

No. \_\_\_\_\_

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IN THE OFFICE OF THE CLERK  
**Supreme Court of the United States**

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,

*Petitioners,*

—v.—

BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Coordinator of Elections; TRE HARGETT, Secretary of State of Tennessee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; ALBERT U. TIECHE, Administrator of Elections for Davidson County, in their official capacities,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether a state may condition the restoration of voting rights to people with felony convictions: (a) on the payment of restitution and child support regardless of the person's financial ability to satisfy those debts; and (b) on the payment of child support when such payment is unrelated to the person's underlying conviction and sentence?

2. Whether the Twenty-Fourth Amendment, which prohibits states from denying the right to vote based on failure to pay a "poll tax or other tax," applies to state laws that set the payment of restitution and child support as a voter qualification when the state monetarily benefits from the collection of such payments?

3. Whether the Sixth Circuit exceeded its judicial authority in ruling that the Tennessee Constitution's Ex Post Facto Clause is not violated by the retroactive application of Tennessee laws that expand a convicted person's disenfranchisement period, notwithstanding the Tennessee Supreme Court's ruling in *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), holding that the state's felon disenfranchisement law is penal in nature and cannot be retroactively applied?

## **PARTIES TO THE PROCEEDING**

All of the respondents have been named in their official capacities. Pursuant to Rule 25(d), Fed. R. Civ. P., the following parties have been automatically substituted for their predecessors in office: Bill Haslam has been substituted for Phil Bredesen as Governor of Tennessee; Mark Goins has been substituted for Brook Thompson as Coordinator of Elections; Tre Hargett has been substituted for Riley Darnell as Secretary of State of Tennessee; and Albert U. Tieche has been substituted for Ray Barrett as Administrator of Elections for Davidson County.

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## **OPINIONS BELOW**

The opinion of the court of appeals is reported at 624 F.3d 742 (6th Cir. 2010). Pet. App. 1a-88a. The order denying rehearing and rehearing en banc is also reported at 624 F.3d 742. Pet. App. 89a-90a. The opinion of the Middle District of Tennessee is reported at 579 F. Supp.2d 1044 (M.D. Tenn. 2008). Pet. App. 91a-126a.

## **JURISDICTION**

The court of appeals entered its judgment on October 28, 2010. The court denied a petition for rehearing and rehearing en banc on December 17, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Section 1 of the Fourteenth Amendment provides in relevant part:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 2 of the Fourteenth Amendment provides in relevant part:

[W]hen 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 of male citizens twenty-one years of age in such State.

The Twenty-Fourth Amendment states in relevant part:

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 Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Article 1, Section 11 of the Tennessee Constitution provides in relevant part:

[L]aws 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.

Tenn. Code Ann. § 40-29-202 provides:

(a) A person rendered infamous and deprived of the right of suffrage by the judgment of any state or federal court is eligible to apply for a voter registration card and have the right of suffrage restored upon: (1) Receiving a pardon, except where such pardon contains special conditions pertaining to the right of suffrage; (2) The discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for any such infamous crime; or (3) Being granted a certificate of final discharge from supervision by the board of probation and parole pursuant to § 40-28-105, or any

equivalent discharge by another state, the federal government, or county correction authority.

(b) Notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person:

(1) Has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence; and

(2) Beginning September 1, 2010, notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all court costs assessed against the person at the conclusion of the person's trial, except where the court has made a finding at an evidentiary hearing that the applicant is indigent at the time of application.

(c) Notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

## **STATEMENT OF THE CASE**

### *a. Statutory Framework*

Tennessee law denies voting rights to people convicted of an infamous crime.<sup>1</sup> Tenn. Const. art.

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

IV, § 2; Tenn. Code Ann. §§ 40-20-112, 40-29-201-205. Tennessee also provides for restoration of the right to vote provided the following conditions are met: (a) the person is not serving a term of imprisonment, parole, or probation; (b) all restitution associated with the criminal sentence has been paid; (c) all court costs have been paid unless the person is found to be indigent; and (d) the person is current on any court-ordered child support payments. Tenn. Code Ann. § 40-29-202. The requirements that restitution and child support be paid in full were first enacted in 2006 and apply retroactively. The child support obligation must be satisfied even if the child support payment is unrelated to the underlying conviction for which the person was disenfranchised. Moreover, there is no indigency exception in the statute for child support or restitution; the indigency exception applies only to court costs.

If the above-mentioned conditions are met, a person may initiate the process of getting his or her voting rights restored by submitting a Certificate of Restoration form to the county election commission office in his or her county of residence. 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. *See State Defendants' Response to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents, C.A. App. 25.*<sup>2</sup>

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<sup>2</sup> "C.A. App." refers to the appendix that was filed in the court of appeals.



b. *Factual Background*

Petitioner Terrence Johnson is a citizen of the United States and a resident of Shelby County, Tennessee. He was convicted of federal wire fraud in 1999 and was ordered to pay over \$40,000 in restitution plus any accrued interest. He has completed his term of imprisonment. The term of supervised release that followed his imprisonment ended when the federal judge presiding over Johnson's criminal case found that Johnson was "unable to satisfy the restitution as ordered by [t]he Court," and that "[b]ased upon his finances and necessary living expenses, it appears that he has paid to the best of his ability." C.A. App. 10. The restitution order, however, otherwise remains in effect and bars Johnson from regaining his right to vote. As the court made clear at the time it ended Johnson's supervised release, "the victim's right to recovery remains in effect and enforceable and can be achieved, if necessary, through civil litigation." *Ibid.* Johnson also has overdue child support payments.

Petitioner Jim Harris is a citizen of the United States and a resident of Madison County, Tennessee. He was convicted of drug offenses in 1995, attempted burglary and a felony drug offense in 1996, and a felony drug offense in 2001. At the time this litigation began, he had completed his terms of imprisonment, parole, and probation for all of those offenses, but still owed about \$2,500 in overdue child support payments.<sup>3</sup>

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<sup>3</sup> Petitioner Harris since has satisfied all of his outstanding child support payments, but still has standing to remain in this suit because the amended complaint sought nominal monetary damages for the past denial of his right to register and vote

Petitioner Joshua Roberts is a citizen of the United States and a resident of Davidson County, Tennessee. He was convicted of forgery, evading arrest and tampering with evidence in the State of Missouri between 1999 and 2001. After completing his term of imprisonment, parole, and probation for these offenses, Roberts applied for restoration of his voting rights in April 2008. The State denied his application on the ground that he owed over \$7,000 in outstanding child support.<sup>4</sup>

All of the petitioners would have been eligible for automatic restoration of their voting rights but for Tennessee's requirement that they satisfy their restitution and/or child support obligations, regardless of their ability to pay. They also would have been eligible to vote but for the state's retroactive application of the restitution and child support requirements.

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based on his outstanding child support payments. *See Lynch v. Leis*, 382 F.3d 642, 646 n.2 (6th Cir. 2004) ("We 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.").

<sup>4</sup> This lawsuit also named Alexander Friedmann as a plaintiff. Friedmann was convicted of two felonies in 1989 and completed his term of imprisonment, parole, and probation for those offenses. 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. In addition to challenging the constitutionality of that statutory requirement, Friedmann asserted a due process claim related to his difficulties in confirming the amount he owed in restitution and in getting an authorized governmental official to sign his Certificate of Restoration form. The parties settled Mr. Friedmann's due process claim and he was voluntarily dismissed from the case.

*c. Proceedings Below*

On February 25, 2008, the petitioners filed a lawsuit seeking to invalidate Tenn. Code Ann. §§ 40-29-202(b) and (c), which condition the restoration of voting rights for people convicted of infamous crimes on the payment of restitution and child support, respectively. They challenged these requirements as unconstitutional voter qualifications 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. Based on the Tennessee Supreme Court's ruling that the state's disenfranchisement laws are penal in nature, *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), the petitioners further asserted that Tennessee's restitution and child support requirements were unconstitutional as applied because they violated Tennessee's state constitutional guarantee against ex post facto laws. Petitioners requested declaratory and injunctive relief, as well as nominal damages.

On August 1, 2008, the state defendants filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings as to all of the petitioners' claims. The petitioners filed a cross-motion under Fed. R. Civ. P. 12(c) or, in the alternative, a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a). The district court held a hearing on the parties' respective motions on September 3, 2008, and, on September 22, 2008, granted the defendants' Rule 12(c) motion.

A divided panel of the court of appeals affirmed. First, the court applied a rational basis test to the petitioners' equal protection claim and

held that “Tennessee possesses valid interests in promoting payment of child support, requiring criminals to fulfill their sentences, and encouraging compliance with court orders.” Pet. App. 9a-10a. The court rejected the petitioners’ argument that the restitution and child support requirements denied voting rights even to those unable to pay, reasoning that “[t]he legislature may have been concerned, for instance, that a specific exemption for indigent felons would provide an incentive to conceal assets and would result in the state being unable to compel payments from some non-indigent felons.” Pet. App. 11a.

The court of appeals also rejected the petitioners’ Twenty-Fourth Amendment claim on the ground that the restitution and child support payments at issue are not a “poll tax or other tax” prohibited by the Twenty-Fourth Amendment. Pet. App. 19a. Finally, the court rejected petitioners’ ex post facto claim based on its determination that the challenged laws serve “legitimate non-punitive interests,” were not enacted with a punitive purpose, and are not excessive. Pet.App. 23a. In reaching this conclusion, the majority held that the Tennessee Supreme Court’s ruling in *May v. Carlton* was not binding because its ruling that the state’s disenfranchisement law is penal in nature was “pure dicta.” Pet. App. 25a.<sup>5</sup>

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<sup>5</sup> In addition, the majority rejected the petitioners’ claims under the Privileges and Immunities Clauses of the U.S. Constitution and Tennessee Constitution, reasoning that those provisions do not apply to voting rights. Pet. App. 20a. Petitioners do not seek review of that ruling in this Court.

Judge Moore dissented from each of the majority's holdings. Although agreeing that the rational basis test applied to the petitioners' equal protection claim, she concluded that "the absence of any policy justification for the distinction in the instant case, as well as [U.S.] Supreme Court precedent addressing the propriety of provisions that discriminate on the basis of wealth, compel the conclusion that . . . Tennessee has no rational basis for denying voting rights to only those felons with outstanding financial obligations, despite their inability to pay." Pet. App. 29a-30a. In contrast to the majority, she determined that at least some portions of the restitution and child support payments met the definition of a "poll tax or other tax" under the Twenty-Fourth Amendment because the state uses part of those funds as state levies to support government programs. Pet. App. 63a-64a. Judge Moore also characterized the majority's interpretation of the Tennessee Supreme Court's ruling in *May v. Carlton* as "unduly restrictive," explaining that "[a]s compared to the pre-2006 version of the law, the challenged provisions make it more difficult to have the right of suffrage restored." Pet. App. 82a. "In concluding otherwise," she wrote, "the majority fails to acknowledge that § 40-29-202(b) and (c) prolong the period of clearly penal disenfranchisement." Pet. App. 82a-83a.

## **REASONS FOR GRANTING THE PETITION**

Forty-five years ago, this Court held in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966), that the Equal Protection Clause prohibits a state from conditioning the right to vote on the wealth of the voter or the payment of a fee. The

Twenty-Fourth Amendment embodies a similar principle in its prohibition of poll taxes. Underlying both the Twenty-Fourth Amendment and this Court's decision in *Harper* is the understanding, fundamental to our American democracy, 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.

Tennessee's re-enfranchisement scheme is irreconcilable with this constitutional vision. Having chosen to provide a means for convicted felons to regain the right to vote, Tennessee has conditioned that right on the repayment of any outstanding restitution, court costs, and child support payments. This statutory impediment to the restoration of voting rights violates equal protection for three separate reasons. First, as this Court recognized in *Harper*, the imposition of any fee on the right to vote "dilute[s]" the right for those with limited means. 383 U.S. at 668. Second, that discrimination is heightened when, as here, the state fails to provide an exception for those who are unable to pay. Third, Tennessee has compounded the constitutional problem by demanding the repayment of delinquent child support payments that are unrelated to the underlying conviction and, thus, unrelated to the initial justification for stripping individuals, like petitioners, of the right to vote in the first place.

Tennessee's re-enfranchisement scheme also violates the Twenty-Fourth Amendment because a portion of the outstanding debts that must be satisfied before the right to vote can be restored goes to the state. To that extent, Tennessee's law is properly understood as a more "sophisticated" way of

collecting a “poll tax or other tax” forbidden by the Twenty-Fourth Amendment. See *Harman v. Forssenius*, 380 U.S. 528, 540 (1965).

Furthermore, the court of appeals improperly disregarded the Tennessee Supreme Court’s own interpretation of state law when it ruled that retroactive application of the challenged provisions does not violate the state constitution’s prohibition on ex post facto laws. While the court of appeals clearly disagreed with the Tennessee Supreme Court’s conclusion that the state’s disenfranchisement law is penal in nature, the state’s interpretation of its own ex post facto clause is authoritative and should have been followed by the court below.

Finally, these legal errors raise issues of national importance. More than 94,000 people in Tennessee are disenfranchised. Although Tennessee is currently the only state to condition re-enfranchisement on child support, over thirty states require convicted felons to pay restitution or court costs before regaining the right to vote. Given the prevalence of such laws, this Court can and should clearly hold that the right to vote cannot be premised on the ability to pay, even for people with criminal convictions.

**I. THE COURT OF APPEALS’ DECISION  
CONFLICTS WITH DECISIONS OF THIS  
COURT STRIKING DOWN LAWS THAT  
DENY THE RIGHT TO VOTE BASED ON  
A PERSON’S ECONOMIC STATUS.**

The court of appeals ruled that a state may refuse to restore voting rights to a convicted person

based solely on their failure to pay restitution or child support even when the requirement discriminates against people based on their wealth. Pet. App. 8a-11a. The court's holding conflicts with this Court's decision in *Harper*. If permitted to stand, the court's ruling would allow states to deny voting rights to people who otherwise are qualified to vote but who lack the financial resources to satisfy their restitution and child support obligations. The opinion below merits this Court's consideration because Tennessee's requirement that a person pay their financial debts as a condition to vote does not pass constitutional muster under any level of scrutiny.<sup>6</sup>

**A. The Equal Protection Clause Bars States From Denying The Right To Vote Based On Indigency.**

In *Harper* this Court held that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” Tennessee’s re-enfranchisement scheme is antithetical to that holding. The impact of Tennessee’s scheme is obviously most severe on those who are unable to pay the debts that Tennessee has made a condition of voting. However, this Court’s equal protection jurisprudence has not been limited to those who lose the right to vote because they

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<sup>6</sup> The petitioners consistently have argued below that their equal protection claim is entitled to a heightened level of scrutiny in accordance with the balancing test laid out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), but that even the lowest level of review requires the defendants to show that the law is nondiscriminatory and reasonable.



cannot pay a state-imposed fee. As this Court explained in *Harper*:

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

*Id.* at 668.

Respondents have argued throughout this litigation that the holding in *Harper* is irrelevant here because petitioners lost their constitutionally-protected right to vote when they were convicted of a felony. This case, however, is not about the constitutionality of Tennessee's disenfranchisement law; rather, it is about the constitutionality of Tennessee's re-enfranchisement law. Once a state adopts a process for determining who is qualified to vote, as Tennessee has done, "to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Harper*, 383 U.S. at 668. Like other voter disqualifications that this Court has struck down, Tennessee's law uses irrelevant criteria to impermissibly deny one group of voters the right to participate in elections "on an equal basis with other qualified voters." *Lubin v. Parish*, 415 U.S. 709, 713 (1974) (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)). See also *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.”).

The court of appeals held that Tennessee has a legitimate interest in conditioning the right to vote on payment of restitution and child support. Pet. App. 10a. However, even under rational basis, this Court has rejected purported state interests that condition the right to vote on a person’s economic status. See *Quinn v. Millsap*, 491 U.S. 95 (1989) (law requiring members of a government board to own real property was not rationally related to any legitimate state interest and violated equal protection); *Turner v. Fouche*, 396 U.S. 346, 362-364 (1970) (law requiring members of local school board to own real property bore no rational relationship to any legitimate government interest); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (Arizona law which excluded non-property owners from voting in elections involving the disbursement of general obligation bonds violated the Equal Protection Clause).<sup>7</sup>

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<sup>7</sup> See also *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (denial of voting rights to non-property owners in elections on revenue bonds violates equal protection clause); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (a State cannot restrict the vote in school district elections to owners and lessees of real property). Circuit courts have applied the rulings in these cases when striking down laws that impose unnecessary and burdensome financial requirements in the voting rights context. See *Lindstedt v. Mo. Libertarian Party*, 160 F.3d 1197, 1198 (8th Cir. 1998) (upholding Missouri ballot access law that allowed indigent candidates to seek a waiver of filing fees); *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (striking down Florida election law that denied minor party candidates option to seek a waiver of signature verification fee, finding that law violated First and Fourteenth Amendments by

In *Harper*, the state charged a fee for voting. In this case, the state requires convicted felons to discharge certain debts before regaining their vote. The latter, like the former, puts a price on the right to vote. Both are unconstitutional under this Court's equal protection jurisprudence.

**B. Tennessee's Re-enfranchisement Law Violates The Equal Protection Clause By Failing To Include An Indigency Exception.**

Even if it might be permissible for the state to condition the right to vote on the repayment of debts in certain circumstances, it is unconstitutional for the state to enforce that exclusion against individuals unable to pay.

That principle, moreover, does not depend on whether regaining one's vote after a felony conviction is described as a right or a privilege. For example, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court recognized that states were not constitutionally compelled to provide criminal defendants with appellate review. Yet, the Court explained, that premise does not lead to the conclusion that "a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18. The Court further added, "[p]lainly the ability to pay [court] costs in advance bears no rational relationship to a defendant's guilt or innocence and

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conditioning ballot access on payment of a fee in spite of the undue financial burden imposed on candidates).

could not be used as an excuse to deprive a defendant of a fair trial.” *Id.* at 17-18. In the words of Judge Moore below, “[t]he analogy to the instant case is striking.” Pet.App. 39a.

Similarly, in *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967), this Court recognized 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 Williams v. Illinois*, 399 U.S. 235, 241 (1970) (invalidating a law which allowed the state to imprison a convicted person who failed to satisfy the financial obligations associated with his sentence, reaffirming its “allegiance to the basic command that justice be applied equally to all persons”); *Douglas v. California*, 372 U.S. 353 (1963) (denial of appellate counsel to indigent defendants violated the Equal Protection Clause).

This Court again reaffirmed these principles in *Bearden v. Georgia*, 461 U.S. 660 (1983). In *Bearden*, 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. “To 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 672-673. *See also M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (state could not dismiss appeal of parent challenging revocation of parental rights solely because parent lacked financial means to pay record preparation fees).

In light of *Bearden*, appellate courts routinely have required lower courts, at a bare minimum, to develop the record sufficiently to establish whether or not a person affected by a monetary obligation lacks the means to satisfy that obligation. See *Legair v. Circuit City Stores, Inc.*, 213 Fed. Appx. 436, 440 (6th Cir. 2007) (“A district court that fails to inquire into the sanctioned party's ability to pay abuses its discretion.”); *Dell Inc. v. Compudirect, Inc.*, 316 Fed. Appx. 32, 34 (2d Cir. 2009) (“[A] party's complete inability, due to poverty or insolvency, to comply with an order to pay court-imposed monetary sanctions is a defense to a charge of civil contempt.”) (citing *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995)); *Wadkins v. Estep*, 194 Fed. Appx. 502, 504 (10th Cir. 2006) (“A prisoner seeking leave from this Court to proceed [in forma pauperis] must show ‘a financial inability to pay the required fees . . . .’”) (citing *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 812 (10th Cir. 1997)); *In re Mendoza*, 182 Fed. Appx. 661, 664 (9th Cir. 2006) (remanding case for determination as to whether student had made good faith effort to repay student loans).<sup>8</sup>

The Tennessee Legislature amended Tenn. Code Ann. § 40-29-202 in 2010 to require that

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<sup>8</sup> Even in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), which upheld Arizona's re-enfranchisement scheme that requires full payment of restitution and court fines, the court expressly narrowed its ruling to addressing the facial challenge the plaintiffs raised and did not consider the constitutionality of the law as applied to indigent persons. *Harvey*, 605 F.3d at 1079 (“[W]e explicitly do not address challenges based on an individual's indigent status.”).

applicants seeking restoration of their voting rights first pay all court costs associated with their sentence, in addition to restitution and child support obligations. The amended law also allows a waiver of the requirement that court costs be paid if the applicant can show he or she is indigent at the time of submitting the application. This exception, however, does not exist with respect to the restitution and child support provisions in the law.

As Judge Moore stated in her dissenting opinion, “when Tennessee decided to authorize re-enfranchisement, the state was prohibited from setting conditions on that re-enfranchisement that discriminate against those otherwise-eligible individuals solely on the basis of their ability to pay a particular sum.” Pet. App. 39a-40a. The court of appeals’ decision upholding the law as applied to indigents is in direct conflict with this Court’s jurisprudence.

**C. Tennessee’s Re-enfranchisement Law Also Violates The Equal Protection Clause By Denying Otherwise Eligible Individuals The Right To Vote Based On Unpaid Child Support Payments Unrelated To Their Underlying Conviction And Sentence.**

In upholding the child support requirement for restoration of voting rights, the court of appeals held “the statutory re-enfranchisement conditions need only further a legitimate government interest – not a legitimate government interest specifically tied to the state’s authority for the initial

disenfranchisement.” Pet. App. 17a. Thus, the court ruled that states may condition the restoration of voting rights on satisfaction of monetary obligations unrelated to a person’s underlying conviction and sentence.

That ruling goes beyond anything this Court has held and, specifically, finds no support in *Richardson v. Ramirez*, 418 U.S. 24 (1974). *Richardson*’s holding that “the exclusion of felons from the vote has an affirmative sanction in [§] 2 of the Fourteenth Amendment,” 418 U.S. at 54, did not involve a re-enfranchisement law. More to the point, the decision in *Richardson* rested on a state’s ability to deny voting rights to those convicted of a crime, not to those involved in civil suits. Here, none of the petitioners was convicted of a crime involving the failure to pay child support.

In *Hill v. Stone*, 421 U.S. 289, 299 (1975), this Court reasoned that “the use of the franchise to compel compliance with other, independent state objectives is questionable in any context.” 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 explained in *City of Cleburne v. Cleburne Living Center*, 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.” If the failure or inability to pay child support did not serve

as a basis to disenfranchise the petitioners, it cannot serve as a basis to continue their disenfranchisement after they have completed their criminal sentences.

This Court has viewed such efforts skeptically in other contexts, as well. For example, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court held that a Wisconsin statute that denied the fundamental right to marry to individuals who had outstanding child support obligations violated the equal protection clause. Of particular relevance here, the Court ruled that Wisconsin's law could not be justified merely because it might, in some instances, provide an incentive for individuals to make support payments. 434 U.S. at 389. Furthermore, this Court has ruled that, if there are alternative means available to achieve the state's interests without burdening the ability to vote, the State must choose those "less drastic means." *Dunn*, 405 U.S. at 343 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). Given the other means available for collecting child support, Tennessee's requirement is unreasonable and unnecessary. See Tenn. Code Ann. § 36-5-901 (permitting the execution of a lien on a person's real or personal property for failure to pay child support); Tenn. Code Ann. §§ 36-5-1102-1106 (allowing the garnishment of a person's wages to collect child support).

For people with felony convictions who do not owe court fines or restitution associated with their sentence but owe outstanding child support as a result of a civil order, their outstanding child support payments serve as the only barrier to getting their voting rights restored. Based on the court of appeals' decision, a state could impose any financial debt – a



credit card bill, a car note, a mortgage payment—as a barrier to the restoration of voting rights. If the decision below is allowed to stand, states could expand their disenfranchisement laws to cover non-criminal behavior. This Court’s decisions do not allow that result.

## II. THE DECISION BELOW REGARDING THE MEANING AND SCOPE OF THE TWENTY-FOURTH AMENDMENT CONFLICTS WITH THIS COURT’S DECISION IN *HARMAN V. FORSSENIUS*.

The court of appeals rejected the petitioners’ Twenty-Fourth Amendment claim on the ground that “[t]he re-enfranchisement law does not condition the right to vote on payment of restitution or child support, but instead conditions the restoration of a felon’s right to vote on such payments – a state regulatory arrangement the Twenty-Fourth Amendment says nothing about.” Pet. App. 18a.<sup>9</sup> The court’s decision was incorrect in light of this Court’s decision in *Harman*.

*Harman* is the only case in which this Court has reviewed the constitutionality of a state election

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<sup>9</sup> The court of appeals relied, in part, on the Ninth Circuit’s decision in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), in which that court rejected a similar Twenty-Fourth Amendment challenge to Arizona’s re-enfranchisement scheme that conditions the restoration of voting rights on the payment of court fines and restitution, and the Fourth Circuit’s decision in *Howard v. Gilmore*, No. 99-2285, 205 F.3d 1333, 2000 WL 203984 (4th Cir. 2000), which upheld a state law under the Twenty-Fourth Amendment that required applicants seeking restoration of their voting rights to pay a \$10 application fee.

law under the Twenty-Fourth Amendment.<sup>10</sup> This Court held in *Harman* that a Virginia law which imposed, as a precondition to vote, either the payment of a poll tax or the filing of a certificate of residence violated the Twenty-Fourth Amendment. 380 U.S. at 533.<sup>11</sup> Given the legislative history behind the Twenty-Fourth Amendment, the *Harman* Court concluded that Congress had a “general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax,” and that Congress was concerned that states were “exact[ing] a price for the privilege of exercising the franchise.” *Id.* at 539. The amendment’s primary purpose was to eliminate wealth as a factor in voting and to encourage the electorate to be more active in the political process. *Id.* at 539. Congress likened the poll tax to property ownership requirements and concluded that a person’s economic status is an invalid voter qualification. *See* 87 Cong. Rec. 17657 (1962) (in a senate floor debate, one of the amendment’s proponents stated “the payment of money . . . should never be permitted to reign as a criterion of democracy.”).

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<sup>10</sup> In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), the plaintiffs raised a claim under the poll tax provision of the Voting Rights Act (42 U.S.C. § 1973h), the language of which mirrors the Twenty-Fourth Amendment. The district court dismissed the claim on the ground that no private right of action existed under the provision. 517 U.S. at 234. This Court reversed the lower court’s ruling and remanded the case for further proceedings without reaching the merits of the plaintiffs’ poll tax claim. *Id.* at 234-235.

<sup>11</sup> The Court found that the alternative of filing a certificate of residence did not redeem the otherwise unconstitutional poll tax. *Id.* at 540-42.

Not only is the court of appeals' decision inconsistent with the holding in *Harman*, the court's ruling undermines Congress' clear intent behind enacting the Twenty-Fourth Amendment. As Judge Moore noted in her dissent, the state's requirement operates in the same manner as a poll tax because failure to pay the debt results in the continued denial of voting rights. Pet. App. 76a. ("[A]lthough the payments here may be reasonably justified outside the election context, they are completely without a function in the State's administration of federal elections.").

The majority below disputed the characterization of the challenged statutes as a tax. However, this Court has taken a more expansive view, defining the word "tax" as "an enforced contribution to provide for the support of government." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citing *United States v. La Franca*, 282 U.S. 568, 572 (1931)). Under Tennessee law, at least some portion of the restitution and child support payments directly benefit the state by financing the administration of government functions and programs. With respect to child support, county clerks may charge five percent of the sum for all payments they receive for the handling and disbursement of such payments. Tenn. Code Ann. § 8-21-403(a). As for restitution, courts often include a restitution order in a criminal sentence even when there is no victim. In the federal system, for example, defendants pay sixty-five percent of the total restitution order to state agencies that administer crime victim assistance programs, and thirty-five percent of the money goes to a state entity

responsible for overseeing substance abuse programs. 18 U.S.C. § 3663(c). At least in some instances, therefore, the state enjoys a direct pecuniary benefit from collecting restitution and child support. Pet. App. 68a. (“[A]t the most fundamental level, § 40-29-202(b) and (c) operate in the same manner as the indisputably forbidden ‘poll tax’ – they both require an individual who desires to vote to pay a monetized sum as an absolute condition to casting a ballot in a federal election.”).<sup>12</sup>

In practice, Tennessee’s requirement that people pay all restitution and be current on child support payments is precisely the “disenfranchisement of the poor” that Congress sought to eliminate and the type of “other tax” Congress abolished with passage of the Twenty-Fourth Amendment. *Harman*, 380 U.S. at 539. The requirement is an absolute bar for those who are otherwise eligible to vote but cannot afford to satisfy their debts. Because the Twenty-Fourth Amendment prohibits a state’s camouflaged attempts to condition the right to vote on the payment of any fee, *Harman*, 380 U.S. at 540-41, the decision below merits this Court’s consideration.

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<sup>12</sup> The Sixth Circuit, in *Wright v. McClain*, 835 F.2d 143, 144-145 (6th Cir. 1987), ruled that payments by parolees into a supervision fund and victim’s compensation fund constituted “taxes” because “[t]he purposes of the charges are to defray the cost to the general public of monitoring and supervising the behavior of convicted offenders and to compensate, in some measure, victims of criminal misconduct.” The court defined a “tax” as an assessment designed for the purpose of raising revenue for the state. 835 F.2d at 145.

**III. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT CONFLICTS WITH DECISIONS OF THE TENNESSEE SUPREME COURT PROHIBITING LAWS THAT RETROACTIVELY EXPAND A CONVICTED PERSON'S PERIOD OF DISENFRANCHISEMENT.**

In addition to rejecting petitioners' federal constitutional claims, the court of appeals also concluded that Tennessee's requirement that restitution and child support be paid as a condition to restoring a convicted person's right to vote is non-punitive in its purpose and application and, therefore, does not violate the state's *ex post facto* clause. Pet. App. 24a. The Tennessee Supreme Court, conversely, has held that disenfranchisement laws are "penal in nature." *May v. Carlton*, 245 S.W.3d at 349. In the petitioners' case, the retroactive application of Tennessee's restitution and child support requirements increases their punishment by extending their period of disenfranchisement. Based on the Tennessee Supreme Court's own interpretation of the state's *ex post facto* clause, the court of appeals' decision was erroneous.<sup>13</sup>

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<sup>13</sup> Tennessee courts have described the state's *ex post facto* clause as providing greater protection than its federal counterpart. See *State v. Gibson*, No. E2003-02102-R3-CD, 2004 WL 2827000, at \*3 n.6 (Tenn. Crim. App. Dec. 9, 2004) ("the Tennessee Constitution's Ex Post Facto Clause is more expansive than the one in Article I, Section 10 of the United States Constitution"); *Decker v. Carroll Academy*, No. 02A01-9709-CV-00242, 1999 WL 332705, at \*12 (Tenn. Ct. App. May 26, 1999) (same).

In *May v. Carlton*, the Tennessee Supreme Court ruled that “laws disenfranchising convicted felons are penal in nature.” 245 S.W.3d at 349. Prior to *May*, the Tennessee Supreme Court already had ruled that the state’s ex post facto clause prohibits the General Assembly from retroactively disenfranchising people with felony convictions who remained eligible to vote at the time of their sentencing. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983).<sup>14</sup> Judge Moore in her dissent concluded that, “the Tennessee Supreme Court, in light of *May*, would view any law that works to restrict further a felon’s right to vote by, for example, conditioning that right on the payment of money, as equally punitive.” Pet. App. 82a.

The court of appeals, however, ruled that the Tennessee Supreme Court’s finding that disenfranchisement laws are penal in nature was “pure dicta” and, therefore, not binding. Pet. App. 25a. The majority purported to justify this ruling by stating that *Gaskin* “provides no support for *May*’s observation that ‘[l]aws disenfranchising convicted felons are penal in nature,’” and that “the ‘penal in nature’ statement [is not] supported by other law or logic in the opinion.” Pet. App. 25a. As a result, the court of appeals disregarded the Tennessee Supreme Court’s unambiguous decisions in *May* and *Gaskin*,

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<sup>14</sup> The petitioners requested that the panel take judicial notice of election training materials state officials prepared following the 2006 changes to the law. In one of the documents, the state clearly took the position that *Gaskin* still applies and that individuals convicted during a certain time period are exempt from all of the requirements set forth in the law. See C.A. App. 25-26..

and improperly substituted its own interpretation of the state's Ex Post Facto Clause for that of the state supreme court.

It is settled that federal courts are bound by a state supreme court's interpretation of state law. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) ("In evaluating a facial challenge to a state law, a federal court . . . must consider any limiting construction that a state court or enforcement agency has proffered.") (internal quotations omitted); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota [Supreme] Court."). In *Bradshaw v. Richey*, 546 U.S. 74 (2005), this Court reversed a decision from the Sixth Circuit in which the court of appeals misapplied Ohio's law regarding transferred intent in a felony murder case. This Court ruled "[t]he Ohio Supreme Court's interpretation [of the law] . . . directly contradicts the Sixth Circuit's analysis," and the court of appeals' ruling was "a flatly countertextual interpretation of what the Ohio Supreme Court said." *Id.* at 76-77. Moreover, even if a state supreme court's view of state law appears to be dicta, it is still binding on a federal court if the explanation of state law is clear and unambiguous. *Id.* at 76.

The court of appeals clearly disagreed with the decision in *May*, but was nonetheless bound to follow it. By ignoring the Tennessee Supreme Court's clear interpretation of state law, the court of appeals exceeded its judicial authority and violated basic principles of federal-state comity. This Court should

review the decision below to correct that fundamental error.<sup>15</sup>

**IV. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THEM.**

Tennessee's law and similar laws of other states codify and legitimize a system of second class citizenship based on wealth. As of now, Tennessee is the only state to condition the restoration of voting rights on the payment of fees that are unrelated to a person's underlying conviction and sentence. However, there are over thirty states that require payment of restitution and/or court costs as a condition to vote.

It is estimated that more than 94,000 people in Tennessee are disenfranchised.<sup>16</sup> Overall, the United States' incarceration rate has increased more than sevenfold since 1868 when Section 2 of the Fourteenth Amendment was ratified, and has significantly risen since the 1970s.<sup>17</sup> The

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<sup>15</sup> While petitioners maintain the rulings in *May* and *Gaskin* foreclose the state's retroactive application of Tenn. Code Ann. §§ 40-29-202(b) and (c), to the extent the court of appeals concluded the Tennessee courts have been silent on this issue, the court could have certified the question to the Tennessee Supreme Court pursuant to Tennessee Supreme Court Rule 23.

<sup>16</sup> See The Sentencing Project Interactive Map, <http://www.sentencingproject.org/map/map.cfm>.

<sup>17</sup> See Jamie Fellner and Marc Mauer, Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, p. 14, n.44.



Department of Justice estimates that there are two million people currently incarcerated, and over five million people under some form of criminal supervision.<sup>18</sup> Numerous studies show that low income people are overly represented in the criminal justice system and, for many, orders to pay restitution and court fines are part of their sentences. Poor people bear the brunt of disenfranchisement laws and are less capable of satisfying orders of restitution and payment of court fines than more affluent individuals. Moreover, because of the fast rate at which interest accrues on these monetary obligations, the total amount a person owes can be grossly out of proportion with the original amount of restitution or court costs imposed.<sup>19</sup> Therefore, state laws that require satisfaction of these debts have a disparate impact on poor people and, in practical terms, can result in their permanent disenfranchisement.

This Court has not specifically addressed the constitutionality of state election laws that condition the restoration of voting rights on the payment of financial debts. However, this Court's jurisprudence in the areas of election law and criminal justice strongly weigh in favor of invalidating Tennessee's

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[http://www.sentencingproject.org/tmp/File/FVR/fd\\_losingthevote.pdf](http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf).

<sup>18</sup> See Bureau of Justice Statistics, Criminal Offenders Statistics, U.S. Department of Justice, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11>.

<sup>19</sup> See ACLU National Prison Project, *In for a Penny: The Rise of America's New Debtors' Prisons*, [http://www.aclu.org/files/assets/InForAPenny\\_web.pdf](http://www.aclu.org/files/assets/InForAPenny_web.pdf).

restitution and child support requirements. Absent this Court's intervention, states will remain free to erect financial barriers to the ballot box justified only by the claim that the people affected have criminal convictions and thus are not entitled to any constitutional protections. This case warrants the Court's review because such a rationale, at its core, violates this nation's most basic notions of democracy and fairness.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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