No. 08-6377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Terrence Johnson, et al.,
Plaintiffs-appellants,
v.
Phil Bredesen, et al.,
Defendants-appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee

BRIEF OF AMICUS-CURIAE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 08-6377 Case Name: Johnson, et. al. v. Bredesen, et. al.

Name of counsel: Erika Wood, Myrna Pérez, Sidney Rosdeitcher and Paul Ambrosius

Pursuant to 6th Cir. R. 26.1, Brennan Center for Justice at NYU School of Law
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 23, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Paul Ambrosius

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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INTEREST OF AMICUS

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") is a not-for-profit, nonpartisan policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center works to eliminate barriers to full and equal political participation and to ensure that American public policy and political institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center's Right to Vote project, housed within the Democracy Program, focuses exclusively on restoring voting rights to persons with criminal convictions, and engages in litigation, legislative and administrative advocacy, and public education nationwide at the federal and state level. The Brennan Center's Justice Program works to ensure that governmental costs are not unfairly shifted to those least able to shoulder them by imposing legal financial obligations ("LFOs") on persons charged with crimes. The Brennan Center's efforts in the promotion and protection of voting rights, particularly on behalf of disadvantaged and minority communities, are extensive, including authoring numerous reports; launching legislative initiatives; and participating as counsel or amicus in a number of federal and state cases involving voting and elections issues.

Amicus submits this Brief in support of Plaintiffs' claim that Tennessee's voter restoration law, Tenn. Code Ann. §§ 40-29-202(b) and 40-29-202(c), conditions the right to vote of persons with felony convictions on their ability to pay legal financial obligations — namely child support arrears and/or restitution — and is therefore an unconstitutional "poll tax" in violation of the Twenty-Fourth Amendment. Accordingly, Amicus contends that the District Court's grant of Defendants' motion for judgment on the pleadings was in error, and should be reversed by this Court.[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for the parties have consented to the Brennan Center appearing as amicus curiae in this matter and to the filing of this Brief.

SUMMARY OF THE ARGUMENT

This is not a case about whether people should pay their child support or restitution. There is no dispute that the state has an interest in having individuals meet those obligations when properly imposed. Instead, this case is about whether a state may impose wealth-based qualifications on the right to vote. Amicus submits that Tennessee's law denying the right to vote

[1] In addition to alleging that Tennessee's law violated the Twenty-Fourth Amendment, Plaintiffs' Complaint included several other state and federal law claims, see R. 57 Plaintiffs' Amendment Complaint, p. 7–11, that the District Court also dismissed. While Amicus agrees with Plaintiffs' position on each of those claims, it limits this Brief to the violation of the Twenty-Fourth Amendment.

to persons with felony convictions who are not in prison, on parole, or on probation — based solely on the fact that they have not paid restitution or are not current in their child support — violates the Twenty-Fourth Amendment.

This appeal involves a modern application of the egalitarian policies that motivated the adoption of the Twenty-Fourth Amendment in response to the systemic disenfranchisement of southern Blacks during the post-Reconstruction era: an individual's inability to pay that results in the vast disenfranchisement of low-income persons of color on account of a criminal history.

The historical record leading to the ratification of the Twenty-Fourth Amendment reveals that the Amendment's drafters sought to eliminate the disenfranchisement of low-income voters, particularly African Americans, based on their economic status or inability to pay. Those goals retain their significance today because the individuals most likely to be denied restoration of their voting rights in Tennessee based upon an inability to pay child support arrears or restitution are low-income persons of color — the very group that the drafters of the Twenty-Fourth Amendment intended to protect.

This Court should reject the District Court's formalistic interpretation of the Twenty-Fourth Amendment as contrary to the text and purpose of its drafters. The lower court's conclusion that requirements to pay restitution and child support arrears "cannot be deemed taxes," R.85 Memorandum Opinion, p. 15 [hereinafter "R.85 Sep. 22 Mem."] overlooks the purpose of the Amendment to eliminate all wealth-based restrictions on voting irrespective of their form. Nor can Tennessee's law be characterized as a valid voter "qualification" under Supreme Court precedent.

The District Court erroneously reasoned that because Plaintiffs-appellants were "already stripped" of the right to vote by reason of their convictions, id., Tennessee may impose restrictions on restoring that right that are wholly unrelated to the capacity to vote. That reasoning flies in the face of the well-settled principle that once a state chooses to extend rights to persons by statute, it is required to do so in a manner consistent with the Constitution.

The District Court's conclusion that it may deny the right to vote to those who cannot afford to pay child support and restitution because Tennessee may permissibly "define the conditions upon which restoration of [the right to vote] will be premised," id., is equally mistaken. The

prohibitions of the Twenty-Fourth Amendment bar Tennessee from conditioning the right to vote on such wealth-based requirements.

Finally, Tennessee cannot extend a criminal sanction based on an individual's wealth. Although two individuals may have the exact same conviction and serve the exact same sentence, the one who can afford to pay his restitution and child support arrears will be eligible to vote, while the one who is too poor will have the sanction of disenfranchisement extended. Thus, wealth and the ability to pay draws a critical distinction separating those who may vote from those who may not under Tennessee Code Ann. §§ 40-29-202(b) and 40-29-202(c).

ARGUMENT

I. CONDITIONING RESTORATION OF VOTING RIGHTS UPON INDIVIDUALS' ABILITY TO PAY IS INCONSISTENT WITH THE TEXT AND PURPOSE OF THE TWENTY-FOURTH AMENDMENT BECAUSE IT EXCLUDES LOW-INCOME AND MINORITY CITIZENS FROM VOTING BASED SOLELY ON THEIR ECONOMIC MEANS.

The text of the Twenty-Fourth Amendment is purposefully broad and prohibits all wealth-based conditions to voting, no matter how labeled or designed. In adopting the Amendment, its drafters aimed to eliminate the historic disenfranchisement of African Americans and other minorities who lacked the financial resources to pay such sums. Tennessee's voter restoration law conflicts with that purpose because it imposes a wealth-based

condition on restoring the right to vote that disproportionately excludes African Americans from the political process solely because they are too poor to pay child support arrears and restitution.

A. The District Court's Conclusion That Legal Financial Obligations Do Not Amount to Poll Taxes Is Contrary to the Text and Purpose of the Twenty-Fourth Amendment

In concluding that Tennessee's voter restoration law is not in conflict with the Twenty-Fourth Amendment because child support arrears and restitution "cannot be deemed taxes," R.85 Sep. 22 Mem., p. 15, the District Court employed an overly formalistic interpretation of the Twenty-Fourth Amendment that is inconsistent with the Amendment's text, the intent of its drafters, and Supreme Court precedent.

The Twenty-Fourth Amendment to the U.S. Constitution states:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representatives of Congress, ***shall not be abridged*** by the United States or any State for reason of failure to pay ***any poll tax or other tax.***

U.S. CONST. amend. XXIV (emphasis added).

That broad language makes clear that Congress intended the Amendment to be applied to a range of wealth-based restrictions on voting in a variety of contexts. By prohibiting taxes that "***abridge***" individuals' right to vote, the Amendment's drafters chose language that would address not only measures

effecting outright denials of voting rights, but also restrictions that could frustrate or discourage low-income voters' participation in the electoral process. See Sloan G. Speck, Comment, "Failure To Pay Any Poll Tax Or Other Tax": The Constitutionality Of Tax Felon Disenfranchisement, 74 U. Chi. L. Rev. 1549, 1568 (2007) (arguing that by its terms, "[t]he rights created by the Twenty-fourth Amendment cannot be 'indirectly denied'"). The Amendment also broadly prohibits all financial preconditions on voting, whether "poll taxes" or "other tax[es]" that achieve the same result. U.S. CONST. amend. XXIV.

Legislative history confirms that the Amendment's drafters intended that text to be interpreted broadly to include any wealth-based restrictions that "exacted a price for the privilege of exercising the franchise." Harman v. Forssenius, 380 U.S. 528, 539 (1965) (citing Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on Amendments to Abolish Tax and Property Qualifications for Electors in Federal Elections, 87th Cong., 2d Sess. 14-22, 48-58; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J.Res. 29, 87th Cong., 2d Sess. 33). Indeed, when Congress proposed the Amendment, it specifically intended to prevent the government "from setting up any substitute tax in lieu of a poll tax" as a means of negating "the amendment's

effect by a resort to subterfuge in the form of other types of taxes." Outlawing Payment of Poll or Other Tax as Qualification for Voting in Federal Elections, H.R. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962). Thus, it is clear that in addressing the disenfranchisement of low-income voters, the drafters of the Twenty-Fourth Amendment sought to eliminate all wealth-based restrictions on voting, regardless of the form such "taxes" would take.

In accordance with this legislative purpose, the United States Supreme Court has interpreted the Twenty-Fourth Amendment expansively to prohibit a variety of financial burdens on the right to vote. In Harman, the Court concluded that "no equivalent or milder substitute" to a poll tax "may be imposed" as a prerequisite to voting, invalidating a Virginia law that required voters to "either pay the customary poll taxes as required for state elections or file a certificate of residence." 380 U.S. at 538, 542. Although the certificate Virginia offered as an alternative to paying a poll tax was not technically a tax, the Court nevertheless concluded that it "serv[ed] the same function as the poll tax" and thus "constitute[d] an abridgment of the right to vote in federal elections in contravention of the Twenty-fourth Amendment." Id. at 538.

The Supreme Court has also struck down various other measures that conditioned voting or other forms of political participation upon the payment of fees. See, e.g., Lubin v. Panish, 415 U.S. 709 (1974) (invalidating a statute that required indigent persons to pay candidate filing fees); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (finding $1.50 poll tax unconstitutional); Hill v. Stone, 421 U.S. 289, 300 (1975) (invalidating Texas law that "disfranchise[d] persons otherwise qualified to vote, solely because they ha[d] not rendered some property for taxation"); Cipriano v. Houma, 395 U.S. 701, 702 (1969) (finding unconstitutional Louisiana law permitting only "property taxpayers" to vote in elections approving municipal revenue bonds).

In addition, whether characterized as a voter qualification or an economic restriction on voting, laws that condition voting upon payment of any sum constitute an imposition of poll taxes that violate the Twenty-Fourth Amendment. In Harper, 383 U.S. at 670, the United States Supreme Court was unequivocal: "wealth or fee paying has . . . no relation to voting qualifications" and thus can never be made a condition of voting. Furthermore, in Harman, the Supreme Court rejected overly formalistic distinctions between qualifications and poll taxes, deeming unpersuasive the State's characterization of its poll tax and residency certificate as a means of

determining voter qualifications by "limiting suffrage to those who took a sufficient interest in the affairs of the State to qualify themselves to vote" or to maintain "continuing residence." 380 U.S. at 544 (internal citation and quotation marks omitted). Rather, the Court reasoned, the Twenty-Fourth Amendment "nullifies sophisticated as well as simple-modes" of abridging voting rights. Id. at 540–41. Looking to the substance of the alleged "qualification" over its form, the Court concluded that Virginia's law requiring a certification in lieu of a poll tax could not be upheld because it distinguished between qualified voters by burdening exclusively those who could not afford the tax. Id. at 542–44 (noting that the poll tax was "abolished absolutely as a prerequisite to voting and [that] no equivalent or milder substitute may be imposed"). Because Tennessee's voter restoration conditions make an individual's wealth central to the determination of voting rights, it is not a valid voter qualification; it is instead a prohibited poll tax within the meaning of the Twenty-Fourth Amendment.

Moreover, even the most literal application of the word "tax" proves erroneous the District Court's conclusion that "the requirements imposed by the statute cannot be deemed taxes." R. 85 Sep. 22 Mem., p.15. In some instances, child support arrears and restitution payments paid by persons with convictions in Tennessee do, in fact, fund legislative programs and

policies in the state. For example, the conviction of an adult defendant for particular offenses involving juvenile delinquents can result in the adult being ordered to pay restitution to the State, which is then deposited in the state general funds and used to fund programs run by the Department of Children's Services. Tenn. Code Ann. § 40-35-320(d).[2] Additionally, when a county clerk receives, handles, or disburses child support arrears under and by court order, the clerk is entitled to charge the party responsible for the payment the sum of five percent of the payment as surcharge. This surcharge is then added to the amount of the court-ordered support. Tenn. Code Ann. § 8-21-403(a). Hence, even under an improperly circumscribed definition of poll taxes, Tennessee's requirement that individuals pay all child support arrears and restitution as a prerequisite to voting is indisputably a poll tax because it conditions voting on one's financial ability to pay fees that, in some instances, support the government.

More fundamentally, as the drafters of the Twenty-Fourth Amendment recognized, the revenue or other interests of the State served by poll taxes do not inoculate these wealth-based voting restrictions against Twenty-Fourth Amendment prohibitions. See H.R. Rep. No. 1821 at 4035

[2] This occurs when an adult defendant is convicted of an offense related to conduct resulting in an adjudication of delinquency of a juvenile requiring treatment and confinement in excess of 90 days in a department of correction facility. Tenn. Code. Ann. § 40-35-320(a).

(dismissing as irrelevant claims that poll taxes were valuable means of raising revenue for Southern school systems); see also Harman, 380 U.S. at 544 (stating that "the poll tax, *regardless of the services it performs*, was abolished by the Twenty-fourth Amendment") (emphasis added); see also Frederic D. Ogden, The Poll Tax in the South 59 (Univ. Ala. Press 1958) (noting that the poll tax is "nominally a revenue measure" because while "it does provide some revenue, [] primarily it restricts voting") [hereinafter "Ogden"].

In the end, whether an LFO like child support arrears or restitution is a poll tax is determined simply by whether the law conditions the right to vote on an individual's ability to pay a government-imposed sum. See Harman, 380 U.S. at 538-40. By its terms, Tennessee's voting rights restoration law does just that by requiring persons who have been convicted of a felony to pay all restitution and child support arrears in order to have their right to vote restored. Tenn. Code Ann. § 40-29-202(b)-(c). Significantly, the child support arrears and restitution owed by each Plaintiff-appellant to get their voting rights restored far surpass the $1.50

poll tax deemed impermissible in Harper, 383 U.S. at 663, which even by modern standards would only amount to $9.83.[3]

In sum, the District Court's conclusion that conditioning voting rights on satisfaction of child support arrears and restitution does not amount to a tax prohibited by the Twenty-Fourth Amendment is inconsistent with the Amendment's text, the intent of its drafters, and Supreme Court precedent. Accordingly, the District Court's decision upholding Tennessee's voter restoration law should be reversed.

B. In Drafting the Twenty-Fourth Amendment, Congress Aimed to End the Disenfranchisement of Voters Based on Race and Poverty.

The history leading to ratification of the Twenty-Fourth Amendment makes clear that Congress and the states intended to eliminate the deliberate and de facto disenfranchisement of African Americans resulting from wealth-based restrictions on voting rampant in the post-Reconstruction era. The "[u]se of the poll tax in the South for suffrage restriction dates back to the . . . 1890's and early 1900's" when former Confederate States sought a legal basis for disenfranchising blacks in order to "preserve white supremacy." Ogden, at 281.

[3] http://www.bls.gov/data/inflation_calculator.htm.

The motivation for poll taxes was often blatantly racist and discriminatory. A proponent of Virginia's poll tax declared at the state's Constitutional Convention in 1902: "'Discrimination! Why, that is precisely what we propose . . . to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.'" Harman, 380 U.S. at 543 (quoting 2 Virginia Constitutional Convention (Proceedings and Debates, 1901-1092) 3076-3077 (Statement of the Honorable Carter Glass)). As commentators have noted, however, the discriminatory motivation for poll taxes was not always explicit: poll taxes "like the literacy test, [also] had a close historical association with the de facto disenfranchisement of African Americans." David A. Strauss, The Irrelevance Of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1481–82 (2001). As one district court noted in 1966, in some states "'payment of the tax was made a voting prerequisite largely because of the belief that whites would be more apt to pay it than Negroes.'" United States v. Texas, 252 F.Supp. 234, 243 n.44 (W.D. Tex. 1966) (quoting Ogden, at 7). Tennessee did not even wait for Reconstruction to formally come to an end before imposing financial requirements for voting as a way to attack Black

voting rights. Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 105 (Basic Books 2000) [hereinafter "Keyssar"].

In the late 1930s, a coalition of social reformers launched a movement to abolish poll taxes, which they viewed as "un-American" and "an impediment to social and economic progress in the South." Keyssar, at 236–37. While some states unilaterally abolished poll taxes during this period, others vigorously resisted reform. Id. at 228. After several unsuccessful attempts to enact an anti-poll tax bill in Congress, reform leaders soon focused their attention on a constitutional amendment. Id. at 237. By the time the Twenty-Fourth Amendment was drafted and then ratified in 1964, there was an extensive public record examining the role of poll taxes in disenfranchising poor, minority voters in the United States. See Texas, 252 F.Supp. at 248 (noting "evidence before both the House and the Senate that the poll tax . . . historically . . . has been a device to disenfranchise the Negro") (citing H.R.Rep. No. 439, 89th Cong., 1st Sess. 22 (1965); S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, at 34 (1965)); see also Ogden, at 173 (describing evidence showing that poll taxes "restrict[] suffrage significantly" in difficult economic times and serve as "an important deterrent to low income individuals at any time").

This historical record makes clear that when Congress drafted the Twenty-Fourth Amendment, it did so with the intention of eliminating the de facto disenfranchisement of racial and ethnic minorities through the subterfuge of economic restrictions. See Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws, 89 Georgetown L.J. 2181, 2208 (2001); see also Keyssar, at 269. The drafters were particularly concerned that wealth-based restrictions on voting would undermine the democratic process by elevating the voice and power of the white and wealthy over those of poor and predominantly minority members of society.

In fact, Congress rejected early attempts to qualify or limit the Amendment's prohibition against conditioning the right to vote on one's ability to pay. Senator Holland, who had introduced an anti-poll tax resolution in many Congresses, once offered a resolution which included a section which would have narrowed the Amendment's protections.[4] The proposed language of that section read: "Nothing in this article shall be

[4] Aside from the section discussed in the text above, the balance of Senate Joint Resolution 58, introduced by Senator Holland, is substantially similar to the final text of the Twenty-Fourth Amendment, reading in relevant part: "The Right of Citizens of the United States to vote in any primary or other election for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax or to meet any property qualification." Report of the Committee on the Judiciary, 88th Cong., 1st Sess. 2 (1963).

construed to invalidate any provision of law denying the right to vote to paupers or persons supported at public expense or by charitable institutions." Report of the Committee on the Judiciary, 88th Cong., 1st Sess. 2 (1963). Congress's rejection of this proposed limitation is powerful evidence that it intended for the Amendment to provide broad protections against economic impediments on an individual's right to vote. The egalitarian purpose and anti-discrimination principles undergirding the Amendment are equally pertinent — and must be applied with equal vigor — today.

C. Tennessee's Voter Restoration Law Is Most Likely to Exclude From the Franchise the Low-Income, Minority Groups That the Twenty-Fourth Amendment Aimed to Protect.

Extensive empirical evidence suggests that by denying voting rights to those who cannot pay child support arrears or restitution, Tennessee's law likely disproportionately excludes poor African Americans from the franchise based solely on their economic means. This harm is exactly that which the Twenty-Fourth Amendment sought to prevent.

Nationally, as well as in Tennessee, persons disenfranchised by felony convictions are disproportionately persons of color and are more likely to be poor. Recent national statistics suggest that African Americans represent 40 percent of all inmates sentenced to a year or more in the state and federal prison population. Paige M. Harrison & Allen J. Beck, Bureau of Justice

Statistics, U.S. Department of Justice, Prisoners in 2005 8 (2006).[5] These rates of incarceration are significant to this case because just as "arrest, conviction, and imprisonment fall more heavily" on persons of color, so does felony disenfranchisement. Jeffrey Reiman, Liberal and Republican Arguments Against the Disenfranchisement of Felons, Criminal Justice Ethics, at 4 (Winter/Spring 2005).[6]

Research suggests that of the estimated 5.3 million Americans who are currently or permanently disenfranchised because of a felony conviction, 1.4 million are African-American men. Sentencing Project, Felony Disenfranchisement Laws in the United States (2008).[7] Persons of color are not only more likely to be disenfranchised, they are also more likely to be poor. Just as during the post-Reconstruction era, race and poverty remain linked today. See, e.g., Eisenhower Foundation, What We Can Do Together: A Forty Year Update of the National Advisory Commission on

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[5] *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

[6] *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_liberalrepublican_argum.pdf.

[7] *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf. Additionally, significant numbers of Latinos are also precluded from voting because of felony disenfranchisement laws. Marisa J. Demeo and Steven A. Ochoa, Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States, at 6 (2003) (noting "Latinos have disproportionately higher rates of disenfranchisement compared to their presence in the voting age population"), *available at* http://www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf.

Civil Disorders, 2 (2008).[8] The 2005 poverty rate for African Americans was 24.9 percent, with 9.2 million persons living in poverty. Carmen DeNavas-Walt, et al. U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2005, (2006).[9]

Significantly, for members of minority groups who are convicted of crimes, their criminal record only exacerbates the economic disadvantages they face upon release. "[A]mong the most challenging situations [persons with felony convictions] face is that of reentry into the labor market . . . . Employment rates and earnings of persons with felony convictions are low by almost any standard — though in most cases they were fairly low even before . . . incarcerat[ion]." Harry J. Holzer, et. al, Employment Barriers Facing Ex-Offenders, (2003).[10] Indeed, for persons with felony convictions, race and a criminal record "interact in powerful ways" to reduce their employment opportunities. Id. at 12 (noting that "black offenders receiv[e] less than one-seventh the number of offers received by white non-offenders with comparable skills and experience"); see also Steven Raphael, The Employment Prospects of Ex-Offenders, Focus Vol. 25, No. 2 (Fall-Winter

[8] *available at* http://www.stanford.edu/dept/csre/pdfs/Kerner_Executive_Summary.pdf.
[9] *available at* http://www.census.gov/prod/2006pubs/p60-231.pdf.
[10] *available at* http://www.urban.org/UploadedPDF/410855_holzer.pdf.

2007–08).[11] Thus, upon release, low-income persons with felony convictions, the majority of whom are persons of color, are disproportionately disadvantaged in their capacity to extricate themselves from the cycle of poverty. Undoubtedly, this reality undermines their ability to pay LFOs like child support arrears and restitution as a condition of restoring their right to vote.

These trends are also evident in Tennessee where racial and ethnic minorities, in particular African Americans, are three times more likely to be disenfranchised than the general population. Jeff Manza & Christopher Uggen, Locked Out: Felony Disenfranchisement and American Democracy 250, 253 (2006) (providing 2004 statistics). And while African Americans make up only 17 percent of the population in Tennessee, U.S Census Bureau, Tennessee State and County QuickFacts, (2007),[12] they constituted 46.4 percent of individuals incarcerated for a felony conviction in Tennessee in 2007–2008. Policy, Planning, & Research Division, Tenn. Department of Corrections, FY 2008: Statistical Abstract 34 (2008).[13] Tennessee's African-American citizens are also more likely to be poor than their white counterparts. The University of Georgia's Initiative on Poverty and the

[11] *available at* http://www.irp.wisc.edu/publications/focus/pdfs/foc252d.pdf.
[12] *available at* http://quickfacts.census.gov/qfd/states/47000.html.
[13] *available at* http://www.state.tn.us/correction/pdf/2008%20Statabs.pdf.

Economy, Interactive Poverty Statistics, http://www.poverty.uga.edu/stats/stats.php (last visited Apr. 4, 2009) (comparing Tennessee's African-American population poverty rate of 25.35% to white poverty rate of 10.85%).

Given that racial and ethnic minorities are most likely to be disenfranchised in Tennessee and that they are also disadvantaged economically, the State's decision to condition restoration of voting rights upon the payment of LFOs conflicts with the purpose of the Twenty-Fourth Amendment by employing wealth-based criteria that excludes those vulnerable groups from the franchise that the Amendment was primarily intended to protect.

This is especially the case when the LFO at issue is child support arrears. Nationwide, high percentages of poor fathers — ninety percent in fact — have accrued child support arrears. See Elaine Sorensen & Chava Zibman, The Urban Institute, "Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?", New Federalism: National Survey of America's Families, Apr. 2001, at 1.[14] Under Tennessee's re-

[14] The amounts owed could be substantial, and thus extremely difficult for poor persons to satisfy. "A 2005 University of Maryland study found that there were 17,214 child support cases in Maryland with incarcerated parents or previously incarcerated parents. The average arrears owed for each incarcerated parent was $15,933 and average arrears for parole was $13,472." Rebekah Diller et al., Brennan Center for Justice, Maryland's

enfranchisement scheme, wealthy executives convicted of white collar felonies are more likely to be able to restore their voting rights after release from prison, while low-income, predominately minority offenders who cannot afford to pay or fully satisfy their child support arrears or restitution are more likely to be shut out of the political process solely because of their inability to pay. This result is anti-democratic and precisely the sort of wealth-based restriction on voting that the Twenty-Fourth Amendment condemns. See Ogden, at 290 (arguing that conditioning suffrage on ability to pay "is contrary to the democratic ideals which underlie the American governmental system" in that it limits suffrage "to an elite group").

In sum, by conditioning voter restoration upon individuals' payment of LFOs, Tennessee's law undermines the fundamental purpose of the Twenty-Fourth Amendment by excluding low-income minority citizens from voting based solely on their economic means. The District Court failed to appreciate the purpose of the Amendment and the impact Tennessee's law has on the disadvantaged minorities whom the Amendment aimed to protect.

Parole Supervision Fee: A Barrier to Reentry 14 (2009), *available at* http://brennan.3cdn.net/fbee4fbc0086ec8804_4tm6bp6oa.pdf.

II. HAVING CHOSEN TO RESTORE THE VOTING RIGHTS OF PERSONS CONVICTED OF FELONIES, TENNESSEE IS FORBIDDEN BY THE TWENTY-FOURTH AMENDMENT FROM DENYING THAT RIGHT ON THE BASIS OF WEALTH.

Having chosen to extend the right to vote to persons with felony convictions, Tennessee cannot then impose wealth-based conditions on that right that violate the Twenty-Fourth Amendment.

Relying on Richardson v. Ramirez, 418 U.S. 24 (1974), a case finding an express sanction pursuant to Section 2 of the Fourteenth Amendment for disenfranchising persons with criminal convictions, the District Court concluded that Plaintiffs were "stripped" of their fundamental right to vote and that Tennessee's restoration statute satisfied rational basis scrutiny because it served a legitimate state interest. R.85 Sep. 22 Mem., at 14–15. The District Court's reasoning is erroneous.

Richardson has no application to the instant case. First, the disenfranchising provision at issue in Richardson flatly denied restoration of the right to vote — it did not consider whether a state could impose wealth-based conditions on the restoration of voting rights and therefore did not implicate the Twenty-Fourth Amendment.[15]

[15] Nor should the Court be persuaded by the reasoning of Johnson v. Bush, 214 F. Supp. 2d 133 (S.D. Fla. 2002), aff'd on other grounds, 405 F.3d 1214 (11th Cir. 2005), or Coronado v. Napolitano, 2008 U.S. Dist. LEXIS 93291 (D. Ariz. Nov. 5, 2008), which is

In this case, the later-ratified Twenty-Fourth Amendment must be taken into account; it supersedes Section 2 of the Fourteenth Amendment insofar as restoration of the right to vote in federal elections is made contingent on satisfying wealth-based requirements. Cf. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 48, 57 (1996) (holding that notwithstanding Congress's powers to abrogate state sovereignty under the Indian Commerce Clause, later adoption of Eleventh Amendment overrode that power); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (holding that the later-adopted enforcement provisions of the Fourteenth Amendment necessarily limited the Eleventh Amendment). Accordingly, the Twenty-Fourth Amendment qualifies any authority Tennessee possesses under Section 2 of the Fourteenth Amendment to deny the franchise to persons with felony convictions.

Whether persons with criminal convictions have the right to vote at all is not at issue in this case. The Twenty-Fourth Amendment, like the analogously worded Fifteenth and Nineteenth Amendments, leave most

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currently on appeal. The courts in those cases reached their conclusions by incorrectly presuming that because Richardson permits states to disenfranchise persons with criminal convictions, the State can decide what conditions it will impose before restoring voting rights. Richardson in no way sanctioned the use of wealth to determine which voters with felony convictions may be disenfranchised — or should remain disenfranchised — and which should not. In fact, there was no Twenty-Fourth Amendment claim or allegations of wealth-based voting restrictions before the Richardson Court.

voter qualifications to the states, but these amendments explicitly prohibit states from denying or abridging the right to vote on the bases of race, sex, or wealth-based conditions, see Williams v. Rhodes, 393 U.S. 23, 29 (U.S. 1968) ("Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote 'for electors for President or Vice President.'"). Just as Tennessee could not restore the right to vote of only white persons or males convicted of felonies because that would violate the Fifteenth and Nineteenth Amendments respectively, Tennessee cannot refuse to restore the right to vote on account of wealth-based conditions under the Twenty-Fourth Amendment.

Even the District Court recognized that while Tennessee could refuse altogether to restore the franchise to persons with criminal convictions, it could not offer to restore that right but impose unconstitutional requirements as a condition to qualify for that right. R.85 Sep. 22 Mem., at 7. This well-established principle was articulated more than 80 years ago in Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593-94 (1926), where the Court stated:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights . . . . It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Similarly, in Sherbert v. Verner, 374 U.S. 398, 404 (1963), the Court rejected the State's reasoning that because unemployment benefits under a state law were not a "right" but merely a "privilege," the State's denial of benefits to the Plaintiff could not violate the Constitution. Id. at 404-08. And in Goldberg v. Kelly, the Court rejected the government's argument that because welfare benefits were a "privilege," the Plaintiff had no constitutional right to a hearing before such benefits could be terminated. 397 U.S. 254, 262 (1970). The Court concluded, "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'" Id. (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

Similarly, in Georges v. Carney, 546 F.Supp. 469, 471 (N.D. Ill. 1982), aff'd 691 F.2d 297 (7th Cir. 1982), the district court analyzed the constitutionality of an Illinois statute relating to the submission of citizen-

initiated advisory questions for consideration by voters through referendum. The Plaintiffs-voters alleged that the process established by the Illinois Legislature for submitting referendum questions — which required such petitions to be signed by 25 percent of the registered voters in the relevant political subdivision — unconstitutionally impeded voters' ability to submit such questions for consideration. Id. Similar to the disenfranchised Plaintiffs in the instant case, the plaintiffs there did not possess a "fundamental right to require a voter referendum under Illinois law." Id. at 476. Nevertheless, the court concluded that the 25 percent requirement was unconstitutional because it was "unnecessarily restrictive" and "overburden[ed] the very right which the legislature has created." Id. at 472, 477. According to the Court, "[o]nce Illinois decided to extend" by statute the right to place a question on the ballot, "it became obligated to do so in a manner consistent with [the] Constitution." Id. at 477. See also Bynum v. Conn. Comm'n on Forfeited Rights, 410 F.2d 173, 175-76 (2d Cir. 1969) (describing question as whether "once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can then deny access to this relief, solely because one is too poor to pay the required fee").

The Twenty-Fourth Amendment would plainly bar Tennessee from only permitting persons current in child support obligations to vote in a federal election. Similarly, here, while Tennessee is not required to restore the right to vote to persons with felony convictions, having chosen to do so, it cannot condition a person's ability to vote on his or her economic status or ability to pay child support arrears and restitution.

The District Court mistakenly reasoned that the conditions of satisfying restitution and child support arrears were constitutional because they satisfied a rational basis test as they were reasonably related to legitimate state interests. R.85 Sep. 22 Mem., at 9 (recounting alternate reasons suggested by State Defendants for the State's interests). As discussed in Section I, however, the Twenty-Fourth Amendment flatly forbids imposing wealth-based conditions on the right to vote regardless of the State's interest in imposing them. See supra Section I, pp. 11–12. If the State conditioned the right to vote on paying a tax to buy milk for poor infants, that policy too would serve a rational state interest in protecting poor children, but it would still be forbidden by the Twenty-Fourth Amendment's bar to wealth-based conditions on the right to vote. Hence, the reasons proffered to justify the Tennessee conditions, similarly do not save the Tennessee statute.

* * *

Simply put, Tennessee may not impose a wealth-based condition on the restoration of the right to vote. As demonstrated above, the conditions imposed in the instant matter amount to an illegal poll tax that is barred by the Twenty-Fourth Amendment. Indeed, even if the conditions imposed by Tennessee were not a tax, as the Plaintiffs-appellants' brief demonstrates, they are invalid because they increase the criminal penalties for indigent persons by extending the sanction of disenfranchisement solely because they are too poor to pay child support arrears or restitution. See Brief of Plaintiffs-appellants at 20–21, Johnson v. Bredesen, No. 08-6377 (6th Cir. Apr. 14, 2009). Although persons convicted of crimes may be deprived of certain rights, the State may not prolong or amplify those deprivations based solely on the convicted person's economic status or inability to pay fines. See Bearden v. Georgia, 461 U.S. 660, 671–72 (1983) (holding that the State cannot incarcerate persons convicted of crimes solely because they have outstanding criminal fines without inquiring into whether the failure to pay was because of indigency); Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (holding that after "the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it

may not then subject . . . defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency").

The rule that emerges from these cases applies equally here: the Constitution does not permit the State to increase a criminal sanction simply because of an individual's inability to pay. This Court recognized this principle in United States v. DeMonte, 25 F.3d 343 (6th Cir. 1994). There, a white collar defendant liquidated all of his assets within weeks for the purpose of making restitution. The district court departed from the sentencing guidelines, in part, because the defendant had paid restitution. While ultimately upholding the district court's departure, the Sixth Circuit rejected the district court's reasoning which justified departure based on the restitutionary payments, and reversed that portion of the district court's opinion. The Sixth Circuit held, "[w]e may not sentence a poor convict more harshly than a rich convict simply because the rich convict is better able to make restitution." Id. at 347. In conclusion, the Court noted that to the extent white collar criminals have more assets, rewarding the use of those assets to make restitution may result in unacceptable "unequal treatment favoring white collar criminals." Id. at 350.

DeMonte is controlling here. The constitutionally relevant distinction being drawn by the Tennessee statute is not between persons who have

finished their criminal sentences and those who have not, but between those who can pay their restitution and child support arrears and those who are too poor, and therefore, cannot. A similar issue was raised in Madison v. Washington, 161 Wash. 2d 85 (2007). This Court should follow the reasoning of the dissent, which concluded: "[w]ealthy people who are convicted of a felony . . . can regain the right to vote almost immediately" whereas poor persons "without resources may never be able to pay their LFOs", Madison, 161 Wash. 2d at 122–23 (Alexander, J., dissenting), and therefore may never be able to participate in democracy.

CONCLUSION

For the reasons set forth above, Amicus Brennan Center respectfully submits that conditioning the restoration of voting rights of persons with felony convictions on the ability to pay LFOs, namely child support arrears and restitution, is an impermissible poll tax that violates the Twenty-Fourth Amendment. Accordingly, this Court should reverse the decision of the court below.

Respectfully submitted,

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Certification of Electronic Service

I hereby certify that on April 23, 2009, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,090 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in 14 point Times New Roman.

DATED this 23th day of April, 2009.

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