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No. 08-6377

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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

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

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BRIEF OF PLAINTIFFS-APPELLANTS

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**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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## **STATEMENT OF JURISDICTION**

This is an appeal of the district court's grant of Defendants-appellees' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 42 U.S.C. §§ 1971(d) and 1973j(f), and 42 U.S.C. § 1983. The district court had supplemental jurisdiction under 28 U.S.C. § 1367(a) to hear Plaintiffs-appellants' state law claims. Plaintiffs-appellants filed a timely notice of appeal on November 13, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

I. Whether the State of Tennessee may require, as a qualification to vote, that a person convicted of an infamous crime pay legal financial obligations (LFOs), namely all restitution associated with his or her sentence and/or be current on any court-ordered child support payments, prior to otherwise restoring the person's right to vote?

II. Whether Defendants-appellees' enforcement of the state's LFO requirement, which was enacted in 2006 prior to Plaintiffs-appellants' felony convictions, violates the state and federal ex post facto clauses?

## STATEMENT OF THE CASE

Tennessee law denies voting rights to people convicted of an infamous crime unless the state restores that right.<sup>1</sup> Tenn. Const. art. IV, § 2; Tenn. Code Ann. §§ 40-20-112, 40-29-201 – 205. Voting rights cannot be restored, however, unless an ex-felon pays all of the restitution associated with his or her sentence and/or is current on any court-ordered child support payments even if the child support is unrelated to the underlying conviction for which the person was disfranchised. Tenn. Code Ann. §§ 40-29-202(b) and 40-29-202(c). In order to initiate the rights restoration process, Plaintiffs-appellants must submit a Certificate of Restoration to the coordinator of elections, but first must satisfy the LFO requirement before even being eligible to submit the form. Tenn. Code Ann. § 40-29-105(b)(3).

Plaintiffs-appellants Terrence Johnson, Jim Harris, and Joshua Roberts were convicted of felonies prior to the enactment of Tenn. Code Ann. §§ 40-29-202(b) and (c). They have completed their terms of imprisonment, parole, and probation. All of the plaintiffs-appellants owed outstanding LFOs at the time this lawsuit was filed, but Plaintiff Harris has since satisfied his child support obligations.<sup>2</sup>

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<sup>1</sup> All felonies in Tennessee are considered infamous crimes. Tenn. Code Ann. § 40-20-112.

<sup>2</sup> Plaintiffs-appellants' amended complaint seeks nominal monetary damages for the past denials of their right to register and vote based on their inability to satisfy their LFOs. R.55 Motion to Amend Complaint. Thus, Jim Harris has standing to remain in this suit. See Lynch v. Leis, 382 F.3d 642, 646 n.2 (6<sup>th</sup> Cir. 2004) (“We

Consequently, they are not eligible to seek restoration of their voting rights. Plaintiffs-appellants would be eligible for automatic restoration of their voting rights but for the state's requirement that LFOs be satisfied first.

They challenge Tennessee's LFO requirement as an unconstitutional voter qualification in violation of the Fourteenth Amendment's Equal Protection Clause, the Twenty-Fourth Amendment, and the Privileges and Immunities Clauses of the federal and state constitutions. Plaintiffs-appellants also argue that, because the LFO requirement is a punishment for their status as felons, Defendants-appellees' enforcement of the requirement violates the state and federal Ex Post Facto clauses.

The district court dismissed Plaintiffs-appellants' amended complaint under Fed. R. Civ. P. 12(c) as a matter of law, and Plaintiffs-appellants appeal that decision as being erroneous.

### **STATEMENT OF FACTS**

Plaintiff Terrence Johnson is a citizen of the United States and a resident of Shelby County, Tennessee. R.57 Amended Complaint, ¶ 4. He was convicted of federal wire fraud in or about 1999 and ordered to pay over \$40,000 in restitution plus interest for his offense. Id. He has completed his term of imprisonment,

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note briefly that [the plaintiff] had asserted below a claim for nominal damages, which is normally sufficient to establish standing, defeat mootness, and grant prevailing party status for the purpose of attorney fees under 42 U.S.C. § 1988).

parole, and probation for that offense. Id. Johnson also has a daughter for whom he owed about \$1,200 in overdue child support payment even though he had custody of his child. Id. Although the parties were unable to complete discovery prior to the district court's dismissal of their claims, Plaintiff Johnson produced documents to Defendants-appellees showing that, according to his probation officer:

he "is unable to satisfy the restitution as ordered by [t]he Court. [I]t appears he made a good faith effort to comply, with payments ranging from \$10.00 to \$80.00. Based upon his finances and necessary living expenses, it appears that he has paid to the best of his ability.\*

Plaintiff Jim Harris is a citizen of the United States and a resident of Madison County, Tennessee. R.55 Motion to Amend Complaint, ¶ 5. He was convicted of drug offenses in or about 1995, attempted burglary and a felony drug offense in or about 1996, and a felony drug offense in or about 2001. Id. He has completed his terms of imprisonment, parole, and probation for all of those offenses. Id. Harris also has a daughter for whom he owed about \$2,500 in overdue child support payments even though he had custody of his child. Id.

Plaintiff Joshua Roberts, who was added to the lawsuit after it was filed, is a citizen of the United States and a resident of Davidson County, Tennessee. Id. at ¶

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\* As stated in Plaintiffs-Appellants' April 14, 2009 letter to this Court, they will not be filing a corrected appendix and have deleted all references to an appendix in this corrected brief. However, they have filed a motion requesting this Court take judicial notice of the discovery documents to which they originally cited.

7. He was convicted of forgery, evading arrest and tampering with evidence in the State of Missouri between 1999 and 2001, and completed his term of imprisonment, parole, and probation for these offenses. Id. He applied for restoration of his voting rights in April 2008, but the State denied his application on the ground that he owes over \$7,000 in outstanding child support payments. Id.

On February 25, 2008, Plaintiffs-appellants filed the instant lawsuit seeking to invalidate Tenn. Code Ann. §§ 40-29-202(b) and (c) which condition restoration of voting rights for people convicted of infamous crimes on the payment of LFOs, namely restitution and child support, respectively. R.1 Complaint, ¶ 1. They challenge Tennessee's LFO requirements as an unconstitutional voter qualification in violation of the Fourteenth Amendment's Equal Protection Clause, the Twenty-Fourth Amendment, and the Privileges and Immunities Clauses of the federal and state constitutions. Id. at ¶¶ 26-38, 46-48; R.55 Motion to Amend Complaint, ¶¶ 28-40, 48-50. Plaintiffs-appellants further argue that, because the LFO requirement is a punishment for their status as felons, Defendants-appellees' enforcement of the requirement violates the state and federal Ex Post Facto clauses. R.1 Complaint, ¶¶ 40-44; R.55 Motion to Amend Complaint, ¶¶ 42-46.

The lawsuit also named Alexander Friedmann as a plaintiff. R.1 Complaint, ¶ 6; R.55 Motion to Amend Complaint, ¶ 6. Friedmann was convicted of two felonies in 1989 and completed his term of imprisonment, parole, and probation.

Id. He applied for restoration of his voting rights in 2006, but the State denied his application on the ground that he owed over \$1,000 in restitution. Id. In addition to the constitutional challenges against Tennessee's LFO requirement, Friedmann asserted a due process claim related to his difficulties in confirming whether or not he indeed owed restitution and of getting an authorized governmental official to sign his Certificate of Restoration form. R.1 Complaint, ¶¶ 50-53; R.57 Amended Complaint, ¶¶ 52-55.

The county defendants-appellees, Kim Buckley, James Johnson, and Ray Barrett, filed separate motions to be dismissed from the case, which the district court denied on June 24, 2008. R.18 Motion to Dismiss by Ray Barrett, R.29 Motion to Dismiss by Kim Buckley, and R.31 Motion to Dismiss by James Johnson; R.44 Memorandum Opinion, R.45 Order Denying Motion to Dismiss. Plaintiffs-appellants moved to amend their complaint on July 17, 2008 to add Joshua Roberts as a plaintiff which the court granted on July 28, 2008. R.55 Motion to Amend Complaint, R.56 Order Granting Motion to Amend. On August 1, 2008, the state defendants-appellees, Phil Bredesen, Brook Thompson, and Riley Darnell, filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings which Plaintiffs-appellants opposed. R.58 Defendants' Motion for Judgment on the Pleadings, R.67 Response to Motion for Judgment on the Pleadings. Plaintiffs-appellants also filed their own Fed. R. Civ. P. 12(c) motion for judgment on the

pleadings or, in the alternative, a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a) which Defendants-appellees opposed. R.68 Motion for Judgment on the Pleadings, R.71 Response to Motion for Judgment on the Pleadings, R.75 Resposne to Motion for Judgment on the Pleadings, R.80 Response to Motion for Judgment on the Pleadings. The district court held a hearing on the respective motions on September 3, 2008, and, on September 22, 2008, granted Defendants-appellees' motion while denying that of Plaintiffs-appellants. R.85 Memorandum Opinion.

Prior to the district court's dismissal of Plaintiffs-appellants' claims, the parties engaged in some discovery, including the exchange of interrogatories and requests for production of documents. One of the documents the state defendants-appellees produced established that, once a person submits a Certificate of Restoration form and all of the information on the form is verified, the person's voting rights are automatically restored. Plaintiff Johnson produced documents showing that he lacked the financial resources to satisfy the over \$40,000 plus interest he owed in restitution and that the victim in his case to whom he owed restitution could not be found.

Based on the district court's September 22, 2008 order, Alexander Friedmann's due process claim was the only outstanding claim remaining in the case. The parties eventually settled the due process claim which enabled Mr.

Friedmann to vote in the November 4, 2008 election, and the parties entered a stipulation agreeing to dismiss Friedmann's claim as moot based on the settlement. R.90 Stipulation of Dismissal. Based on the stipulation, the district court dismissed the entire case on November 10, 2008, and Plaintiffs-appellants filed the instant appeal on November 13, 2008. R.91 Order Dismissing Action, R.93 Notice of Appeal.

### **SUMMARY OF THE ARGUMENT**

The Supreme Court repeatedly has reaffirmed the importance of the right to vote as the foundation of our democracy. Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964). Although a state may erect electoral standards to determine who is qualified to vote, such standards cannot be arbitrary, capricious, or result in invidious discrimination. Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992). To do so would run counter to the bedrock principles of fairness and equality for which Section 1 of the Fourteenth Amendment, the Twenty-Fourth Amendment, and the Privileges and Immunities Clause, as well as the state laws upon which Plaintiffs-appellants also rely, stand.

Tennessee's LFO requirement serves as a real and serious barrier which has prevented Plaintiffs-appellants Johnson, Harris, and Roberts from having their voting rights restored. There is no question that the requirement is a voter

qualification and makes the payment of a fee a condition to voting. This requirement cannot stand in the face of legal precedent which provides that laws discriminating against individuals on the basis of wealth or make payment of any fee a condition for voting are a form of invidious discrimination and unconstitutional. Harman v. Forssenius, 380 U.S. 528, 539 (1965); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

Further, Tennessee courts have characterized the state's felon disfranchisement law as "penal in nature" and struck down attempts by the state legislature to retroactively apply changes to the law. May v. Carlton, 245 S.W.3d 340, 349 (Tenn. 2008); Gaskin v. Collins, 661 S.W.2d 865, 868 (Tenn. 1983). Because Plaintiffs-appellants were convicted of crimes for which the punishment included loss of their voting rights until completion of imprisonment, parole, and probation, Defendants-appellees' attempt to apply retroactively the LFO requirement to Plaintiffs-appellants violates the state and federal Ex Post Facto clauses. Thus, the district court erred in dismissing Plaintiffs-appellants' amended complaint as a matter of law.

### **STANDARD OF REVIEW**

This Court reviews de novo a district court's grant of a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. Jelovsek v. Bredesen, 545 F.3d 431, 434

(6<sup>th</sup> Cir. 2008); Barany-Snyder v. Weiner, 539 F.3d 327, 332 (6<sup>th</sup> Cir. 2008);

JPMorgan Chase Bank, N.A. v. Winget, 510 F.3d 577, 581 (6<sup>th</sup> Cir. 2007).

## ARGUMENT

### **I. TENNESSEE’S REQUIREMENT THAT PLAINTIFFS-APPELLANTS SATISFY THEIR LEGAL FINANCIAL OBLIGATIONS AS A PRECONDITION TO VOTING IS AN UNCONSTITUTIONAL VOTER QUALIFICATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.**

Sections 40-29-202(b) and (c) of the Tennessee Code which require, as a precondition to voting, Plaintiffs-appellants to satisfy all court-ordered restitution and be current on any child support payments, violates their right to participate in elections on an equal basis with more affluent ex-felons. Those who are more affluent are financially able to immediately satisfy such payments and thus do not face the same unconstitutional barriers to getting their voting rights restored. The child support requirement is particularly unlawful because it discriminates against those who have criminal convictions while not affecting the voting rights of those who do not.

The district court dismissed Plaintiffs-appellants’ Equal Protection claim on the grounds that: (1) Plaintiffs-appellants, as convicted felons, “do not have [a] fundamental right to vote” and (2) “indigence is not a suspect classification.” R.85 Memorandum Opinion, pp. 4, 7. The court applied a rational basis standard of review to Plaintiffs-appellants’ claims and, despite its finding that the child-support

requirement “bears a particularly tenuous relationship with any legitimate state objective,” the court accepted the State’s purported interests in “protecting the ballot box from felons,” “encouraging the payment of child support,” and “withholding the restoration of voting rights from felons who have not completed their entire sentence.” *Id.* at 9-11. The district court’s ruling is erroneous because the Supreme Court repeatedly has recognized that a person’s financial status is irrelevant for purposes of voting and also has characterized such wealth-based qualifications as a form of invidious discrimination meriting a heightened standard of review under the Equal Protection clause.

**A. Tennessee’s Re-enfranchisement Scheme Restores The Right To Vote And, Therefore, Must Comport With Equal Protection Standards.**

Voting, in and of itself, is fundamental in nature. *See Reynolds v. Sims*, 377 U.S. 533, 555 n.28 (1964); *Stewart v. Blackwell*, 444 F.3d 843, 856 (6<sup>th</sup> Cir. 2006) (“For more than a century the Supreme Court has acknowledged the fundamental nature of the right to vote.”), vacating as moot 473 F.3d 692 (6<sup>th</sup> Cir. 2007). The right to vote is protected by more constitutional amendments than any right we enjoy as Americans, *i.e.*, the First, Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, Twenty-Sixth, and Twenty-Seventh. *See Reynolds*, 377 U.S. at 555 n.28 (noting the “expansion of the right of suffrage” by the various constitutional amendments as well as the civil rights legislation enacted by

Congress in 1957 and 1960) As the Court held in Wesberry v. Sanders, 376 U.S. 1, 17 (1964): “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” Because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,” the Supreme Court has consistently characterized the right to vote as a “fundamental political right.” Reynolds v. Sims, 377 U.S. at 562 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). See also Stewart v. Blackwell, 444 F.3d at 872 (“An individual’s vote is the lifeblood of a democracy.”). Its fundamental role in the functioning of America’s democratic institutions means that “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.” Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969).

The district court concluded that Plaintiffs-appellants do not have a fundamental right to vote, relying upon Richardson v. Ramirez, 418 U.S. 24, 54 (1974), in which the Court held that “the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . .” R.85 Memorandum Opinion, pp. 4-5. Section 2 provides:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-

President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, **except for participation in rebellion, or other crime**, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number the male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added).

The plaintiffs-appellants in Richardson challenged a California law which disfranchised persons convicted of an “infamous crime” and made restoration of voting rights possible only through a court order or an executive pardon. 418 U.S. at 27-32. Although the Court rejected their argument that the state’s felon disfranchisement law violated the Equal Protection Claim, the Court remanded for further consideration the issue of whether “there was such a total lack of uniformity in county election officials’ enforcement of the challenged state laws as to work a separate denial of equal protection.” Id. at 56.

Plaintiffs-appellants’ do not claim that the right to vote may not be taken away from persons convicted of crimes that were felonies at common law, even though not required and not universally done by all States. Plaintiffs-appellants also acknowledge that once taken away the right does not have to be restored. However, once a state adopts a scheme to restore this fundamental right, it may not require satisfaction of an unconstitutional condition. In the instant case, the district court failed to place the necessary importance on the fact that the Richardson court

left the door open for lower courts to strike down a state's re-enfranchisement process if it runs afoul of equal protection standards.<sup>3</sup>

While Section 2 contains an “affirmative sanction,” the Supreme Court subsequently has held that felon disfranchisement laws must be applied in a non-discriminatory manner consistent with Section 1 of the Fourteenth Amendment, which guarantees all U.S. citizens “the equal protection of the laws.” In Hunter v. Underwood, 471 U.S. 222 (1985), the Court invalidated under the Equal Protection Clause Alabama's felon disfranchisement scheme which the state had adopted for the purpose of discriminating against African Americans. The Court held: “we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [state law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez . . . suggests to the contrary.” 471 U.S. at 233. In Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977), the court similarly held that Alabama law which disfranchised men, but not women, convicted of spousal abuse violated the Equal Protection

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<sup>3</sup> The district court relied upon this Court's decision in Wesley v. Collins, 791 F.2d 1255, 1261 (6<sup>th</sup> Cir. 1986) in which this Court ruled that “the right of felons to vote is not fundamental.” R.85 Memorandum Opinion, p. 5. Plaintiffs-appellants note that Wesley v. Collins involved a challenge to Tennessee's disfranchisement scheme, not its re-enfranchisement scheme. Plaintiffs-appellants also re-emphasize that in Stewart v. Blackwell, this Court held that the right to vote is fundamental in nature. 444 F.3d at 856. Thus, Tennessee's decision to provide for the restoration of voting rights to ex-felons results in the restoration of a fundamental right.

Clause. Hunter shows that the affirmative sanction of Section 2 notwithstanding, laws pertaining to the voting rights of people with convictions must comport with principles of fairness and equality under the Equal Protection Clause of Section 1. The mere fact that someone has been convicted of a crime does not, as the district court erroneously held, deprive him or her of that protection. A felon cannot be denied the right to vote for a reason that violates the Equal Protection Clause. See Bullock v. Carter, 405 U.S. 134, 141 (1972) (while a state may determine voter qualifications, “this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment”); Stewart v. Blackwell, 444 F.3d at 859-60 (“[T]he right to vote encompasses ‘more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.’”) (quoting Bush v. Gore, 531 U.S. 98, 104-05 (2000)).

In addition, while a state may disfranchise persons convicted of certain felonies, once it provides a method of restoration of voting rights it must also comply with Section 1 of the Fourteenth Amendment. A state could not, for example, provide for restoration of voting rights of men only, or whites only. Such provisions would violate Section 1 both because they impose unconstitutional classifications and because they deny the fundamental right to vote to women and non-whites. See Lubin v. Panish, 415 U.S. 709, 713 (1974) (“the Equal Protection Clause confers the substantive right to participate on an equal basis with other

qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population") (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). Returning to our examples, to deny women and non-whites the right to challenge their continued and selective disfranchisement on the grounds that they were felons who did not have the fundamental right to vote would also be in violation of Section 1. Yet, the district court's rationale would deny them the right to challenge their discriminatory disfranchisement.

In Bynum v. Conn. Comm'n on Forfeited Rights, 410 F.2d 173, 175-76 (2<sup>nd</sup> Cir. 1969), the court addressed the issue of whether a state, "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 plaintiff in Bynum was convicted of burglary and sentenced to probation. After completing his term of probation, he sought restoration of his voting rights, but alleged that he was unable to pay the \$5.00 fee to apply for rights restoration. Id. at 175. The court reasoned that, "[w]hile there may well be civil fees to which the equal protection clause does not apply . . . the issue raised here is so closely intertwined with the exercise of the

political franchise (where the doctrine of equal protection does apply . . . ) that we cannot dismiss the problem out of hand.” Id. at 177. The district court determined that the Bynum decision is of limited precedential value because it predates the Supreme Court’s decision in Richardson v. Ramirez. R.85 Memorandum Opinion, p. 12. However, although the Bynum court remanded the case for further determination regarding the plaintiff’s economic status, the court’s conclusion that the plaintiff stated a valid equal protection claim is directly applicable to the instant case.

Further, the fact that payment of fines and restitution are part of a sentence does not insulate Tennessee’s LFO requirement from constitutional review under Section 1 of the Fourteenth Amendment. In Townsend v. Burke, 334 U.S. 736, 741 (1948), for example, the Court held that a sentencing procedure that “is inconsistent with due process of law . . . cannot stand.” The Court has consistently held that sentences are subject to review under the due process clause and other provisions of the constitution. See e.g., Furman v. Georgia, 408 U.S. 238, 241 (1972) (the Eighth Amendment is applicable to the states through the privileges and immunities and due process clauses of Section 1 of the Fourteenth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed violates the Eighth and Fourteenth Amendments); Atkins v. Virginia,

536 U.S. 304 (2002) (the execution of mentally retarded criminals is prohibited by the Eighth Amendment). The district court committed error in concluding that a classification imposed as part of a sentence is insulated from review under the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

Plaintiffs-appellants neither challenge nor seek to be relieved from any aspect of their sentences. Instead, they oppose, as an unlawful voter qualification, the payment of any fee, including payment of restitution and child support, as a precondition to being able to vote. The district court's determination that Tennessee's LFO requirement is not an electoral standard, like the \$5.00 fee in Bynum, is clearly erroneous. Just as the plaintiff in Bynum alleged that the \$5.00 application fee was a real and serious obstacle for purposes of getting his voting rights restored, Plaintiffs-appellants face the same obstacle in the instant case.

**B. The Requirement Of Payment Of LFOs Is An Unconstitutional Voter Qualification.**

In Farrakhan v. Washington, 338 F.3d 1009, 1016 (9<sup>th</sup> Cir. 2003), involving a challenge to the State of Washington's felon disenfranchisement law under Section 2 of the Voting Rights Act, the court held that felon disenfranchisement is a voting qualification. Likewise, any requirement a state erects for purposes of a convicted felon getting his or her voting rights restored also is a voting qualification. See Lubin v. Parish, 415 U.S. at 713 ("Whenever a state adopts a process for determining who is qualified to vote, individuals have a substantive right under the

Equal Protection Clause to participate in elections on an equal basis as other qualified voters.”). See also Dunn v. Blumstein, 405 U.S. at 336 (it is well established that “a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”). Once a state grants the right to vote, it may not value one person’s vote more than another’s through either arbitrary or disparate treatment. Bush v. Gore, 531 U.S. 98, 104-105 (2000) (emphasis added).

Although the case law is clear, the district court erroneously concluded that indigence is not a suspect classification for purposes of equal protection. R.85 Memorandum Opinion, pp. 7-8. Classifications based on wealth are “traditionally disfavored,” Harper v. Va. State Bd. of Elections, 383 U.S. at 668, and conditioning participation in the political process on the “ability to pay” a fee will be sustained only if a state can show a compelling interest for doing so. Bullock v. Carter, 405 U.S. at 149. In Harper, in striking down Virginia’s poll tax, even as to those who could afford to pay it, the Court held that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” 383 U.S. at 668. The Court reasoned that “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant. In this context – that is, as a condition of obtaining a ballot – the requirement of fee

paying causes an ‘invidious’ discrimination . . . that runs afoul of the Equal Protection Clause.” Id. The Court concluded that “a State violates the Equal Protection Clause whenever it makes the affluence of the voter or payment of any fee an electoral standard.” Id. at 666. See also Griffin v. Illinois, 351 U.S. 12, 18 (1956) (“a State can no more discriminate on account of poverty than on account of religion, race, or color”).

The Supreme Court repeatedly has reaffirmed that the Equal Protection Clause outlaws invidious forms of discrimination. See generally City of Boerne v. Flores, 521 U.S. 507, 528 (1997); Shaw v. Hunt, 517 U.S. 899, 923 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 246 (1995); Quinn v. Millsap, 491 U.S. 95, 105 (1989). That the “payment of any fee” standard of the Equal Protection Clause is fully applicable to persons convicted of offenses is evident from numerous decisions of the Supreme Court which have invalidated laws denying convicted felons access to certain rights based on their economic status. In Bearden v. Georgia, 461 U.S. 660 (1983), for example, the Court ruled that a state may not revoke an indigent defendant’s probation for failure to pay a fine and restitution without first determining whether the defendant made any bona fide attempts to pay the debt or whether an alternative form of punishment existed. The Court reasoned that “[t]o do otherwise would deprive the probationer of his

conditional freedom simply because, through no fault of his own, he cannot pay the fine.” Id. at 672-73.

The Court in Williams v. Illinois, 399 U.S. 235, 240-41 (1970) invalidated a law which allowed the state to imprison a convicted person who failed to satisfy the financial obligations associated with his sentence. The Court reaffirmed its “allegiance to the basic command that justice be applied equally to all persons.” 399 U.S. at 241. In Roberts v. LaVallee, 389 U.S. 40, 42 (1967), a case involving a state prisoner who appealed a trial court’s denial of his request for a free transcript of lower court proceedings, the Court noted that “[o]ur decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.” See also Douglas v. California, 372 U.S. 353, 356 (1963) (denial of appellate counsel to indigent defendants-appellees violated the Equal Protection Clause).

In Stewart v. Blackwell, this Court held that “[e]qual protection [ ] requires ‘minimal procedural safeguards’ such that there is ‘at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.’” 444 F.3d at 860 (quoting Bush v. Gore, 531 U.S. at 109). In Stewart v. Blackwell, prior to vacating the decision on mootness grounds, this Court ruled that the state of Ohio’s use of punch card and central count optical scan voting

systems violated the Equal Protection clause because the use of these technologies resulted in a greater likelihood that a person's vote would not be counted on the same terms as someone voting in a county which used a different system. Id. at 871, 876-77. In reaching this conclusion, this Court relied heavily upon the decision in Harper and reasoned that “[t]he technology provided to a voter by the State, like that voter’s wealth, has no relation to voting qualifications or the value of that vote.” Id. at 870 (emphasis added). This Court further held “the right to have one’s vote counted on equal terms is part of the right to vote. No other conclusion is possible from the case law and thus, strict scrutiny applies.” Id. at 868. Similarly, requiring the Plaintiffs-appellants in the instant case to pay LFOs as a condition for obtaining the ballot is a form of discrimination that violates the Equal Protection Clause.

The fact that Tennessee may permanently disfranchise some convicted felons does not mean that the wealth based prohibition of the Equal Protection Clause does not apply to the requirement of payment of restitution and child support. In Griffin, the petitioners sought to appeal their criminal convictions and challenged the denial of their request that the costs for obtaining trial transcripts be waived because of their indigence. 351 U.S. at 13-16. The Supreme Court recognized that Illinois was not required to provide appellate review, but held that because it had done so it could not “discriminate . . . against some convicted

defendants-appellees on account of their poverty.” Id. at 18. The Court concluded that the petitioners were entitled to equal protection against invidious discrimination throughout the appellate process to the same extent as convicted felons who could afford to pay the transcript costs. Id. at 17-18 (“[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial”). Similarly, because Tennessee allows restoration of voting rights, it may not condition that restoration upon payment of fines or costs, nor deprive Plaintiffs-appellants of the opportunity to get their voting rights automatically restored merely because they cannot afford to satisfy financial obligations. Therefore, the district court’s conclusion that “indigence is not a suspect classification” is untenable in light of the cases cited above.<sup>4</sup>

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<sup>4</sup> In footnote 5, the district court asserts that Plaintiffs-appellants have not addressed the issue of whether they may seek a reduction or modification of their restitution and/or child support orders, and have not discussed what impact doing so might have on their eligibility to vote. R.85 Memorandum Opinion, p. 10 n.5. Under Tennessee law, “[a] child support order is not subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.” Corbin v. Corbin, No. W2008-00437-COA-R3-CV, 2009 WL 454134, at \*4 (Tenn. Ct. App. Feb. 24, 2009). Because Plaintiffs-appellants owe outstanding child support payments, those orders are not retroactively modifiable. As for the over \$40,000 plus interest Plaintiff Johnson owes in restitution, he produced documents to Defendants-appellees establishing his financial inability to satisfy that entire obligation and the U.S. government’s decision to hold him responsible for the entire amount regardless of his financial situation. R.69-3 Declaration of Terrence Johnson. Thus, Plaintiffs-appellants have been unable to

Tennessee's LFO requirement subjects Plaintiffs-appellants to a severe restriction – denial of automatic restoration of voting rights – based on their inability to completely satisfy their LFOs. The completion of imprisonment, parole, and probation does not depend on a person's economic status. However, the payment of LFOs does. Because the LFO requirement disproportionately impacts those who are incapable of paying, Sections 40-29-202(b) and (c) are discriminatory in their operation and, therefore, are a form of invidious discrimination which is unconstitutional. The district court failed to recognize this important distinction.

Although Plaintiffs-appellants have completed their terms of imprisonment, parole, and probation, the opportunity for them to have their voting rights restored is illusory and, in the case of Plaintiff Johnson who owes over \$40,000 plus interest in restitution, unattainable for years to come. The result is that Plaintiffs-appellants are foreclosed from regaining the right to vote solely on the basis of their economic status. Because wealth has nothing to do with one's qualifications to vote, Tennessee's LFO requirement exemplifies invidious discrimination in the voting context.

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seek a reduction or modification of their outstanding LFOs which further supports their facial and as-applied challenges to Tennessee's LFO requirement.

**C. The District Court Should Have Reviewed Plaintiffs-appellants' LFO Claims Under A Heightened Standard.**

Since the challenged state law is a suspect wealth based classification that limits the restoration of a fundamental right to those who can afford it, the court should have analyzed Plaintiffs-appellants' Equal Protection claim under the standards announced in Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992). When determining whether or not a state election law or policy violates the Equal Protection Clause, a court must first consider the character and magnitude of the asserted injury to the rights that the Fourteenth Amendment protects. Anderson, 460 U.S. at 789 (applying strict scrutiny standard in ruling that an Ohio statute which required independent candidates running for President to file their nomination papers earlier than political party candidates violated equal protection clause). The court then should identify and evaluate the precise interests that the state puts forward to justify the burden that its law or policy imposes on a plaintiff. Id. "In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." Id. Once a state election law subjects equal protection rights to "severe" restrictions, the state law must be "narrowly drawn to advance a state interest of compelling importance." Burdick v. Takushi, 504 U.S. at 434 (internal citations omitted). See also Hill v. Stone, 421 U.S. 289, 295 (1975) ("restrictions

on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack") (emphasis added).

In a recent challenge to Indiana's requirement that voters present photo identification at the polls, the Supreme Court reaffirmed that courts should carefully scrutinize state-imposed voter qualifications to examine whether such burdens are "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" Crawford v. Marion County Election Bd., 128 S.Ct. 1610, 1616 (2008), (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)). The need to apply a heightened level of scrutiny in the instant case is further buttressed by the Supreme Court's decision in Harper v. Va. State Bd. of Elections. In invalidating Virginia's poll tax the Court held: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper, 383 U.S. at 669, citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Reynolds v. Sims, 377 U.S. at 581 (rejecting "a clearly rational state policy" as justifying a violation of the equal population standard). A state's important regulatory interests may justify a challenged electoral standard only if the standard is reasonable and nondiscriminatory. Burdick v. Takushi, 504 U.S. at 434.

The right to vote is fundamental and Tennessee has adopted a scheme which restores that fundamental right on the condition that LFOs be paid. Plaintiffs-appellants oppose Tennessee's LFO requirement as an unlawful voter qualification, and the district court should have analyzed their Equal Protection claims under a strict scrutiny standard because of the fundamental nature of the right to vote.

**D. Tennessee's LFO Requirement, As A Voter Qualification, Does Not Serve A Compelling Governmental Interest.**

Because Tennessee's re-enfranchisement scheme affects a fundamental right and distinguishes among a class of felons based on their economic status and, in the case of the child support obligations, does not impose a similar restriction on those who do not have criminal convictions, the state may only maintain the LFO requirement if it can establish that it serves a compelling governmental interest. Burdick, 504 U.S. at 434. As even the district court recognized, Defendants-appellees cannot meet this heightened burden. R.85 Memorandum Opinion, pp. 10-11.

Defendants-appellees' asserted interests do not take into consideration those individuals who lack the economic means to meet their financial obligations which even Tennessee's own child support law does. See Tenn. Code Ann. § 39-15-101(a) ("A person commits the crime of nonsupport who fails to provide support which that person is able to provide . . . ."). In addition, the Supreme Court has

stated that “the use of the franchise to compel compliance with other, independent state objectives is questionable in any context.” Hill v. Stone, 421 U.S. at 299. See also Carrington v. Rash, 380 U.S. 89, 96 (1965) (“States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State”); Harman v. Forssenius, 380 U.S. 528, 542 (1965) (“constitutional deprivations may not be justified by some remote administrative benefit to the State”). As the Court explained in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985), even in the absence of heightened scrutiny, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”

The Court also has ruled that, if there are alternative means to achieve the state’s interests without burdening the right to vote, the State must choose those “less drastic means.” Dunn, 405 U.S. at 343. In the instant case, the district court determined that “the statutory requirement that convicted felons be current in all child-support payments before being eligible for reenfranchisement bears a particularly tenuous relationship with any legitimate state objective”. R.85 Memorandum Opinion, pp. 10-11) (emphasis added).

Tennessee also has other available means by which to collect child support and restitution such as executing a lien on the person’s real or personal property (Tenn. Code Ann. § 36-5-901), garnishing the person’s wages (Tenn. Code Ann.

§§ 36-5-1102-1106), and holding the person in contempt for willfully failing to pay (Tenn. Code Ann. § 40-24-105). There is no reason to believe that the non-payment of an often sizeable financial obligation immediately upon release from supervision can in any way be used as a proxy for determining a citizen's commitment to abide by the laws.<sup>5</sup> If anything, the LFO requirement creates a serious barrier for purposes of rehabilitation and reintegration into society, especially in this case where Plaintiffs-appellants obviously want to participate in the political process.

In light of the array of other collection devices available to the state, it is difficult to imagine how the denial of the fundamental right to vote makes available any additional financial resources that are not already otherwise accessible. This is particularly true with regard to those who are indigent. As the Supreme Court has recognized, denying a citizen access to a fundamental right “for failing to do that which they cannot do” is irrational and cannot survive under any level of judicial scrutiny. Zablocki v. Redhail, 434 U.S. 374, 394 (1978) (Stewart, J., concurring); See also Bearden, 461 U.S. at 671 (“the State cannot justify

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<sup>5</sup> In fact, a recent New York Times article discusses the difficulty many parents face in meeting their child support obligations in these tough economic times. Julie Bosman, Fighting Over Child Support After The Pink Slip Arrives, N.Y. Times, Mar. 28, 2009, available at <http://www.nytimes.com/2009/03/29/nyregion/29support.html?scp=2&sq=child%20support&st=cse>.

incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.”). The district court summarily refused to apply Zablocki to Plaintiffs-appellants’ claims and issued a ruling which runs completely counter to the holding and principles announced in that case. (R.85 Memorandum Opinion, p. 10).

Because the relationship between the State’s re-enfranchisement classification and its asserted goals is, as the district court determined, tenuous, the classification cannot be found to serve a compelling governmental interest. Tennessee’s re-enfranchisement scheme unnecessarily locks out a substantial number of its citizens from the procedures available to regain the fundamental right to vote. Because this restriction cannot survive scrutiny under a strict or rational basis standard, the law facially violates the Fourteenth Amendment’s Equal Protection Clause and cannot stand. Further, it appears that the state’s purported interests are pretextual because if the state were really interested in protecting the ballot box from individuals who failed to pay child support, the prohibition would apply to all individuals, not just those who have felony convictions. As the Court held in Harman v. Forssenius, “[c]onstitutional deprivations may not be justified by some remote administrative benefit to the

state.” 380 U.S. at 542. See also Stewart v. Blackwell, 444 F.3d at 859 (“[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference . . . .”) (quoting Dunn, 405 U.S. at 343).

Moreover, as articulated in Section I.C. above, Burdick requires the district court to determine whether the challenged voter qualification is “reasonable and non-discriminatory.” 504 U.S. at 434. That is a higher level of review than the rational basis test the district court applied. Tennessee’s LFO requirement results in invidious discrimination because it requires payment of a fee as a voter qualification. As the Supreme Court repeatedly has held, the payment of any fee cannot serve as an electoral standard. Harper, 383 U.S. at 668. Tennessee’s LFO requirement is also unreasonable under Harper because Plaintiffs-appellants’ inability to satisfy their LFOs has absolutely no bearing on whether they are rehabilitated and qualified to cast a ballot. Thus, Sections 40-29-202(b) and (c) of the Tennessee Code violate the Equal Protection Clause and must be struck down.

## **II. TENNESSEE’S LFO REQUIREMENT IS EQUIVALENT TO A POLL TAX OR OTHER TAX WHICH THE TWENTY-FOURTH AMENDMENT OUTLAWED AS A QUALIFICATION TO VOTE.**

Plaintiffs-appellants contend that Tenn. Code Ann. §§ 40-29-202(b) and (c) are equivalent to a “poll tax or other tax” banned by the Twenty-Fourth Amendment because they condition the restoration of voting rights on the payment

of LFOs. R.55 Motion to Amend Complaint, ¶¶ 38-40. The district court dismissed this claim on the grounds that no court has “ever applied the Twenty-Fourth Amendment in any context that did not involve an explicit and unambiguous poll tax.” R.85 Memorandum Opinion, p. 12. Unfortunately, the district court misinterpreted the Supreme Court’s rulings in seminal cases such as Harman and Harper.

Section 2 of the Twenty-Fourth Amendment provides that a citizen’s right to vote in federal elections “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.” One of the primary reasons Congress adopted the Twenty-Fourth Amendment was its concern that poll taxes exacted a price for voting and would be used to disfranchise the poor. Harman v. Forssenius, 380 U.S. at 539 (“Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax.”). Congress and the states were insisting that a price not be placed on the right to vote. The House Judiciary Committee concluded that the poll tax was “merely an obstacle to the proper exercise of a citizen’s franchise,” and the Attorney General stated that his main objection to the poll tax was that “it clogs voter registration and limits participation in the processes of government.” H.R. Rep. No. 87-1821, reprinted in 1962 U.S.C.C.A.N. 4033, 4035. In a house floor debate, one of the amendment’s proponents stated that “the payment of

money . . . should never be permitted to reign as a criterion of democracy.” 87 Cong. Rec. H17657 (1962) (statement of Rep. Fascell) (emphasis added). Congress likened the poll tax to property ownership requirements, and concluded that a person’s wealth has no place in determining a person’s right to vote. The Twenty-Fourth Amendment’s primary purpose was to eliminate an unnecessary and unfair obstacle to voting, and to encourage the electorate to be more active in the political process.

Tennessee has provided for the restoration of voting rights to persons convicted of felonies, but has conditioned that restoration upon payment of restitution and/or child support. In doing so, the state is in direct violation of the Twenty-Fourth Amendment. A court is “bound to give to the constitution and the laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions.” Rhode Island v. Massachusetts, 37 U.S. 657, 723 (1838). Accord, Morton v. Mancari, 417 U.S. 535, 551 (1974). The only way to harmonize Section 2 of the Fourteenth Amendment and the subsequently enacted Twenty-Fourth Amendment is to conclude that while the Fourteenth Amendment provides a sanction for disfranchising certain felons, it does not exempt a state from the ban on fees when it provides for restoration of voting rights. To read the two amendments as the

district court did would create disharmony and undercut the very purpose of the Twenty-Fourth Amendment.

It is also irrelevant for Twenty-Fourth Amendment purposes that LFOs are not a traditional tax levied upon each person in the state. In Harman, the Supreme Court struck down under the Twenty-Fourth Amendment Virginia's requirement that a person must either pay a poll tax or file a certificate of residence in order to vote. 380 U.S. at 533. The Court ruled that the requirement that a certificate of residence, which was not itself a tax, be filed was unconstitutional because it "serv[ed] the same function as the poll tax." Id. at 542. See also Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) ("[A]ll fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law.").

Although Tennessee's LFO requirement only affects some felons, the Twenty-Fourth Amendment's prohibition applies even if only a single person must pay any fee in order to vote. See Hill v. Stone, 421 U.S. at 292, 298 (striking down a Texas law that did not give equal weight to ballots cast by voters who failed to render property for taxation, regardless of whether those who rendered property actually paid any tax). See also United States v. Texas, 252 F. Supp. 234, 252 (W.D. Tex. 1966) (invalidating Texas' poll tax system even though only a portion of potential voters were required to pay tax). The Twenty-Fourth Amendment, like

the Fourteenth Amendment, “nullifies sophisticated as well as simple-minded modes’ of impairing the right guaranteed.” Harman, 380 U.S. at 540-41. See also Harper v. Virginia, 383 U.S. at 666 (the “payment of any fee as an electoral standard” violates the Fourteenth Amendment). The payment of LFOs serves the same function as a poll tax and is an impermissible burden on the right to vote in violation of the Twenty-Fourth Amendment.

In Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1366-67 (N.D. Ga. 2005), the court issued a preliminary injunction enjoining the state of Georgia from requiring those voting in person to present government issued photo IDs for which they had to pay. In granting the injunction, the court found that paying for an ID was a “material requirement” in order to vote and, thus, amounted to a poll tax in violation of the Twenty-Fourth Amendment. Id. at 1370. The court also found it irrelevant that a fee waiver option existed for those who were indigent: “the fact that some individuals avoid paying the cost for the Photo ID does not mean that the Photo ID card is not a poll tax.” Id. Common Cause/Georgia further supports plaintiffs-appellants’ contention that the state’s LFO requirement is a poll tax or fee in violation of the Twenty-Fourth Amendment. Although the district court ultimately ruled that the photo identification was valid - but only after the legislature deleted the provision requiring that voters pay for the identification - the court awarded the plaintiffs-appellants attorneys fees based on their success at

the preliminary injunction stage which included their success on the Twenty-Fourth Amendment claim. See Common Cause/Georgia v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007); Common Cause/Georgia v. Billups, 554 F.3d 1340, 1355-56 (11<sup>th</sup> Cir. 2009) (affirming award of attorneys fees for plaintiffs-appellants with respect to grant of preliminary injunction).

Tennessee's LFO requirement serves the same function as a poll tax – its satisfaction is a material requirement to Plaintiffs-appellants getting their voting rights automatically restored. But for the LFO requirement, Plaintiffs-appellants would be eligible to vote. Sections 40-29-202(b) and (c) violate both the spirit and letter of the Twenty-Fourth Amendment because they condition the right to vote on payment of a fee. The fact that payment of restitution is a part of Plaintiff Johnson's sentence is irrelevant. He does not challenge his sentence, including the criminal courts' imposition of restitution.<sup>6</sup> These financial obligations may be imposed and collected by the state, but Tennessee cannot use the denial of the right to vote as a collection method. Although he did not have an opportunity to complete discovery prior to the district court's dismissal of his Twenty-Fourth Amendment claim, Plaintiff Johnson produced documents to Defendants-appellees

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<sup>6</sup> The district court incorrectly stated that Plaintiff Johnson does not consider payment of restitution to be part of his sentence. R.85 Memorandum Opinion, p. 15 n.7. Plaintiffs-appellants further highlight the fact that any child support orders against them have absolutely nothing to do with the underlying felony for which they were disfranchised.

showing that he is financially unable to satisfy the over \$40,000 plus interest that he owes in restitution. Tennessee’s LFO requirement is precisely the “disenfranchisement of the poor” that the Twenty-Fourth Amendment prohibits because it serves as an absolute bar for those who are otherwise eligible to vote but simply cannot afford to pay. The district court erred in dismissing Plaintiffs-appellants’ Twenty-Fourth Amendment claim.

### **III. THE CHALLENGED SCHEME VIOLATES THE FEDERAL AND STATE PRIVILEGES AND IMMUNITIES CLAUSES.**

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” Article XI, Section 8 of the Tennessee Constitution states that the Tennessee Legislature “shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.”

This Court has held that “[i]t is not to be doubted that the people of a state may through a constitutional convention prescribe the qualification of voters and the limitation of the elective franchise, provided of course that the privileges and

immunities of voters guaranteed to them by some provision of the Federal Constitution are not violated.” Pirtle v. Brown, 118 F.2d 218, 219 (6<sup>th</sup> Cir. 1941) (emphasis added). Tennessee courts have interpreted the state’s Privileges and Immunities Clause as ensuring the same protections as the equal protection clause. Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978); Baker v. Vanderbilt Univ., 616 F. Supp. 330, 332-33 (M.D. Tenn. 1985).

When examining a state election law under the Privileges and Immunities Clause, courts should not only look at the face of the statute, but also at whether the law has a disparate impact on a particular group of persons. See Anderson v. Celebrezze, 460 U.S. at 789. Even though Tennessee’s LFO requirement may appear neutral on its face, the law negatively and disproportionately impacts indigent people. The result is that poor people, many of whom were already disadvantaged in areas such as education, employment, and housing, are further locked out of the political process.

Moreover, as Plaintiffs-appellants argued in Section I above, the State’s LFO requirement does not serve a compelling governmental interest. Instead, the law further expands the already wide gulf between the wealthy and the poor when it comes to the exercise of voting rights even among the class of felons and, in many instances, serves to permanently disfranchise indigent people in violation of the state and federal Privileges and Immunities Clause.

Just as disturbing, if not more so, is the state's denial of voting rights to those who owe child support, but also have a felony conviction. Those who owe child support, but have no criminal convictions, continue to enjoy their right to vote even though the conduct – non-payment of child support – is the same. Surely, such an arbitrary and capricious classification cannot stand.

The district court employed the same reasoning in dismissing Plaintiffs-appellants' Privileges and Immunities claim as it did in rejecting Plaintiffs-appellants' Equal Protection claim. R.85 Memorandum Opinion, pp. 18-19. Plaintiffs-appellants reassert, as argued above, that Tennessee's LFO requirement has a disparate impact on them based on their economic status. They remain ineligible to access the state's restoration scheme based on an invalid voter qualification. This practice results in invidious discrimination and violates the Privileges and Immunities clauses of the federal and state constitutions.

**IV. DEFENDANTS-APPELLEES' ENFORCEMENT OF TENNESSEE'S LFO REQUIREMENT AGAINST PLAINTIFFS-APPELLANTS VIOLATES THE STATE EX POST FACTO CLAUSE BECAUSE, AS THE TENNESSEE SUPREME COURT ALREADY HAS RULED, FELON DISFRANCHISEMENT IS A PUNISHMENT AND THE LAW CANNOT BE RETROACTIVELY APPLIED TO PLAINTIFFS-APPELLANTS.**

Tennessee's constitution provides that “[l]aws may be passed excluding from the right of suffrage persons who may be convicted of an infamous crime.” Tenn. Const. art. 4, § 2. The state passed its first felon disfranchisement law in

1871 and, since then, has amended the law several times.<sup>7</sup> Prior to 1981, not all felonies were considered infamous crimes. In 1981, the legislature amended the election code to define all felonies as infamous crimes and attempted to apply the new definition retroactively so that certain felony convictions would result in disfranchisement where they had not before. Gaskin v. Collins, 661 S.W.2d 865, 868 (Tenn. 1983). In Gaskin, the Tennessee Supreme Court ruled that the ex post facto clause of the Tennessee Constitution “prohibits the General Assembly from retroactively disenfranchising convicted felons who have never been adjudged infamous.” Id. at 868.

In 2006, the Tennessee legislature amended the election code to require that people with felony convictions satisfy restitution and be current with any child support payments as a precondition to getting their voting rights restored. However, based on Tennessee state court rulings, the current law allows those convicted of felonies between January 15, 1973 and May 17, 1981 to vote even from jail or prison, thus creating an exception in Tennessee’s felon disfranchisement law to allow people convicted of felonies during that time period to vote. See Gaskin, 661 S.W.2d 865; Crutchfield v. Collins, 607 S.W.2d 478 (Tenn. Ct. App. 1980) (ruling that because the sentencing orders of the three

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<sup>7</sup> See Jeff Manza and Christopher Uggen, Locked Out: Felon Disfranchisement and American Democracy 239 (2006); Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide Appendix B, Tennessee (2006).

plaintiffs-appellants, convicted in 1971, 1978, and 1980, did not declare their crimes to be infamous, they retained the right to vote). Plaintiffs-appellants were convicted of felonies prior to 2006 and, therefore, part of the punishment for their crimes was that they would lose the right to vote until they had completed imprisonment, parole, and probation.

In dismissing Plaintiffs-appellants' ex post fact claim, the district court ruled that Tennessee's LFO requirement is civil, not penal, in nature and therefore does not implicate the state or federal Ex Post Facto clause. R.85 Memorandum Opinion, pp. 17-18. Article 1, Section 11 of the Tennessee Constitution states that "laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no Ex post facto law shall be made." The U.S. Constitution also prohibits the passage of ex post facto laws. U.S. Const. art. 1, § 9. Further, in May v. Carlton, 245 S.W.3d 340, 349 (Tenn. 2008), the Tennessee Supreme Court ruled that "[l]aws disenfranchising convicted felons are penal in nature."

Courts have held that the Ex Post Facto clause "is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." California Dep't of Corr. v. Morales, 514 U.S. 499, 504 (1995) (internal citations omitted); Carmell v. Texas, 529 U.S. 513, 524-25 (2000) ("the words ex

post facto laws were technical expressions, and meant every law . . . which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed . . . .”) (internal citations omitted); State v. Odom, 137 S.W.3d 572 (Tenn. 2007) (same). The Supreme Court has defined the ex post facto clause as prohibiting “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” Collins v. Youngblood, 497 U.S. 37, 42 (1990) (emphasis in original) (quoting Calder v. Bull, 3 Dall. 386, 390 (1798)). “It is settled, by decisions of this Court . . . that any statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto.” Id. (quoting Beazell v. Ohio, 269 U.S. 167, 169-70). As the U.S. and Tennessee Supreme Court have held, a legislature may not retroactively increase the punishment for a criminal act. Id.; Gaskin, 661 S.W.2d at 868.

In determining whether a law violates the ex post fact clause, courts must look for two critical elements: (1) the law must be retroactive, thus applying to acts committed before its passage; and (2) it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 28-31 (1981); Lynce v. Mathis, 519 U.S. 433, 441 (1997). “[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [ex post facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.”

Weaver, 450 U.S. at 30-31. See also United States v. Davis, 397 F.3d 340, 347 (6<sup>th</sup> Cir. 2005) (“A law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’”) (quoting Miller v. Florida, 482 U.S. 423, 430 (1987)). In Weaver, the Court held the “law need not impair a ‘vested right’ to violate the ex post facto prohibition,” but need only impose a punishment more severe than that to which the defendant was subject at the time of his or her conviction. Id. at 29.

When analyzing whether a law is penal in nature, a court must look to the legislature’s intent and, if it is clear that the legislature intended to impose a punishment, the inquiry ends there. Smith v. Doe, 538 U.S. 84, 92 (2003); Kansas v. Hendricks, 521 U.S. 346, 361 (1997). If, however, the legislature’s intent was to impose a civil and non-punitive regulatory scheme, a court must “further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil.” Smith, 538 U.S. at 92 (internal citations omitted). Courts have conducted this review by considering seven factors which the Supreme Court has held are neither exhaustive nor dispositive, but nevertheless may be useful. Id. at 97 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963)). The factors are: “[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will

promote the traditional aims of punishment – retribution and deterrence – whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.” Mendoza-Martinez, 372 U.S. at 168-169.

The district court determined that the Tennessee legislature’s decision to deny voting rights to anyone convicted of a felony until they have satisfied any restitution and/or are current on child support payments is not punitive. Yet, the court also determined that payment of restitution is a part of a person’s criminal sentence. Thus, the court has contradicted itself in attempting to make a false and unsupportable distinction. The district court’s position is further difficult to understand given that it accepted the state’s reasons for enforcing the LFO requirement, which are, as Defendants-appellees articulated, “protecting the ballot box from felons who continue to break the law by not abiding by enforceable court orders;” “protecting the ballot box from people who subvert this policy and neglect their own children;” and “protecting the ballot box from people who refuse to complete the entire sentence for the crime of which they were convicted.” R.59 Memorandum in Support of Motion for Judgment on the Pleadings, pp. 12-13. The fact that Tennessee’s re-enfranchisement statutes are found in the “Criminal

Procedure” section of the Tennessee Code further establishes that Tennessee’s disfranchisement law is an additional criminal penalty for a conviction.

Plaintiffs-appellants also note that, both in historical and contemporary times, felon disfranchisement has been viewed as a punishment for committing a crime and the language in Section 2 clearly illustrates this point. U.S. Const. amend. XIV (prohibiting states from denying citizens voting rights “except for participation in rebellion, or other crime”). The Tennessee Supreme Court already has ruled that the state’s felon disfranchisement law is “penal in nature.” May v. Carlton, 245 S.W.3d at 349. May involved a petitioner who sought habeas corpus relief from a judgment which declared his offense “infamous” even though, at the time of sentencing, the legislature had not declared the crime as infamous. Id. at 342. In granting the habeas corpus petition, the court reasoned that “[b]ecause the right to vote is fundamental to the concept of liberty in [Tennessee], an erroneous label of infamy in a judgment of conviction warrants remedy and should be declared null and void.” Id. at 349.

The district court attempts to distinguish May and Gaskin on the grounds that those cases involved a change in the definition of the petitioners’ crimes thus resulting in them being subject to the state’s felon disfranchisement law. R.85 Memorandum Opinion, p. 18. However, the punishment in both cases is the same – felon disfranchisement for a specified period of time – and just like a court may

not retroactively increase a person's term of imprisonment or probation, neither can a court retroactively increase Plaintiffs-appellants' term of disfranchisement.

Because the Tennessee Supreme Court's decisions in May and Gaskin do not conflict with federal law, the district court was bound to except the state court's interpretation of state law which deems Tennessee's felon disfranchisement law as penal, not civil, in nature. See Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law and [ ] we are bound by their constructions except in extreme circumstances") (internal quotations and citations omitted); Ring v. Arizona, 536 U.S. 584, 603 (2002) (recognizing the Arizona Supreme Court's construction of Arizona sentencing law as authoritative); Alabama v. Shelton, 535 U.S. 654, 674 (2002) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State.") (internal quotations and citations omitted). Cf. Dyer III v. Bowlen, 465 F.3d 280, 284 (6<sup>th</sup> Cir. 2006) ("A state court decision is considered contrary to federal law 'if the state court arrives at a conclusion opposite to that reached by the [Supreme] Court on a question of law or if the state court decides a case differently than the [Supreme] Court has on a set of materially indistinguishable facts.'") (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). Thus, the district court erred in not applying the rulings in May and Gaskin to Plaintiffs-appellants' ex post facto claims.

Sections 40-29-202(b) and (c) of the Tennessee Code were enacted in 2006. Prior to 2006, Tennessee's re-enfranchisement law did not require a person to pay all of their restitution or be current on child support payments. Under the old law, Plaintiffs-appellants, who were all convicted before 2006, would have been eligible to get their voting rights restored. The application of Sections 40-29-202(b) and (c) to Plaintiffs-appellants is retroactive and the laws increase the penalties that Plaintiffs-appellants faced when they were convicted. Tennessee's LFO requirement, as it applies to Plaintiffs-appellants, clearly violates the state ex post facto clause and this Court is bound by the state supreme court's interpretation of state law and the Tennessee legislature's intent in enacting the felon disfranchisement and re-enfranchisement laws.

### **CONCLUSION**

The district court erred in dismissing Plaintiffs-appellants' claims under the Equal Protection Clause, the Twenty-Fourth Amendment, the Privileges and Immunities Clause, and the Ex Post Facto Clause. Plaintiffs-appellants respectfully request that this Court reverse the district court's dismissal of Plaintiffs-appellants' claims, order that Plaintiffs-appellants be allowed to vote, and remand the case for further proceedings in accordance with this Court's order.

/s/Nancy Abudu

## **CERTIFICATE OF COMPLIANCE**

Pursuant to 6th Cir. R. 32(a), the undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 10,771 words. The brief was prepared in Microsoft Word 2002 using a Times New Roman 14-point font.

/s/Nancy Abudu

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 30, 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/Nancy Abudu

**Addendum**  
**Designation of Relevant District Court Documents**

Record Entry	Description
1	Complaint or Indictment
-	Report and Recommendation of Magistrate (if applicable)
91	Memorandum Opinion (from which appeal taken)
93	Judgment (from which appeal taken)
94	Notice of Appeal
18	Defendant Barrett's Motion to Dismiss
19	Response in Opposition to Defendant Barrett's Motion to Dismiss
30	Reply in Support of Defendant Barrett's Motion to Dismiss
31	Defendant Johnson's Motion to Dismiss
32	Brief in Support of Defendant Johnson's Motion to Dismiss
33	Response in Opposition to Defendant Buckley's Motion to Dismiss
34	Response in Opposition to Defendant Johnson's Motion to Dismiss
44	Memorandum Opinion
45	Order on Motions to Dismiss
47	Defendant Buckley's Answer
48	Defendant Barrett's Answer
50	Defendant Johnson's Answer
56	Order Granting Motion for Leave to Amend Complaint
57	Amended Complaint
58	State Defendants' Motion for Judgment on the Pleadings
59	Memorandum in Support of State Defendants' Motion for Judgment on the Pleadings
61	Defendant Barrett's Answer to Amended Complaint

62	Defendant Buckley's Answer to Amended Complaint
63	Defendant Johnson's Answer to Amended Complaint
67	Response in Opposition to State Defendants' Motion for Judgment on the Pleadings
68	Plaintiffs' Motion for Judgment on the Pleadings
69	Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings
70	Reply in Support of State Defendants' Motion for Judgment on the Pleadings
71	Response in Opposition to Plaintiffs' Motion for Judgment on the Pleadings
72	Reply in Support of Plaintiffs' Motion for Judgment on the Pleadings
75	Defendant Buckley's Response in Opposition to Plaintiffs' Motion for Judgment on the Pleadings
82	Reply to Defendant Johnson's Response to Plaintiffs' Motion for Judgment on the Pleadings
83	Reply to Defendant Buckley's Response to Plaintiffs' Motion for Judgment on the Pleadings
85	Memorandum Opinion
86	Order
87	Order Terminating Joshua Roberts as Plaintiff