SUPREME COURT NO. 78598-8

SUPREME COURT OF THE STATE OF WASHINGTON

DANIEL MADISON, BEVERLY DUBOIS and DANNIELLE GARNER,

Respondents/Plaintiffs,

v.

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

Appellants/Defendants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS DANIEL MADISON, BEVERLY DUBOIS and DANNIELLE GARNER

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I. INTRODUCTION

Under *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1996), statutes that make the payment of money a voter qualification are unconstitutional, regardless of the individual financial situation of those impacted by those statutes. On cross-appeal, Plaintiffs seek a declaration from this Court that Washington may not deny restoration of voting rights to any ex-felons who have satisfied all terms of their sentences except for the payment of LFOs. Though Washington's felon vote restoration scheme treats indigent ex-felons particularly unfairly, with respect to all ex-felons, the State's use of money as a voter qualification device is unconstitutional regardless of the financial circumstances of the individuals affected.

II. ARGUMENT

A. Under *Harper*, Using The Payment Of Money As A Voter Qualification Is Unconstitutional Regardless Of The Particular Financial Status Of The Individuals Affected.

Plaintiffs' cross-appeal is based on the United States Supreme Court's decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663

(1996). Brief of Respondents/Cross Appellants at 44-45. A centerpiece of the State's response to the cross appeal is its assertion that in *Harper*:

> The Court did not reach the question, because it was not presented, of whether a state could apply a poll tax to those able to pay.

Reply Brief of Appellants at 31. This assertion is false. The United States Supreme Court was clear in *Harper* that its holding applied as equally to those who were able to pay the money sought as those who could not:

> We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

Harper, 383 U.S. at 668.

One's individual financial situation was irrelevant to the constitutional analysis, because a state "violates the Equal Protection Clause of the Fourteenth Amendment *whenever it makes the...payment of any fee an electoral standard.*" *Id.* at 666 (emphasis added). As the Court explained, "[t]o introduce...payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.* at 668.

"The degree of the discrimination is irrelevant." Having stated so clearly that the use of payment of any fee as an electoral standard is invalid, the Court did not then evaluate whether plaintiffs' financial situation permitted them to pay the $1.50 at issue. Contrary to the assertion made by the State here, the Court in *Harper* was explicit that its holding was *not* limited solely to those who were unable to pay because of their financial status.[1]

The State is also wrong in its claim that the question of whether a state could apply a poll tax to those able to pay "was not presented" to the Court in *Harper*. Reply Brief of Appellants at 31. In fact, the precise question of whether the holding should be limited to indigents was squarely before the Court. The United States, in an amicus curiae brief co-authored by then Solicitor General Thurgood Marshall, urged the Court to go beyond the relief sought by plaintiffs—who had focused their

[1] Indeed, if the Court in *Harper* wished to limit its holding to those who could not afford to pay the money at issue, it would have done so, just has it has done in other cases. As the State points out (Reply Brief of Appellant at 29-30) the United States Supreme Court in *Williams v. Illinois*, 399 U.S. 235, 273 n.19 (1970), *Bearden v. Georgia*, 461 U.S. 660, 668 (1970), and *Lubin v. Panish*, 415 U.S. 709, 719 (1974), explicitly held that the use of money in those cases was unconstitutional only as applied to those who could not afford to pay.

challenge on the impact of the law on those too poor to pay[2]—to declare a broader rule. Brief for the United States as Amicus Curiae, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), 1965 WL 130114. The United States argued that:

> [a] system that bases voting qualification on the payment of money, even an amount which to the average person is nominal, has built into it inequalities which bear no relationship to the State's legitimate concern with fostering a responsible electorate.

Id. at *33. This basic vice, the United States urged, could not "be cured by exempting poor persons." *Id.* As such, it was irrelevant whether a person could afford to pay the $1.50 in question or not, because the use of money as a vote qualification device was unconstitutional "on its face." *Id.* at *39-40.

The State also tries to evade the plain language of *Harper* by again arguing that ex-felons "have no fundamental right to vote" and that Washington can justify its law by arguing that there is a rational relationship between the law and the State's classification. Reply Brief of

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[2] *See* Brief for Appellant, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), 1965 WL 115352; Brief for Appellants, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), 1965 WL 130113.

Appellants at 28-29. This argument ignores the primary holding of *Harper*: that the use of the payment of money as a voter qualification is *always* irrational ("a capricious and irrelevant factor"), and thus always unconstitutional. 383 U.S. at 666, 668. The *Harper* Court effectively imposed a per se rule condemning the use of money as a voter qualification in any context. Without engaging in a typical rational basis inquiry, wherein the Court evaluates a state interest to ensure that it has a rational relationship to the classification at issue, the Court simply concluded that a State "violates the Equal Protection Clause whenever it makes the...payment of any fee an electoral standard." *Id.* at 666.[3] The Court did not discuss the interests put forward by the state, nor did it evaluate those interests against the classification being challenged. Here too, Washington's use of the payment of money as a voting qualification is, on its face, a per se violation of Equal Protection Clause under *Harper*.

[3] The dissenters argued that the Court should have conducted such a rational basis inquiry. *Harper* 383 U.S. 674 (Black, J. dissenting); *Id.* at 684-85 (Harlan, J., dissenting). The fact that the Court did not follow the dissenters' advice is a clear indication that the Court was categorically rejecting the notion that money as a voter qualification could ever be constitutional.

Even if *Harper* were read to require that the Court subject Washington's vote restoration scheme to traditional rational basis scrutiny (which is does not), the language of the opinion establishes that there can never be a rational link between the payment of money and the right to vote. As the Court clearly stated, "[t]o introduce...payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.* at 668. As such, even under the level of review urged by the State (Reply Brief of Appellants at 28-29), Washington's money-based vote restoration scheme cannot survive constitutional scrutiny.[4]

In a mischaracterization of Plaintiffs' argument, the State suggests that Plaintiffs have "shift[ed] their position" in their cross-appeal. Reply Brief of Appellants at 28-29. This is incorrect: *Harper* not only provides ample authority to affirm the trial court with respect to ex-felons unable to

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[4] This conclusion is unaffected by *Sheperd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), a case cited by the State in its Reply Brief, but not in any of its prior briefing to the trial court or to this Court. The State cites *Sheperd* (its only case that addresses the question of felon re-enfranchisement) to support its argument that ex-felons have no fundamental right to vote. *Sheperd*, however, does not concern the use of money as a voter qualification. As described above, the Court in *Harper* made it clear that requiring

(Footnote continued)

pay off their LFOs, it also supports Plaintiffs' argument on cross-appeal. *Harper* holds that a state's use of payment of money as a voter qualification device is always irrational, and thus always unconstitutional. *Harper* therefore requires affirmance of the trial court. *Harper* also stands foursquare for the proposition that its central holding—that the use of money as a voter qualification is always unconstitutional—applies regardless of the particular financial situation of those impacted by the qualification. 363 U.S. at 666, 668. This principle forms the basis of Plaintiffs' cross-appeal. Plaintiffs have consistently relied on *Harper* to support their argument that the right to vote should be restored to both ex-felons who cannot afford to pay off their LFOs, and ex-felons who can afford to pay off their LFOs. Brief of Respondents/Cross Appellants at 12-15, 43-47. There has been no "shift in position."

Though the trial court's order permits Plaintiffs Madison, DuBois, and Garner to register to vote, the order also vests the State with the power to seek cancellation of Plaintiffs' vote registration at any time if it alleges

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the payment of money as a voter qualification is never rational and therefore always unconstitutional.

that Plaintiffs' "financial status" allows them to pay their LFO balance in full. The trial court's order therefore unconstitutionally burdens Plaintiffs' right to vote until their LFO balances are paid in full.[5] This ongoing use of the payment of money as a voter qualification device is explicitly barred by *Harper*.[6]

B. Contrary To The State's Assertion, It Is The State's Implementation Of The Trial Court's Order That Will Cause Confusion, Not The Trial Court's Order Itself.

In addition to being required by *Harper*, the system advocated by Plaintiffs in their cross-appeal would be easier to administer than either the current system for vote restoration or the system envisioned by the trial court's order. The State mischaracterizes this argument as an acknowledgment that "the ruling of the trial court is ill-defined and unworkable" and "unwieldy and wholly ambiguous." Reply Brief of Appellants at 31. This characterization is false.

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[5] "Washington's law governing disenfranchisement of felons following a felony conviction is invalid as to all felons who have satisfied the terms of their sentences except for paying legal financial obligations, and who, due to their financial status, are unable to pay their legal financial obligations immediately." CP 433.

[6] The fact that there is a continuing burden on Plaintiffs' rights under the trial court's order is the primary reason why Plaintiffs have standing to cross appeal. See infra Section II.C below.

The trial court's order can be implemented successfully, but such success depends on the ability of the State to put into place adequate administrative mechanisms to ensure that the constitutional rights of eligible voters are properly protected. This is where Plaintiffs' practical concerns with the trial court's order lie. As was demonstrated by the 2004 governor's race litigation, the existing system for determining whether an ex-felon who has been released from custody is eligible to vote is plagued by complexity and confusion. Such problems have been acknowledged by Defendant Secretary of State Reed himself:

> We clearly have a problem in the State of Washington as to identify who can vote and who can't vote.

CP 286-88. County auditors and election officials support Defendant Secretary of State Reed's characterization of these problems. CP 290-93.

The felon vote restoration system that would result if Plaintiffs prevail on cross-appeal would avoid these dangers and—unlike the State's proposal—would be constitutional under *Harper*. If Plaintiffs' proposal becomes law, the voting rights of ex-felons would be simple to determine from the perspective of both election administrators and ex-felons seeking to lawfully participate in the political process: all ex-felons no longer

under the supervision of the Department of Corrections would be entitled to register to vote. Such a system is far more consistent with the State's public policy "to encourage every eligible person to register to vote and to participate fully in all elections." RCW 29A.04.205.

C. Plaintiffs Are "Aggrieved Parties" Under RAP 3.1.

The State contends that Plaintiffs' cross-appeal is not properly before the Court because Plaintiffs lack "an interest of their own in the arguments raised on cross appeal" and seek cross-appeal "based on the alleged rights of third parties." Reply Brief of Appellants at 27. The State is wrong. Plaintiffs' appeal of the trial court's order satisfies the requirements of RAP 3.1 precisely because their "personal rights" are "substantially affected." *Breda v. B.P.O. Elks Lake City*, 120 Wn.2d 351, 353, 90 P.3d 1079 (2004). This is because under the trial court's order the State retains the power to seek revocation of Plaintiffs' voting rights until their LFO balance is paid in full.

Though the trial court's order states that Plaintiffs "are entitled to register to vote and are eligible to sign the oath required by RCW 29A.08.230," it requires that Plaintiffs' voting rights remain contingent on

the discretion of the State to challenge the reasons for Plaintiffs' failure to pay their legal financial obligations in the future:

> Washington's law governing disenfranchisement of felons following a felony conviction is invalid as to all felons who have satisfied the terms of their sentences except for paying legal financial obligations, and who, due to their financial status, are unable to pay their legal financial obligations immediately.

CP 433-34. As such, Plaintiffs' vote remains contingent on the payment of money, which is precisely the constitutional wrong identified in *Harper*. This violation of Plaintiffs' constitutional rights will continue to substantially affect Plaintiffs' personal rights until their LFO balances are paid in full. The United States recognized the importance of this consideration in its amicus brief in *Harper*. In that brief the United States argued that merely prohibiting application of the poll tax to indigents would create ongoing hardship on those who qualified for the exemption because "it would be necessary to require evidence of poverty, and the furnishing of such evidence would itself constitute a burden on the exercise of the franchise." Brief for the United States as Amicus Curiae, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), 1965 WL

130114, *33. Because Plaintiffs are an "aggrieved party" under RAP 3.1, they are entitled to cross appeal.

Washington cases that have found a party not to be "aggrieved" as required under RAP 3.1 do not involve circumstances similar to this case, but rather involve parties who have no actual interests at stake on appeal or who argue additional reasons to support an outcome identical to the one reached by the trial court. In *Breda*, for instance, plaintiffs were the only party named on appeal, even though the sole issue raised was the imposition of sanctions against plaintiffs' counsel. 120 Wn.2d at 353, 90 P.3d at 1081. Because plaintiffs' "proprietary, pecuniary, or personal rights" were not affected by the sanctions imposed against counsel, the appeal was dismissed. *Id.* In this case, unlike *Breda*, Plaintiffs' personal rights are directly impacted by the limitation of the trial court's order. Their cross-appeal is therefore proper under RAP 3.1.

In *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793, 796 (1987), another case cited by the State, the trial court rejected plaintiff's challenge to Tacoma's conservation program on statutory authority grounds, but agreed with plaintiff's contention that the

program constituted an unconstitutional gift. Plaintiff appealed and asked the Washington Supreme Court to affirm the trial court's decision, but to do so on different grounds. *Id.* Because plaintiffs sought only to challenge the trial court's reasoning, but not the substantive result, they were found not to be an "aggrieved party" under RAP 3.1. *Id.* Unlike in *City of Tacoma*, Plaintiffs here seek relief on appeal that is different than the relief offered by the trial court, as it will permit them to have their right to vote restored without the State continuing to use the payment of money as a vote qualification device. Because this relief will substantively affect Plaintiffs' right in ways different than the relief offered by the trial court, Plaintiffs are entitled to cross appeal the trial court's order.

For the same reasons that Plaintiffs are "aggrieved parties" under RAP 3.1, Plaintiffs' cross-appeal is not a challenge "based on the alleged rights of third parties" (Reply Brief of Appellants at 27, n.19), or an invitation to the Court to provide an advisory opinion. *Id.* at 27. Unlike here, plaintiffs in *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), lacked a "direct and substantial" interest in challenging

the constitutionality of the statute at issue because a jury had already determined that they had suffered no financial harm as a result of the statute being challenged. With no harm, plaintiffs in *To-Ro* lacked standing. *Id.* In *Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994), plaintiffs challenged a statute that was not yet in effect. The Court held that "[w]hen a statute is not in effect...we cannot do otherwise than find that this is only a speculative dispute." *Id.* None of these concerns is present in this case.

Here, unlike in *To-Ro* and *Walker*, the constitutional rights of Plaintiffs Madison, DuBois, and Garner are directly and substantially harmed by Washington's ex-felon vote restoration scheme. Under the trial court's order, Plaintiffs continue to have their vote qualifications determined by the payment or non-payment of money. As recognized by the Court in *Harper*, such money-based voter qualification devices directly violate the constitutional rights of Plaintiffs, regardless of their particular financial situation. Plaintiffs' standing to cross appeal the trial court's order is clear.

But even if the Court were to find that Plaintiffs do not have standing to pursue a cross-appeal, it would still have jurisdiction to resolve Plaintiffs' arguments. Washington law is clear that appellate courts may affirm a lower court decision on any grounds supported by the record. *Failor's Pharmacy v. Department of Soc. and Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994); *Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976). This rule is consistent with *City of Tacoma*, because that case asked only whether an initial notice of appeal could be filed by a prevailing party for the sole purpose of obtaining affirmance on alternative grounds. Here, the State filed a notice of appeal and thereby invoked this Court's jurisdiction. Thus, while Plaintiffs believe that their objections to the trial court's declaratory judgment are properly framed as a cross-appeal, if the Court disagrees it should still consider and rule on the arguments described above because they are alternative grounds for affirming the trial court's judgment.

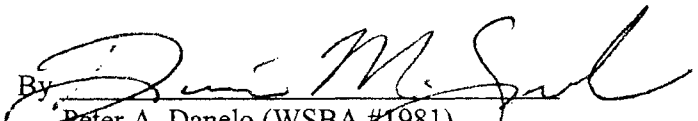
III. CONCLUSION

The trial court held that "Washington's law governing disenfranchisement of felons following a felony conviction is invalid as to

all felons who have satisfied the terms of their sentences except for paying legal financial obligations, and who, due to their financial status, are unable to pay their legal financial obligations." CP 433. Though Plaintiffs agree with the trial court's order as it applies to those who are unable to pay their LFOs in full, the distinction the court drew between those able to pay and those unable to pay their LFO obligations is invalid under the federal Equal Protection Clause. Therefore, for the reasons set forth above, Plaintiffs seek a declaration from this Court that Washington may not deny restoration of the right to vote to ex-felons who have completed all terms of their sentence other than the payment of LFOs, regardless of the particular financial situation of those individuals.

RESPECTFULLY SUBMITTED this 13th day of June, 2006.

HELLER EHRMAN LLP



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The undersigned certifies under penalty of perjury under the laws of the State of Washington that:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party in the above-entitled action, and competent to be a witness herein.

2. I am an employee of Heller Ehrman LLP, the attorneys for Respondents in the above-entitled action.

3. On June 13, 2006, I caused a true and correct copy of the Reply Brief of Respondents/Cross-Appellants Daniel Madison, Beverly Dubois and Dannielle Garner, and this Declaration of Service to be served upon counsel for Appellants via email and Federal Express at the respective addresses indicated below:

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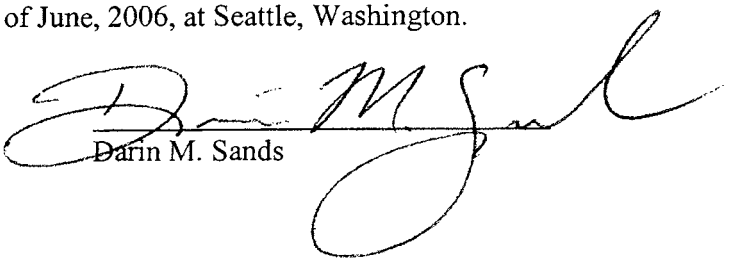

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