No. 08-17567

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARMANDO CORONADO,
Plaintiff,
JOSEPH RUBIO; MICHAEL GARZA; MICHELE CONVIE;
RAYMOND LEWIS, Jr.,
Plaintiffs-Appellants,

v.

JANET NAPOLITANO, in her official capacity as Governor; JANICE K. BREWER, in her official capacity as Secretary of State of Arizona; F. ANN RODRIGUEZ, in her official capacity as Pima County Recorder; HELEN PURCELL, in her official capacity as Maricopa County Recorder,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

Brief of Amicus-Curiae
Brennan Center for Justice at NYU School of Law
In Support of Plaintiffs and Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Brennan Center for Justice at NYU School of Law does not issue stock, and there is no parent corporation or publicly held corporation that holds 10 percent or more of the stock of the Brennan Center for Justice at NYU School of Law.

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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 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, by conditioning the right to vote on persons with felony convictions' ability to pay legal financial obligations ("LFOs") — including fines and/or restitution — Arizona's voter restoration law, Ariz. Rev. Stat. Ann. § 13-912(A)(2), constitutes an unconstitutional "poll tax" in violation of the Twenty-Fourth Amendment. Accordingly, amicus contends that the district court's conclusion that Plaintiffs failed to state a claim under the Twenty-Fourth Amendment 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 case concerns the fundamental right to vote, the meaning of the Twenty-Fourth Amendment's prohibition on poll taxes, and the vitality of the United States Supreme Court's holdings that the right to vote cannot be abridged on account of an individual's inability to pay. The specific question presented is whether Arizona's law denying the right to vote to

[1] In addition to alleging that Arizona's law violated the Twenty-Fourth Amendment, Plaintiffs' Complaint included several other state and federal law claims, see Pl.'s Am. Compl., at 9-13, that the district court similarly dismissed. While amicus agrees with Plaintiffs' position on each of those claims, it limits this brief to the violation of the Twenty-Fourth Amendment.

persons with felony convictions — who are not in prison, on parole, or on probation — based solely on the fact that they have not paid LFOs stemming from their convictions violates the Twenty-Fourth Amendment. Resolving that question requires the Court to apply 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 to a modern context: the vast disenfranchisement of low-income persons of color from the franchise on account of felony convictions.

Specifically, the purpose of the Twenty-Fourth Amendment has equal force and meaning here. As set forth more fully below, the historical record recounting the events leading to 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 ability to pay. Those goals retain their significance today because the individuals most likely to be denied restoration of their voting rights in Arizona based upon an inability to pay LFOs are low-income persons of color — the very group that the drafters of the Twenty-Fourth Amendment intended to protect.

Moreover, 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. Specifically, the lower court's conclusion that fines do "not amount to a tax," Memorandum of Decision and Order January 22, 2008, at 7-8 (hereinafter "Jan. 22 Dec."), fails to recognize that the Amendment sought to broadly eliminate wealth-based restrictions on voting irrespective of the form of the restriction. Additionally, by concluding that "no right to vote exists for a poll tax to abridge because Plaintiffs were disenfranchised by reason of their convictions," id. at 7, the lower court departed from well-settled precedent recognizing 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. Specifically, this Court should reject the district court's conclusion that requiring payment of LFOs is not a wealth-based restriction on voting because "having decided to re-enfranchise ex-felons, Arizona may permissibly fix as a qualification the requirement that those individuals complete the terms of their sentences." Id. at 8. The lower court's characterization of Arizona's law as a valid voter "qualification" is a false distinction that has been previously rejected by United States Supreme Court. Wealth and the ability to pay LFOs is the critical, and only, distinction separating those with felony convictions who may vote under Ariz. Rev. Stat. Ann. § 13-912(A)(2) from those who may not.

Accordingly, as set forth more fully below, amicus respectfully submits that this Court should reverse the decision of the court below and hold that Arizona's decision to condition restoration of voting rights upon individuals' ability to pay LFOs constitutes an unconstitutional poll tax that violates the Twenty-Fourth Amendment.

ARGUMENT

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

The text of the Twenty-Fourth Amendment is purposefully broad and encompasses 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. Arizona's voter restoration law conflicts with that purpose by disproportionately excluding African Americans and Latinos from the political process solely because they are too poor to pay fines and other sums. For all of these reasons, the lower court's decision should be reversed.

A. **The District Court's Conclusion That LFOs Do Not Amount to Poll Taxes Is Contrary to the Text and Purpose of the Amendment.**

In concluding that Arizona's voter restoration law is not in conflict with the Twenty-Fourth Amendment because it "does not amount to a tax," Jan. 22 Dec. at 7-8, 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, "Failure To Pay Any Poll Tax Or Other Tax": The Constitutionality Of Tax Felon Disenfranchisement, 74 U. Chi. L. Rev.

1549, 1574 (2007) (arguing that by its terms, "[t]he rights created by the Twenty-fourth Amendment cannot be "indirectly denied"). Additionally, 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.

Moreover, legislative history also suggests that the Amendment's drafters intended that text to be interpreted broadly to include any economic-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.

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).

Notwithstanding these decisions eschewing all forms of economic preconditions on voting, the district court concluded that "requiring felons to pay financial costs associated with their crimes in order to regain suspended civil rights does not amount to a tax." Jan. 22 Dec., at 7. In so concluding, the court cited an ancient description of "poll taxes" from Breedlove v. Suttles, 302 U.S. 277, 281 (1937), overruled by Harper, 383 U.S. 663, which stated that "[p]oll taxes are laid upon persons . . . to raise money for the support of government or some more specific end." Id. As a threshold matter, the description of a poll tax in Breedlove does not in any way govern the analysis of the Twenty-Fourth Amendment because that case was decided nearly thirty years *before* ratification of the Amendment, and thus cannot speak to its purpose including, in particular, the intended meaning of the words "other tax" in its text. But to the extent that the court concluded

that LFOs are not poll taxes because they do not generate income for the State, that conclusion was incorrect.

LFOs paid by persons with convictions in Arizona do, in fact, fund a wide-range of legislative programs and policies in the State. In particular, penalty assessments (i.e., surcharges), which are calculated at a percentage of an individual's fines, are added "on top of all felony fines" in the State. Susan Turner and Judith Greene, The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County, 21 Just. Sys. J. 1 1999-2000 [hereinafter "Turner & Green"]; see also Ariz. Rev. Stat. Ann. § 13-805(A) (stating that upon the end of defendants' sentences or probation, court "shall enter [] a criminal restitution order in favor of the state for the unpaid balance, f any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed"). As a result, the Arizona Supreme Court has concluded that surcharges added to criminal fines effectively operate as taxes. May v. McNally, 203 Ariz. 425, 431 (2002), cert. denied May v. Brewer, 538 U.S. 923 (2003).

In fact, "[s]urcharges of 77 percent apply to all criminal fines" and monies from those charges "flow to the criminal justice enhancement fund, the medical services enhancement fund, the clean elections fund and to a variety of funds designed to improve processing of criminal cases." AZ S.F.

Sheet, 2000 Reg. Sess. H.B. 2660 (West. Mar. 8, 2008); Ariz. Rev. Stat. Ann. § 12-116.01(H) (criminal justice enhancement fund); Ariz. Rev. Stat. Ann. § 12-116.02(F) (medical services enhancement fund). In addition, surcharges on criminal fines support Arizona's DNA Identification System, Ariz. Rev. Stat. Ann. § 12-116.01 (J); and even help fund salaries of adult and juvenile probation officers and surveillance officers, Ariz. Rev. Stat. § 12-114.01(B). Hence, even under the lower court's circumscribed definition of poll taxes, Arizona's requirement that individuals pay all LFOs as a prerequisite to voting is indisputably a poll tax because it conditions voting on one's financial ability to pay fees that support the government.

More fundamentally, as the drafters of the Twenty-Fourth Amendment recognized, whether poll taxes generate revenue for the state or further other state interests is not dispositive of whether wealth-based restrictions on voting constitute unconstitutional poll taxes. See 87th Cong., 2d Sess., at 4035 (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 is a poll tax is determined simply by whether the right to vote is conditioned on an individual's ability to pay a government-imposed sum. Harman, 380 U.S. at 538-40.

By its terms, Arizona's voting rights restoration law does just that by requiring persons who have been convicted of a felony to "pay[] any fine or restitution imposed" in order to restore civil rights, including the right to vote. Ariz. Rev. Stat. Ann. § 13-912 (A)(2). Significantly, in Maricopa County, where several Plaintiffs reside, fines for certain offenders are imposed at an average of $476 per person, see Turner & Green, at 14 — an amount that far surpasses 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.[2]

In sum, the district court's conclusion that LFOs do not amount to taxes under 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 Arizona's voter restoration law should be reversed.

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

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. Indeed, 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 181. During this time, proponents of poll taxes sought to exploit the inextricable link between race and poverty in the United States. See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 228 (Basic Books 2000) [hereinafter Keyssar].

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, 242 n.44 (W.D. Tex. 1966) (quoting Ogden, at 7).

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 33-34 (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 guise 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 the poor, predominantly minority members of society. While Arizona’s voter restoration law may not have grown out of the same post-reconstruction era, the egalitarian purpose and anti-

discrimination principles undergirding the Amendment are equally pertinent — and must be applied with equal vigor — today. Indeed, doing so is consistent with this Court's particular sensitivity to the modern reality of racial inequality and its effect on equal access to the political process.

Indicative of this Court's sensitivity to that reality is Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003), a case involving a claim under Section 2 of the Voting Rights Act, in which this Court reasoned that "racial bias in the criminal justice system may very well interact with voter disqualifications to create . . . barriers to political participation on account of race . . . ." In so holding, this Court made clear that judges must be attuned to "voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process." Id. at 1019.[3] Given the history and purpose of the Twenty-Fourth Amendment, as well as the evidence set forth below that low-income persons of color are likely to be disproportionately denied restoration of voting rights in Arizona, the reality of racial barriers to political participation discussed in Farrakhan

[3] Significantly, in Farrakhan, this Court suggested in dicta that Washington's voting rights restoration law which required persons with felony convictions to "repay their monetary obligations in order to be eligible for restoration" might present a "cognizable" claim of an unconstitutional poll tax. 338 F.3d at 1022 n.19. The Court never reached that issue, however, because the Plaintiffs in Farrakhan only asserted that claim under the Voting Rights Act and the Court ruled that they otherwise lacked standing to assert such a claim. Id.

should inform this Court's analysis of the asserted poll-tax violation in this case as well.

C. Arizona'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 research and evidence suggests that by denying voting rights to those who cannot pay LFOs, Arizona's law likely excludes poor African Americans and Latinos from the franchise based solely on their economic means. That invidious result is exactly what the Twenty-Fourth Amendment sought to prevent.

Nationally, as well as in Arizona, disenfranchised persons with felony convictions are disproportionately persons of color and are more likely to be poor. Recent statistics suggest that nationally, African Americans and Latinos make up 60 percent of 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).[4] These rates of incarceration are significant to this case because given that "arrest, conviction, and imprisonment fall more heavily" on persons of color, felony

[4] *available at www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf*; see also U.S. Census Bureau, Population by Race Alone, Race in Combination Only, Race Alone Or in Combination, and Hispanic or Latino Origin for the United States: 2000 (2001), *available at www.census.gov/population/cen2000/phc-t1/tab03.pdf*

disenfranchisement does so as well. Jeffrey Reiman, Liberal And Republican Arguments Against the Disenfranchisement of Felons Criminal Justice Ethics, at 4 (Winter/Spring 2005).[5]

Research suggests that of the estimated 5.3 million Americans who are currently or permanently disenfranchised, 1.4 million are African-American men. Sentencing Project, Felony Disenfranchisement Laws in the United States (2008).[6] 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") [hereinafter MALDEF Report].[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,

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

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

[7] *available at http://www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf*

What We Can Do Together: A Forty Year Update of the National Advisory Commission on Civil Disorders, at 2 (2008).[8] The 2005 poverty rate for African Americans was 24.9 percent, with 9.2 million persons living in poverty; for Latinos, that figure was 21.8 percent or 9.4 million people. Carmen DeNavas-Walt, et al. U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2005, at 13-15 (2006).[9]

Significantly, for members of minority groups who are convicted of crimes, their criminal record only exacerbates the economic disadvantages that 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, at 2 (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,

[8] *available at* *http://www.stanford.edu/dept/csre/pdfs/Kerner_Executive_Summary.pdf*

[9] *available at www.census.gov/prod/2006pubs/p60-231.pdf*

[10] *available at http://www.urban.org/UploadedPDF/410855_holzer.pdf*

The Employment Prospects of Ex-Offenders, Focus Vol. 25, No. 2 (Fall-Winter 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 as a condition of restoring their right to vote.

These trends are also evident in Arizona where racial and ethnic minorities, and in particular, Latinos "are more likely to be disenfranchised than the general population" MALDEF Report, at 6 (noting that although Latinos in Arizona make up 15.07 percent of the total citizen voting age population, they make up 27.5 percent of those persons who are disenfranchised);[12] James Thomas Tucker & Rodolfo Espino, Voting Rights in Arizona: 1982-2006 17 S. Cal. Rev. L. & Soc. Just. 283, 284-295 (2008) (describing long history of voter discrimination against Arizonans of Hispanic, American-Indian, African-American and Asian Heritage) [hereinafter "Voting Rights in Arizona"]. And while African Americans make up only 3.6 percent of the population in Arizona, blacks constitute 13.2 percent of all persons incarcerated in Arizona's state prisons. See Ariz.

[11] *available at http://www.irp.wisc.edu/publications/focus/pdfs/foc252d.pdf*
[12] *available at http://www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf*

Dep't of Corrections, Inmate Statistics: Who Is in Prison? (Feb. 2005);[13] Rural Policy Research Institute, at 3 Demographic and Economic Profile Arizona (Aug. 2006).[14]

Arizona's minority citizens are also more likely to be poor than their white counterparts. See Voting Rights in Arizona, at 295 ("Hispanic voting-age citizens trail non-Hispanic voting-age citizens in every socio-economic category" and a higher percentage of this population lives in poverty as compared to non-Hispanics). American-Indians in Arizona face similar economic disadvantages with one-third of the voting-age population living below the poverty level. Id. at 296. And recent figures suggest "wide racial disparit[ies] in income and poverty" levels, particularly in Maricopa County where several of the Plaintiffs reside. See 2008 Central Arizonans for a Sustainable Economy, Analysis of Regional Data from the U.S. Census Bureau 2007 American Community Survey (2008) (noting more minorities live in poverty in Phoenix than do white citizens and that income and earnings of "Black and Hispanic households were dramatically lower than White households").[15]

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[13] *available at http://www.azcorrections.gov/reports/Who.htm*
[14] *available at http://www.rupri.org/Forms/Arizona.pdf*
[15] *available at http://www.centralarizonans.org/downloads/2007%20PD%20Report.pdf*

Given that racial and ethnic minorities are most likely to be disenfranchised in Arizona 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 intended to protect. Thus, under Arizona's scheme, wealthy financial executives convicted of white collar felonies are more likely to restore their voting rights after release from prison, while low-income, predominately minority offenders who cannot afford to pay their LFOs are more likely to be shut out of the political process solely because of their inability to pay. The Arizona Supreme Court has specifically recognized that wealth is likely the determinative factor bearing on whether persons with felony convictions pay LFOs. See Application of Collins, 108 Ariz. 310, 311 (1971) (stating that "a great majority of those who fail to pay fines" in Arizona "do so because of their poverty"). 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, Arizona'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 Arizona's law has on the disadvantaged minorities whom the Amendment aimed to protect; its decision should be reversed.

II. HAVING CHOSEN TO RESTORE THE VOTING RIGHTS OF PERSONS CONVICTED OF FELONIES, ARIZONA MUST DO SO IN CONFORMITY WITH THE TWENTY-FOURTH AMENDMENT.

Having chosen to extend the right to vote to persons with felony convictions, Arizona must do so constitutionally and cannot condition a person's right to vote upon payment of fees or fines in violation of the Twenty-Fourth Amendment. In concluding that Arizona's law did not constitute a poll tax, the district court reasoned that because Richardson v. Ramirez, 418 U.S. 24, 54 (1974), permits Arizona to "fix as a qualification for voting that a person not have been convicted of a felony . . . [i]t follows that, having decided to re-enfranchise ex-felons, Arizona may permissibly fix as a qualification for voting that those individuals complete the terms of their sentences" which, according to the court, necessarily includes payment of fines and restitution imposed by that sentence. Jan. 22 Dec. at 8. The

district court also concluded that the Amendment did not apply because Plaintiffs have been disenfranchised and, therefore, "have no right to vote for the Arizona statutes to abridge." Jan. 22 Dec. at 8. The district court's reasoning is fundamentally flawed because irrespective of the fact that fines are imposed as part of a sentence and whether a "right" or statutory "privilege" is at issue, the State may not restrict access to voting in a manner that conflicts with the Constitution.

As a threshold matter, the district court failed to recognize that a state's authority to disenfranchise pursuant to Richardson does not end the constitutional inquiry or eclipse all consideration of whether the legislature has otherwise restricted access to voting in an unconstitutional manner. The United States Supreme Court has consistently held that although persons convicted of crimes may be deprived of certain rights — most significantly, their right to freedom — 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 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"); see also Madison v. State, 161 Wash.2d 85, 124-25 (2007) (Alexander, J., dissenting) (relying on Bearden 461 U.S. 660, and Williams, 399 U.S. 235, and reasoning by analogy that although felons can be disenfranchised, voting, like freedom, "remains a fundamental right, and when all other conditions of a sentence have been fulfilled, felons cannot be deprived further of their right to vote for failure to pay LFOs").

The district court too quickly dismissed the importance of these holdings, describing them as "inapt" because Plaintiffs do not allege that the State is holding them beyond the maximum term or revoking their probation. Jan. 22 Dec. at 6. The rule, however, that emerges from these cases applies equally here: the Constitution does not permit the state to prolong a criminal sanction, including the loss of voting rights, or to impose a consequence of conviction unevenly, simply because of an individual's economic status or inability to pay. Because the District Court's conclusion that Plaintiffs "have no right . . . to abridge" Jan. 22 Dec. at 8, was inconsistent with these long recognized precedents, it should be rejected by this Court.

In addition, irrespective of whether a "fundamental right" or statutory "privilege" is at issue, the State may not enact laws that conflict with the Constitution, including the Twenty-Fourth Amendment. The fallacy of the lower court's reasoning was rejected long ago by the Supreme Court in a series of case recognizing that the mere fact that the state has no obligation to extend a benefit or privilege does not free the state of constitutional limitations once it decides to make a benefit available. This 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, 397 U.S. 254, 262 (1970), 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. 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)).

Indeed, it is a "familiar constitutional principle that a state, though having acted when not compelled, may consequentially create a constitutionally protected interest." Right to Read Def. Comm. of Chelsea v. Sch. Comm. of Chelsea, 454 F.Supp. 703, 712 (D. Mass. 1978) (citations omitted). This is also true with respect to voting rights. See 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").

For example, in Georges v. Carney, 546 F.Supp. 469, 471 (N.D.Ill. 1982), aff'd by 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 Plaintiff-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 Constitution." Id. at 477.

Similarly, here, while Arizona is not required to restore the right to vote to persons with felony convictions, having chosen to do so, it cannot in any way condition a person's ability to vote on his economic status or ability to pay fines, fees, or any other sums. Even if voting is deemed to be a privilege extended to disenfranchised persons by the grace of the state, Arizona cannot manipulate the Twenty-Fourth Amendment "out of existence" by conditioning restoration of voting rights upon an

impermissible poll tax. Frost, 271 U.S. at 593-94. Moreover, because the Twenty-Fourth Amendment was ratified later than the Fourteenth Amendment, it qualifies any authority Arizona possesses under Section 2 of the Fourteenth Amendment to disenfranchise persons with felony convictions. See 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).

In addition, whether characterized as a voter qualification or an economic restriction on voting, laws that condition voting upon payment of any sum constitute poll taxes that violate the Twenty-Fourth Amendment. In Harper v. Va. State Bd. of Elections, 383 U.S. at 670, the United States Supreme Court was unequivocal: "wealth or fee paying has . . . no relation to voting qualification" and thus can never be made a condition of voting. But under Arizona's voter restoration scheme, once individuals are released from prison, parole, or probation, wealth and an ability to pay fines is the only "qualification" separating those who may vote from those who may not. Accordingly, the district court's characterization of Arizona's re-enfranchisement law as a valid voter "qualification" requirement and not a poll tax is an overly formalistic, false distinction. Indeed, that distinction

falls apart once it is logically acknowledged — as the Arizona Supreme Court has — that "a great majority of those who fail to pay fines" in Arizona "do so because of their poverty." Collins, 108 Ariz. at 311; see supra Part IC.

Moreover, the Supreme Court rejected a similar argument in Harman, 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 maintained "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").

Applying Harman here, this Court should reject the district court's characterization of Arizona's re-enfranchisement law as a valid voter

"qualification:" in reality the only reason Plaintiffs are not "qualified" to vote under Arizona's law is their inability to pay fees. This Court should reaffirm that that kind of voter qualification is never permitted under the Twenty-Fourth Amendment.

In addition, this Court should not be persuaded by the decision of the Washington Supreme Court in Madison v. State, 161 Wash.2d at 85. In that case, the court acknowledged that conditioning restoration of voting rights upon individuals' payment of LFOs would exclude some persons with felony convictions from the franchise because of their inability to pay, while permitting others to regain the right to vote. 161 Wash.2d at 107. The Madison Court reasoned that Richardson approved of this result because it recognized the authority of states to disenfranchise "some or all" of the persons convicted of felonies within the state. Id. at 107 (quoting Richardson, 418 U.S. at 53). But 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, a claim under the Twenty-Fourth Amendment and allegations of wealth-based restrictions on voting were not even before the Court.

In sum, in accordance with Harman, this Court should acknowledge that the constitutionally relevant distinction being drawn by the Arizona

statute is not between persons who have finished their criminal sentences and those who have not, but between those who can afford to finish their sentences by paying LFOs and those who are too poor, and therefore, cannot. As the dissent properly recognized in Madison, a voter restoration law cannot unconstitutionally create a system whereby "[w]ealthy people who are convicted of a felony . . . can regain the right to vote almost immediately" whereas poor persons "who lack resources . . . may never be able to pay their LFOs" and therefore participate in democracy. Madison, 161 Wash.2d at 122 (J. Alexander, dissenting). That LFOs may be assessed as part of a criminal sentence simply has no bearing on whether Arizona may condition the right to vote on individuals' ability to pay. Because that requirement makes an individual's wealth central to the determination of voting rights, it is not a valid voter qualification; but is instead a prohibited poll tax within the meaning of the Twenty-Fourth Amendment.

CONCLUSION

For the reasons set forth above, amicus Brennan Center respectfully submits that by conditioning restoration of voting rights on persons with felony convictions' ability to pay LFOs, Ariz. Rev. Stat. Ann. § 13-912(A)(2) is in impermissible poll tax that violates the Twenty-Fourth Amendment. Accordingly, this Court should reverse the decision of the court below.

Respectfully submitted,

Dated: February 4, 2009

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Certification of Electronic Service

I hereby certify that on February 4, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth 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 limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,898 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 proportionately spaced typeface using MS Word in 14 point Times New Roman.

DATED this 4th day of February, 2009.

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