

a claim. For the reasons set forth below, Plaintiffs respectfully request that this Court deny Defendants' motion.

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs, who are Arizona citizens and have felony convictions, filed their original complaint on or about June 6, 2007 challenging the constitutionality of Arizona's felon disfranchisement law on two grounds: (1) that the State should not require people with felony convictions to pay legal financial obligations ("LFOs") prior to getting their voting rights restored; and (2) that Congress did not intend for Section 2 of the Fourteenth Amendment to cover the slew of felonies which now exist under Arizona law, namely drug crimes and aggravated domestic violence. Compl. ¶¶ 1-4, 58-87.

Defendants Napolitano and Brewer filed Fed. R. Civ. P. 12(b)(6) motions to dismiss the original complaint for failure to state a claim on August 13, 2007 and September 20, 2007, respectively. In Plaintiffs' opposition to the motions to dismiss, they noted that Arizona's LFO requirement has demonstrably negative and disparate impact on indigents and person lacking the resources to pay their LFOs in full; this contrasts with the ability of those in a position to quickly pay and thereby effectively buy back their fundamental right to vote at an earlier point. Pls.' Opp. To Defs.' Mot. Dismiss at 18-19. Plaintiffs also maintained that, to properly interpret the language and intent of Section 2 of the Fourteenth Amendment, this Court had to consider the implications of the bald assertion that any future crime was necessarily included, including minor misdemeanors. *Id.* at 27-29. The explosion in newly defined crimes and criminal convictions since passage of Section 2 and the resulting racial disparities in the application of Arizona's felon disfranchisement law must at least be examined for an

informed decision on this question. In its January 22, 2008 order granting Defendants' motion to dismiss without prejudice, this Court declined to consider those arguments, stating that Plaintiffs' complaint contained no allegations regarding wealth or racial disparities in the criminal justice system. Coronado v. Napolitano, 2008 WL 191987, at *7, n.7 (D. Ariz. Jan. 22, 2008).

On February 21, 2008, Plaintiffs filed an amended complaint to include allegations regarding economic disparities in the enforcement of the LFO requirement and the existence of racial disparities in the application of Section 2 in general. Defendants filed a motion to dismiss the first amended complaint on May 19, 2008.

II. SUMMARY OF ARGUMENT

Defendants argue that the amendments to Plaintiffs' complaint still do not state a cognizable legal claim and that this Court should dismiss the lawsuit. Defs.' Br. in Supp. Mot. Dismiss at 2-3. Plaintiffs specifically allege in their amended complaint that Arizona's requirement that people with criminal convictions pay LFOs prior to getting their voting rights restored constitutes wealth discrimination and serves no compelling or legitimate governmental interest. First Amended Compl. ¶ 3. In support of this claim, Plaintiffs assert that Arizona's LFO requirement "negatively and disproportionately impacts indigent people in violation of the equal protection clause." Id. at ¶ 63. Taking these factual allegations as true, and regardless of whether this Court adopts a strict scrutiny or rational basis standard of review, Plaintiffs are entitled to present evidence concerning these impacts and challenge the state's purported governmental interests in enforcing the LFO requirement.

Plaintiffs also allege that Congress, when enacting Section 2 of the Fourteenth Amendment, intended the term “other crime” to be narrowly construed to apply to a limited number of crimes, i.e. crimes that were felonies at common law. *Id.* at ¶¶ 1-2. To support their claim regarding Congress’ intent, Plaintiffs further allege that “the number of people with criminal convictions has increased significantly since passage of the Fourteenth Amendment,” and that “Arizona’s felon disfranchisement scheme results in minorities being denied the right to vote at much greater rates than whites.” *Id.* at ¶¶ 45-46. These allegations must be taken as true at this stage of the proceedings. As the case proceeds in accordance with the Federal Rules, Plaintiffs would demonstrate the violations of their constitutional rights by presenting evidence regarding (1) the economic status of Arizona’s felon population and the impact of this status on their right to vote, and (2) the racial make-up of those targeted by Arizona’s criminal system and the costs in human and societal terms, and in constitutional interpretation, if Defendants’ open-ended definition of Section 2 was accepted. Plaintiffs cannot meet this burden if they are denied the opportunity to engage in discovery and to present evidence and expert testimony.

A ruling on the substantive merits of Plaintiffs’ complaint at this stage, absent the opportunities to gather and submit evidence as contemplated by the Federal Rules is premature. Thus, this Court should deny Defendants’ motion to dismiss and allow the parties to proceed with discovery.

III. THE APPLICABLE LEGAL STANDARDS

It is “only the extraordinary case in which dismissal is proper” for failure to state a claim. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court may dismiss a complaint as a matter of law only if the complaint: (1) lacks a

cognizable legal theory; or (2) fails to contain sufficient facts to support a cognizable legal claim. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). When ruling on a motion to dismiss, the court must assume that the complaint's factual allegations are true and should construe all inferences from them in the non-moving party's favor. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002); Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Although conclusory allegations are insufficient to defeat a Fed. R. Civ. P. 12(b)(6) motion, the federal rules only require that the plaintiff put the defendant on notice as to what the legal claim is and the grounds upon which the claim rests. Ascon Properties, Inc. v. Mobil Oil Co., 901 F.2d 696, 1155 (9th Cir. 1989).

The court must not look at whether the plaintiff will “ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Also, in general, a court may not consider materials outside the pleadings when resolving a motion to dismiss. Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir.1998). Instead, the court must decide “whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of a plaintiff's claims.” De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978) (emphasis added).

Assuming all of the allegations in Plaintiffs' amended complaint are true, as this Court must do, Plaintiffs have stated federal and state constitutional claims upon which relief may be granted. Therefore, this Court should not dismiss this case.

IV. PLAINTIFFS ARE ENTITLED TO ENGAGE IN DISCOVERY TO SUPPORT THEIR CLAIM THAT ARIZONA'S LFO REQUIREMENT IS UNCONSTITUTIONAL BECAUSE IT HAS A NEGATIVE AND DISPARATE IMPACT ON INDIGENT PEOPLE AND TO REBUT THE STATE'S PURPORTED INTERESTS IN ENFORCING THE LFO REQUIREMENT.

Defendants argue that Plaintiffs' equal protection claim fails because Plaintiffs do not allege "any purposeful discrimination on the part of the State," or that Arizona's felon disfranchisement law is responsible for racial disparities in the criminal justice system. Defs.' Br. in Supp. Mot. Dismiss at 5-6. Defendants also assert that Plaintiffs' allegations regarding the disparate impact that Arizona's LFO requirement has on indigent people does not present a claim. *Id.* at 7. Defendants have mischaracterized the nature of Plaintiffs' equal protection claim and the purpose of their allegations regarding wealth disparities in the enforcement of the LFO requirement.

First, Plaintiffs' allegations in the amended complaint regarding racial disparities in the criminal justice system are solely related to Plaintiffs' common law felony claims – not the LFO requirement as Defendants apparently assume. Therefore, to the extent Defendants challenge Plaintiffs' equal protection claim by arguing that Plaintiffs have not alleged intentional racial discrimination on the State's part, their arguments are irrelevant.

Second, in arguing that the impact of Arizona's LFO requirement on indigent people has no bearing on the constitutionality of the law, Defendants misinterpret the Supreme Court's holding in Richardson v. Ramirez, 418 U.S. 24 (1974) and the impact that the decision has on laws which govern the restoration of voting rights. In light of Defendants' position and this Court's determination on the initial motion to dismiss, it must be emphasized that the Supreme Court repeatedly has recognized the ability to vote as fundamental to our democracy. M.L.B. v. S.L.B., 519 U.S. 102, 124 n.14 (1996)

("[V]oting cannot hinge on ability to pay . . . for it is a 'fundamental political right . . . preservative of all rights.'") (internal citations omitted). The fact that a "fundamental right" – whether voting, speech, or liberty – can be infringed in the face of a compelling interest, or pursuant to a competing constitutional provision, does not alter its basic nature as fundamental (thereby requiring "strict scrutiny" in determining if even a temporary deprivation is permissible.). Furthermore, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government" Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). Thus, while a state may deprive felons of the right to vote (even though this is not mandated), and may allow ex-felons to regain this fundamental right (also voluntary), it cannot do so in an unconstitutional manner. Limiting deprivation of, or failure to return access to, this basic right to only men, or Caucasians, or those with sufficient resources, would transform an otherwise voluntary legal effort into unconstitutional state action.

In Richardson, the Court held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment" 418 U.S. at 54. The Court did not hold or suggest that there was a similar affirmative sanction to condition re-enfranchisement upon payment of a fee or LFOs and Defendants have not presented a single case to support that proposition. In fact, the Court's decision in Richardson to remand the case to determine whether counties in California were enforcing the state's restoration law unequally "as to work a separate denial of equal protection," shows that constitutional parameters do apply when it comes to the re-enfranchisement process. See id. at 56. The Supreme Court's subsequent decision in Hunter v. Underwood, 471 U.S. 222, 233 (1985), invalidating under the Fourteenth Amendment an Alabama law

disfranchising persons convicted of crimes of “moral turpitude” because it was enacted with a discriminatory purpose, shows that conviction of a crime does not mean a felon is entitled to no constitutional protections when it comes to voting. See also Hobson v. Pow, 434 F. Supp. 362, 367 (N.D. Ala. 1977 (invalidating on grounds of gender based discrimination a state law disfranchising persons convicted of the crime of “assault and battery on the wife”).

The Supreme Court has held that denying a citizen access to a fundamental right – which Arizona’s felon re-enfranchisement scheme does – “for failing to do that which they cannot do” is irrational and cannot survive under any level of equal protection scrutiny. Zablocki v. Redhail, 434 U.S. 374, 394 (1978) (Stewart, J., concurring). The Court’s decisions consistently have held that the existence of a fundamental right cannot be conditioned on the ability to pay. See Bearden v. Georgia, 461 U.S. 660, 671 (1983) (“the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay a debt to society solely by lumping him together with other poor persons and thereby classifying him as dangerous.”); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (invalidating a state practice of granting appellate review only to persons who could afford a trial transcript); Douglas v. California, 372 U.S. 353 (1963) (indigent entitled to counsel on first direct appeal); Roberts v. LaVallee, 389 U.S. 40 (1967) (indigent entitled to free transcript of preliminary hearing); Mayer v. Chicago, 404 U.S. 189 (1971) (indigent cannot be denied an adequate record on appeal). All of these cases strongly support Plaintiffs’ proposition that there can be no equal justice where regaining the right to vote depends on the amount of money a person has.

The completion of a prison sentence, probation, and parole is something that all convicted felons are capable of doing. The payment of LFOs, including court fees, restitution, and interest, is fundamentally different because it depends on a person's wealth, and discriminates against those who are incapable of paying. Some ex-felons are able to pay these obligations immediately after completing prison, probation and parole. Those who pay the fees and restitution are able to vote, and those who do not are unable to vote. The only bar to the right to vote for ex-felons in the second group is their inability to pay. Defendants are unlawfully disfranchising poor people by requiring the payment of LFOs.

Finally, Defendants assert, without any support, that the LFO requirement serves the State's interest "in punishing and deterring criminal activity" and rehabilitates convicted persons by requiring them to "recognize and accept responsibility for the consequences of the criminal activity." Defs.' Br. in Supp. Mot. Dismiss at 9, quoting Coronado v. Napolitano, 2008 WL 191987, at *4 (D. Ariz. Jan. 22, 2008). Plaintiffs maintain that the state's re-enfranchisement scheme is subject to strict scrutiny for all of the reasons set forth in their response to Defendants' motion to dismiss the original complaint. Pls.' Resp. in Opp. Mot Dismiss at 9-12. However, even assuming, arguendo, that rational basis review applies to Plaintiffs' LFO claim, Plaintiffs are entitled to gather evidence that rebuts the notion that denying voting rights to people with criminal convictions achieves the interests set forth above. It must be emphasized that Plaintiffs are not seeking to be relieved from their financial obligations nor in any way to interfere with the existing state sentencing scheme. Yet, for a person whose situation requires years to complete this obligation despite good faith efforts, there is little state

interest in withholding the basic right of a citizen in a democratic society with resulting irreparable harm to the individual involved.

In United States v. Hancock, 231 F.3d 557, 566 (9th Cir. 2000), a case to which Defendants cite to support their argument that rational basis review applies, the court ruled that “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” quoting Heller v. Doe, 509 U.S. 312, 319 (1993). See also McConnell v. Federal Election Comm’n, 540 U.S. 93, 269 (2003) (reviewing evidence government defendants presented when determining constitutionality of law under rational basis test). In order to meet their burden of challenging the State’s asserted interests, Plaintiffs are entitled to engage in discovery and offer evidence to this Court.

Upon completion of discovery, Plaintiffs intend to show that (1) indigent persons are overrepresented in the criminal justice system; (2) those who are indigent are in no better position to pay their LFOs when they complete their term of imprisonment, probation, and parole than when they were first sentenced; (3) there are persons whose economic situation prevents them from paying the LFOs in full for many years; (4) these persons are as suitable in every respect to responsibly exercise the right to vote as those who are in a position to quickly pay all of the LFOs; (5) allowing persons the ability to vote while they are in the process of paying their LFOs does not interfere with or hinder any of the goals of the state criminal system nor the goals of sentencing; and (6) returning the right to vote to an indigent person upon completion of the sentence does not interfere with or hinder that ability to collect any outstanding LFO amount. Once Plaintiffs are able to properly present this and other relevant evidence, this Court will have the

information necessary to adequately evaluate the merits of Plaintiffs' constitutional law claims. At this stage, however, dismissal of Plaintiffs' claims would be premature and contrary to the intent of the Federal Rules of Civil Procedure and of applicable court decisions.

V. PLAINTIFFS' ALLEGATIONS REGARDING THE RACIAL IMPACT OF ARIZONA'S FELON DISFRANCHISEMENT LAWS SUPPORT THEIR ARGUMENT REGARDING CONGRESS' LEGISLATIVE INTENT WHEN ENACTING SECTION 2 OF THE FOURTEENTH AMENDMENT AND PLAINTIFFS ARE ENTITLED TO ENGAGE IN DISCOVERY IN ORDER TO SUPPORT THEIR CLAIMS.

Defendants argue that this Court should dismiss Plaintiffs' common law felony claims because Plaintiffs do not present any allegations which "change the Court's determination that the plain language of the Fourteenth Amendment authorizes states to disenfranchise felons, regardless of the type of felony they have committed." Defs. Br. in Supp. Mot. Dismiss at 11. Defendants' description regarding the nature of Plaintiffs' common law felony claims is inaccurate and dismissal of these claims at this stage would be improper.

Plaintiffs' common law felony claims are grounded in the proposition that Congress did not intend for the term "other crime" in Section 2 to cover the plethora of felonies which now exist, particularly those crimes which have resulted in an alarming number of minorities being incarcerated and disfranchised as Plaintiffs allege. First Amended Compl. ¶¶ 37-46. Although Plaintiffs cited some legislative history to support their claims, Plaintiffs intend to introduce additional evidence and testimony from constitutional law and criminal law experts to further buttress their position.

It is premature for this Court to conclude to a certainty that Plaintiffs' claims fail as a matter of law. Plaintiffs should be afforded the opportunity to organize and submit

the evidence that supports their claims in the manner contemplated by the federal rules. See Hancock, 231 F.3d at 566; McConnell, 540 U.S. at 269. See also Fed. R. Civ. P. 12(d) (converting a motion to dismiss into a motion for summary judgment if matters outside of the pleadings are presented to and not excluded by the court); Dkt. 63 (Minute Order re-setting Fed. R. Civ. P. 16 scheduling conference to September 29, 2008 which is when the parties usually would discuss discovery matters). Taking as true Plaintiffs' allegations regarding congressional intent when enacting Section 2, the significant (and not contemplated) expansion in the list of criminal offenses, and the existing racial disparities in the state criminal system, Plaintiffs have stated constitutional claims for which this Court may grant relief in the form of allowing Plaintiffs to register to vote.

Defendants' suggestion that the plain meaning of the term "other crime" covers all crimes flies in the face of Supreme Court precedent which recognizes that "other crime" for purposes of felon disfranchisement generally does not include misdemeanor offenses which also are "crimes." See generally Blackledge v. Perry, 417 U.S. 21, 28 n.6 (1974) ("[C]onviction of a 'felony' often entails more serious collateral consequences than those incurred through a misdemeanor conviction.").

The Supreme Court's decision in Richardson does not forever foreclose any reexamination of felon disfranchisement laws under the equal protection clause. In Fields v. Palmdale School District, 427 F.3d 1197, 1208 (9th Cir. 2005), for example, the court recognized that its understanding of the Constitution is evolving and, therefore, the application of umbrella rights – like the right to equal protection when it comes to voting – is significant for understanding that evolution. In a case challenging Washington state's felon disfranchisement law, the Ninth Circuit ruled that, if the plaintiffs could show a

connection between racial discrimination in the criminal justice system and its impact on felon disfranchisement, they could establish a claim under the Voting Rights Act that Washington's law dilutes minority voting strength. Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003). The Farrakhan analysis involving the Voting Rights Act is directly applicable for purposes of allowing Plaintiffs in the instant case to gather evidence regarding racial disparities in Arizona's application of its felon disfranchisement law which will shed light on how the law's application undermines Congress' intent when it enacted Section 2. Therefore, this Court should allow the parties to engage in discovery and to adequately litigate the case in order to enable an informed decision on the merits.

VI. CONCLUSION

For all of the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

RESPECTFULLY SUBMITTED this 17th day of June, 2008.

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Certificate of Service

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