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7 *In Propria Personam*

8 ARIZONA COURT OF APPEALS

9 DIVISION ONE

10 James J. Hamm and Donna
11 Leone Hamm,

12 Plaintiffs/Appellants,

13 -vs-

14 Charles L. Ryan, Director, Arizona
15 Department of Corrections,

16 Defendant/Appellee.

No. 1 CA-CV 12-0130

Maricopa County Superior Court
Case No. CV 2011-097117

17 OPENING BRIEF ON APPEAL

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23 James J. Hamm
24 139 East Encanto Drive
25 Tempe, Arizona 85281
26 Appellant *pro se*

Donna Leone Hamm
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Appellant *pro se*

May 11, 2012

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1 STATEMENT OF THE CASE

2 **JURISDICTIONAL STATEMENT**

3 This Court has jurisdiction of this direct appeal from the Maricopa County
4 Superior Court's final judgment (**12/19/2011 signed Minute Entry Order**) in
5 **CV 2011-097117** a Declaratory Judgment action under **A.R.S. § 12-1831 et seq.**,
6 the **Uniform Declaratory Judgments Act**, against Charles L. Ryan, the director
7 of the Arizona Department of Corrections (hereinafter, "**ADC**"), pursuant to
8 **A.R.S. Const. Art. VI, § 9** and **A.R.S. § 12-2101.A(1)**.

9
10 **NATURE OF THE CASE AND PROCEEDINGS AND DISPOSITION BELOW**

11 Plaintiffs-Appellants filed a Complaint for Declaratory Judgment in the
12 Maricopa County Superior Court, asserting that a legislatively authorized
13 background check fee for persons applying to visit an inmate in the ADC
14 constituted a tax rather than a fee **(1)** because 100% of the monies raised by the
15 challenged fee legislatively are mandated for general public purposes (*i.e.*, the ADC
16 Building Renewal Fund) and **(2)** the monies are collected by a purely pretextual fee
17 (the visitor background check fee) unrelated to the ADC building Renewal Fund.

18 Plaintiffs moved for summary judgment; the defendant moved for cross
19 summary judgment; and the lower court conducted oral argument on the issues.

20 The Superior Court ruled that the fee was a fee rather than a tax because
21 each person required to pay the fee was requesting to visit an ADC prisoner and
22 each person paying the fee received a benefit in the form of authorization to visit
23 an inmate confined within the department of corrections. See **12/19/2012 Minute**
24 **Entry Order (signed)** (constituting a final judgment), at top of P. 3. The Superior
25 Court rejected the argument that the legislatively mandated exclusive use of the
26 monies converted the fee into a tax. See **Id.**, at P. 5, first full paragraph.

1 Plaintiffs also asserted that the challenged fee was a constitutionally
2 prohibited special law because it was imposed on only a tiny fraction of the persons
3 who benefit from renewal and maintenance of ADC buildings.

4 The Superior Court ruled that the law was not a special law, on the ground
5 that the assessment passed the three-part test from **State Compensation**
6 **Fund v. Symington**, 174 Ariz. 188, 193, 848 P.2d 273, 278 (1993), namely.
7 **(1)** that the fee was rationally related to maintenance of buildings used by visitors
8 (as well as by others), **(2)** that all members of the relevant class were included, and
9 **(3)** that the class of ADC visitors is elastic because persons may move into and out
10 of the class. See **12/19/2012 Minute Entry Order**, at bottom of P. 5 and top of
11 P. 6.

12 Within the time allowed for appeal pursuant to **Rule 9, ARCAP**,
13 Plaintiffs/Appellants filed a Notice of Appeal in the Maricopa County Superior Court.
14 Subsequently, time for filing the Opening Brief was extended to May 11, 2012, by
15 this Court's Order filed 08/10/2007.

16 **STATEMENT OF FACTS**

17 **1.** Plaintiffs/Appellants James J. Hamm and Donna Leone Hamm each
18 submitted an application to visit an ADC inmate on July 21, 2011, along with
19 payment of the required \$25.00 fee. See Verified Complaint, at page 3, ¶ 8 &
20 ¶ 9.

21 **2.** Defendant ADC Director Charles L. Ryan, subsequent to enactment of
22 **A.R.S. § 41-1604.B(3)**, and pursuant to the authorization contained therein,
23 authorized and implemented a revised administrative procedure, **Department**
24 **Order 911 ("DO 911")** effective July 20, 2011, which, at **section .01,**
25 **subsection 1.2**, established a \$25.00 visitor background check fee for all persons
26 over the age of 18 who apply to visit an ADC inmate, with 100% of all monies

1 collected to be deposited in the ADC Building Renewal Fund. See Complaint,
2 PP. 3-4, ¶ 10; and **Hamm Exhibit C** (attached to Complaint).

3 **3.** The \$25.00 fee imposed by Defendant Ryan via **DO 911, section 1.2**, was
4 authorized by **A.R.S. § 41-1604.B(3)**, which states:

5 B. The director may:

6 3. Establish by rule a one-time fee for conducting
7 background checks on any person who enters a
8 department facility to visit a prisoner. A fee shall not be
9 charged for a person who is under eighteen years of age.
10 The director may adopt rules that waive all or part of the
11 fee. The director shall deposit, pursuant to sections
12 35-146 and 35-147, any monies collected pursuant to this
13 paragraph in the department of corrections building
14 renewal fund established by section 41-797.

11 **A.R.S. § 41-1604.B(3).**

12 **4.** The statute establishing the ADC Building Renewal Fund expressly
13 constrains and dedicates the use of the monies in the fund, as follows:

14 A. The department of corrections building renewal fund
15 is established consisting of monies deposited pursuant to
16 section 31-230.... The director shall administer the fund.
17 Monies in the fund are subject to legislative appropriation
18 and are exempt from the provisions of section 35-190
19 relating to the lapsing of appropriations.

20 B. The director shall use the monies in the fund for
21 building renewal projects that repair or rework buildings
22 and supporting infrastructure that are under the control of
23 the state department of corrections and that result in
24 maintaining a building's expected useful life. Monies in
25 the fund may not be used for new building additions, new
26 infrastructure additions, landscaping and area
beautification, demolition and removal of a building and,
except as provided in subsection C of this section, routine
preventive maintenance.

 C. The director may use up to eight percent of the
annual expenditures from the fund for routine preventive
maintenance.

24 **A.R.S. § 41-797.**

25 **5. ADC Department Order 911**, Inmate Visitation, effective July 20,
26 2011, at **DO 911.01** (Visitation Application Process), **subsection 1.2**, provides, in

1 pertinent part, as follows:

2 1.2 Background Check Fee - A one-time, non-
3 refundable, \$25.00 background check fee must be
4 paid at the time the application is submitted for all
5 adult visitors applying for visitation on or after
6 July 20, 2011. The fee is applicable regardless of
7 the outcome, unless the visitor is exempt from the
8 fee as set forth below in 1.2.1. The Director shall
9 deposit all background check fees into the
10 Department's Building Renewal Fund, established
11 by A..R.S. 41-797.

12 1.2.1 The following persons are exempt from the
13 one-time \$25.00 background check fee:

14 1.2.1.1 Children under the age of 18.

15 1.2.1.2 Inmates' attorneys of record and
16 their agents.

17 1.2.1.3 Foster parents or court appointed
18 legal guardians of the inmates'
19 minor children, as outlined in
20 1.3.5.2 of this section.

21 1.2.1.4 Persons applying for
22 telephone-only contact.

23 1.2.2 Applications...shall not be processed until the
24 background check fee is received.

25 **ADC DO 911.01, subsection 1.2.** (attached to the Superior Court Complaint
26 as **Hamm Exhibit C**).¹

1 6. On June 16, 2011, Plaintiff / Appellant Donna Leone Hamm personally
2 visited the Department of Public Safety ("DPS") headquarters in Phoenix, Arizona,
3 to conduct research on the cost of a "records" check (the DPS does not use the
4 term "background check"). Plaintiff learned the following.

5 **A)** A records check for any person who wishes to have one
6 performed on him/herself through DPS is free of charge, and includes
7 the taking of a full set of fingerprints. The person must show a photo
8 ID and provide other personal information. The process takes a few

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25 ¹ Appellants' trial court **Exhibit C** consisted of only the first three pages of the
26 37-page **ADC DO 911**, because only those pages directly addressed the \$25.00
visitor background check fee challenged in the Complaint as an unconstitutional tax
and an unconstitutional special law.

1 weeks, and the person is mailed the results of the ACIC records check.

2 **B)** A person who works for a private company who requires
3 a "records check" and a fingerprint card is charged a fee of \$5.00. The
4 same personal information and I.D. as mentioned above are required.
5 The check performed is an ACIC.

6 **C)** For employees of state agencies (such as schools, etc.),
7 the fee to obtain a fingerprint clearance card — far beyond what is
8 required by ADC to process a visitor's application — is \$24.00, and
9 includes the taking and processing of fingerprints.

10 **D)** For visitors or volunteers to state agencies, the fee to
11 obtain a fingerprint clearance card, which of course includes the taking
12 and processing of fingerprints, is \$20.00.

13 **E)** According to DPS, only the FBI can perform NCIC checks
14 (the ADC claims that their "background" checks include both an ACIC
15 and an NCIC check).

16 **See** 06/16/2011 e-mail from Plaintiff / Appellant Donna Hamm to ADC Director
17 Ryan, attached to the Superior Court Motion for Summary Judgment filed
18 August 23, 2011, designated **Hamm Exhibit E**, and incorporated by reference as
19 though fully set forth therein.

20 **7.** Following her visit to DPS headquarters, Plaintiff / Appellant Donna Leone
21 Hamm called the FBI telephone number provided by DPS (304-625-3878) to find
22 out how much the FBI charges for an NCIC check. Plaintiff / Appellant was
23 informed that individual citizens may request an NCIC criminal background check
24 from the FBI, but only after submitting a fingerprint card completed by an
25 authorized criminal justice agency. A letter must also be submitted which includes
26 the person's birth date, place of birth, etc. The FBI fee is \$18.00.

1 8. On June 16, 2011, Plaintiff / Appellant Donna Hamm sent an email to
2 Defendant Ryan, providing the information she had obtained from DPS, and
3 challenging the \$25.00 amount for the fee as being an arbitrary amount. See
4 previously referenced Superior Court **Hamm Exhibit E**.

5 9. Following Defendant Ryan's receipt of Plaintiff / Appellant Donna Hamm's
6 06/15/2011 email, the only change made by Director Ryan was a change in the
7 wording of the ADC's newly revised **D.O. 911** from a "*visitor application fee*" to the
8 correct wording, replicating the exact language in the statute, which is
9 "*a background check fee*."

10 ISSUES PRESENTED FOR REVIEW

11 1. Did the Superior Court err in concluding that the ADC visitor background
12 check fee was a fee and not a tax (and therefore not an unconstitutional tax)?

13 2. Did the Superior Court err in concluding that the ADC visitor background
14 check fee was not an unconstitutional special law (regardless of whether the fee
15 was a fee or a tax)?

16 ARGUMENT

17 **I. INTRODUCTION**

18 This case arises from a declaratory judgment action in which Plaintiffs assert
19 that the Legislature enacted an unconstitutional tax on prison visitor applicants for
20 the express and exclusive purpose of funding the renewal and maintenance of
21 buildings under ADC control. The two claims asserted in the Superior Court
22 Complaint were that the \$25.00 fee constituted an unconstitutional tax raised by
23 means of a pretextual fee; and that the authorizing statute was an unconstitutional
24 special law, regardless of whether the fee was a fee or a tax.

25 Up to a point, Appellants concede that if the charge is a fee rather than a tax,
26 it is permissible, but only subject to the constraints imposed by Stewart v. Verde

1 **River Irrigation & Power District**, 49 Ariz. 531, 68 P.2d 329 (1937) (hereinafter,
2 **Stewart**):

3 As Plaintiffs have stated previously, there is nothing
4 unconstitutional about charging applicants for the actual
5 cost of conducting background checks — with the proviso
6 that background checks are actually conducted as
7 claimed, that there is some record of each background
8 check actually performed, that there is a record of the
9 results of each background check, **that there is a
10 reasonable connection between the actual cost of the
background check actually conducted and the fee
charged**, that the visitor is provided with a copy of the
background check for which they have been charged, and
that the record of each background check is maintained by
the agency in case the applicant elects to exercise his
right to challenge the agency result as incorrect,
inadequate, or erroneous.

11 **Appellants' (Combined) Reply / Response**, at page 18, lines 13-23.

12
13 **III. THE SUPERIOR COURT'S STEWART ANALYSIS WAS
INCORRECT**

14 The Superior Court concluded that the \$25.00 background check fee was not
15 an unconstitutional tax but rather a legitimate fee. **12/19/2012 Order** (constituting
16 final judgment). The Superior Court's conclusion that the background check fee
17 was legitimate was based upon its interpretation and application of **Stewart**.

18 **A. An Examination of Stewart's Cost vs. Surplus Reasoning.**

19 The fee challenged in **Stewart** involved a system of graduated fees, with the
20 fee being proportionate to the number of acres to be irrigated and / or the amount
21 of electricity to be produced. The Verde River Irrigation and Power District, an
22 irrigation district organized under the then-existing laws of the state of Arizona,
23 applied for a permit for authorization to appropriate sufficient waters from the Verde
24 River for the irrigation of 96,000 acres of land and for the development of
25 approximately 25,000 horsepower of electrical energy. **Stewart**, 49 Ariz. at 533,
26 68 P.2d at 330.

1 The **Stewart** Court considered

2 ...whether the fee fixed by the statute is beyond the
3 boundaries of that permissible to legislative action. In so
4 determining, there are two factors which must be
5 considered, (a) was the fee based upon the theory of
6 paying the reasonable expenses to the state of furnishing
7 the service, or was it fixed for the purpose of returning a
8 surplus revenue to the state, and (b) if the former be true,
9 was the scale of payment in reasonable proportion to the
10 services rendered. To illustrate, if the expense to the state
11 of conducting a certain department, which is maintained
12 for the purpose of rendering services to individuals who
13 profit directly thereby, is \$50,000 a year, and the fees
14 charged are so fixed by the Legislature that it may
15 reasonably be anticipated that the annual returns will
16 approximate the cost of the department, and no more,
17 obviously the purpose of the Legislature was not to make
18 a profit, but to pay expenses. If, on the other hand, the
19 probable costs of maintenance were \$50,000, but the fees
20 were such that it might reasonably be anticipated the
21 returns would be \$500,000, it is equally plain that it must
22 be assumed the real purpose of the Legislature was
23 revenue for the general expenses of the state, and not
24 merely the maintenance of the department which
25 furnishes the service.

14 **Stewart**, *supra*, 49 Ariz. 531, 545-46, 68 P.2d 329, 335.

15 At first blush, it might seem that the above quote settles the matter in favor
16 of the Superior Court's judgment, given that it is self evident that the costs of ADC
17 building renewal and maintenance necessarily must far exceed the monies raised
18 by a one-time visitor background check fee. The seemingly logical conclusion
19 would be that "*obviously the purpose of the Legislature was not to make a profit.*"

20 Upon closer examination, however, the actual functioning of the fee is at
21 odds with the underlying suppositions inherent within the reasoning of **Stewart**.
22 **Stewart** involved a challenge to a fee specified by statute, asserting that the fee
23 was in fact a tax. The fee involved was in the amount of \$10,970.40, required by
24 **§ 3316, Rev.Code 1928**, for a permit sought by an irrigation district organized
25 under the then-existing laws of the state of Arizona, having within its boundary
26 some 96,000 acres of land, for authorization to appropriate sufficient waters from

1 the Verde River for the irrigation of the 96,000 acres of land and for the
2 development of approximately 25,000 horsepower of electrical energy. **Stewart**,
3 49 Ariz. at 533, 68 P.2d at 330.

4 The level of usage sought by the application for the permit determined the
5 amount of the proportional fee that was to be paid, under the then-existing statutory
6 structure, based upon the anticipated level of water usage. The Legislature had
7 enacted a system of graduated fees, proportionate to the number of acres to be
8 irrigated and / or the amount of electricity to be produced.

9 It should be no surprise that the ultimate outcome of the lawsuit brought by
10 the Verde River Irrigation and Power District was that the fee was clearly a user fee
11 and not a tax; and that the fee was reasonably related to the usage sought by the
12 District. The analysis of the Arizona Supreme Court was instructive. The Court
13 held that a fee is "*a charge fixed by law for the service of a public officer,*" while a
14 tax is "*a forced contribution of wealth to meet the public needs of the government,*"
15 citing Webster's New International Dictionary. **Stewart**, 49 Ariz. at 544-45, 68 P.2d
16 at 334-35.

17 **B. Two Stewart-related Errors Inherent in the Superior Court 18 Judgment**

19 The Superior Court missed two essential matters with regard to **Stewart**.

- 20 **1. The lower court found that the background check fee
21 was legitimate under Stewart by erroneously
22 evaluating the background check fee as though it
23 was identical to a prison visitor fee — but there is no
24 such fee as a prison visitor fee.**

25 It is important for this Court to note that Appellants openly concede that it
26 is not a violation of the state constitution for the legislature to authorize a fee
which will be imposed upon a select group (here, prison visitor applicants) and
is used to defray the costs of the particular service for which the fee is imposed
(here, performing a background check).

1 Appellants emphasize that, under Arizona law, there is no such fee as a
2 “*prison visitor fee*,” there is only — expressly and exclusively — a **background**
3 **check fee.**² Whether a “*prison visitor fee*” would pass constitutional muster is an
4 issue of no import to this Court in determining the constitutionality of the
5 background check fee, because the Legislature enacted the fee as a background
6 check fee, not as a prison visitor fee. The issue of whether, if the Legislature had
7 acted differently, such different action would be in conformity with the constitution
8 is a matter outside the purview of this appeal.³

9 The fee in this case, however, does not qualify for those provisions. **First**, the
10 Department of Corrections was not authorized by the legislature to collect the fee
11 for the purpose of defraying the actual costs of performing a visitor background
12 check (that is what the legislation should have done, but it did not do so). Any
13 attempt to so claim would at once be revealed as sheer pretext, because the
14 statute expressly mandates that the monies be deposited to the ADC Building
15 Renewal Fund for legislatively specified general building renewal and maintenance,
16 not used to defray any costs of performing visitor background checks.

17 ² See **Fact # 9** of this Brief, indicating that, following Defendant Ryan’s receipt
18 of Plaintiff / Appellant Donna Hamm’s 06/15/2011 email, the only change made by
19 Director Ryan was a change in the wording of the ADC’s newly revised **D.O. 911**
from a “*visitor application fee*” to the correct wording, which is a “*background check*
20 *fee*.”

21 ³ By law, the courts of this state are not to render hypothetical judgments, but
22 rather to declare judgments based upon then-existing facts and the law as it
23 actually exists pursuant to formal enactments of the Legislative Branch.
24 **Moore v. Bolin**, 70 Ariz. 354, 220 P.2d 850 (1950) (holding that constitutional
25 questions are not to be determined abstractly or in a hypothetical case, or
26 anticipated in advance of the necessity for the determination thereof); **American
Federation of State, County and Municipal Employees, AFL-CIO, Council 97
v. Lewis, ADC Director**, 165 Ariz. 149, 797 P.2d 6 (App.1990,Div.1) (“*We have
held...that declaratory relief must be based on an existing state of facts, not those
which may or may not arise in the future*,” citing **Land Department v. O’Toole**,
154 Ariz. 43, 739 P.2d 1360 (App.1987,Div.1)). See also, **Manning v. Reilly**,
2 Ariz.App. 310, 408 P.2d 414 (1965) (declaratory judgment not available to obtain
a judgment which is advisory only or merely answers an abstract question).

1 **Second**, the service provided — a background check — is unrelated to ADC
2 building renewal and maintenance. The evil sought to be corrected — *i.e.*, the
3 hidden, true, legislative purpose for the pretextual fee — is to respond to the
4 renewal and maintenance needs of the ADC's more than 1,550 buildings and the
5 infrastructure needed to support the use of those buildings. Such building renewal
6 and repair needs are, of necessity, constant and continuous, with nearly 40,000
7 current inmates and yearly turnover of more than 15,000 inmates. ADC buildings
8 renewal and repair needs include locking, alarm, and security systems, along with
9 the infrastructure systems such as wells, water delivery systems, waste water
10 systems and treatment plants, fire alarms, security systems, and HVAC systems.
11 The ADC's Fiscal Year 2013 Capital and Building Renewal Request, required by
12 statute to be submitted to the Governor's Office, included \$174 Million in projects.⁴

13 The benefit from the use of the funds deposited to the ADC Building Renewal
14 Fund accrues to all prisoners, regardless of whether they have visitors; and to all
15 members of the public who use some ADC buildings, not merely those who visit
16 prisoners. Such beneficiaries include ADC employees, law enforcement officers
17 who conduct meetings at the prison, community volunteers, university and college
18 tour groups, and victims' reconciliation groups who meet within ADC facilities. The
19 service sought by the person paying the fee, however, is not building renewal, but
20 rather performing a background check. That is the service for which the fee was
21 enacted and the service expressly stated in the authorizing statute. The crucial

22 ⁴ There are fewer than 70 visitation areas in the ADC, the vast majority of
23 which consist of portions of buildings rather than entire buildings, out of the more
24 than 1,550 buildings under the control of the ADC. Yet prison visitors are the only
25 group specially selected by the Legislature as cash cows for building renewal and
26 maintenance funds. This is a clear example of special legislation, imposing a
charge upon a select group of the public that has contact with less than 4% of
ADC's buildings, while not charging other groups, not excluding prison employees,
who use 100% of ADC buildings and who receive a direct and important benefit
from building renewal and maintenance, yet are not subject to any fee whatsoever.

1 point here is that the fees paid by visitor applicants provide no portion of the cost
2 of background checks — 100% of the cost of background checks is borne by the
3 taxpayers of the State of Arizona, despite the Legislature imposing a background
4 check fee on visitor applicants.

5 **2. Under Stewart's cost vs. surplus analysis, the fee**
6 **clearly exceeds the cost of background checks and**
7 **therefore is intended to produce a surplus intended**
8 **to defray a portion of unrelated costs that do not**
9 **constitute a legitimate legislative purpose for the**
10 **background check fee.**

11 The reason that the fees paid by visitor applicants provide no portion of the
12 cost of background checks is that the Legislature diverted 100% of the monies
13 collected by the background check fees to ADC general building renewal and
14 maintenance. In Stewart, it was a crucial point that there was a direct connection
15 between the purpose for which the fee was charged (*i.e.*, processing an application
16 for a permit to appropriate water from the Verde River) and the use of the monies
17 collected by the fee (*i.e.*, funding the potentially extensive evaluation of the needs
18 and problems associated with determining whether to approve or deny the
19 application for a water allocation).

20 The Stewart court's analysis (1) emphasized that the monies collected by the
21 fee were dedicated to the accomplishment of those duties,⁵ and (2) articulated in
22 great detail the duties of the Arizona Water Commissioner that were required prior
23 to approving the application of the Verde River Irrigation and Power District:

24 ...long and expensive surveys of the land and
25 investigation of the proposed works, involving expert
26 engineering skill and even a hearing of considerable
 extent, might be necessary before the commissioner could
 determine whether the proposed application conflicts with

⁵ “Further, the original act clearly contemplated this for section 21, supra,
provided that the fees collected should be used ‘*to the extent of its resources and
in preference to the use of any other appropriation*’ to pay the expenses of the
office....” Stewart, 49 Ariz. at 547, 68 P.2d at 335.

1 other rights already vested, or is against the interest and
2 welfare of the public. Applying this rule to the present
3 case, it is a notorious fact that the Salt River Valley
4 Water Users' Association, which comprises some 250,000
5 acres of the most valuable irrigated land in the state,
6 has at all times violently opposed the granting of any right
7 of appropriation of the waters of the Verde River to the
8 plaintiff, on the ground that any rights granted thereby
9 would conflict most seriously with the vested interests
10 of the association in such water. Whether or not, as a
11 matter of fact, the association could have maintained its
12 contention successfully in the courts, we express no
13 opinion. But the conflict was imminent and apparent,
14 and certainly a conscientious and careful water
15 commissioner, before granting a permit which was bound
16 to result in litigation of the most extensive and expensive
17 type eventually, would have considered most carefully all
of the questions involved, legal, physical, and financial,
and such consideration to be of any real value must
have required much labor, both on the part of the
commissioner and such others as he might necessarily
be compelled to employ to assist him. We are of the
opinion it is apparent the services required in determining
whether an appropriation for a hundred thousand acres
should be granted always may, and frequently must,
greatly exceed in value the services required in
determining the same question in regard to an
appropriation for a hundred acres. And such being the
case, we may not, as a matter of law, hold that
the Legislature made an arbitrary or unreasonable
classification in fixing the fees set forth in section 3316,
supra, which should be paid by an applicant for a permit
to appropriate waters.

18 **Stewart**, 49 Ariz. at 551-52, 68 P.2d at 337-38 (discussing and adopting as
19 applicable the holding of the United States Supreme Court in **Pacific Live Stock**
20 **Company v. Lewis**, 241 U.S. 440 (1916), which dealt with a similar circumstance).

21 In sharp contrast to the organization of the authorizing legislation in **Stewart**
22 — *i.e.*, amount of graduated fee directly linked to level of water usage sought by
23 application, and dedication of monies collected by fees to the duties and effort
24 necessarily required for determination of whether to approve application — the
25 organization of the authorizing legislation in this case expressly disavows any
26 connection at all between the task of performing a background check and the

1 use of the monies collected by the fee. Indeed, the authorizing legislation prohibits
2 the ADC (and the director of the ADC) from using any portion of the fee to defray
3 the costs associated with either performing the background check or determining
4 visitor approval or denial. See A.R.S. § 41-1604.B(3) (“*The director shall deposit,*
5 *pursuant to sections 35-146 and 35-147, any monies collected pursuant to this*
6 *paragraph in the department of corrections building renewal fund established by*
7 *section 41-797.*”).

8 In Stewart, the Arizona Supreme Court held that the real question involves
9 “*the ultimate purpose of the Legislature, cost or surplus revenue.*” Stewart,
10 49 Ariz. at 547, 68 P.2d at 346. Here, the Superior Court conflated the massive
11 costs of general prison building renewal and maintenance (of over 1,550 buildings)
12 with the specific limited costs of background checks — a mistake understandable
13 due to conceptual association with the effect of approving visitors, but a mistake
14 that impermissibly substitutes the funding of general prison building renewal and
15 maintenance for the legislatively mandated purpose of performing background
16 checks:

17 The people in general, for instance taxpayers in the
18 western part of the state, have little or no interest in the
19 determination of the question as to whether the title of the
20 Pacific Live Stock Company to a particular quantity of
water is settled one way or the other. The proceeding is
primarily beneficial only to the parties in interest, and in
justice they should bear their share of the cost.

21 Stewart, *supra*, 49 Ariz. 531, 550, 68 P.2d 329, 337 (quoting from and commenting
22 upon the holding in Pacific Live Stock Company, *supra*.

23 Appellants ask this Court to take special note of the fact that the United
24 States Supreme Court held In Pacific Live Stock Company that the interests of
25 justice called for the applicant to bear a share of the cost of the determination of
26 title (to a quantity of water). However, the future actual or anticipated value of the

1 title to the applicant was not a factor. The cost that was to be shared was the cost
2 of the proceeding at which and by which the issue of title was settled. It was
3 **Pacific Live Stock Company's role** as an applicant that called for sharing the cost
4 of the application process, and the monies collected by fees were dedicated
5 specifically to that determination process, not to defraying the ancillary costs that
6 might be associated with future actual use of the water allocation.

7 Applying the same principles here, the cost of the process that should be
8 shared is the process of conducting a background check, not the costs associated
9 with the process of visiting an ADC inmate; and in this case, the cost of the
10 background check is not shared by the visitor applicant, because the Legislature
11 diverted the entire fee to a separate purpose wholly unrelated to the cost of
12 a background check.

13
14 **III. THE SUPERIOR COURT'S ANALOGY TO KYRENE SCHOOL**
DISTRICT V. CITY OF CHANDLER WAS INVALID

15 The Superior Court concluded that the challenged fee was essentially a user
16 fee, analogizing to **Kyrene School District No. 28 v. City of Chandler**
17 150 Ariz. 240, 722 P.2d 967 (App.1986):

18 In a sense, the fees represent part of the capital cost of
19 the wastewater and water systems spread among its
20 users. This aspect was found persuasive by a Texas
21 court in a similar case, *Bexar County v. City of San*
Antonio, 352 S.W.2d 905 (1962).

22 In the Bexar County case, the City of San Antonio
23 charged Bexar County a sewer charge for the use of the
24 sewer system. The City of San Antonio argued that the
25 charges were taxes from which it was immune. The court
26 held that the charges were not taxes and that the city
could make a reasonable charge for the use of its sewers,
"sufficient to operate and maintain such sewer system and
to provide for replacements and future extensions thereof."
352 S.W.2d at 907. We have earlier held that the system
development charges were in exchange for the overall
benefit of receiving water and wastewater services from
Chandler. We hold that directing part of that payment

1 toward the expansion and replacement of these systems
2 makes the charge no more a tax in this case than was the
 sewer charge in *Bexar*.

3 **Kyrene**, 150 Ariz. at 244, 722 P.2d at 971.

4 The Superior Court's analogy of this case to **Kyrene** does not stand up to
5 scrutiny. The very aspect of the case which was most persuasive to the **Kyrene**
6 court — that the fees charged represent part of the capital cost of the wastewater
7 and water systems spread among its users — is noticeably missing in the case now
8 before the Court. As noted above, prison visitors have contact with less than 4%
9 of ADC buildings, yet are the only group charged a fee that is transferred to the
10 ADC Building and Renewal Fund. It is quite reasonable to believe that if the only
11 entities who were assessed a system development charge, a part of which was
12 transferred to the water development reserve fund, were those entities representing
13 less than 4% of those using Chandler's wastewater and water system, while all
14 others were exempted from the charge, that the **Kyrene** court would not have held
15 that the fee was a constitutional one, because the fee would not essentially
16 represent the capital cost of the wastewater and water systems proportionally
17 spread among its users — if 4% of the users were the only ones charged the fee,
18 it could not be "proportionally allocated," because that 4% would represent 100%
19 of the fees collected.

20 The same is true in this case. ADC visitors have contact with less than 4%
21 of ADC buildings, but the fees charged those 4% represent 100% of the fees
22 collected to defray the costs of over 1,550 ADC buildings and supporting ADC
23 infrastructure. **Ergo, the background check fee, which is not a prison visitor**
24 **fee, is not a user fee; and any analogy to Kyrene is inappropriate and**
25 **nondispositive because the charge does not represent a capital cost**
26 **proportionally spread among ADC building users.**

1 With regard to the issue of whether the background check fee is a user fee,
2 and with regard to one final aspect of the decision in Kyrene, one additional factor
3 should be considered. In other cases — Kyrene and others cited by Appellee in
4 the Superior Court — the monies collected by a user fee is used to defray the costs
5 of processing a user application and then, in some cases, a portion of the fee is
6 also used to defray the costs of maintaining the department or agency itself.

7 In this case, however, this time-honored means of proceeding has been
8 discarded in favor of an unprecedented process which collects a fee for a
9 legislatively-specified purpose and then diverts 100% of the monies collected to a
10 wholly different purpose, a purpose that the State is constitutionally obligated to
11 provide (obligated to provide without regard for whether any person ever applies
12 for visitor status). With regard to the background check fee, the alternative purpose
13 is the maintenance and renewal of ADC buildings.

14 Moreover, the fee charged in this case is even more divorced from
15 connection to the visitor applicant who pays the fee because there is no connection
16 between monies collected by the fee for the background check and the costs of the
17 service provided. Further, there is no mandated connection between the
18 independent purpose for which the monies are legislatively dedicated — ADC
19 building renewal and maintenance — and the ADC visitors. In other words, the
20 legislation eschews any requirement that buildings actually used for ADC visitation
21 be renewed or maintained at all. In the traditional user fee arrangement, the fee
22 defrays the service provided (processing applications, etc.) and then any excess
23 may be used for wider purposes of the agency that collects the fee. Here, the fee
24 defrays none of the cost of the service provided (the background check) and the
25 independent purpose that is mandated by the Legislature contains no essential
26 connection to any service to the persons paying the fee — *i.e.*, there is no

1 requirement that even a thousandth of one percent (.001%) of the monies collected
2 must be dedicated to renewal or maintenance of the buildings in which visitation
3 takes place. In the ordinary user fee situation, there is an essential connection
4 between the fee collected and the service for which the fee is charged or some
5 other service or benefit accruing to the person (or category of person) who is
6 charged the fee. Here, however, there is no essential legal connection at all.

7 A simple example demonstrates the problem. If the State of Arizona required
8 taxpayers to pay a fee for the filing of their tax returns with the Arizona Department
9 of Revenue — in addition to the taxes that are paid — and then mandated that the
10 filing fee monies be wholly dedicated to the Department of Revenue’s motor pool,
11 it would be clear that the State was simply imposing an additional tax on its citizens
12 by means of a subterfuge. The very same arguments that the Superior Court used
13 to support the visitor background check fee would also support that
14 tax-by-subterfuge fee, namely, that the filer voluntarily asks a public officer to
15 perform a certain service for him (filing his tax return form), which bestows a benefit
16 upon him not shared by any other members of society (processing of his tax
17 return). So long as the person does not seek to file a tax return, no fee would be
18 required of him, and thus the necessity of its payment would not arise unless and
19 until the individual requests the public authority to perform the service. The
20 subterfuge by which the State accrues money to defray the costs of its motor pool,
21 however, clearly represents a tax disguised as a fee. The essential connection
22 between the fee and the use of the monies collected by the fee is lost, and that loss
23 renders the fee unconstitutional.

24 **IV. THE SUPERIOR COURT’S TRANSAMERICA TITLE ANALYSIS WAS**
25 **BASED UPON AN IMPERMISSIBLE TRANSFORMATION OF THE**
26 **BACKGROUND CHECK FEE INTO A PRISON VISITOR FEE**

In its decision granting judgment to Defendant / Appellee, the Superior Court

1 cited a holding from Arizona Department of Revenue v. Transamerica Title
2 Insurance Company, 124 Ariz. 417, 420, 604 P.2d 1128, 1131 (1979) to support
3 its conclusion that the fee is not a tax. See 12/19/2012 Minute Entry Order, at
4 page 3. The holding in Transamerica Title was that a tax is “*the enforced*
5 *contribution of persons and property levied by the authority of the state.*” Id.

6 Appellants have no dispute about the Transamerica Title court’s definition
7 of a tax, but assert that the operation of the background check fee and the
8 diversion of 100% of the monies collected to a purpose distinct from the purpose
9 of the fee (performing a background check), transforms the pretextual fee into a
10 tax, compelling prison visitor applicants to make a monetary contribution required
11 by the authority of the state for a purpose unrelated to the performance of the
12 service for which the fee was collected (funding ADC building renewal and
13 maintenance rather than performing a background check).

14 The lower court’s citation to Transamerica Title as support for its decision
15 constitutes yet another example of the insidious error involved in treating the
16 background check fee as though it was a prison visitor fee. Appellants hereby
17 incorporate all prior argumentation as applicable to the lower court’s use of
18 Transamerica Title as support for its ruling.

19 **V. THE SUPERIOR COURT’S CITATION TO WELLER v. CITY OF**
20 **PHOENIX FAILED TO TAKE INTO ACCOUNT THE BASIS FOR THE**
WELLER DECISION

21 The Superior Court cited Weller v. City of Phoenix, 39 Ariz. 148, 151,
22 4 P.2d 665, 667 (1931) for the proposition that “*in distinguishing between taxes*
23 *and assessments, ‘taxes are generally held to be burdens or impositions laid*
24 *for purposes of general revenue, regardless of the direct benefit accruing to the*
25 *person or property taxed....’”). See 12/19/2012 Minute Entry Order, at page 3.*

26 In Weller, a homestead owner challenged a lien for paving costs under a

1 special assessment by the municipal corporation. The **Weller** court ruled that
2 homesteads are subject to municipal assessments such as paving costs under the
3 general taxing authority, but distinguished such assessments from taxes in that
4 assessments are special and local impositions on property for a public purpose, but
5 are proportioned in amount to the special benefit derived from the compulsory
6 expenditure. Taxes, on the other hand, are burdens or impositions laid for
7 purposes of general revenue, **regardless of the direct benefit accruing to the**
8 **persons or property taxed.** Importantly, the basis for the **Weller** court's ruling
9 was as follows:

10 ...[W]ith the special assessment, the burden is placed
11 directly in proportion to the actual benefit received by the
12 property assessed, and presumably the increased value
 will pay for the assessment. And it is only justice that
 property which receives a benefit should pay therefor.

13 **Weller**, 39 Ariz. at 154, 4 P.2d at 667.

14 It is thus clear that **Weller** has no role to play in supporting the lower court's
15 conclusion in this case. The **Weller** court concluded that the assessment was
16 imposed pursuant to the taxing authority, even though the assessment was not,
17 strictly speaking, a tax. Importantly, however, the operation of the assessment was
18 expressly held to provide a direct benefit from the service for which the assessment
19 was imposed. That is to say, the homeowner was charged an assessment in
20 proportion to the cost of the paving that was ordered by the municipality, and the
21 paving itself boosted the property value of the home.

22 Once again, in sharp contrast to the assessment structure in **Weller**, the
23 instant case completely uncouples the fee charged from the service provided.
24 Here, the fee is expressly for a background check, but does not defray even the
25 tiniest portion of the cost of the background check performed. Instead, the monies
26 collected by the fee are diverted to a different purpose, that of renewing and

1 maintaining the over 1,550 buildings under the control of the ADC, **regardless of**
2 **whether the use of the monies will ever produce any direct benefit accruing**
3 **to the visitor applicant who paid the fee.** The fee paid is legislatively prohibited
4 from being used to defray the cost of the service actually performed (the
5 background check).

6 **VI. THE SUPERIOR COURT'S JACHIMEK ANALYSIS FAILED TO TAKE**
7 **INTO ACCOUNT A CRITICAL DIFFERENCE BETWEEN JACHIMEK**
8 **AND THE CASE AT BAR**

8 The Superior Court's analogy to Jachimek v. State of Arizona,
9 205 Ariz. 632, 74 P.3d 944 (App.2003,Div.1), was the analogy closest to the case
10 now before this Court, in the sense that the fee challenged in Jachimek was used
11 for broader public purposes than merely defraying the costs of processing the pawn
12 transaction report that the law required each pawnbroker to pay. The difference
13 between Jachimek and this case, however, is a critical difference.

14 The critical factor in Jachimek that was not addressed by the Superior Court
15 and which militates in favor of Appellants is as follows:

16 ...[P]awnshops exist in a heavily regulated environ-
17 ment. **** In such an environment, the services provided
18 in exchange for the fee **may include** some services
19 designed to protect the public from the potential negative
20 consequences of permitting the activity, **so long as "the**
21 **fees paid by each particular applicant bear some**
22 **reasonable relation to the service to be performed**
23 **by the department in his behalf."** *Stewart*, 49 Ariz.
at 548, 68 P.2d at 336. As the factors outlined in
24 *May* demonstrate, the amount assessed in such
25 circumstances can be expended for "the regulation...of
26 the parties upon whom the assessment is imposed,"
not merely for processing the paperwork associated
with the regulation. See *May*, 203 Ariz. at 431, ¶ 24,
55 P.3d at 774.

24 Jachimek, 205 Ariz. at 637, 74 P.3d at 949

25 Jachimek does not stand for the proposition that the **entire fee** may be
26 diverted to a purpose other than the service for which the fee is paid. The phrase

1 “*may include*,” combined with the phrase “*not merely*,” clearly indicate that a
2 portion of a fee may be expended for broader purposes, but the dispositive fact is
3 that such an arrangement does not partake of a pretextual subterfuge.

4 Moreover, the broader purposes involved in Jachimek are still linked to
5 needs or benefits arising from pawnbroker transactions. Here, on the other hand,
6 the broader purposes only tangentially involve prison visitor applicants (even if the
7 application to visit an ADC inmate is approved).

8 Once again, the Superior Court’s erroneous analysis and application of
9 Jackimek derives from mistaking the ADC background check fee for a prison
10 visitor fee; and that error requires a *de facto* re-writing of the authorizing statute,
11 a matter requiring formal action by the Legislature, not subject to myopic
12 (mis)interpretation by the courts.

13 VII. THE SUPERIOR COURT’S MAY v. McNALLY ANALYSIS WAS 14 INCORRECT

15 In May v. McNally, 203 Ariz. 425, 55 P.3d 768 (2002), the Arizona Supreme
16 Court held that the fee vs. tax issue is generally determined by three factors:

17 Whether an assessment should be categorized as a tax or
18 a fee generally is determined by examining three factors:
19 “(1) the entity that imposes the assessment; (2) the parties
20 upon whom the assessment is imposed; and (3) whether
the assessment is expended for general public purposes,
or used for the regulation or benefit of the parties upon
whom the assessment is imposed.”

21 May, 203 Ariz. at 431, ¶ 24, 55 P.3d at 774, ¶ 24, citing Bidart Bros. v. Cal. Apple
22 Comm’n, 73 F.3d 925, 931 (9th Cir.1996) (citing San Juan Cellular Tel. Co. v.
23 Pub. Serv. Comm’n of Puerto Rico, 967 F.2d 683 (1st Cir.1992).

24 In May, the Arizona Supreme Court held that the 10% surcharge on civil and
25 criminal fines met all three of the required tests because “*it was imposed by*
26 *citizen initiative on a broad range of payers for a public purpose.*” See

1 **May**, 203 Ariz. at 431, ¶ 24, 55 P.3d at 774, ¶ 24. Importantly, there was no service
2 or benefit that accrued to the payer as a result of the tax, and there was no
3 voluntary act by which a person would ask a public official to perform a service or
4 provide a benefit.

5 The vast majority of the **May** decision was devoted to the First Amendment
6 issue, because that was the primary challenge to the surcharge. In the case at bar,
7 there is no First Amendment issue, but the three part test stated in **May** does not
8 settle the issue in this case, because in **May** the court did not address any nuanced
9 issue involving any one of the three tests. The three tests as applied to this case
10 are **(1)** the entity that imposes the assessment (here, the legislature); **(2)** the parties
11 upon whom the assessment is imposed (here, ADC visitor applicants); and
12 **(3)** whether the monies accrued by the assessment are expended for general
13 public purposes or used for the regulation or benefit of the parties upon whom the
14 assessment is imposed — here, public purposes not linked to the costs of the
15 service for which the fee was required (performing a background check) and not
16 providing any benefit unique to the persons assessed the fee.

17 The first and third elements support Appellant’s contention that the
18 assessment in this case is a tax rather than a fee; and the second element
19 supports the contention that the statute is a special law.

20 With regard to the first element, the assessment was authorized by the
21 Legislature, not a lesser entity, and all monies collected are dedicated to a general
22 public purpose other than the service for which the fee was required. See A.R.S.
23 **§ 41-797.A.**

24 With regard to the third element, the assessment purportedly is related to the
25 regulation of to the parties upon whom the assessment was imposed, but this
26 connection is belied by the fact that the Legislature dedicated 100% of the monies

1 collected to a general public purpose, the renewal and maintenance of buildings
2 used by the ADC.

3 With regard to the second element, the assessment is imposed upon a very
4 narrow range of payers, those members of the public who seek to visit ADC
5 inmates, but the monies collected by the assessment are dedicated exclusively for
6 the benefit of the polity of the State of Arizona, the benefit of **all** who use the
7 buildings, including ADC employees, other prisoners who do not have visitors, law
8 enforcement officers who interview prisoners at the prison, volunteers from the
9 community, university and college tour groups, and victims' reconciliation groups
10 who meet within the ADC.

11 The State of Arizona constitutionally must provide and maintain all buildings
12 used by the Department of Corrections as part of the state criminal justice system.
13 The conclusion to be drawn from the examination of the factors is that the
14 assessment imposed in this case constitutes a **tax**, not a **fee**.

15 **VIII. THE BACKGROUND CHECK FEE IS A SPECIAL LAW**

16 The state constitution prohibits the enactment of special laws where a
17 general law can serve (regardless of whether involving taxes or fees):

18 **§ 19. No local or special laws shall be enacted in any
19 of the following cases, that is to say:**

20 **9. Assessment and collection of taxes.**

21 **20. When a general law can be made applicable.**

22 **Ariz. Const. art. 4, pt. 2, § 19 (9) & (20).**

23 The Constitution of the State of Arizona permits and controls taxation,
24 whereby general laws taxing the citizenry produce monies for the general fund of
25 the state, and such tax monies provide the source for the renewal and maintenance
26 of buildings under the control of the Department of Corrections. Instead of a
general law, however, the legislature has enacted in this case a special law, one

1 which “*applies only to certain members of a class or to an arbitrarily defined class*
2 *which is not rationally related to a legitimate legislative purpose.*”
3 **State Compensation Fund v. Symington**, 174 Ariz. 188, 192, 848 P.2d 273, 277
4 (1993) (quoting **Arizona Downs v. Arizona Horsemen's Foundation**,
5 130 Ariz. 550, 557, 637 P.2d 1053, 1060 (1981)).

6 In this case, the persons who use the buildings under the control of the
7 Department of Corrections include, but unquestionably are not limited to members
8 of the public who apply to visit prisoners. Other who use ADC buildings include
9 Department officials, Department staff and employees, members of the public who
10 have business with the Department, and the general citizenry of the state, who
11 benefit from the incarceration and rehabilitation of prisoners committed to the care
12 and custody of the department.

13 Of the class of persons who use Department of Corrections buildings or who
14 derive a benefit from the use of ADC buildings, the statute authorizing the
15 assessment of a fee “*applies only to certain members of [the] class, namely, only*
16 *those who apply to visit prisoners within the ADC.*”

17 The statute authorizing the fee does not have a “*legitimate legislative*
18 *purpose.*” As previously mentioned, the Arizona Supreme Court has addressed the
19 issue of a special law — *i.e.*, one which “*applies only to certain members of a class*
20 *or to an arbitrarily defined class which is not rationally related to a legitimate*
21 *legislative purpose.*” **State Compensation Fund v. Symington**, *supra*,
22 174 Ariz. at 192, 848 P.2d at 277, quoting **Arizona Downs v. Arizona**
23 **Horsemen's Foundation**, *supra*, 130 Ariz. at 557, 637 P.2d at 1060.

24 Appellants ask this Court to take special note of the fact that, **within the**
25 **context of a fee that is challenged as being a pretext for imposition of an**
26

1 **unconstitutional special law which actually imposes a tax rather than a fee,**
2 **a “*legitimate legislative purpose*” requires a direct connection between the**
3 **purpose for which the tax / fee is imposed and a service or benefit unique to**
4 **the parties assessed:**

5 ¶ 15 Here, there is clearly a legitimate governmental
6 objective—to provide fire and emergency services to
7 the county island residents. Moreover, the population
8 designated in the legislation, the county island resi-
9 dents who will be losing their fire and emergency services,
10 is rationally related to that objective. The legislation was
11 enacted to assist the county island residents in solving
12 the problem of their impending loss of services.
13 **Therefore, the first prong of the test is satisfied**
14 **because the population classification is rationally**
15 **related to the legislation's objective of providing**
16 **fire and emergency services to those in need.**

17 **Town of Gilbert v. Maricopa County, 213 Ariz. 241, ¶ 15, 141 P.3d 416, ¶ 15**
18 **(App.2006, Div.1).**

19 Accordingly, Plaintiffs contend that the legislative purpose underlying the
20 assessment is not a *legitimate legislative purpose* (as that term is defined for
21 taxation purposes) because the Monies accrued from the assessment do not
22 provide the service that is unique to the parties assessed. The service unique to
23 the parties assessed is a background check, but the monies accrued from the
24 assessment do not provide that service; they are diverted to a service that is not
25 unique to the parties assessed — indeed, any connection at all to the parties
26 assessed is purely theoretical, not a product of any requirement in the legislation.

 The actual benefit arising from the statutorily directed use of the monies —
ADC building renewal and maintenance — accrues not only to i) members of the
public who visit ADC prisoners, but also to ii) the entire population of the State of
Arizona (by defraying the tax burden associated with maintaining buildings under
control of the state agency) and iii) all persons who use ADC buildings regularly or

1 | intermittently. This latter group includes (1) state and federal law enforcement
2 | officers and officials who interview prisoners at the prison; (2) Board of Executive
3 | Clemency members, Board staff, and members of the public attending Board
4 | hearings conducted within the ADC; (3) staff and employees of the ADC;
5 | (4) persons approved for visitation with inmates; (5) ADC approved program
6 | volunteers from the community; (6) institutions and organizations that provide
7 | services to prisoners and/or to ADC staff and employees; (7) university and college
8 | tour groups; and (8) victim reconciliation participants at meeting within ADC
9 | institutions.

10 | Pursuant to **A.R.S. § 41-1604.B(3)**, the statutorily mandated purpose of the
11 | monies collected by the assessment is to fund a state agency’s general building
12 | renewal projects that repair or rework buildings and supporting infrastructure, along
13 | with routine preventive maintenance — but not by means of a constitutionally
14 | imposed tax, but rather by an assessment upon an extraordinarily narrow slice of
15 | the citizenry imposed by means of a pretextual fee uncoupled from the legislatively
16 | stated purpose of the fee. The combination of a general public purpose with no
17 | unique benefit accruing to the population assessed necessarily means that there
18 | is no “*legitimate legislative purpose*,” because the actual purpose is an attempt to
19 | shift a portion of the legitimate tax burden of the general citizenry of the State to a
20 | limited portion of a specialized group who derive no special benefit from the use of
21 | the monies taken from them. Prison visitors cannot be used as “*cash cows*” by
22 | the legislature, because the Arizona Constitution prohibits the enactment of
23 | such laws.

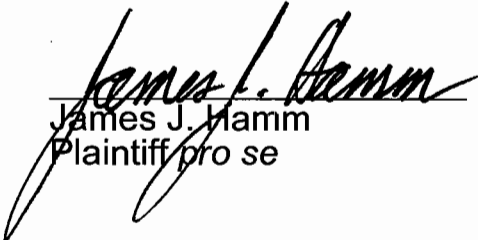
24 | CONCLUSION

25 | The fee imposed upon prison visitor applicants for a background check is
26 | unconstitutional for multiple reasons. The fee collected does not actually provide

1 the unique service for which the fee expressly was imposed. The fee collected is
2 wholly diverted from the unique service for which the fee was imposed to an
3 alternative service which fails to provide a service or benefit unique to the parties
4 assessed. The class of people who are dunned for building renewal and
5 maintenance — by means of a pretextual fee for a background check — constitute
6 only a fraction of the class of people who actually use the buildings, and constitute
7 a class of people who use only a fraction of the total number of buildings. The fee
8 — a background check fee — is wholly diverted to a broader public service /
9 burden, rather than being used for a broader public service or burden in addition
10 to providing the service for which the fee was imposed. The fee is not reasonably
11 related to the purpose for which the fee was imposed, because 0% of the fee is
12 used for the service requested, while 100% of the fee is devoted exclusively to a
13 specific public purpose with only a minor connection to the parties assessed — *i.e.*,
14 the ADC controls over 1,550 buildings, less than 70 buildings or portions of
15 buildings are used for visitation, and there is no requirement that any of the diverted
16 fees actually be used for the renewal or maintenance of visitation areas which are
17 sometimes used by visitors.

18 **WHEREFORE**, based upon the foregoing, Appellants respectfully request the
19 Court grant this appeal, reverse the Order of the Superior Court granting summary
20 judgment to Appellee Charles L. Ryan, and direct the lower court to enter summary
21 judgment for Appellees.

22 **RESPECTFULLY SUBMITTED** this 11^{TW} day of May, 2012.

23
24 
25 James J. Hamm
26 Plaintiff *pro se*


Donna Leone Hamm
Plaintiff *pro se*

1 CERTIFICATE OF COMPLIANCE

2 Pursuant to Rule 14(b), ARCAP, Plaintiff/Appellant certifies that this Opening
3 Brief

4 X Uses proportionately spaced non-script 14-point Arial font;

5 X Is double-spaced except for those quotations, headings, and
6 footnotes permitted to be single spaced; and

7 X Contains 8,869 words, averaging not more than 280 words per
8 page, not including title page, table of contents, table of citations,
9 certificate of compliance, and certificate of service.

10 May 11, 2012
11 Date

James Hamm
James Hamm

12 CERTIFICATE OF FILING AND SERVICE

13 Pursuant to Rule 4(a) and Rule 15(a), ARCAP, an Original and Six
14 Copies of the Foregoing Hand-Delivered for Filing To :

15 Ruth Willingham, Clerk, Arizona Court of Appeals, Division One,
16 Room 203, 1501 West Jefferson, Phoenix, Arizona 85007-3329.

17 Pursuant to Rule 4(b) and Rule 15(b), ARCAP, Two Copies of the
18 Foregoing Mailed To :

19 Eryn M. McCarthy, Assistant Attorney General, 1275 West
20 Washington Street, Phoenix, Arizona 85007-2997 (attorney for
21 Appellee).

22 By *James Hamm*
23 James Hamm

24 Date May 11, 2012