

No. 19-169

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In the  
Supreme Court of the United States

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JANE DOE,

*Petitioner*

v.

IOWA,

*Respondent*

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On Petition for a Writ of Certiorari  
to the Iowa Supreme Court

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BRIEF OF AMICUS CURIAE COMMUNITY  
LEGAL SERVICES, INC. IN SUPPORT OF  
PETITIONER JANE DOE'S PETITION FOR A  
WRIT OF CERTIORARI

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**INTEREST OF AMICUS CURIAE <sup>1</sup>**

Community Legal Services, Inc. (CLS) was founded by the Philadelphia Bar Association in 1966 as an independent 501(c)(3) organization to provide free legal services in civil matters to low-income Philadelphians. Since its founding, CLS has served more than one million clients who could not afford to pay for legal representation. CLS has prioritized providing extensive services to people with criminal records for nearly two decades. It has been at the cutting edge of issues surrounding the civil consequences of criminal records, including the impact of records on employment, housing, and education.

CLS also assists hundreds of Philadelphians each year with clearing up their records through the expungement, sealing, and pardon processes. CLS advocated for Pennsylvania's bi-partisan Clean Slate law, which became the first in the nation to automate the process of sealing millions of criminal records, including all non-convictions. CLS is a national leader on criminal record clearing, and has launched the National Record Clearing Project through which it provides nationwide support to civil legal services and other organizations that are seeking to start or expand their record clearing programs.

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<sup>1</sup> Counsel for amicus curiae authored this brief in whole, and no other person or entity other than amicus has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties were given ten days notice and both parties consented to the filing of this brief.

## SUMMARY OF ARGUMENT

In the digital age, arrest records are often as readily available as newspaper articles, able to be pulled up on a smart phone or delivered to an inbox in the form of a commercial background check. This is especially the case in Iowa, where even people falsely accused of crimes have that information publicized online on a government website. These records impact the nearly 700,000 Iowans who have been arrested, but are particularly detrimental to indigent Iowans who are most in need of access to employment, housing, and stability for their families. Even a non-conviction record can wholly foreclose the ability of individuals to secure gainful employment or access stable and safe housing.

In Iowa, a poor person who is charged with a crime is required to pay a fee to enjoy the right to counsel in his defense, even if he is found not guilty. Iowa crossed a constitutional line in its efforts to collect that fee when it enacted Iowa Code § 901C.2, which denies access to expungement to people who were too poor to pay for a lawyer in the first place, and are still too poor to pay for the indigent defense fee. By enacting a harsh, discriminatory and punitive penalty that singles out indigent defense fee debt and applies to people who are presumed innocent, Iowa has violated both the Equal Protection Clause and the fundamental prohibition against punishing the innocent.

The sanction is a punishment because Iowa legislators recognized no legitimate government purpose for keeping non-conviction records public, finding instead that public arrest records were an unjust penalty imposed on innocent people. Moreover,

the sanction is excessive in relation to any legitimate interest. Poor Iowans are not good sources of income, and are even less likely to be able to pay if their records are made public and they are unable to secure gainful employment.

Iowa Code § 901C.2 not only punishes people who are presumed innocent, it singles out people who are presumed innocent *and* have the misfortune of being poor. The intersection of the Equal Protection challenge with the presumption of innocence makes this case ripe for review. The widespread availability of non-conviction records and the harm they cause makes this case of particular importance nationwide. We thus respectfully ask this Court to grant the petition for certiorari.

## ARGUMENT

### I. ARREST RECORDS ARE DEVASTATINGLY COMMON AND EASILY ACCESSIBLE IN THE DIGITAL AGE

More than one hundred million American adults have some type of criminal record.<sup>2</sup> In Iowa, this translates to over 677,000 individuals.<sup>3</sup> Today, approximately one-third of American adults, and one-half of African American adults, will be arrested by

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<sup>2</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 3 (2014), *available at* <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

<sup>3</sup> *Supra* note 2 at Table 2.

the age of twenty-three.<sup>4</sup> Half of American children now have at least one parent who has a criminal record.<sup>5</sup> Many of these records are for arrests that never resulted in conviction.

The prevalence of and easy access to criminal records has become a significant burden on millions of individuals and families across the United States. Twenty years ago, an employer or landlord would have to go to a local courthouse to view a physical file to find out whether a job applicant or potential tenant had a criminal record. Now, due to advances in technology and the resulting rise of a multi-billion-dollar background check industry, employers, landlords, and data collection companies are able to easily access criminal records online.<sup>6</sup>

For individuals who were arrested but never convicted, the widespread publication of this record information is particularly problematic. In the past, an individual who was not convicted of an offense would leave the courtroom with little to no repercussions from the state having accused him of a crime, potentially without merit. Today, states like Iowa frequently publish criminal record information

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<sup>4</sup> Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

<sup>5</sup> REBECCA VALLAS ET AL., CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN: A TWO-GENERATION APPROACH 1 (2015).

<sup>6</sup> See Nat'l Ctr. for State Courts, Privacy/Public Access to Courts Records: State Links, <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx> (last visited Aug. 28, 2019); Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321 (2015).

online and sell arrest data to commercial background check companies who then reveal that information to employers, landlords, and others. Criminal histories are particularly easy to access in Iowa because statewide criminal record information is published on Iowa Courts Online, which can be accessed by any person at any time.<sup>7</sup> This information can be used even against individuals who were acquitted.

## **II. ARREST RECORDS CAUSE STIGMA AND FORECLOSE ABILITY TO EARN INCOME AND ACCESS LIFE NECESSITIES**

### **a. Criminal Background Screening is on the Rise among Employers**

Ninety percent of employers perform some form of criminal background check during the hiring process.<sup>8</sup> Many employers contract with commercial background check companies to provide them with criminal history record information. These companies are permitted by the Fair Credit Reporting Act to reveal arrests without convictions dating back seven years. 15 U.S.C. § 1681c(a)(5). Sometimes this rule is violated and arrests dating back much further than seven years are reported.

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<sup>7</sup> See Iowa Courts Online Search, <https://www.iowacourts.state.ia.us/ESAWebApp/SelectFrame> (last visited Aug. 29, 2019).

<sup>8</sup> Roy Maurer, *More Employers Letting Candidates Explain Conviction Records*, SOC'Y FOR HUMAN RES. MGMT. (May 15, 2015), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/candidates-explain-conviction-records.aspx>.

Employers commonly screen for and reject applicants, or terminate current employees, based on records of arrest without conviction. “Ban-the-Box” laws that prohibit asking about criminal records on the initial job application have proliferated around the country. But these laws have not reduced the prevalence of background screening of applicants and employees, which is on the rise.<sup>9</sup> Many employers consider arrest records relevant to the hiring process, while other employers lack training in how to understand criminal records and may assume that arrest records are equivalent to conviction records. This means that people with arrest records lose more job opportunities and earn less money than their counterparts without records.

#### **b. Arrest Records Cause Lack of Income and Depressed Earnings**

The widespread availability of arrest records and the prevalence of employer background checking mean that individuals who have never been convicted of a crime can nonetheless be boxed out of employment altogether, or be stuck in a chronic state of underemployment, unable to reach their full earning potential based on their education, skills, and abilities.

Researchers have found that the existence of a criminal record reduces the likelihood of a job offer by more than 50 percent, with an even more pronounced

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<sup>9</sup> Roy Maurer, *Know Before You Hire: 2017 Employment Screening Trends*, SOC'Y FOR HUMAN RES. MGMT. (Jan. 25, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/2017-employment-screening-trends.aspx>.

effect on Black applicants than white applicants.<sup>10</sup> Another study found that when employers asked about criminal history of job applicants, those without records received sixty-three percent more callbacks, even though the records in question were relatively minor.<sup>11</sup>

By contrast, a study out of California showed that individuals who had their arrest records expunged reported an increase in yearly income of \$6,190 after record clearance.<sup>12</sup> Additionally, ninety-three percent of those surveyed reported feeling more confident in their future job prospects once the stigma of their criminal records were no longer following them.<sup>13</sup>

Similarly, a study out of Michigan found that those who obtain expungement experience a sharp upturn in their wages within just two years, with earnings rising by twenty-five percent.<sup>14</sup> The

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<sup>10</sup> Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. 195, 199 (2009), available at [https://scholar.harvard.edu/files/pager/files/annals\\_sequencingdisadvantage.pdf](https://scholar.harvard.edu/files/pager/files/annals_sequencingdisadvantage.pdf).

<sup>11</sup> Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV.: PAPERS & PROC. 560, 560 (2017), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2892&context=articles>.

<sup>12</sup> Meyli Chapin et al., *A Cost-Benefit Analysis of Criminal Record Expungement in Santa Clara County*, STAN. UNIV. PUB. POLICY PROGRAM 15 (2014), available at <https://publicpolicy.stanford.edu/publications/cost-benefit-analysis-criminal-record-expungement-santa-clara-county>.

<sup>13</sup> *Supra* note 12.

<sup>14</sup> J.J. Prescott & Sonja Starr, *Expungement of Criminal Convictions: An Empirical Study*, 635 PUB. LAW AND LEGAL

researchers attribute this to unemployed people finding jobs and very minimally employed people finding steadier or higher-paying work.<sup>15</sup>

Framed another way, Iowans who cannot afford to pay their indigent defense fees and expunge their records experience the harm of having their wages depressed by twenty-five percent. This is analogous to wage garnishment, which federal law generally caps at twenty-five percent of income.<sup>16</sup> In *James v. Strange*, this Court noted that a “debtor's wages are his sustenance, with which he supports himself and his family. The average low income wage earner spends nearly nine-tenths of those wages for items of immediate consumption.” *James v. Strange*, 407 U. S. 128, 135 (1972). Iowans with arrest records that they cannot expunge due to their indigence are like the debtors in *Strange*, unable to support themselves and their families.

If indigent Iowans were allowed to access the expungements to which they are otherwise legally entitled, they would have a chance to increase their earnings and climb out of poverty. Not only would this increase individual and family income, but it would also create more government revenue for Iowa because individuals with higher income are able to pay more in taxes and utilize fewer public benefits.<sup>17</sup> Ensuring that indigent individuals have access to

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THEORY RES. PAPER SERIES 45 (2019), *available at* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3353620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620).

<sup>15</sup> *Supra* note 14.

<sup>16</sup> U.S. DEP'T OF LABOR EMP'T STANDARDS ADMIN. WAGE & HOUR DIV., FACT SHEET #30: THE FEDERAL WAGE GARNISHMENT LAW, CONSUMER CREDIT PROTECTION ACT'S TITLE III (2016), *available at* <https://www.dol.gov/whd/regs/compliance/whdfs30.pdf>.

<sup>17</sup> *Supra* note 12.



expungement relieves individual suffering, while ultimately providing financial benefits to localities, states, and our nation as a whole.

**c. Housing Access and Family Stability  
Are Impacted by Arrest Records**

Arrest records also serve as a large barrier to stable housing, especially for low-income and vulnerable individuals and families. Public housing authorities often use records of arrest without conviction to deny housing to prospective residents or evict current tenants.<sup>18</sup> Moreover, many public housing authorities look back as far as twenty years to deny individuals housing based on criminal records.<sup>19</sup> These denials prevent entire families from being able to live together in affordable housing.

Although not regulated in the same way as public housing, private landlords often set up background check procedures of their own volition or as required by some municipal governments, and deny rentals to individuals with arrest records.<sup>20</sup> One recent study out of Akron, Ohio found that nearly two-thirds of private landlords did not accept applicants with criminal records.<sup>21</sup> A brief search on Craigslist

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<sup>18</sup> MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 16-19 (2015), *available at* <https://www.povertylaw.org/files/docs/WDMD-final.pdf>.

<sup>19</sup> *Supra* note 18, at V.

<sup>20</sup> Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. 4, 5-6 (2011).

<sup>21</sup> *Supra* note 20, at 6.

reveals that screening based on arrest records runs rampant across the country. In states like Iowa where non-conviction arrest information is published online, landlords can easily do their own internet searches and screen out prospective tenants with arrest records.

These policies cause many vulnerable individuals and families to face tremendous housing instability, and even homelessness, while doing little to protect the safety of residents. Moreover, housing and employment discrimination often compound one another, keeping indigent people in a perpetual state of instability and poverty, unable to escape their records and access the basic necessities of life.

Take the case of CLS client Maria, a 37-year-old mother of three children who had experienced years of domestic violence at the hands of her children's father. After his violence put her in the hospital several times, Maria decided she needed to leave him. While she was in the process of getting legal help to get a Protection from Abuse order against him, he showed up at her house and began physically attacking her. Afraid for her life, Maria grabbed the closest item she could find – a glass bottle – and hit him on the head with it so she could get away. He then ran to the police station with a bleeding cut on his head and accused her of assaulting him. This led to Maria being arrested. Fortunately, these unfounded charges were quickly dismissed for lack of evidence.

Soon after, Maria was hired as a receptionist at a hospital, and was able to leave the home of her abuser and begin renting a safe apartment where she could live with her children. Then, the background check the hospital conducted came back and Maria's arrest record was reported. The hospital flagged the

record and told Maria she would need to clear it up if she was to continue to work there. Maria was fearful that she would lose her job and thus her ability to maintain a safe home for herself and her children.

Maria was able to get connected to legal help to get her record expunged, which she then was able to show to her employer to maintain her job. Had she been in Iowa and charged an indigent defense fee, she would not have been able to afford to expunge her record given her precarious financial situation. She would have likely lost her job, and she and her children would have become homeless, unable to procure or sustain housing because of her record. Or worse yet, they would have been put back in a situation where they were subject to violence.

Maria's story is all too common among CLS's clients. Likewise, there are doubtless thousands of innocent Iowans like Maria who are facing similar situations due solely to their indigency.

### **III. IOWA CODE § 901C.2 PUNISHES INNOCENT PEOPLE BY RELEASING THEIR CRIMINAL RECORDS TO THE PUBLIC SOLELY BECAUSE THEY ARE INDIGENT**

Jane Doe, like all the Iowans who are eligible for expungement under Iowa Code § 901C.2, is presumed innocent. Even though she was not convicted, Doe owes fees to the state for the attorney who was appointed to represent her because she could not afford to hire counsel. As much as the Iowa government may want to exact indigent defense fees, they may not do so in a way that punishes Doe,

because she is protected by the presumption of innocence.

In enacting Iowa Code § 901C.2, Iowa legislators imposed the penalty of keeping arrest records public for people who were presumed innocent but could not pay fees. By their own calculations, keeping non-conviction records public is harsh, unjust, and unrelated to a legitimate governmental interest. Because the Iowa legislature chose to impose this penalty after recognizing that it is unjust and unjustifiable, the publication of arrest records is a punishment. As a punishment imposed on people presumed innocent, it violates one of the most basic tenets of our law.

**a. Presumption of Innocence is a Bedrock Principle that Prohibits Punishing People Who Are Not Convicted of Crimes**

When individuals like CLS client Maria or Iowa Legal Aid client Doe are arrested, they are presumed innocent unless proven guilty. This presumption of innocence is a value that lies at the root of our nation. “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary.” *Coffin v. United States*, 156 U.S. 423, 453 (1895). This principle is not altered if a person is indigent, has appointed counsel, owes fees, or is unable to pay fees. The realization of the presumption of innocence cannot be contingent on indigency. *See Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956) (“Plainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence.”).

Presumption of innocence is not limited to individuals who have pending charges. *Nelson v. Colorado*, 137 S.Ct. 1249, 1255 n.8 (2017). Rather, individuals like Maria or Doe who are accused of crimes but later acquitted, or have their charges dismissed, are likewise presumed innocent. *See id.* (finding that petitioners whose “convictions were reversed or vacated, with no prospect of re prosecution” were presumed innocent “once those convictions were erased.”)

Iowans who are eligible for expungement under Iowa Code § 901C.2 were all either acquitted of the charges against them or had those charges dismissed, so they are all presumed innocent. It should go without saying that they therefore should not face punishment. Punishing people who are presumed innocent is the antithesis of due process. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). That is why this Court has made clear that people who are not convicted of a crime “may not be punished at all.” *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2474 (2015).

### **b. Publicizing Non-conviction Records Imposes an Unjust Harm on Innocent People**

The legislative history and text of Iowa Code § 901C.2 show that Iowa legislators recognized the great harm imposed by public non-conviction records which prevent Iowans from accessing opportunity. Iowa viewed this harm as particularly unjust because it was imposed on people who enjoy the presumption of innocence. Iowa legislators crafted a law that did not recognize any legitimate governmental interest in

keeping non-conviction records public, and thereby they expressed their belief that publicizing these records was unjustifiable.

**i. Iowa Legislators Supported the Bill as a Means to Undo an Unjust Harm to Innocent Iowans**

Reflecting the growing body of research and awareness regarding the harm of arrest records, the Iowa legislature introduced Senate File 385, the bill that became Iowa Code § 901C.2, in the spring of 2015. The bill received unanimous, bipartisan support – no small feat in today’s hyper-partisan era. Many legislators spoke in favor of the bill, emphasizing the fact that public records do great harm.

I had a constituent who contacted me this summer and her story was horrific... She was arrested for dealing in meth... It was a case of mistaken identity, totally mistaken identity, I talked to both of the lawyers involved... [After the case was dismissed], for her it was not over. She has a degree as a medical assistant ... She goes to apply for a job and the first thing they see on her records is that she was charged with dealing in meth... She can’t get a job anywhere because of the fact that she can’t get it taken off Iowa Courts Online.<sup>22</sup>

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<sup>22</sup> *Representative Sharon Steckman Remarks on Senate File 385* (April 14, 2015, 8:57:39 AM), <https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=86&billName=SF385> (follow April 14, 2015 “video” link).

This is a bill that is going to help thousands of Iowans... Under current law [a dismissed] case file, all the information in it, all the untrue allegations stays on their record forever. And every time they go to apply for a job, every time they fill out a rent application ... they have worry that somebody is going to pull that out.<sup>23</sup>

The Iowa legislators not only condemned the harm caused by public non-conviction records, they believed that expunging such records is required by justice. Unlike the Iowa Supreme Court, which dismissed expungement as “a matter of legislative grace,” *State v. Doe*, 927 N.W.2d 656, 660 (Iowa 2019), Iowa legislators explained that it is fundamentally unjust to harm those who have been convicted of no crime by foreclosing access to necessities like employment and housing, and that the purpose of the bill was to undo that unjust harm.

Colleagues, this is the right thing to do. People who are not guilty have court records online, are being harmed. Some are having trouble getting jobs, finding a place to live... It’s just not right to do that to people if they were found not

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<sup>23</sup> *Representative Mary Lynn Wolfe Remarks on Senate File 385* (April 14, 2015, 8:55:15 AM), <https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=86&billName=SF385> (follow April 14, 2015 “video” link).

guilty or if the charges weren't justified.<sup>24</sup>

The bill's sponsor in the house went so far as to describe the retention of public non-conviction records as a penalty that violated fundamental rights. "It's just simply the right thing to do to make sure that people's fundamental rights are protected, that they are [sic] not have a lingering penalty or societal black mark for a crime of which they are [sic] been found not guilty."<sup>25</sup>

The Iowa legislators understood that living with an arrest record is an unjust penalty that impacts every area of life, and expungement is the way to fulfill the promise of the presumption of innocence.

**ii. The Text of Iowa Code § 901C.2 Reflects the Belief that Public Non-conviction Records Are an Unjust Penalty**

During the discussion of Senate File 385, not a single legislator argued that there is a legitimate governmental purpose for permanently publicizing a non-conviction record. No one argued that there is value in a public record that could possibly outweigh

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<sup>24</sup> *Senator Rich Taylor Closing remarks on Senate File 385* (March 17, 2015, 4:52:00 PM), <https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=86&billName=SF385> (follow March 17, 2015 "video" link).

<sup>25</sup> *Representative Chris Hagenow Closing remarks on Senate File 385* (April 14, 2015, 9:01:16), <https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=86&billName=SF385> (follow April 14, 2015 "video" link).



the harm public records caused. Instead, all of the speakers expressed a belief that making non-conviction records public forever imposes an unjust penalty on innocent people. This belief is not only a matter of legislative history; it is built into the very text and structure of Iowa Code § 901C.2.

Iowa Code § 901C.2 is premised on the belief that there is no possible legitimate governmental interest in keeping a non-conviction record public. The law does not allow a prosecutor to object and argue the government's interest in keeping a particular non-conviction record public. *See* Iowa Code § 901C.2 (“the court *shall* enter an order expunging” a qualifying record. (emphasis added)). The law does not allow the presiding judge to weigh the government's need for a public record against the harm to the individual, to determine whether the allegations were sufficiently proven, to decide whether the actions underlying the arrest are part of a larger pattern of behavior, or to judge whether the individual somehow “merits” expungement.<sup>26</sup> Instead, every qualifying record “shall be expunged.” Iowa Code § 901C.2. In creating this structure, the legislators codified their belief that forever publicizing non-conviction records is an unjust and unjustifiable harm.

### **c. Making Non-conviction Records Public Due to Unpaid Fees**

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<sup>26</sup> The government's potential arguments are much weaker than they might be if Iowa completely destroyed an expunged record. Under Iowa law, an expunged record is not destroyed. It is inaccessible by the public, but can still be viewed by judges, court clerks, police and corrections personnel, and prosecutors. Iowa Code § 901C.2(2); Iowa Code § 907.4(2). This is similar to “sealing” or “limited access” in other states.

### **Impermissibly Punishes Innocent People**

Iowa legislators recognized that making non-conviction records public forever is an unjust and unjustifiable penalty. They described the harm in punitive terms, calling it a “lingering penalty”<sup>27</sup> and a harm that was “just not right.”<sup>28</sup> They crafted a law that did not recognize any possible legitimate governmental interest in keeping records public, but instead created an automatic right for all eligible cases without consideration of the government’s need for a particular public record.

But even as they expressed the belief that publicizing non-conviction records was an unjust penalty on the innocent, even as they passed a law that codified that belief, they made it impossible for indigent people to expunge their non-conviction records. The Iowa Supreme Court found that this condition was imposed to “motivate defendants to pay what they owe to the State.” *State v. Doe*, 927 N.W.2d at 665.

But Iowa may not punish innocent people in order to extract money from them. *Cf. Nelson v. Colorado*, 137 S.Ct. at 1256 (“Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions.”) Every Iowan who is eligible for expungement under Iowa Code § 901C.2 is presumed innocent, no matter if she is rich or poor, if she owes fees or not.

Iowa has extended a right of expungement to people who are presumed innocent based on notions of

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<sup>27</sup> *Supra* note 25.

<sup>28</sup> *Supra* note 24.

basic fairness and justice, recognizing that that the harm is great and there is no legitimate governmental interest at play. At the same time, they have imposed this harm, a harm that *they have deemed* unjust and unjustifiable, as a penalty for nonpayment of fees. By choosing to impose this penalty, they are punishing the innocent.

The gravity of the penalty alone makes it akin to a punishment. “[I]t is not hyperbole to suggest that one who is falsely accused is subject to punishment despite his innocence [due to his arrest record]. Punishment of the innocent is the clearest denial of life, liberty and property without the due process of law.” *Commw. v. Malone*, 244 Pa.Super. 62, 69 (Pa. Super. Ct. 1976) (cited with approval in *Commw. v. Wexler*, 494 Pa. 325, 329 (Pa. 1981)). Innocent people lose wages, jobs, and housing due to criminal records that are generated, retained and publicized by the government. In fact, the Pennsylvania Supreme Court has found that there is a right to expungement of arrest records in some circumstances because the hardship imposed is so great. *Commw. v. Wexler*, 494 Pa. at 329.

But it is not only the seriousness of the penalty that makes this action a punishment. It is the fact that Iowa has chosen to impose a penalty even after recognizing that it is harsh, unjust and unjustifiable. Iowa legislators recognized that there can be no governmental interest in publicizing an arrest record that outweighs the harm that record causes to people who are presumed innocent. They crafted a law that mandates expungement of eligible cases, without consideration of the particular facts underlying them. But at the same time, Iowa chose to publicize non-conviction records as a penalty for nonpayment. By

imposing a serious harm without a legitimate governmental interest, Iowa has chosen to punish innocent people who owe fees. *See Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015) (actions are a punishment if “the actions are not ‘rationally related to a legitimate nonpunitive governmental purpose’” or if “the actions ‘appear excessive in relation to that purpose.’” (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979))).

Iowa’s publication of non-conviction records is also punitive because it is excessive in light of any possible legitimate governmental interest. *See id.* (actions are punishment if they “appear excessive in relation to [their stated] purpose.”). The harm public criminal records do to innocent people greatly outweighs any gain the legislature can expect to get by “motivating” indigent people to pay fees they cannot afford. Individuals who have no ability to pay are by their nature not good sources of revenue for the government. The government is more likely to recoup revenue by allowing indigent people to access expungement, which will allow them to get better employment, pay more in taxes, and rely less on public assistance programs.<sup>29</sup>

Moreover, the penalty of denying access to expungement is excessive because it is imposed on people even when they have no ability to pay the fees they owe. The Iowa Supreme Court found that a judge is not permitted to waive the fee requirement when the petitioner has no ability to pay. “Had the legislature intended to allow courts to waive the requirement that court-appointed attorney fees be repaid prior to expungement based on a present

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<sup>29</sup> *See supra* note 12.

inability to pay, it could have said so.” *State v. Doe*, 927 N.W.2d at 665. A penalty that applies irrespective of ability to pay is a lifetime sentence for many Iowans, and imposing this penalty on those who were never convicted is excessive no matter what they owe.

#### **IV. SINGLING OUT AND PUNISHING PEOPLE WHO OWE FEES DUE TO INDIGENCY VIOLATES THE EQUAL PROTECTION CLAUSE**

The error of Iowa’s scheme is even more apparent when one considers that the class of people who are punished are indigent people who exercised their right to court-appointed counsel. *State v. Doe*, 927 N.W.2d at 662 (“In our view, the relevant groups to compare are individuals who owe fees to a private attorney and those like Doe who owe fees for court-appointed counsel.”). Iowa Code § 901C.2 violates the Equal Protection Clause because it singles out people who exercised their right to court-appointed counsel for a harsh and punitive penalty. Iowans who are innocent, but have the misfortune of also being poor, cannot expunge their records “merely because [their] obligation is to the public treasury rather than to a private creditor.” *James v. Strange*, 407 U.S. 128, 138 (1972). In contrast, people of means who could afford to hire a lawyer and are subsequently acquitted or have the charges against them dismissed can easily remove their arrest record from the public sphere.

Indigent people like Doe who cannot afford counsel are nonetheless guaranteed the right to counsel by the United States Constitution. Imposing harsh conditions against her because she exercised this right, and thereafter owes fees to the state, is “a

discrimination which the Equal Protection Clause proscribes.” *James v. Strange*, 407 U.S. at 140-41. The Court in *James v. Strange* considered a recoupment statute that imposed harsher recoupment rules on indigency fees than other types of debts. The Court found that this law violated the Equal Protection Clause because it invidiously discriminated against indigent criminal defendants. The Court stated that the law “embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.” *James v. Strange*, 407 U.S. at 142.

Like the recoupment statute in *James v. Strange*, Iowa Code § 901C.2 is punitive and discriminatory in relation to indigent people charged with crimes. But unlike the recoupment statute in *James v. Strange*, Iowa Code § 901C.2 targets poor people who are also presumed innocent. A poor person who is wrongly charged with a crime is already burdened with court debt in Iowa, despite his innocence. To add insult to injury, the Iowa legislature has decided to single out that debt for harsh, discriminatory and punitive treatment. Iowa legislators have imposed a sanction that, by their own calculations, is unjust and has no legitimate governmental purpose. By targeting indigent defendants, they are violating the Equal Protection Clause. By targeting *innocent* indigent defendants, they are violating our deepest ideals of justice and fairness.

## CONCLUSION

Innocent Iowans with arrest records should not be forced to live with a myriad of negative

consequences for their entire lives solely because they are indigent. This case presents a legal issue of great importance to the Constitution, set in the context of a widespread problem regarding the public availability of non-conviction records and the devastating harm they cause to individuals and families. We respectfully request that this Court grant certiorari in this matter and reverse the decision of the Iowa Supreme Court.

Respectfully submitted,

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