

1 TERRY GODDARD
 2 Attorney General
 3 Firm Bar No. 14000
 4 Mary O’Grady, No.011434
 5 Solicitor General
 6 Barbara A. Bailey, No. 018230
 7 Assistant Attorney General
 8 1275 West Washington Street
 9 Phoenix, Arizona 85007-1298
 10 Tel: (602) 542-3333
 11 Fax: (602) 542-8308
 12 Attorneys for Defendants Governor Janet Napolitano
 13 And Secretary of State Janice Brewer

14 **IN THE UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF ARIZONA**

16 ARMANDO CORONADO; JOSEPH
 17 RUBIO; MICHAEL GARZA; MICHELE
 18 CONVIE; and RAYMOND LEWIS, JR.,

19 Plaintiffs,

20 v.

21 JANET A. NAPOLITANO, Governor;
 22 JANICE K. BREWER, Secretary of State
 23 of Arizona, F. ANN RODRIGUEZ, Pima
 24 County Recorder; and HELEN PURCELL,
 25 Maricopa County Recorder, in their official
 26 capacities,

27 Defendants,
 28 .

NO. CV07-01089 PHX SMM

**STATE DEFENDANTS’ MOTION
 TO DISMISS THE FIRST
 AMENDED COMPLAINT
 AND MEMORANDUM
 IN SUPPORT THEREOF**

(Assigned to the Honorable
 Stephen M. McNamee)

(Oral Argument Requested)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MOTION

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Governor Janet A. Napolitano and Secretary of State Janice K. Brewer (“Defendants”) move to dismiss the First Amended Complaint and this action for failure to state a claim upon which relief can be granted. This motion is supported by the following memorandum of points and authorities.

**MEMORANDUM
Preliminary Statement**

Plaintiffs’ new allegations do nothing to address the legal deficiencies that this Court already has determined are fatal to plaintiffs’ case. Plaintiffs’ new complaint amends their first one by adding only four allegations that are arguably relevant to their claims. None of those four allegations, however, addresses either this Court’s dismissal order or the well-established law that is dispositive of their claims. In the First Amended Complaint (“FAC”), plaintiffs attempt to transform their equal protection challenge into a claim based on racial discrimination. Their lone allegation regarding “racial disparities,” however, does not even implicate Arizona’s felon disenfranchisement laws. Instead, plaintiffs allege that discrimination in “the federal and state criminal justice systems” disparately impacts racial minorities.

Moreover, apart from the failure to allege any racial discrimination caused by the specific laws that plaintiffs seek to challenge, the FAC fails to allege any discriminatory purpose or intent on the part of Arizona in enacting or implementing its felon disenfranchisement laws. Accordingly, plaintiffs’ newly-styled equal protection claim is as legally deficient as their first.

Plaintiffs also reassert the same equal protection claims based on a “common law felony” distinction that are identical to those claims definitively decided and rejected by the Court previously in this case. No case of which we are aware has ever recognized that such a distinction limits states’ authority to disenfranchise felons. Indeed, every case that *has* addressed such an argument has decided it against plaintiffs. In any event,

1 the FAC provides no basis whatever for undoing the Court's ruling on plaintiffs'
2 "common law felony" theory. The FAC should be dismissed.

3 **Relevant Procedural Background and the First Amended Complaint**

4 *1. The original complaint and its dismissal.*

5 Plaintiffs filed the original complaint in this action on June 1, 2007. [Dkt. 1]
6 That complaint asserted seven counts based on the federal and state constitutions. The
7 first four claims challenged Arizona's disenfranchisement of convicted felons unless
8 and until those felons have completed all of the terms of their sentences, including the
9 payment of any fines or restitution. [Compl. ¶¶ 56-71] The remaining three claims
10 challenged the disenfranchisement of all convicted felons, including those felons
11 convicted of crimes that were not in existence at the time the Fourteenth Amendment
12 was adopted (*i.e.*, "non common law" felonies). [Compl. ¶¶ 73-83]

13 In the original complaint, some plaintiffs (Coronado, Rubio and Garza) asserted
14 that they were injured because they had not paid the financial penalties that resulted
15 from their conviction for one or more felonies. [Compl. ¶¶ 7-9] Two other plaintiffs
16 (Convie and Lewis) asserted that they were injured by Arizona's felon
17 disenfranchisement because they had committed only "non common law" felonies and
18 therefore could not be disenfranchised in accordance with the federal and state
19 constitutions. [Compl. ¶¶ 10-11] None of the plaintiffs alleged that he or she was a
20 member of any minority racial group.

21 The Court dismissed the complaint in its entirety. [Order dated 1/22/08, dkt. 48]
22 The Court held that Arizona treats all felons the same with regard to disenfranchisement
23 and restoration of civil rights. Every felon is disenfranchised and must complete his or
24 her sentence, regardless what that sentence is, before becoming eligible to be restored to
25 civil rights. [Order at 6] Similarly, the Court held that Arizona's requirement that
26 felons complete their sentences by paying any fines or restitution is not a poll tax.
27 [Order at 8-9] The Court also rejected plaintiffs' Arizona constitutional claims, which
28 would have required the Court to read different provisions of that constitution as
conflicting. [Order at 9] The Court rejected plaintiffs' privileges and immunities

1 claims for the same reason it rejected the equal protection claims. [Order at 10-11]
 2 Finally, the Court found that the plain language of the Fourteenth Amendment permits
 3 states to disenfranchise felons and does not distinguish between the types of felonies
 4 committed. [Order at 12-14]

5 **2. The First Amended Complaint.**

6 The FAC is nearly identical to the original complaint. With regard to
 7 substantive allegations that relate to their claims, plaintiffs added only the following
 8 allegations to the FAC:

9 The number of people who have criminal convictions has increased
 10 significantly since passage of the Fourteenth Amendment. [¶ 45]

11 Given the racial disparities within the federal and state criminal justice
 12 systems, Arizona's felon disfranchisement [sic] scheme results in
 13 minorities being denied the right to vote at much greater rates than whites.
 [¶ 46]

14 Defendants' requirement that people with a felony conviction pay all of
 15 their LFOs as a precondition to being eligible for restoration of their
 16 voting rights also negatively and disproportionately impacts indigent
 people in violation of the equal protection clause. [¶ 63]

17 Arizona's admission to the Union required that it disenfranchise only
 18 those individuals convicted of common law felonies. [¶ 78]¹

19 **Legal Argument**

20 **I. THE APPLICABLE LEGAL STANDARD.**

21 In deciding a motion to dismiss, courts accept all material allegations in the
 22 complaint as true. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988).
 23 Conclusory allegations of law and unwarranted inferences, however, are insufficient to
 24 defeat a motion to dismiss for failure to state a claim. *E.g., Fields v. Legacy Health*
 25 *Sys.*, 413 F.3d 943, 951 n.5 (9th Cir. 2005) (citing *Nat'l Ass'n for the Advancement of*

26 _____
 27 ¹ The only other substantive changes to the complaint were the deletion of references to
 28 the Voting Rights Act [FAC ¶¶ 4, 67], the clarification that plaintiff Garza asserts the
 claims based on the requirement that felons pay their financial penalties before being
 restored their civil rights [FAC ¶¶ 61-62, 70], and the deletion of a reference to a

1 *Psychoanalysis v. Cal. Bd.*, 228 F.3d 1043, 1049 (9th Cir. 2000)); *McGlinchy*, 845 F.2d
 2 at 810 (“[C]onclusory allegations without more are insufficient to defeat a motion to
 3 dismiss for failure to state a claim.”).

4 Moreover, dismissal is warranted if the complaint lacks a cognizable legal theory
 5 or insufficient facts under a cognizable legal claim. *SmileCare Dental Group v. Delta*
 6 *Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996); *Perry v. Beamer*, 933 F.
 7 Supp. 556, 557, 559 (E.D. Va.) (dismissing a complaint challenging a felon
 8 disenfranchisement law because the legal theories raised by the complaint failed as a
 9 matter of law), *aff’d*, 99 F.3d 1130 (4th Cir. 1996).

10 **II. THE COURT SHOULD DISMISS COUNTS ONE THROUGH FOUR**
 11 **BECAUSE THE AMENDED ALLEGATIONS DO NOT SAVE PLAINTIFFS’**
 12 **CLAIMS.**

13 **A. Plaintiffs’ Equal Protection Claim Fails Because the U.S.**
 14 **and Arizona Constitutions Expressly Permit Felon**
 15 **Disenfranchisement.**

16 **1. Plaintiffs’ allegation of “racial disparities” does not support**
 17 **their claim.**

18 Plaintiffs attempt to save their lawsuit by alleging that “[g]iven the racial
 19 disparities within the federal and state criminal justice systems, Arizona’s felon
 20 disenfranchisement [sic] scheme results in minorities being denied the right to vote at
 21 much greater rates than whites.” [¶ 46] Having failed to state a claim in their original
 22 complaint, plaintiffs apparently are re-characterizing their lawsuit as one based on
 23 racial discrimination. Their new complaint, however, does not allege any equal
 24 protection claim based on racial discrimination for at least two reasons.

25 First, the FAC does not allege any purposeful discrimination on the part of the
 26 State. Under *Richardson*, states may constitutionally disenfranchise felons and never
 27 restore their right to vote. In *Hunter v. Underwood*, the Supreme Court articulated a
 28 single exception to *Richardson*’s express recognition of states’ authority to
 disenfranchise felons. 471 U.S. 222, 233 (1985); see *Richardson v. Ramirez*, 418 U.S.

preliminary injunction under the relief sought by the complaint [FAC p. 13 ¶ 4].

1 24 (1974). *Hunter* unremarkably held that states may not intentionally discriminate on
2 the basis of race in disenfranchising felons. *Id.* at 227-28 (affirming judgment in
3 plaintiffs’ favor on an equal protection claim based on disenfranchisement of felons,
4 where Alabama had expressly enacted its felon disenfranchisement law for the purpose
5 of excluding minorities from the franchise). Under *Hunter*’s narrow exception,
6 however, a plaintiff may not merely rely on an allegation of a disparate racial impact.

7 *Hunter* expressly requires that plaintiffs challenging felon disenfranchisement
8 based on alleged racial discrimination must show not only that the law causes a racially
9 disproportionate impact but also that the law was enacted with a racially discriminatory
10 intent or for a discriminatory purpose. *Id.* at 227-28 (requiring a showing of both
11 impermissible racial motivation and racially discriminatory impact for equal protection
12 challenge to felon disenfranchisement law based on race).

13 The FAC does not allege any intentional discrimination on the part of Arizona in
14 disenfranchising felons. There is no allegation that Arizona enacted its constitutional or
15 statutory provisions on felon disenfranchisement for the purpose of excluding any racial
16 minority from the franchise. Indeed, there is no allegation of any improper purpose
17 whatever on the part of Arizona in enacting its disenfranchisement laws.² Accordingly,
18 plaintiffs’ allegation of racial discrimination is insufficient to support an equal
19 protection claim. *E.g., Johnson v. Governor of the State of Florida*, 405 F.3d 1214,
20 1218, 1223-24 (11th Cir. 2005) (affirming judgment in favor of Florida where plaintiffs
21 failed to allege facts sufficient to establish intentional discrimination in state’s felon
22 disenfranchisement law).

23 Second, plaintiffs’ new allegation regarding “racial disparities within the federal
24 and state criminal justice systems” is not an allegation of discrimination caused by
25 Arizona’s felon disenfranchisement laws. The FAC does not allege that Arizona
26 discriminates based on race in the manner in which it disenfranchises felons. Indeed,
27 plaintiffs do not dispute that every person convicted of a felony is subject to the same

28 ² Neither does the FAC allege that Arizona’s law regarding restoration of right was
enacted for any discriminatory purpose.

1 disenfranchisement provisions. Neither does the FAC allege that the manner in which
2 Arizona restores felons' rights is discriminatory. Plaintiffs (understandably) do not
3 allege or even suggest that Arizona restores civil rights to felons based on race
4 considerations. There is simply no allegation that either the taking away of felon voting
5 rights or the restoration of civil rights to convicted felons is itself discriminatory.

6 Instead, the discrimination upon which plaintiffs rely *allegedly already exists* in
7 the criminal justice system. Plaintiffs apparently complain that racial disparity in the
8 criminal justice system results in a disproportionately higher number of minority
9 individuals comprising the pool of felons, who are in turn subject to disenfranchisement
10 and the restoration of rights laws. Such an allegation, however, is not an allegation of
11 discrimination caused by Arizona's disenfranchisement laws and accordingly is
12 insufficient to challenge those laws based on equal protection.

13 **2. Plaintiffs' allegation of disparate impact on indigent persons**
14 **does not state a claim.**

15 The only other allegation added by the FAC that conceivably could bear on
16 plaintiffs' equal protection claim is their assertion that Arizona's requirement that
17 felons pay all financial obligations to be eligible to have rights restored "negatively and
18 disproportionately impacts indigent people in violation of the equal protection clause."
19 [FAC ¶ 63]³ That allegation, however, does not support a claim under the equal
20 protection clause under the reasoning and holding of *Richardson*.

21 As explained in Defendants' motion to dismiss the original complaint, Arizona's
22 disenfranchisement of felons is expressly permitted by the Constitution. Under
23 *Richardson*, states may disenfranchise felons forever, and thus may necessarily
24 disenfranchise them until they have completed all the terms of their sentences. The
25 *Richardson* Court did not undertake a traditional equal protection analysis when
26 considering the constitutionality of California's felon disenfranchisement scheme.
27 Instead, the Court held that the Fourteenth Amendment expressly sanctions states'

28 ³ The additional allegation that "[t]he number of people who have criminal convictions
has increased significantly since passage of the Fourteenth Amendment" is irrelevant to

1 disenfranchisement of felons. *Richardson*, 418 U.S. at 54, 56.

2 The fact that plaintiffs here at times have characterized their claim as a challenge
3 to Arizona's laws of "re-enfranchisement," as opposed to disenfranchisement, does not
4 alter the legal analysis under *Richardson*. The *Richardson* Court did not recognize any
5 such distinction. Moreover, the plaintiffs in *Richardson* were challenging California's
6 refusal to "re-enfranchise" them, not the state's authority to disenfranchise them in the
7 first place. *Id.* at 33 (challenging the denial of voting rights to ex-felons). Yet the
8 Court analyzed their claim as one of disenfranchisement. *Id.* at 56.

9 To the extent plaintiffs challenge the requirement that they complete their entire
10 felony sentences before being restored their civil rights, plaintiffs are challenging the
11 *duration* of their disenfranchisement. *Richardson* makes clear, however, that the
12 duration of states' disenfranchisement of felons is unlimited if the states so choose.

13 Even if *Richardson* is not interpreted to foreclose plaintiffs' equal protection
14 challenge altogether, plaintiffs' claim should be dismissed under a rational basis review.
15 As this Court previously recognized, plaintiffs cannot claim a fundamental right in this
16 case because they have lost their right to vote. [See Order at 6 ("Having been
17 legitimately disenfranchised, Plaintiffs can no longer claim that their right to vote is
18 fundamental.")]

19 In addition, an allegation that plaintiffs are indigent, even if it had been asserted
20 in the FAC, would not implicate a heightened standard of review because indigent
21 persons do not comprise any suspect class for purposes of equal protection analysis.
22 *E.g.*, *Harris v. McRae*, 448 U.S. 297, 322-23 (1980) ("poverty, standing alone[,] is not
23 a suspect classification"); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) ("this Court has
24 never held that financial need alone identifies a suspect class for purposes of equal
25 protection analysis") (citations omitted); *Hassan v. Wright*, 45 F.3d 1063, 1068 (7th Cir.
26 1995) ("indigents do not compose a suspect class").⁴

27
28 the analysis of plaintiffs' claims. [See FAC ¶ 45]

⁴ The FAC does not allege that any of the plaintiffs either are indigent or unable to complete their respective felony sentences by paying off their financial penalties.

1 Because neither a fundamental right nor a suspect class is implicated by the
2 FAC’s allegations, the Court should uphold Arizona’s disenfranchisement law because
3 it is rationally related to a legitimate government interest. *E.g., United States v.*
4 *Hancock*, 231 F.3d 557, 566 (9th Cir. 2000) (where a law neither implicates a
5 fundamental right nor targets a suspect class, courts apply a rational basis review in
6 deciding equal protection challenges); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197,
7 1208 (9th Cir. 2005) (under rational basis review, restrictions will be upheld if they are
8 rationally related to a legitimate state interest).

9 The Court already has held that Arizona’s requirement that felons pay their
10 financial penalties, as part of their felony sentences, before having their civil rights
11 restored serves the State’s interest “in punishing and deterring criminal activity.”
12 [Order at 7] The Court recognized the State’s interest in rehabilitating convicted
13 persons by requiring them to “recognize and accept responsibility for the consequences
14 of the criminal activity.” [*Id.*] The Court held that including financial obligations in a
15 convicted felon’s sentence is rationally related to those legitimate state interests. [*Id.*]
16 Nothing in the FAC supports any finding to the contrary.

17 Accordingly, plaintiffs’ new allegation regarding unnamed “indigent people”
18 does not support any equal protection claim.

19 **B. Plaintiffs’ Poll Tax Claim Was Already Decided.**

20 The FAC continues to assert a poll tax claim based on the Twenty-Fourth
21 Amendment. Other than deleting a reference to a federal statute as support for
22 plaintiffs’ poll tax claim, the FAC’s allegations regarding that claim (Count Two) are
23 identical to those of the original complaint. [Compare Compl. ¶¶ 60-64 (dkt. 1) with
24 FAC ¶¶ 64-67 (dkt. 59)] The Court dismissed plaintiffs’ poll tax claim, however,
25 because the Court found that fines and restitution are part of a felon’s sentence—not a
26 poll tax. [Order at 8] As the Court held, requiring felons to pay financial penalties,
27 which may legitimately be part of their criminal sentence, does not make the ability to
28 pay “an electoral standard.” Instead, Arizona permissibly limits the restoration of rights
to those felons who have completed the sentences imposed for their criminal conduct.

1 The Court has decided the matter. Plaintiffs should not be permitted to continue
2 asserting a poll tax claim in their FAC.

3 **C. Plaintiffs’ Remaining Claims Based on Arizona Constitutional**
4 **Provisions and the Privileges and Immunities Clause Have**
5 **Been Decided Against Plaintiffs.**

6 **1. Plaintiffs’ claim based on the free and equal elections clause**
7 **was decided.**

8 As with plaintiffs’ poll tax claim, the Court directly addressed and decided their
9 claim based on Arizona Constitution, art. 2, § 21 (“free and equal elections clause”),
10 against the plaintiffs. [See Order at 9] The FAC adds no allegations that support any
11 claim under the free and equal elections clause. Accordingly, the Court should dismiss
12 that claim for the reasons stated in the Court’s dismissal order.

13 **2. The FAC does not state any claims under the privileges and**
14 **immunities clauses.**

15 The Court previously addressed and dismissed plaintiffs’ claims based on the
16 privileges and immunities provisions of the Arizona and federal constitutions.
17 Nonetheless, the FAC continues to assert those claims in Count Four. Nothing in the
18 FAC’s allegations, however, alters the Court’s analysis of those claims. As the Court
19 previously held, plaintiffs’ federal privileges and immunities claim fails for the same
20 reason their equal protection claim fails—the right to vote can be suspended without
21 violating the Constitution under *Richardson*. [Order at 10-11] Moreover, Arizona’s
22 restoration of rights law is rationally related to legitimate state interests, as discussed
23 above, and therefore is constitutional. In addition, the Court may dismiss plaintiffs’
24 federal privileges and immunities claim on the separate basis that the right to vote is not
25 a “privilege” under the U.S. Constitution’s privileges and immunities clause. *Minor v.*
26 *Happersett*, 88 U.S. 162, 174 (1874) (holding that the right to vote is not conferred by
27 the privileges and immunities clause).

28 Plaintiffs’ claim under Arizona’s privileges and immunities provision fails for
the same reasons explained in Defendants’ motion to dismiss the original complaint and
in the Court’s dismissal order. [See dkt. 22 at pp. 11-12] Plaintiffs’ new allegations

1 about “racial disparities” in the justice system or disparate impact on “indigent people”
2 do not change that analysis. The Arizona privileges and immunities provision has the
3 same effect as the federal equal protection clause. *E.g., Ariz. v. Bonnewell*, 2 P.3d 682,
4 686 (Ariz. App. 1999). Accordingly, the Court should (again) dismiss plaintiffs’
5 privileges and immunities claim for the reasons explained in Section II(A) above.

6 **III. THE COURT SHOULD DISMISS COUNTS FIVE THROUGH SEVEN**
7 **BECAUSE THE COURT PREVIOUSLY REJECTED THOSE CLAIMS.**

8 As in the original complaint, Counts Five through Seven of the FAC attempt to
9 assert legal theories based on an irrelevant distinction in the type of felony of which an
10 individual was convicted and for which he was subsequently disenfranchised. [FAC
11 pp. 11-13] Plaintiffs previously alleged that states may disenfranchise only those
12 individuals who are convicted of an offense that would have constituted a felony at
13 common law. [FAC ¶¶ 80, 83, 87] The original complaint asserted claims under the
14 equal protection clause, the Arizona free and equal elections clause, and the privileges
15 and immunities clauses of the federal and state constitutions based on that so-called
16 “common law felony” distinction.

17 The Court rejected those claims, however, based on the plain language of § 2 of
18 the Fourteenth Amendment: “Plaintiffs’ argument finds no support in either a plain
19 reading of § 2 or principles of statutory interpretation.” [Order at 12] The only change
20 Plaintiffs made to Counts Five through Seven in their FAC was the addition of a
21 conclusory and unsupported allegation that “Arizona’s admission to the Union required
22 that it disenfranchise only those individuals convicted of common law felonies.” [FAC
23 ¶ 78] That allegation, however, does nothing to change the Court’s determination that
24 the plain language of the Fourteenth Amendment authorizes states to disenfranchise
25 felons, regardless of the type of felony they have committed.

26 Accordingly, the Court should dismiss those counts for the reasons stated in the
27 Court’s dismissal order.
28

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2008, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following

CM/ECF Registrants:

Laughlin McDonald
Neil Bradley
Nancy G. Abudu
American Civil Liberties Union
Voting Rights Project
2600 Marquis One Tower
245 Peachtree Center Ave., NE
Atlanta, GA 30303-1227
lmcdonald@aclu.org
nbradley@aclu.org
nabudu@aclu.org
Attorneys for Plaintiffs

Daniel Pochoda
Legal Director
American Civil Liberties Union
Foundation of Arizona
PO Box 17148
Phoenix, AZ 85011-0148
dpochoda@acluaz.org
Attorneys for Plaintiffs

Daniel Jurkowitz
Pima County Attorney's Office
Civil Division
32 N Stone Ave
Suite 2100
Tucson, AZ 85701
Daniel.Jurkowitz@pcao.pima.gov
Attorney for Defendant F. Ann Rodriguez

M. Colleen Connor

1 MCAO Division of County Counsel
2 222 N. Central Avenue, Ste. 1100
3 Phoenix, Arizona 85003
4 connorc@mcao.maricopa.gov
Attorneys for Defendant Helen Purcell

5 Dennis Wilenchik
6 Kathleen Rapp
7 Wilenchik & Bartness PC
8 2810 N 3rd Street
9 Phoenix, AZ 85004
10 KathleenR@wb-law.com
11 diw@wb-law.com
12 *Attorneys for Defendant Helen Purcell*

13 COPY of the foregoing mailed with Notice of
14 Electronic Filing this 19th day of May, 2008 to:

15 The Honorable Stephen M. McNamee
16 United States District Court
17 Sandra Day O'Connor U.S. Courthouse, Suite 624
18 401 West Washington Street, SPC 59
19 Phoenix, AZ 85003-2158

20
21
22
23
24
25
26
27
28

/s/ Erica Lane _____

204156