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In Propria Personam

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 James J. Hamm and Donna Leone
9 Hamm,

10 Plaintiffs,

11 -vs-

12 Charles L. Ryan, director, Arizona
13 Department of Corrections,

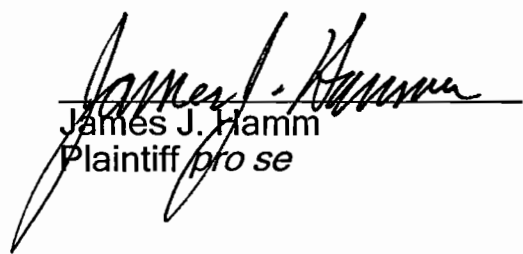
14 Defendant.

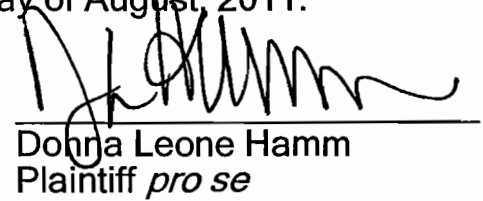
No. CV 2011-097117

PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT
(Unconstitutional Tax)

15 COME NOW Plaintiffs *in pro per* James J. Hamm and Donna Leone
16 Hamm and move the Court for summary judgment pursuant to Rule 56, Arizona
17 Rules of Civil Procedure (hereinafter, Ariz.R.Civ.P.), on the grounds that there
18 are no material facts in dispute between the parties and Plaintiffs are entitled to
19 summary judgment as a matter of law. This Motion is supported by Plaintiffs'
20 Separate Statement of Material Facts and the following Memorandum of Points
21 and Authorities.

22 RESPECTFULLY SUBMITTED this 1st day of August, 2011.

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


Donna Leone Hamm
Plaintiff *pro se*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This is a Motion for Summary Judgment in a Complaint for Declaratory
4 Judgment which seeks 1) to have A.R.S. § 41-1604.B(3) (effective July 20,
5 2011) and Arizona Department of Corrections (hereinafter, "ADC") Department
6 Order 911, section 1.2 (hereinafter, "DO 911") (effective July 20, 2011) declared
7 unconstitutional and 2) to have the \$25.00 fee charged to each Plaintiff
8 reimbursed. The Complaint challenges the statute that authorized the fee as
9 being an unconstitutional tax and a constitutionally prohibited special law, and
10 challenges the administrative regulation imposing the \$25.00 fee as an act
11 without or in excess of jurisdiction or legal authority.

12 II. NO MATERIAL FACTS IN DISPUTE

13 There are only five (5) material facts in this case and none of them are in
14 dispute between the parties. The material facts are separately presented in
15 accordance with the rule, and are repeated immediately below for ease of
16 reference.

17 1. Plaintiffs James J. Hamm and Donna Leone Hamm are Arizona
18 taxpayers over the age of 18 and citizens of the United States and the State of
19 Arizona who were and are residents of Maricopa County, Arizona at all times
20 relevant to this Complaint. Plaintiffs each submitted an application to visit an
21 Arizona Department of Corrections ("ADC") inmate on July 21, 2011, along with
22 payment of a required \$25.00 fee. See Verified Complaint, at page 3, ¶ 8 &
23 ¶ 9.

24 2. Defendant Charles L. Ryan is the Director of the Arizona
25 Department of Corrections ("ADC"). Subsequent to enactment of A.R.S.

1 § 41-1604.B(3), Defendant Ryan authorized and implemented a revised
2 administrative procedure, Department Order 911 ("DO 911") effective July 20,
3 2011, which, at section .01, subsection 1.2, established a \$25.00 visitor
4 background check fee for all persons over the age of 18 who apply to visit an
5 ADC inmate, with 100% of monies so collected to be deposited into the ADC
6 Building Renewal Fund. See Verified Complaint, at pages 3-4, ¶ 10; and Hamm
7 Exhibit C. (attached to the Complaint in this matter).

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

10 *B. The director may:*

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

21 A.R.S. § 41-1604.B(3).

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

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

B. The director shall use the monies in the fund for
building renewal projects that repair or rework buildings
and supporting infrastructure that are under the control
of the state department of corrections and that result in
maintaining a building's expected useful life. Monies in

1 the fund may not be used for new building additions,
2 new infrastructure additions, landscaping and area
3 beautification, demolition and removal of a building
and, except as provided in subsection C of this section,
routine preventive maintenance.

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

6 A.R.S. § 41-797.

7 5. ADC Department Order 911, Inmate Visitation, effective July 20, 2011,
8 at DO 911.01 (Visitation Application Process), subsection 1.2, provides, in
9 pertinent part, as follows:

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

16 1.2.1 The following persons are exempt from the
one-time \$25.00 background check fee:

17 1.2.1.1 Children under the age of 18.

18 1.2.1.2 Inmates' attorneys of record
and their agents.

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

21 1.2.1.4 Persons applying for
telephone-only contact.

22 1.2.2 Applications...shall not be processed until
the background check fee is received.

23 ADC DO 911.01, subsection 1.2., attached to the Complaint as Hamm
24 Exhibit C.

25 Hamm Exhibit C consists of only the first three pages of ADC DO 911,

1 which is a 37-page document, because only those pages directly address the
2 \$25.00 visitor background check fee challenged in the Verified Complaint as an
3 unconstitutional tax and an unconstitutional special law.

4 5 ARGUMENT

6 On July 21, each Plaintiff submitted to the ADC an application to visit an
7 inmate residing within the ADC. Pursuant to ADC DO 911, section 1.2, Plaintiffs
8 were required to pay a \$25.00 fee for a visitor background check as part of the
9 application process. The fee imposed by Defendant Ryan via DO 911, section
10 1.2 was authorized by the legislature in A.R.S. § 41-1604.B(3). The statute
11 reads as follows:

12 *B. The director may:*

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

18 **A.R.S. § 41-1604.B(3).**

19 Plaintiffs' challenge to the statute does not attack the background check
20 as impermissible *per se*, but rather asserts that the collection of a purely
21 pretextual fee in order to raise monies that are mandated for general public
22 purposes (the ADC Building Renewal Fund) constitutes an impermissible tax
23 and a constitutionally prohibited special law.

24 The statute establishing the ADC Building Renewal Fund expressly
25 constrained and dedicated the use of the monies in the fund, as follows:

1 A. The department of corrections building renewal
2 fund is established consisting of monies deposited
3 pursuant to section 31-230.... The director shall
4 administer the fund. Monies in the fund are subject to
legislative appropriation and are exempt from the
provisions of section 35-190 relating to the lapsing of
appropriations.

5 B. The director shall use the monies in the fund for
6 building renewal projects that repair or rework buildings
7 and supporting infrastructure that are under the control
8 of the state department of corrections and that result in
9 maintaining a building's expected useful life. Monies in
the fund may not be used for new building additions,
new 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.

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

12 **A.R.S. § 41-797.**

13 For reasons discussed in detail at a later point in this Motion, the following
14 matters are significant: (1) the visitor background check fee must be deposited
15 in the ADC Building Renewal Fund and must be used for building renewal and
16 maintenance; (2) the use of the monies collected is not within the control of the
17 ADC director, but rather mandated by the Legislature for building renewal
18 purposes, and the monies are expressly subject to further control and
19 re-designation by the legislature ("*subject to legislative appropriation, see A.R.S.*
20 **§ 41-797.A**); and (3) the monies collected may not be used to defray any costs
21 that might be associated with conducting a background check (pursuant to the
22 express legislative mandate for the use of the monies.

23 **A. PLAINTIFFS ARE ENTITLED TO CHALLENGE THE STATUTE /**
24 **ADMINISTRATIVE REGULATION IN THIS CASE BECAUSE**
25 **THEY HAVE FORMALLY APPLIED TO VISIT AN ADC INMATE,**
THEY HAVE PAID THE VISITOR BACKGROUND CHECK FEE,

1 **AND THEY HAVE A CONSTITUTIONALLY PROTECTED**
2 **PROPERTY INTEREST IN THE MONEY USED TO PAY THE FEE**
3 **TO THE STATE AGENCY.**

4 Plaintiffs have standing to bring this constitutional challenge because
5 Plaintiffs have applied to visit an ADC inmate, *i.e.*, Betty Smithey,
6 ADC # 024685, via the formal process used by the ADC for visitor applications;
7 and Plaintiffs have paid the required fee, which they believe constitutes an
8 unconstitutional tax rather than a fee and an unconstitutional special law.

9 Plaintiffs have standing to bring this constitutional challenge because
10 Plaintiffs are taxpayers within this jurisdiction and Plaintiffs have a
11 constitutionally protected property interest arising from their ownership of the
12 private funds used to pay the fee charged by the ADC for a visitor background
13 check.

14 Plaintiff Donna Leone Hamm lobbied legislators against the enactment
15 of SB 1621. In her capacity as Executive Director of Middle Ground Prison
16 Reform, Plaintiff Donna Hamm expressed numerous concerns, in writing,
17 about the idea of imposing a background check fee for persons who apply
18 to visit ADC prisoners. See Letter of January 24, 2011, attached hereto,
19 designated Hamm Exhibit D, and now incorporated by reference as though fully
20 set forth herein. The objections included (1) discussion of the taxation issue
21 arising from a pretextual fee for ADC visitor applicants with 100% of the monies
22 collected being used for facilities renewal and maintenance, costs which
23 properly are to be borne by general fund tax dollars, see Hamm Exhibit D,
24 at pages 1 & 2 (*i.e.*, paragraphs 3, 4, 5, and 6); and (2) discussion of the fact that
25 informal research revealed no other state charging prison visitor background
26 checks, see Hamm Exhibit D, last full paragraph on page 2.

1 Following passage of SB 1621 into law, Plaintiff Donna Hamm
2 communicated in writing to Defendant Ryan with regard to various aspects of
3 the administrative regulation implementing a fee for background checks on
4 persons who apply to visit an inmate within ADC institutions. As a result of
5 Plaintiff lobbying and communicating her concerns to Defendant Ryan and
6 to legislators, the ADC administrative regulation was revised to eliminate
7 all persons under the age of 18, to delete repetitive (yearly) background
8 check fees for the same applicant, and to modify language from a "*visitor*
9 *application fee*" to a "*visitor background check fee*." Plaintiff's concerns with
10 regard to constitutional issues, however, had no effect.

11 **B. CRITICAL CONSIDERATIONS BEARING UPON WHETHER**
12 **THE VISITOR BACKGROUND CHECK FEE CONSTITUTES A**
13 **PERMISSIBLE FEE OR AN UNCONSTITUTIONAL TAX AND A**
14 **CONSTITUTIONALLY-PROHIBITED SPECIAL LAW.**

15 Plaintiff contends that the \$25.00 visitor background check fee imposed
16 pursuant to DO 911 and pursuant to A.R.S. § 41-1604.B(3), the statute that
17 collects such funds and mandates the use of the funds for the Arizona
18 Department of Corrections Building Renewal Fund, is a tax rather than a fee and
19 an unconstitutional "*special law*" in violation of Ariz. Const. art. 4, pt. 2, § 19 (9)
& (20).

20 In determining whether an assessment is a fee or a tax, this Court should
21 consider the following questions: (1) was the assessment imposed by the
22 legislature or a lesser political entity; (2) is the assessment used for a general
23 public purpose; (4) are the collected monies subject to acquisition by the
24 legislature for public purposes; (5) is the assessment used for the regulation of
25 the group upon whom the assessment is imposed; (6) does the assessment

1 result in a special benefit to the group compelled to pay the assessment; and
2 (7) is the amount of the assessment based upon the theory of furnishing a
3 service to the group compelled to pay the assessment, and, if so, is the scale of
4 the assessment in reasonable proportion to the service provided.

5
6 **1. The Monies Collected by the Assessment Are Statutorily
Dedicated to a Public Purpose.**

7 The assessment in this case is for a general public purpose, *i.e.*, “[t]he
8 *director shall deposit..., any monies collected pursuant to this subsection in*
9 *the department of corrections building renewal fund established by*
10 *section 41-797.” See A.R.S. § 41-1604.B(3) (quoted in full at Note 3, herein).*

11 The legislature expressly limited the use of the monies collected by means
12 of the visitor background check fee and deposited in the ADC Building Renewal
13 Fund, in specific detail:

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

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

A.R.S. § 41-797 (bold print added) (quoted in full at Note 4, herein).

23 **2. The Assessment Was Imposed by Authorization of the**
24 **Legislature, the Taxing Authority of the State.**

The assessment in the form of a visitor background check fee, with the

1 monies mandatorily placed in the Arizona Department of Corrections Building
2 Renewal Fund, was imposed by authority of the state legislature, the
3 fundamental taxing entity/authority of the state, rather than imposed by a lesser
4 entity.

5 Taxing in the State of Arizona is a function of the legislature, and other,
6 lesser, entities may impose a tax only pursuant to a formal delegation enacted
7 by the legislature. In this case, the state agency which is to collect the “fee” is
8 not the entity which authorized the fee; instead, the assessment was
9 accomplished by statutory enactment of the primary taxing authority (“*The*
10 *director may establish by rule a fee for any deposits made to a prisoner*
11 *spendable account.*” See A.R.S. § 41-1604.B(3).

12
13 **3. The Monies Collected by the Assessment Are Subject to
Legislative Appropriation for Other Public Purposes.**

14 Further, in addition to the statutorily-specified general public use for
15 monies in the ADC Building Renewal Fund, the legislature nonetheless also
16 expressly provided that the monies may be appropriated for yet other public
17 purposes. A.R.S. § 41-797.A (“*Monies in the fund are subject to legislative*
18 *appropriation....*”) (bold print added).

19 **4. The Assessment Is Not a Voluntary Charge Paid in Return
20 for a Public Service That Bestows a Specific Benefit on the
Particular Group Assessed.**

21 The Arizona Supreme Court has distinguished between a fee and a tax by
22 noting that a fee is a voluntary charge paid in return for a public service that
23 bestows a particular benefit on the recipient, “*while a tax is a forced contribution*
24 *of wealth to meet the public needs of the government.*” Stewart v. Verde River
25 Irrigation & Power District, 49 Ariz. 531, 534, 544-45, 68 P.2d 329, 330, 334-35

1 (1937).

2 From an examination of the statutory limitations on the use of the collected
3 monies – *i.e.*, for general building renewal projects that repair or rework ADC
4 buildings and supporting infrastructure, along with routine preventive
5 maintenance – it is quite clear that the \$25.00 visitor background check fee is
6 “*a forced contribution of wealth to meet the public needs of the government.*”
7 The actual general public purpose for the monies collected by the challenged
8 assessment is unambiguously established by express language of the
9 authorizing statute. See detailed discussion in Section VII. B. 1, above. As a
10 result of the legislative restriction on the use of the monies accrued by
11 the assessment, it is clear that the monies are NOT used for the regulation or
12 direct benefit of the parties upon whom the assessment is imposed.

13
14 i) **a legitimate fee – one not a tax disguised as a fee –
provides a specific benefit to those assessed the fee.**

15 It is important for this Court to note that Plaintiffs concede that a fee which
16 is imposed upon a select group and is used to defray the costs of particular
17 services or benefits provided specifically to members of the group upon whom
18 the fee is assessed is, in all likelihood, a permissible fee not violative of the state
19 constitution. Because the assessment in this case is linked to a request by a
20 member of the public to be allowed to visit an inmate within the ADC, this Court
21 might be presented with an argument that the group of persons who are
22 assessed the fee (visitor applicants) do receive a particular benefit or service in
23 return for the assessment, namely, that the ADC performs a background check
24 which provides information used by the agency in its determination of whether
25 to approve or deny the application to visit an inmate. It is conceivable that such

1 an argument might include the claim that the fee is a voluntary one because
2 members of the public are not required by law to visit inmates within the ADC.

3 ii) the fee in this case is not a legitimate fee, for two
4 reasons.

5 In this case, however, the Court should note that there are two significant
6 problems with such an argument. First, The Department of Corrections was not
7 authorized by the legislature to collect the fee for the purpose of defraying the
8 costs of performing the visitor background check. Any attempt to so claim would
9 at once be revealed as a sheer pretext, because the statute expressly mandates
10 that the monies collected be deposited to the ADC Building Renewal Fund for
11 legislatively specified general public purposes, not used for defraying the costs
12 of performing visitor background checks.

13 Second, the benefit which accrues from the use of the monies collected
14 by the assessment is a general public benefit, not directed toward the members
15 of the group assessed to pay the fee. The benefit that accrues from the use of
16 the funds deposited to the ADC Building Renewal Fund accrues to all prisoners,
17 regardless of whether they have visitors; and to all members of the public who
18 use ADC buildings, not merely those who visit prisoners. Such beneficiaries
19 include, but are not limited to, ADC employees, law enforcement officers who
20 conduct meetings at the prison, community volunteers, university and college
21 tour groups, and victims' reconciliation groups who meet within the ADC.

22
23 **C. THE \$25.00 VISITOR BACKGROUND CHECK FEE MEETS THE
TESTS FOR A TAX AND FOR A SPECIAL LAW.**

24 In sharp contrast to a legitimate fee, a tax is an assessment of money
25 that is not related to any particular government service or benefit provided to

1 the persons assessed. The Arizona Supreme Court – in the course of
2 discussing what constitutes a tax rather than a fee – has held that a tax relates
3 to the taxpayer's ability to pay based on the taxpayer's property or income rather
4 than its relationship to any particular government service provided to the
5 payees. Verde River, *supra*, 49 Ariz. at 544-45, 68 P.2d at 334-35. Here, the
6 assessment is not a fee because the assessment imposed upon members of
7 the public (visitor applicants) is wholly unrelated to any particular benefit not
8 afforded to others who do not pay the assessment. An assessment providing
9 general benefits arising from the accomplishment of public purposes is a tax, not
10 a fee.

11 Whether an assessment should be categorized as a tax or a fee is
12 generally determined by examining three factors: (1) the entity that imposes the
13 assessment; (2) the parties upon whom the assessment is imposed; and
14 (3) whether the monies accrued by the assessment are expended for general
15 public purposes or used for the regulation or benefit of the parties upon whom
16 the assessment is imposed. Jachimek v. State of Arizona, 205 Ariz. 632, ¶ 9,
17 74 P.3d 944, ¶ 9, (App.2003, Div.1), citing May v. McNally, 203 Ariz. 425,
18 430-31, 55 P.3d 768, 773-74 (2002).

19 **1. The Assessment In this Case Is A Tax, Not A Fee.**

20 The first and third elements support Plaintiffs' contention that the
21 assessment in this case is a tax rather than a fee and the second element
22 supports the contention that the statute is a special law.

23 With regard to the first element, the assessment was authorized by the
24 Legislature, not a lesser entity (see section VII B. 2., herein), and the monies
25 collected are not only dedicated to a general public purpose (renewal and

1 maintenance of buildings used by the state agency), but also subject to
2 appropriation by the legislature (see A.R.S. § 41-797.A).

3 With regard to the third element, the assessment is not related to the
4 regulation of or a benefit to the parties upon whom the assessment was imposed
5 (see section VII B. 4., herein); rather, the assessment is imposed for a general
6 public purpose (the renewal and maintenance of buildings used by the ADC,
7 see section VII B. 1., herein).

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

15 The State of Arizona constitutionally must provide and maintain all
16 buildings used by the Department of Corrections as part of the state criminal
17 justice system. The conclusion to be drawn from the examination of the factors
18 discussed in Jachimek is that the assessment imposed in this case constitutes
19 a tax, not a fee.

20 2. The Assessment In this Case Is A Special Law.

21 Assuming, *arguendo*, that this Court deems the assessment to be a tax
22 rather than a fee, based upon the combination of factors presented herein and
23 discussed above, it is incumbent upon this Court to determine whether the tax
24 is being imposed in an unconstitutional manner.

1 The state constitution prohibits the enactment of special laws where a
2 general law can serve:

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

5 9. Assessment and collection of taxes.

6 20. When a general law can be made applicable.

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

8 The Constitution of the State of Arizona permits and controls taxation,
9 whereby general laws taxing the citizenry produce monies for the general
10 fund of the state, and such tax monies provide the source for the renewal and
11 maintenance of buildings under the control of the Department of Corrections.
12 Instead of a general law, however, the legislature has enacted in this case a
13 special law, one which "*applies only to certain members of a class or to an*
14 *arbitrarily defined class which is not rationally related to a legitimate legislative*
15 *purpose.*" State Compensation Fund v. Symington, 174 Ariz. 188, 192,
16 848 P.2d 273, 277 (1993) (quoting Arizona Downs v. Arizona Horsemen's
Foundation, 130 Ariz. 550, 557, 637 P.2d 1053, 1060 (1981)).

17 In this case, the persons who use the buildings under the control of the
18 Department of Corrections include, but unquestionably are not limited to
19 members of the public who apply to visit prisoners. Other who use ADC
20 buildings include Department officials, Department staff and employees,
21 members of the public who have business with the Department, and the general
22 citizenry of the state, who benefit from the incarceration and rehabilitation of
23 prisoners committed to the care and custody of the department. Of the class of
24 persons who use Department of Corrections buildings or who derive a benefit
25 from the use of ADC buildings, the statute authorizing the assessment of a fee

1 “*applies only to certain members of*[the] *class*, namely, only those who apply to
2 visit prisoners within the ADC.

3
4 **3. The Statute Authorizing the Fee Does Not Have a
“*Legitimate Legislative Purpose.*”**

5 As previously mentioned, the Arizona Supreme Court has addressed the
6 issue of a special law (one which “*applies only to certain members of a class or*
7 *to an arbitrarily defined class which is not rationally related to a legitimate*
8 *legislative purpose.*” State Compensation Fund v. Symington, *supra*,
9 174 Ariz. at 192, 848 P.2d at 277, quoting Arizona Downs v. Arizona
10 Horsemen's Foundation, *supra*, 130 Ariz. at 557, 637 P.2d at 1060.

11 Plaintiffs ask this Court to take special note of the fact that, within the
12 context of a fee that is challenged as being a pretext for imposition of an
13 unconstitutional special law which actually imposes a tax rather than a fee,
14 a “*legitimate legislative purpose*” requires a direct connection between the
15 use of the monies collected and a service or benefit unique to the parties
16 assessed:

17 ¶ 15 Here, there is clearly a legitimate governmental
18 objective—to provide fire and emergency services to the
19 county island residents. Moreover, the population
20 designated in the legislation, the county island
21 residents who will be losing their fire and emergency
22 services, is rationally related to that objective. The
23 legislation was enacted to assist the county island
24 residents in solving the problem of their impending loss
25 of services. Therefore, the first prong of the test is
satisfied because the population classification is
rationally related to the legislation's objective of
providing fire and emergency services to those in
need.

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

1 Accordingly, Plaintiffs contend that the legislative purpose behind the
2 assessment in this case is not a *legitimate legislative purpose* (as that term is
3 defined for taxation purposes) because the benefit accruing from the
4 assessment does not provide any service or benefit unique to the parties
5 assessed.

6 The actual benefit arising from the statutorily directed use of the monies
7 – ADC building renewal and maintenance – accrues not only to a) members of
8 the public who visit ADC prisoners, but also to b) the entire population of the
9 State of Arizona (by defraying the tax burden associated with maintaining
10 buildings under control of the state agency) and c) all persons who use ADC
11 buildings regularly or intermittently. This latter group includes (1) state and
12 federal law enforcement officers and officials who interview prisoners at the
13 prison; (2) Board of Executive Clemency members, Board staff, and members
14 of the public attending Board hearings conducted within the ADC; (3) staff
15 and employees of the ADC; (4) persons approved for visitation with inmates;
16 (5) ADC approved program volunteers from the community; (6) institutions and
17 organizations that provide services to prisoners and/or to ADC staff and
18 employees; (7) university and college tour groups; and (8) July 28, 2011 victim
19 reconciliation participants at meeting within ADC institutions.

20 Pursuant to A.R.S. § 41-1604.B(3), the statutorily mandated purpose of
21 the assessment is to fund a state agency's general building renewal projects
22 that repair or rework buildings and supporting infrastructure, along with routine
23 preventive maintenance – but not by means of a constitutionally imposed tax,
24 but rather by an assessment upon an extraordinarily narrow slice of the
25 citizenry. The combination of a general public purpose with no unique benefit

1 accruing to the population assessed necessarily means that there is no
2 "*legitimate legislative purpose*," because the actual purpose is an attempt to
3 shift the legitimate tax burden of the general citizenry of the State to a limited
4 portion of a specialized group who derive no special benefit from the use of
5 the monies taken from them. Prison visitors cannot be used as "*cash cows*" by
6 the legislature, because the Arizona Constitution prohibits the enactment of
7 such laws.

8 Accordingly, there is no constitutionally sufficient connection between
9 the specific population assessed the \$25.00 fee and any benefit derived from
10 the fee not accruing to others not assessed the fee. Hence, the fee is an uncon-
11 **stitutionally imposed tax and the statute is an unconstitutional special law.**

12 **4. There Is No Substantial Cost Involved in Performing a**
13 **Background Check for ADC Visitor Applicants.**

14 The assessment in this case is particularly egregious because there is no
15 substantial cost involved in performing a background check.

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

20 1) A records check for any person who wishes to have one
21 performed on him/herself through DPS is free of charge, and
22 includes the taking of a full set of fingerprints. The person must
23 show a photo ID and provide other personal information. The
24 process takes a few weeks, and the person is mailed the results of
25 the ACIC records check.

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

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

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

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

15 See 06/16/2011 e-mail from Plaintiff Donna Hamm to ADC Director Ryan,
16 attached hereto, designated Hamm Exhibit E, and now incorporated by
17 reference as though fully set forth herein.

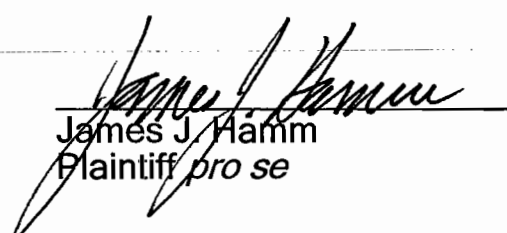
18 Following her visit to DPS headquarters, Plaintiff Donna Leone Hamm
19 called the FBI telephone number provided by DPS (304-625-3878) to find out
20 how much the FBI charges for an NCIC check. Plaintiff was informed that
21 individual citizens may request an NCIC criminal background check from the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

1 On June 16, 2011, Plaintiff Donna Hamm sent an email to Defendant
2 Ryan, providing the information she had obtained from DPS, and challenging the
3 \$25.00 amount for the fee as being an arbitrary amount. See Hamm Exhibit E.
4 Following Defendant Ryan's receipt of Plaintiff Donna Hamm's 06/15/2011
5 email, the only change made by Director Ryan was a change in the wording of
6 the ADC's newly revised D.O. 911 from a "*visitor application fee*" to the correct
7 wording, which is a "*background check fee*."

8 **CONCLUSION**

9 Accordingly, based upon the Complaint for Declaratory Judgment and
10 Exhibits attached thereto; the accompanying Separate Statement of Material
11 Facts; and this Motion for Summary Judgment and Exhibits attached thereto,
12 this Court should rule in favor of Plaintiffs with regard to the challenged statute
13 and the challenged administrative regulation, because (1) the statute is a tax
14 rather than a fee, (2) the statute constitutes an unconstitutional tax, (3) the
15 statute is a special law prohibited by the state's Constitution, and (4) the
16 administrative regulation constitutes action taken without or in excess of
17 authority, *i.e.*, an *ultra vires* action, and therefore did not and does not have the
18 force and effect of law. Plaintiffs respectfully request this Court grant relief as
19 requested in the Complaint in this matter.

20 RESPECTFULLY SUBMITTED this ^{5th} day of August, 2011.

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22 
23 James J. Hamm
24 Plaintiff *pro se*

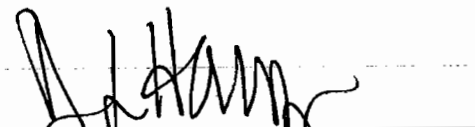
21
22 
23 Donna Leone Hamm
24 Plaintiff *pro se*

EXHIBIT D

Middle Ground Prison Reform

139 East Encanto Drive

Tempe, Arizona 85281

(480) 966-886

middlegroundprisonreform@mjr.com

January 24, 2011

Representative or Senator
Arizona House of Representatives/State Senate
17000 West Washington
Phoenix, Arizona 85007

Dear Representative or Senator _____:

No one can ignore the fact that the state of Arizona faces unprecedented budget shortfalls which impact every administrative agency of government.

As the Executive director of Middle Ground Prison Reform, I write to you about proposals that have been made to legislators by the JLBC and/or the Executive which include: (1) charging a \$25 background check fee to current and potential visitors to inmates in the Arizona Department of Corrections; and (2) deducting a 1% fee from all deposits into inmate banking accounts for "account management." See Executive Budget Recommendation, 2011/12.

Under the pretext of charging fees for background checks and managing inmate bank accounts, 100% of the funds collected from these fees will actually be placed in the Building Renewal and Preventive Maintenance Program (fund), which, under the proposal, will be committed to the "sole responsibility" of the Arizona DOC.

Background Check Fee

The DOC policy on visitation includes a requirement that all potential visitors, including babies and children, file an application to visit (and, allegedly, a background check is performed). The background check is based upon name, date of birth (and when provided, a social security number). The applicant, if an adult, is also required to provide a copy of a government photo ID.¹

The proposal for the new \$25 background check fee explicitly indicates that implementation of the fee is designed for the express purpose of providing an additional funding source for facilities maintenance for the ADOC, and not for the purpose of defraying the actual costs of performing the background check.

Middle Ground strongly opposes the funding of facilities maintenance by charging fees to members of the public who visit in DOC facilities. To the extent that facilities maintenance overlaps with legitimate security concerns of the prison system, the responsibility for meeting such maintenance/security needs lies exclusively with the Appropriations Committee of the Legislature,

¹ Inexplicably, the Department's Visitor Application also *requires* the applicant to provide their employer's name, address and telephone number, as well as the applicant's occupation. There is no legitimate basis to request this information in order to approve a visitor.

funded via general fund tax dollars. It is inappropriate to impose an additional tax on the family members and other members of the public who chose to exercise the privilege to visit prisoners while confined within the DOC. There is no legitimate basis in Arizona law for such a specialized tax on prison visitors to meet general fund obligations.

In addition to the fact that the purpose of this fee is to fund facilities maintenance and not to defray the relatively minor costs of the background checks actually performed by the DOC, it is unreasonable for the DOC to charge for and perform background checks on infants and other young children who cannot possibly have security issues of relevance to visitation within the DOC. Additionally, it is unreasonable for the DOC to charge for and perform background checks for those who already have passed the DOC's background check procedure.

Taking all these things into account, it is clear that the background check fee is nothing more than a pretext for raising additional taxes on the backs of prison visitors. It is transparently exploitative.

Fees for Deposits Into Inmate Accounts

Similarly, the proposed fee of 1% for each deposit to any inmate's account was proposed solely for the purpose of providing yet another funding source for the facilities maintenance program of the DOC.

With regard to the 1%-of-all-deposits fee, there is an additional concern, above and beyond all those concerns expressed above. The DOC does not provide inmates with any interest on funds deposited to inmate accounts, purportedly because the interest derived from the inmate funds serves to pay the cost of administering the inmate accounts. Here, the new, additional 1% fee bears no relationship whatsoever to the management of inmate accounts; rather, the fee is simply another way of funding facilities maintenance for the prison system on the backs of inmates and members of the public, via an unnecessary and unjustified charge on funds deposited to inmate accounts.

Middle Ground strongly opposes the imposition of the 1% fee on deposits unless (1) inmates are paid interest on their deposited funds; and (2) the fees charged on deposits are exclusively directed toward the management of inmate accounts. In addition, if a 1% fee is charged on deposits, it should be capped at a reasonable amount per transaction; say, \$1.00. There is no rational basis for charging more to process a larger amount of money to an inmate banking account than there is for processing a smaller amount - the work and the process is precisely the same. Clearly, the only reason a percentage-of-deposit fee is being contemplated is for the purpose of raising money to fund the facilities maintenance program.

Other States

Middle Ground is an affiliate organization to National CURE, a criminal justice reform agency based in Washington, D.C., which has affiliates or member organizations in each U.S. state and in some foreign countries. We conducted an informal poll of each state's CURE affiliate group, and we learned that, to the best of our knowledge, there is no other state (or country) that charges a fee for prison visitor applications or background checks.

Conclusion

We are aware that there are many proposals to raise funds from select groups within the state, such as raising tuition fees for college students, etc. There is a highly significant difference, however, between the newly proposed DOC fees and the other proposals. The increased charges in other

instances bear a direct and irrefutable connection between the service provided and the additional funds being raised. For example, tuition fees for students are used to directly reduce the cost of providing educational and institutional services to those students; there is no pretext involved.

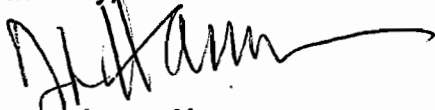
Every social scientific study that has ever been conducted on the effects of prison visitation and maintenance of community ties while incarcerated has shown a dramatic positive effect on reducing recidivism for those who maintain family and community ties versus those who don't. The seminal study was conducted in 1974 in the California Department of Corrections (Holt/Miller). Several subsequent studies have borne out these findings. Charging fees to already economically disadvantaged families will not encourage nor facilitate visitation, and thus will, to some extent, have the effect of aggravating the recidivism problem rather than ameliorating it.

Moreover, the Arizona DOC requires persons who have no intention of actually visiting a prisoner (because they live out-of-state or out-of-the-country) to fill out a visitor application and go through a background check, even if their only contact with the prisoner will be via the inmate collect telephone system. Under the proposal, even those who will not visit a prisoner, but who will accept collect phone calls from an inmate, will pay the "background check fee."

The proposed fees are grossly exploitative of a vulnerable group of people who have no other means to see a loved one incarcerated except to pay the fee. The fee is not being used to perform or supplement background checks, but is instead being used for an entirely unrelated purpose – prison facilities maintenance – which is an essential function of government that must be paid for via general fund taxes.

We urge you to reject these proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hamm", with a long horizontal flourish extending to the right.

Donna Leone Hamm
Director

EXHIBIT E

Mr. Ryan:

Thank you for forwarding the recent responses to my questions. In keeping with your admonition to have any responses or additional questions submitted to you by the close of business today (June 16), I am submitting the following. This information is with respect to the \$25 fee that you have settled on, apparently based on a fee that DPS charges for certain background checks.

I personally drove to the DPS headquarters today to submit myself for a "records check" (they don't call it a background check). Here's what I learned:

1. A records check for any person who wishes to have one performed is free of charge. This includes the taking of fingerprints. Several weeks after the person submits their I.D. and fingerprint card, along with some other personal information, a copy of an ACIC check is mailed to that person.
2. A person who works for a private company who requires a background check and a fingerprint card will pay a fee of \$5.00. Same items as above are required. The background check performed is an ACIC check.
3. For employees of state agencies (schools, etc.) the fee to obtain a fingerprint clearance card, which of course includes the taking of fingerprints, personal information, etc. is \$24.00
4. For visitors or volunteers to state agencies, the fee to obtain a fingerprint clearance card, which of course includes the taking of fingerprints, personal information, etc. is \$20.00

According to DPS, they don't do NCIC checks. Instead, only the FBI can do those checks. I called the information telephone number for the FBI (304) 625-3878 to find out how much it costs for an NCIC check. Individual persons may request an NCIC criminal background check from the FBI, but only after submitting a fingerprint card compiled by an authorized criminal justice agency. A letter must also be submitted which includes name, address, telephone, email address, etc. and the fingerprint card must contain location of the person's birth, etc. The fee for this work is \$18. I strongly suspect that the Arizona Department of Corrections does not perform NCIC checks on visitors because of the lack of fingerprints and other required information. If you claim that you do so, then this email doubles as a public records request of all records, expenditures, reports and other electronic or paper records of the Department which prove that NCIC checks are performed on prison visitors, without revealing any names or confidential information. Failure to respond to this public records request will allow me to make the assumption that no such records are checked by your agency on visitors.

As a consequence of the above information, it seems both reasonable and logical to challenge the Department's decision to charge a fee of \$25.00 for visitor background checks (you aren't authorized to charge a visitor application (processing) fee) when all the Department does is run a computerized ACIC check for warrants and criminal history records. If an NCIC check is performed by the ADOC, I'd like information about how this procedure is undertaken without fingerprints and -- sometimes -- even without social security numbers of visitors. In fact, the Department's "background" check takes your employee approximately 30 seconds to perform. Please again justify the fee of \$25.00 when DPS performs a much more detailed and thorough background check, including the taking and processing of national database fingerprint comparisons, for visitors to state agencies for a fee of \$20?

I am prepared to put all of the above information in a sworn affidavit. You are, of course, free to check this information yourself.

With respect to your information about the wording of "visitor application fee" and "fee for conducting a background check," there is a huge difference. A "visitor application fee" implies that you are somehow permitted to charge a fee for processing the application from the moment it is submitted until the moment it is denied and/or approved. That is simply not the case. As authorized in the statute, the fee is limited and specifically targeted for "conducting a background check" and that is what it should be called at all times in the policy.

If I have further information or questions, I will submit them prior to the close of business today.

Donna Leone (Hamm)
Criminal Justice Consultant
Executive Director - Middle Ground Prison Reform
See: www.middlegroundprisonreform.org

MIDDLE GROUND HAS BEEN ARIZONA'S PREMIER CHAMPION OF THE RIGHTS OF THE INCARCERATED SINCE 1983