

SUPREME COURT OF THE STATE OF WASHINGTON

DANIEL MADISON et al.,

Respondents,

v.

STATE OF WASHINGTON et al.,

Petitioners.

BRIEF OF AMICI CURIAE

LEAGUE OF WOMEN VOTERS OF WASHINGTON

LEAGUE OF WOMEN VOTERS OF SEATTLE

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U.S. Const. amend XIV	<i>passim</i>
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I. IDENTITY AND INTEREST OF AMICUS

The League of Women Voters of the United States was founded on February 14, 1920, in anticipation of the passage of the 19th Amendment to the U.S. Constitution, which gave women the right to vote. The original purpose of the League was to educate and involve the newly enfranchised voters and other citizens in the political and electoral process.

The mission of the League of Women Voters today is to promote the informed and active participation of citizens in government. Throughout its history the League has worked to remove barriers to voting, to increase voter participation, and to reform election processes at every level of government.

The League believes that every citizen should be protected in the right to vote.

The League is strictly nonpartisan, and does not support or oppose candidates for public office. Members of the Washington and Seattle Leagues are also members of the League of Women Voters of the United States.

The League of Women Voters of Washington was organized in 1920. The League has its roots in the equal suffrage movement that led Washington to grant women the right to vote in 1910, nine years before

the 19th Amendment extended the right to vote to all American women. Today the League has twenty-three local Leagues around the state with over two thousand Washington members. The League of Women Voters of Seattle, formed in 1921, has about 800 members in Seattle, Mercer Island, Shoreline, Bellevue, Kirkland, Issaquah and other areas of Northeast King County.

The Washington and Seattle Leagues support full and automatic restoration of voting rights for people with felony convictions upon their release from incarceration.

II. STATEMENT OF THE CASE

The facts of this case are adequately discussed in the briefs submitted by the parties.

III. ARGUMENT AND AUTHORITY

The League of Women Voters of the United States believes that voting is a fundamental citizen right that must be guaranteed.

Statement of Position on Citizen's Right to Vote, as Announced by National Board, March 1982.

The requirement of “legal financial obligations” as a condition of voting offends the basic principle that voting is a fundamental right. Disenfranchisement of felons as a punishment for their crimes is permitted by §2 of the Fourteenth Amendment, but the right to vote remains

fundamental. The exercise of the right to vote may never be conditioned upon the payment of money.

As the Supreme Court stated more than a century ago, the right to vote is a fundamental political right, “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed 220 (1886). Although disenfranchisement of for crime is permitted by §2 of the Fourteenth Amendment, the right to vote remains fundamental. Contrary to the State’s argument, disenfranchisement does not create a class of persons for whom voting is something less than a fundamental right or whose right to vote may be subjected to any restriction that can be justified under the ‘rational basis’ test.

The State and the trial court have incorrectly interpreted *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), to hold that felons have no fundamental right to vote. The assertion that the ‘rational basis’ test applies to felons is based on this erroneous interpretation of *Richardson*.

Under *Richardson*, the disenfranchisement of felons does not violate equal protection because such disenfranchisement is expressly sanctioned by §2 of the Fourteenth Amendment. The Fourteenth Amendment does **not** sanction the imposition of “legal financial obligations” as a condition on restoration of the franchise. The Fourteenth

Amendment does ***not*** authorize states to distinguish between felons who can afford to pay and those who cannot. Such invidious wealth-based discrimination violates the Equal Protection Clause of § 1 of the Fourteenth Amendment regardless of whether the persons affected have felony convictions or not.

A. The right to vote is a fundamental right, even for convicted felons. *Richardson v Ramirez*, 418 U.S. 24 (1974) does not hold otherwise.

The State's legal argument begins with the confident assertion that the United States Supreme Court held in *Richardson*, 418 U.S. 24, that "Felons do not have a constitutionally protected right to vote." App. Br. at 7. Based on this assertion, the State argues that the challenged LFO requirement is reviewed under the rational basis standard and not the strict scrutiny normally applicable to restrictions on the right to vote. The trial court agreed.

The State and the trial court have misread *Richardson*, repeating an erroneous interpretation of that case by a lower federal court in *Owens v. Barnes*, 711 F.2d 25 (3rd Cir.), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983). **The majority opinion in *Richardson* never uses the phrase 'fundamental right,' and never addresses the issue of whether the right of felons to vote is a 'fundamental' right.**

Additionally, the phrase ‘rational basis’ is not used in either the majority or dissent in *Richardson*.

A correct understanding of the issue and holding in *Richardson* is essential to a correct analysis of this case. In *Richardson*, convicted felons in California argued that the disenfranchisement of felons violated equal protection. The California Supreme Court agreed. The felons’ argument was based on recent Supreme Court cases applying the Equal Protection Clause of § 1 of the Fourteenth Amendment to restrictions on voting. *Richardson*, 418 U.S. at 53. The Supreme Court noted, however, that the felons’ argument “implicates not merely the language of the Equal Protection Clause of § 1 of the Fourteenth Amendment, but also the provisions of the less familiar §2 of the Amendment.” *Richardson*, 418 U.S. at 42. Section 2 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 ... 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).

U.S. Const. amend XIV, §2.

The Court agreed with the state that the Equal Protection clause could not have been intended to prohibit the disenfranchisement of felons which was “expressly exempted from the lesser sanction of reduced representation imposed by §2 of the Amendment.” *Richardson*, 418 U.S. at 43.

[t]he exclusion of felons from the vote has an affirmative sanction in §2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of §2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

Richardson, 418 U.S. at 54.

The dissenters asserted that “§2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment.” *Richardson*, 418 U.S. at 74 (Marshall, J., dissenting). Consequently, the dissenters argued that the disenfranchisement of felons was subject to the Equal Protection Clause, that voting is a fundamental right, and that the necessary justification for disenfranchisement was lacking. *Richardson*, 418 U.S. at 77-78 (Marshall, J., dissenting).

Richardson's narrow holding — that the disenfranchisement of felons does not violate the Equal Protection Clause — is entirely based on a structural analysis of the Fourteenth Amendment and an historical analysis of §2 of that Amendment. The *Richardson* majority does not address whether the right to vote is a fundamental right. Nor does the majority indicate what of type of equal protection analysis should be applied to state laws that implement the disenfranchisement sanctioned by §2.

The erroneous assertion that *Richardson* holds that felons have no fundamental right to vote comes from a decision of a panel of the Third Circuit Court of Appeals. In *Owens*, 711 F.2d 25, the circuit court rejected the argument that the denial of absentee ballots to incarcerated felons violated equal protection. The *Owens* court opined that “It follows [from *Richardson*] that the standard of equal protection scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard.” *Owens*, 711 F.2d at 27.

That part of *Owens* is simply incorrect. *Richardson* was based on §2 of the Fourteenth Amendment. *Richardson* rejected the requirement of a compelling state interest for the disenfranchisement of felons because such disenfranchisement has an “affirmative sanction” in §2 of the Fourteenth Amendment, *not* because a lower level of scrutiny should be

applied to felons under the Equal Protection Clause. *Richardson*, 418 U.S. at 54. Other cases relied on by the State, including *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), and *Baker v. Cuomo*, 58 F.3d 814 (2nd Cir. 1995), merely repeat the erroneous analysis in *Owens*.

Two years after *Owens*, the Supreme Court revisited the issue of felon disenfranchisement in *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). In *Hunter*, persons convicted of presenting a worthless check challenged a provision of the Alabama constitution that disenfranchised persons convicted of crimes involving moral turpitude. The Supreme Court agreed with the plaintiffs that the original enactment of the challenged provision was motivated by a desire to discriminate against blacks. *Hunter*, 471 U.S. at 233.

As it had done in *Richardson*, the Court relied on a structural and historical analysis of the Fourteenth Amendment:

The single remaining question is whether § 182 is excepted from the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the “other crime” provision of §2 of that Amendment. Without again considering the implicit authorization of §2 to deny the vote to citizens “for participation in rebellion, or other crime,” see *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), we are confident that §2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary.

Hunter, 471 U.S. at 233. As in *Richardson*, the Court did not address the issue of whether the right of felons to vote is a ‘fundamental’ right. The *Hunter* opinion did not use the terms ‘fundamental right,’ ‘rational basis’ or scrutiny. Nor did *Hunter* approve, or even cite, *Owens, supra*.

Under *Richardson* and *Hunter*, the dispositive question is whether a challenged classification is sanctioned by the §2 of the Fourteenth Amendment. If the classification is sanctioned by §2 (*Richardson*), then the classification cannot be held to violate the Equal Protection Clause of § 1. If the classification is not sanctioned by §2 (*Hunter*), then the Equal Protection Clause applies.

If the *Owens* analysis were correct, a state would be permitted to disenfranchise one category of felons, bar a second category of felons from voting in school district elections, and impose poll taxes on a third category of felons. These classifications would normally violate equal protection under *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), and *Harper v. Virginia*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). If, as *Owens* suggests, felons have no fundamental right to vote then such restrictions could be constitutionally applied to felons.

The assertions in *Owens* that felons have no fundamental right to vote and that restrictions on felons are reviewed under the ‘rational basis’

test are incorrect. The Supreme Court did not use this analysis in *Richardson* or *Hunter*, and it does not follow logically from the conclusion that §2 of the Fourteenth Amendment sanctions disenfranchisement generally.

Contrary to *Owens* and the arguments advanced by the State in this case, §2 of the Fourteenth Amendment merely sanctions disenfranchisement as such. That provision does not create a class of persons for whom voting is not a fundamental right. Nor does that provision create a class of persons to whom the Equal Protection Clause does not apply.

This Court is bound to follow *Richardson's* interpretation of §2 of the Fourteenth Amendment. *Tricon, Inc. v. King County*, 60 Wn.2d 392, 394, 374 P.2d 174 (1962). But this Court is not bound by the opinions of lower federal courts, and this Court should not follow any opinions that it does not find persuasive. *See State v. Barefield*, 110 Wn.2d 728, 732 n.2, 756 P.2d 731 (1988). The trial court followed *Owens* (and *Baker*) for lack of any argument against those cases. This Court should not repeat the erroneous analysis of *Richardson* in *Owens* and its progeny.

Instead, this Court should expressly reject *Owens* and its erroneous statement that restrictions on voting are subject only to 'rational basis' review. This Court should follow *Richardson* and *Hunter* in holding that

only those classifications affirmatively sanctioned by §2 of the Fourteenth Amendment are excluded from review under the Equal Protection Clause.

B. Legal financial obligations are not sanctioned by §2 of the Fourteenth Amendment and are thus subject to strict scrutiny under the Equal Protection Clause of § 1.

Under *Richardson* and *Hunter*, the dispositive question is whether a challenged classification (or distinction) is sanctioned by the §2 of the Fourteenth Amendment. If it is not, then the Equal Protection Clause of §1 of the Fourteenth Amendment applies.

The classification at issue in *Richardson* — felons generally — is affirmatively sanctioned by §2 of the Fourteenth Amendment. Consequently, the disenfranchisement of felons as such does not violate equal protection. *Richardson*, 418 U.S. at 54.

The distinction between felons and non-felons is the only distinction to which a structural analysis of the Fourteenth Amendment should be applied. Section 2 of the Fourteenth Amendment does not specify which crimes warrant disenfranchisement. Consequently, a state is required by the structure of the Fourteenth Amendment to specify which crimes warrant disenfranchisement under §2. Nevertheless, as the *Hunter* holds, §2 of the Fourteenth Amendment was not intended to permit the purposeful racial discrimination, and classifications that are based on such

intent are not sanctioned by that provision or exempted from the guarantee of equal protection.

Nor does §2 of the Fourteenth Amendment indicate whether disenfranchisement should be permanent or temporary, or, if the latter, what the period of disenfranchisement should be. Thus the structure of the Fourteenth Amendment invites states to make this determination as well. As *Owens* and *Baker* show, some states have opted for temporary disenfranchisement based on the term of incarceration. The validity of particular terms of disenfranchisement is not before this Court.¹

The dispositive issue in this case is whether the imposition of legal financial obligations as a restriction on the fundamental right to vote is sanctioned by §2 of the Fourteenth Amendment. Unlike the Washington constitution², the Fourteenth Amendment does not address the restoration of voting rights at all. Nothing in the language or structure of the Fourteenth Amendment invites states to require felons to pay fines before having their right to vote restored. Therefore, such requirements remain subject to the strict scrutiny of the Equal Protection Clause in §1 of the Fourteenth Amendment.

¹ Although the analysis of *Richardson* in *Owens* and *Baker* is erroneous, the result in those cases is probably correct.

The validity of legal financial obligations as part of a criminal sentence is not at issue in this case. But the ability of a felon (or ex-felon) to pay such obligations bears no relationship to the qualifications of a voter. *Harper*, 383 U.S. at 670. The requirement that a felon pay legal financial obligations as a condition of voting, like any other classification based on ability of a voter to pay a fee, violates equal protection.

C. Washington’s felony disenfranchisement system discriminates on the basis of wealth and disproportionately impacts racial minorities.

The Leagues approve and adopt the arguments set forth in the Brief of Amici Curiae filed by the Brennan Center for Justice, Hate Free Zone of Washington, and other supporting organizations.

IV. CONCLUSION

This Court should affirm the decision of the superior court except insofar as the order entered on April 21, 2006 holds that Washington’s law governing disenfranchisement of felons is only unconstitutional as applied to felons who are unable to pay their LFOs. The LFO requirement should be struck down as entirely unconstitutional.

² Wash. Const. art. VI, § 3

RESPECTFULLY SUBMITTED this 25th day of May, 2006.

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