an interest of the State if it meets only a small portion of the State's various goals. *State v. Phelan,* 100 Wn.2d 508 (1983) (superseded). In *State v. Phelan,* Mr. Phelan sought credit for time he served in jail awaiting sentencing against a discretionary minimum term set by the Board of Prison Terms and Paroles. The State asserted that it had an important governmental interest in rehabilitation that was substantially related to denying Mr. Phelan credit for time he served in jail rather than prison. *Id* at 514. The Washington Supreme Court disagreed, finding that the State's interest was not only rehabilitation but also punishment, deterrence and incapacitation. *Id.* While prison time may have been more rehabilitative than jail time, both settings were equally suited to punishment, deterrence and incapacitation. Denial of jail time was not substantially related to the cluster of government interests since it addressed only one of the four interests. *Id* at 514 ("The connection of a denial of jail time credit with only one of the various goals of discretionary minimum terms is insufficient under the enhanced review applicable here"); See also *Mississippi University for Women v. Hogan,* 102 S.Ct. 3331, 3337, 458 U.S. 718, 725–26 (1982) (intermediate scrutiny requires that a law bear a strong, direct connection to the government's goal based on "reasoned analysis").

Under any of the three levels of scrutiny, a law may not create results contrary to the government's purported interest. Under intermediate scrutiny, the government must be protective

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of its purported important interest. *See Clark v. Jeter*, 108 S.Ct. 1910, 1916, 486 U.S. 456, 464–65 (1988) (Pennsylvania law setting 6 year statute of limitations for actions to establish paternity of children born out of wedlock and receive child support was not substantially related to State's interest in avoiding litigation of stale or fraudulent claims when there were multiple exceptions to the rule and other civil actions were tolled during a child's minority). To meet even rational basis review, a statute must "operate so as rationally to further" its purpose. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); See also *Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (a law may fail rational basis test if its methods are "discontinuous with the reasons offered" to support them).

A law may not single out a group to bear the burden of saving government funds without some legitimate justification for picking that group. *Plyler v. Doe*, 102 S.Ct. 2382, 2400, 457 U.S. 202, 227 (1982) ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"). *See also Nielsen v. Washington State Dept. of Licensing*, 177 Wn.App. 45, 59–60 (2013) (statute that conserved state resources by refusing to mitigate the damage the Department of Licensing did to drivers whose licenses it wrongly revoked did not meet rational basis test).

ii. 10.21.055 Does Not Meet the Intermediate Scrutiny Test

Under 10.21.055, a court must impose alcohol monitoring at the expense of the accused. The State is likely to claim two possible interests in this law: protecting community safety and saving government funds. Neither of these interests are substantially related to requiring the accused to pay for alcohol monitoring.

Because the statute requires the accused to obtain and pay for alcohol monitoring as a condition of release, an accused's inability to do so will result in revocation of pretrial release

and time in jail awaiting resolution of their case. To demand the accused either bear the financial brunt of pretrial alcohol monitoring or spend pretrial time in jail does not meet the government purpose of saving funds because it does not ultimately conserve money. It costs the government money. The cost of SCRAM alcohol monitoring is $400 a month. The jail charges municipalities $101.69 to keep a person in general population for a day, $160.13 for medical and $242.79 for persons with specialized mental health needs. Exh. C. The same 6th month period that costs $2400 for SCRAM, costs the county roughly $18,304 for someone placed in the jails general population[3].

Neither is the statute substantially related to the State's interest in community safety. While requiring those accused of DUI to submit to alcohol monitoring may decrease future incidents of drunk driving, there is no connection between requiring the accused to pay for that alcohol monitoring and decreased drunk driving. The community is no safer if the accused pays than if the government pays or the court provides the monitoring equipment. Any claim that the statue promotes community safety is untrue. Requiring an indigent accused person to pay for alcohol monitoring leaves the roads less safe than if the government covered the cost. It is unlikely that an indigent person will tell the court that they cannot afford the cost of monitoring as the court sets pretrial conditions of release because they know that admission will trigger pretrial detention. Instead, the court will impose the condition and set a future date for the accused to come to court and show compliance. If the accused cannot afford the cost of monitoring, they will spend the time between the setting of conditions of release and the compliance hearing in the community without alcohol monitoring.

[3] The costs of incarceration numbers provided from the jail likely overestimate the costs for people who have county cases since the data provided only addresses costs to the municipalities and may overestimate the costs to Snohomish County District Court cases.

II. THE IMPOSTION OF MANDATORY PRETRIAL CONDITIONS THAT THE ACCUSED CANNOT AFFORD RESULTS IN DISPROPORTINATE PRETRIAL INCARCERATION OF POOR PEOPLE, VIOLATING THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The United States Supreme Court has disfavored policies that have a disparate impact on people living in poverty who are caught up in the criminal justice system. In *Griffin v. Illinois*, 351 U.S. 12, 17 (1956), the Supreme Court addressed equal protection, poverty, and the courts. The defendants in Griffin had been convicted of armed robbery but could not appeal because they could not afford the mandatory trial transcript. The Supreme Court held that Illinois violated equal protection when it denied the defendants the opportunity to appeal their convictions. *Id.* ("in criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color"). The court made clear that the Constitution allows "no invidious discriminations between persons and different groups of persons" and that all accused people "stand on an equality before the bar of justice in every American court." *Griffin*, 351 U.S. at 17 (*citing Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

Several subsequent U.S. Supreme Court cases emphasize that courts violate equal protection when they treat indigent defendants more harshly than they would more wealthy defendants. *See Williams v. Illinois*, 399 U.S. 235, 244, 90 S. Ct. 2018, 2023-24, 26 L. Ed. 2d 586 (1970) (sentencing court violates Equal Protection Clause when it requires indigent defendant to serve sentence longer than statutory maximum because defendant is unable to pay costs and fines); *Tate v. Short*, 401 U.S. 395, 399, 91 S. Ct. 668, 671, 28 L. Ed. 2d 130 (1971) ("[s]ince Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant

without the means to pay his fine"); *Bearden v. Georgia*, 461 U.S. 660, 671, 103 S. Ct. 2064, 2072, 76 L. Ed. 2d 221 (1983) (sentencing court violates Equal Protection Clause when it orders indigent defendant who has made bona fide but unsuccessful efforts to pay costs and fines to serve time for failing to pay costs and fines; "[t]his would be little more than punishing a person for his poverty" and is not allowed).

Lower federal courts have noted that equal protection forbids linking incarceration to poverty. See *United States v. Flowers*, 946 F. Supp. 2d 1295, 1302 (M.D. Ala. 2013) ("it is inequitable for indigent defendants who cannot pay for home-confinement monitoring to be imprisoned while those who can pay to be subject to the more limited monitored home confinement avoid prison"); *United States v. Doe*, 870 F. Supp. 702, 705 (E.D. Va. 1994) (it would be fundamentally unjust to allow a wealthy person to purchase a lighter sentence than an indigent person).

Because RCW 10.21.055 leads to incarceration based on the non-willful failure of poor people to pay for alcohol monitoring, it violates equal protection.

III. GOOD PUBLIC POLICY REQUIRES THE COURT TO FUND PRETRIAL ALCOHOL MONITORING IF IT IMPOSES THAT MONITORING AS A CONDITION OF PRETRIAL RELEASE.

Prior the formation of Washington's Pretrial Reform Task Force, the National Institute of Justice (NIJ) addressed the issue of pretrial release/pretrial conditions. The NIJ program found "the concept of equal justice under law is deeply embedded in the U.S. Constitution and is a core value of American society. In the area of pretrial release/detention decisionmaking, it means, at a

minimum, that all defendants should have the same opportunity for consideration for release without invidious discrimination based on race, sex, or **economic status**."[4]

In 2017, Washington's Pretrial Task Force was convened to address and improve Washington Courts' pretrial services programs. Justice Yu, Judge Sean P. O'Donnell and Judge Mary Logan (the heads of the Superior Court's and the District Court's Judges Associations respectively) headed the task force and worked with national, state and local pretrial services programs in order to make recommendations intended to improve pretrial practices in Washington. See Exh. B.

The task force made numerous recommendations based on its review of pretrial services programs. One such recommendation is that:

> **Governments should bear the cost of pretrial services rather than the accused**: Accused persons cannot and should not be required to incur additional costs or debts as a result of their participation in pretrial services. Pretrial services include, but are not limited to: electronic monitoring, drug and alcohol monitoring, mental/behavioral health treatment, and court reminders.

The task force found that in order to maximize justice for all:

> Focusing the following recommendations on the needs of individuals who come into contact with the criminal justice system is critical. That contact starts with pretrial decisions and the very first decision can have significant consequences on a person's job, housing, and family life. Consistent with Washington law and its court rules, the best practice is to ensure the fewest number of people are detained pretrial, with the fewest possible conditions, and without jeopardizing public safety. Accused individuals should not be detained pretrial solely because of their inability to post a bond or pay for their release. **Nor should these individuals bear the costs of monitoring if released pretrial.**

[4] https://www.ncjrs.gov/pdffiles1/nij/181939.pdf (last visited May 18, 2020)

Every entity in the criminal justice system should take steps to ensure that the systems in place and the reforms to be implemented do not have a disproportionate impact on a person because of his or her race, ethnicity, gender, socioeconomic position, or otherwise. *Id.* at pg. 8 (emphasis added).

CONCLUSION

The Washington Constitution, the United States Constitution and good public policy all require that the court pay the cost of alcohol monitoring if it imposes such monitoring as a condition if pretrial release.

RESPECTFULLY SUBMITTED this _____ day of May, 2020.

_____
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