

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 Defendant Governor Janet Napolitano

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

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

Plaintiffs,

v.

JANET K. NAPOLITANO, Governor;  
JANICE K. BREWER, Secretary of State  
of Arizona, F. ANN RODRIGUEZ, Pima  
County Recorder; and HELEN PURCELL,  
Maricopa County Recorder, in their official  
capacities,

Defendants.

No. CV07-01089 PHX SMM

**MOTION TO DISMISS PURSUANT  
TO FED. R. CIV. P. 12(B)(6) AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

(Assigned to the Honorable  
Stephen M. McNamee)

**(Oral Argument Requested)**

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Governor Janet K. Napolitano moves to dismiss the Complaint and this action with prejudice for failure to state a claim upon which relief can be granted. This motion is supported by the following memorandum of points and authorities.

1 **MEMORANDUM**

2 **Preliminary Statement**

3 Plaintiffs' Complaint asks the Court to disregard longstanding federal and state  
4 constitutional law and grant felons the right to vote even if they have not completed the  
5 terms of their lawfully imposed sentences. The Plaintiffs' claims are based on two  
6 novel theories: (1) the State discriminates against them on the basis of wealth because  
7 the State does not restore civil rights to felons until they have completed all the terms of  
8 their sentences, which may include the payment of fines; and (2) the State discriminates  
9 against them because they "only" have committed crimes that were not felonies at  
10 common law.

11 The constitutional sanction of felon disenfranchisement, however, has been well-  
12 established for more than a century. Unlike other rights set out in the Constitution, the  
13 right to vote is *expressly limited* as that right pertains to individuals who have chosen to  
14 engage in criminal conduct. Indeed, the Supreme Court established decades ago that  
15 the Constitution does not require states to restore voting rights to felons *at any time*—  
16 even if they complete their sentence. Arizona chooses to restore such forfeited rights,  
17 but requires in return that a felon complete all the terms of his sentence.

18 Under the reasoning of Supreme Court precedent, there is no equal protection  
19 review required with regard to Plaintiffs' challenge. Moreover, even if equal protection  
20 concerns were implicated in the circumstances, Plaintiffs' Complaint does not (and  
21 cannot) overcome the heavy presumption in favor of upholding Arizona's constitutional  
22 and statutory provisions on felon disenfranchisement.

23 Neither do the many authorities that have addressed felon disenfranchisement  
24 laws support Plaintiffs' claim that the *type* of felony they committed governs whether  
25 the State may take away their voting rights. Instead, those authorities stand for the  
26 notion that states constitutionally may remove the right to vote from individuals who  
27 engage in any or all types of felonies. Accordingly, the Court should dismiss Plaintiffs'  
28 Complaint.

**Overview of Arizona's Felon Disenfranchisement Laws and Relevant Allegations**

1 **of the Complaint**

2 Since Arizona became a state, its Constitution has limited the right to vote of  
3 convicted felons. The Constitution provides, in part, with regard to voter qualifications:  
4 “No person who is adjudicated an incapacitated person shall be qualified to vote at any  
5 election, nor shall any person convicted of treason or felony, be qualified to vote at any  
6 election unless restored to civil rights.” Ariz. Const. art. VII § 2 (underscoring added).

7 In accordance with that constitutional mandate, the Arizona Revised Statutes  
8 provide that “[a] conviction for a felony suspends the following civil rights of the  
9 person sentenced: 1. The right to vote.” Ariz. Rev. Stat. (“A.R.S.”) § 13-904(A).<sup>1</sup> In  
10 Arizona, a person who has been convicted of a single felony automatically regains his  
11 civil rights if the person both “[c]ompletes a term of probation or receives an absolute  
12 discharge from imprisonment” and “[p]ays any fine or restitution imposed.” A.R.S. §  
13 13-912(A). Thus, upon completion of both the imprisonment and payment of financial  
14 penalties imposed as a result of a felon’s criminal conviction, that person’s civil rights  
15 are restored.<sup>2</sup> Those rights include the right to vote.

16 For persons who have been convicted of more than one felony, restoration of  
17 civil rights is not automatic. Such felons must apply to the superior court to have their  
18 civil rights restored. A.R.S. § 13-905 (setting forth the application process for  
19 restoration of civil rights for persons who have completed probation); A.R.S. § 13-906  
20 (setting forth the application process for restoration of civil rights for persons who have  
21 been discharged from prison). The superior court judge by whom the felon was  
22 sentenced has discretion whether to grant restoration of the felon’s civil rights upon  
23 application. A.R.S. § 13-908.

24 \_\_\_\_\_  
25 <sup>1</sup> A felony is “an offense for which a sentence to a term of imprisonment in the custody  
26 of the state department of corrections is authorized by any law of this state.” A.R.S. §  
27 13-105(16).

28 <sup>2</sup> The right to possess a weapon is not automatically restored, however. A.R.S. § 13-  
912(B). In addition, under legislation enacted in 2007 the right to vote of persons  
convicted of counterfeiting election returns is not automatically restored. *See* 2007 Ariz.  
Sess. Laws ch. 295, § 5 (amending A.R.S. § 16-1011).

1 Arizona courts are authorized to impose fines in addition to, or in lieu of, prison  
2 terms as sentences for felony convictions. *See* A.R.S. § 13-801. In addition, the  
3 superior court may order that all or any part of a fine imposed on a convicted felon be  
4 allocated as restitution for any economic loss that was caused by the felon's crime.  
5 A.R.S. § 13-804. In determining the amount of restitution, the superior court "shall not  
6 consider the economic circumstances of the defendant." A.R.S. § 13-804(C).

7 According to the Complaint, each of the five plaintiffs in this case has been  
8 convicted of a felony under Arizona law. [Compl. ¶¶ 7-11] Plaintiffs Coronado, Rubio  
9 and Garza were sentenced to pay fines, probation costs, restitution or some combination  
10 of those costs. [Compl. ¶¶ 7-9] The Complaint alleges that each of those three  
11 plaintiffs was denied restoration of his civil rights based on the failure to complete his  
12 sentence by paying his outstanding financial obligations that resulted from his felony  
13 conviction. [*Id.*]

14 Plaintiffs Convie and Lewis were convicted of multiple felonies. [Compl. ¶¶ 10-  
15 11] The Complaint does not allege that either Ms. Convie or Mr. Lewis has ever  
16 applied to obtain restoration of civil rights or that any such application was ever denied  
17 by the superior court.

## 18 Legal Argument

### 19 I. THE APPLICABLE STANDARD.

20 In deciding a motion to dismiss, courts accept all material allegations in the  
21 complaint as true. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9<sup>th</sup> Cir. 1988).  
22 Conclusory allegations of law and unwarranted inferences, however, are insufficient to  
23 defeat a motion to dismiss for failure to state a claim. *E.g., Fields v. Legacy Health*  
24 *Sys.*, 413 F.3d 943, 951 n.5 (9<sup>th</sup> Cir. 2005) (citing *Nat'l Ass'n for the Advancement of*  
25 *Psychoanalysis v. Cal. Bd.*, 228 F.3d 1043, 1049 (9<sup>th</sup> Cir. 2000)); *McGlinchy*, 845 F.2d  
26 at 810 ("[C]onclusory allegations without more are insufficient to defeat a motion to  
27 dismiss for failure to state a claim.").

28 Moreover, dismissal is warranted if the complaint lacks a cognizable legal theory  
or insufficient facts under a cognizable legal claim. *SmileCare Dental Group v. Delta*

1 *Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9<sup>th</sup> Cir. 1996); *Perry v. Beamer*, 933 F.  
2 Supp. 556, 557, 559 (E.D. Va.) (dismissing a complaint challenging a felon  
3 disenfranchisement law because the legal theories raised by the complaint failed as a  
4 matter of law), *aff'd*, 99 F.3d 1130 (4<sup>th</sup> Cir. 1996).

5 **II. THE U.S. AND ARIZONA CONSTITUTIONS PERMIT DISENFRANCHISEMENT OF**  
6 **ALL FELONS, INCLUDING THOSE WHO HAVE NOT COMPLETED ALL THE**  
7 **TERMS OF THEIR SENTENCES.**

8 **A. The Complaint Fails to State an Equal Protection Claim Because the**  
9 **U.S. and Arizona Constitutions Expressly Permit Felon**  
10 **Disenfranchisement.**

11 Plaintiffs assert an equal protection violation based on Arizona's requirement  
12 that felons complete all the terms of their sentences, including the payment of all  
13 outstanding fines and restitution payments, to be eligible to have their civil rights  
14 restored. [Compl. ¶¶ 56-59] That claim fails as a matter of law, however, because the  
15 Fourteenth Amendment expressly recognizes states' rights to disenfranchise felons.  
16 Moreover, even if a traditional equal protection analysis applies in this case, the claim  
17 would fail because Arizona has a rational basis for requiring felons to complete all the  
18 terms of their criminal sentences before restoring their civil rights.

19 **1. Under *Richardson*, Arizona is not required to restore**  
20 **felons' civil rights until they complete all the terms of**  
21 **their sentence.**

22 Arizona's Constitution expressly provides that "[n]o person who is adjudicated  
23 an incapacitated person shall be qualified to vote at any election, nor shall any person  
24 convicted of treason or felony, be qualified to vote in any election unless restored to  
25 civil rights." Ariz. Const. art. 7 § 2(C).<sup>3</sup> That provision is sanctioned by the U.S.  
26 Constitution's Fourteenth Amendment, which expressly permits states to disenfranchise  
27 felons.

28 <sup>3</sup> Nearly every state in the Union has enacted felon disenfranchisement laws. *See*  
*Johnson v. Florida*, 405 F.3d 1214, 1218 (11<sup>th</sup> Cir. 2005) (noting that 48 states have such  
laws).

1 Specifically, section 2 of the Fourteenth Amendment addresses the right to vote  
2 for certain electors, officers and legislators. That section imposes on states the penalty  
3 of reduced representation in federal government if such states deny the vote to eligible  
4 individuals “*except for participation in rebellion, or other crime.*” U.S. Const. XIV  
5 Amend. § 2 (emphasis added). In *Richardson v. Ramirez*, the Supreme Court  
6 interpreted the language of section 2 in deciding a challenge to California’s felon  
7 disenfranchisement laws. 418 U.S. 24, 56 (1974).

8 In *Richardson*, convicted felons sued California election officials for refusing to  
9 register the plaintiffs to vote after the felons had completed their respective criminal  
10 sentences. *Id.* at 26-27. California’s constitution excluded from voting persons  
11 convicted “of any infamous crime.” *Id.* at 27. The Court held that felon  
12 disenfranchisement laws are not subject to the same equal protection analysis as other  
13 state limitations on the franchise. *Id.* at 54. Because that same amendment expressly  
14 sanctions the disenfranchisement of felons, states may deny felons the right to vote if  
15 states so choose. *Id.* at 54-56. Moreover, under *Richardson*, states are not required to  
16 restore that right *at any time*, even upon completion of a felon’s sentence. *Id.* at 56.

17 Under *Richardson*, Arizona may constitutionally take away felons’ right to vote.  
18 The fact that Arizona chooses to restore felons’ civil rights only after the felon has  
19 completed all terms of his sentence does not render Arizona’s restoration process  
20 unconstitutional.

21 **2. Arizona’s civil rights restoration law is constitutional**  
22 **under traditional equal protection analysis because it is**  
23 **supported by a rational basis.**

24 Even if a traditional equal protection analysis applies to Arizona’s civil rights  
25 restoration process, Plaintiffs’ Complaint does not state an equal protection claim.  
26 Plaintiffs do not (and cannot) allege that they are members of any protected class. *E.g.*,  
27 *United States v. Hancock*, 231 F.3d 557, 565 (9<sup>th</sup> Cir. 2000) (recognizing that the  
28 defendant who was a multiple misdemeanor convict was not a member of a protected  
class for purposes of an equal protection challenge). Neither is there any fundamental

1 right implicated by Arizona’s civil rights restoration process. Although the right to  
2 vote is fundamental to citizens, felons do not have *any* right to vote—fundamental or  
3 otherwise. *Richardson*, 418 U.S. at 56; *see also Madison v. Washington*, No. 78598-8,  
4 \_\_\_ P.3d \_\_\_, 2007 WL 2128346, at \*8-9 (Wash. July 26, 2007) (holding that under  
5 *Richardson*, felons do not have a fundamental right to vote and applying rational basis  
6 review to felon disenfranchisement law).

7 Thus, Arizona’s law must be upheld as long as it is rationally related to a  
8 legitimate government interest. *E.g., Hancock*, 231 F.3d at 566 (where a law neither  
9 implicates a fundamental right nor targets a suspect class, courts apply a rational basis  
10 review in deciding equal protection challenges); *Fields v. Palmdale Sch. Dist.*, 427 F.3d  
11 1197, 1208 (9<sup>th</sup> Cir. 2005) (“government actions that do not affect fundamental rights  
12 or liberty interests and do not involve suspect classifications will be upheld if . . . they  
13 are rationally related to a legitimate state interest”). In addition, a “classification  
14 neither involving fundamental rights nor proceeding along suspect lines is accorded a  
15 strong presumption of validity.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). Moreover,  
16 the person attacking the validity of the law has the burden “to negative every  
17 conceivable basis which might support it.” *Id.* at 320 (internal quotation marks  
18 omitted).

19 Arizona’s law regarding restoration of civil rights classifies felons into two  
20 groups: those who complete their criminal sentences and those who do not. The  
21 Complaint does not allege that Arizona has no legitimate interest in having felons  
22 complete all the terms of their sentences, including the payment of any financial  
23 penalties. Plaintiffs made a conscious decision to engage in felonious conduct,  
24 knowing that conviction for such crimes would result in the loss of some of their civil  
25 rights, including the right to vote. At the time Plaintiffs chose to commit felonies, they  
26 knew that Arizona could sentence them to pay fines for their conduct and restitution for  
27 the economic losses directly caused by their conduct to their victims. They also knew  
28 that before they could ever have their civil rights restored, they would have to complete  
*all* the terms of their sentences, whatever those sentences would be under Arizona law.

1 Arizona's Legislature long ago made a policy choice about the financial  
2 penalties that may be imposed as a result of a felony conviction. Similarly, the people  
3 of Arizona, in adopting the Victims Bill of Rights, made a policy choice that persons  
4 convicted of crimes—not their victims—should pay for the economic losses directly  
5 caused by that criminal conduct. *See* Ariz. Const. art. 2 § 2.1(8). Requiring persons  
6 who nonetheless choose to engage in that conduct to complete all of their sentence  
7 before restoring their civil rights is rationally related to Arizona's interest in deterring  
8 crime, punishing crime, and compensating societal victims of their crime. *E.g.*,  
9 *Madison*, 2007 WL 2128346, at \*12 (“The State clearly has an interest in ensuring that  
10 felons complete all of the terms of their sentence, and there is no requirement that the  
11 State restore voting rights to felons until they do so.”).

12 Moreover, states have a legitimate interest in regulating the franchise, including  
13 determining the qualifications of voters. *E.g.*, *Richardson*, 418 U.S. at 53 (noting that  
14 states may consider a person's criminal record in determining voter qualifications);  
15 *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445, 451-52 (2d Cir. 1967)  
16 (discussing the historical justifications for disenfranchising criminals); *Madison*, 2007  
17 WL 2128346, at \*12 (states have an interest “in limiting political participation of those  
18 unwilling to abide by laws and in requiring the completion of all sentence elements  
19 before the right to vote is restored”).

20 Under *Richardson*, felons have no right to vote if the state chooses to remove  
21 that right. Accordingly, there can be no equal protection problem with Arizona's  
22 policy decision to require felons to complete their sentences before restoring their civil  
23 rights. Moreover, even if an equal protection claim was viable, it fails here because  
24 Arizona plainly has a legitimate interest served by its civil rights restoration process.  
25 Accordingly, the Court should dismiss Plaintiffs' equal protection claim based on the  
26 failure to pay financial penalties.

27 **B. Arizona's Civil Rights Restoration Law Is Not a Poll Tax.**

28 Plaintiffs assert that Arizona's civil rights restoration process amounts to a poll  
tax prohibited by the Twenty-Fourth Amendment and the Voting Rights Act, 42 U.S.C.

1 § 1973h. [Compl. ¶¶ 60-64] The Twenty-Fourth Amendment provides that the right to  
2 vote in federal elections “shall not be denied or abridged by the United States or any  
3 State by reason of failure to pay any poll tax or other tax.” U.S. Const. XXIV Amend.  
4 § 1. That Amendment “was passed in order to combat the ‘disenfranchisement of the  
5 poor[,]’ which was the intention of the early poll taxes.” *Gonzalez v. Arizona*, 485 F.3d  
6 1041, 1049 (9<sup>th</sup> Cir. 2007) (quoting *Harman v. Forssenius*, 380 U.S. 528, 539 (1965)).

7 There is no allegation, much less any evidence, that Arizona’s requirement that  
8 felons complete their sentences to have their civil rights restored was or is intended to  
9 impose a tax on the right to vote. Plaintiffs’ poll tax claim fails for at least two reasons.  
10 First, because felons have no right to vote, requiring them to complete all the terms of  
11 their sentences, including payment of imposed financial penalties, cannot be a tax on  
12 that right. In other words, a right must exist before it can be abridged or denied. *E.g.*,  
13 *Harman*, 380 U.S. at 541 (to demonstrate invalidity of Virginia’s voting restriction, “it  
14 need only be shown that it imposes a material requirement solely upon those who  
15 refuse to surrender their constitutional right to vote in federal elections without paying a  
16 poll tax”); *see also Madison*, 2007 WL at \*10 (distinguishing the poll tax found  
17 unconstitutional in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966), and  
18 stating that “[c]onvicted felons, on the other hand, no longer possess that fundamental  
19 right as a direct result of their decisions to commit a felony”).

20 Second, Arizona’s civil rights restoration law does not make affluence or the  
21 payment of any fee an electoral standard. *E.g.*, *Harper*, 383 U.S. at 666 (The Equal  
22 Protection Clause is violated “whenever it makes the affluence of the voter or payment  
23 of any fee an electoral standard”). In the seminal poll taxes cases, the Supreme Court  
24 struck down state laws that required every person in the state to pay a fee as condition  
25 to voting. *Harper*, 383 U.S. at 664; *Harman*, 380 U.S. at 528. By contrast, Arizona  
26 does not require persons who otherwise are eligible to vote to pay any fee to vote.  
27 Arizona chooses to restore civil rights that properly had been stripped from persons  
28 who committed a felony upon completion of those persons’ criminal sentence. A  
financial cost to a felon associated with his crime to attain his forfeited civil rights does

1 not amount to a tax on the right to vote. *Cf. Gonzalez*, 485 F.3d at 1048-49 (rejecting  
2 poll tax claim based on incidental costs that voter identification requirement would  
3 have on voting; the challenged law did not make the payment of fee an electoral  
4 standard).

5 **C. Arizona’s Felon Disenfranchisement Law Does Not Violate the Free  
6 and Equal Elections Clause of the Arizona Constitution.**

7 The Free and Equal Elections Clause of the Arizona Constitution provides, “All  
8 elections shall be free and equal, and no power, civil or military, shall at any time  
9 interfere to prevent the free exercise of the right of suffrage.” Ariz. Const. art. 2 § 21.  
10 That provision, however, must be read harmoniously and consistently with other  
11 constitutional provisions. *E.g., Arizona v. Jordan*, 104 Ariz. 193, 196, 450 P.2d 383,  
12 386 (1969) (courts have a duty to harmonize separate constitutional provisions “so that  
13 the constitution is a consistent workable whole”).

14 Arizona’s Constitution expressly excludes from the franchise “any person  
15 convicted of treason or felony,” unless that person has been “restored to civil rights.”  
16 Ariz. Const. art. 7 § 2(C). Those two provisions easily can be read in harmony to  
17 guarantee the free exercise of the right to vote for such persons who have such a right,  
18 and to exclude felons from those persons who have such a right.

19 The Free and Equal Elections provision necessarily presumes that the right to  
20 vote exists in the first place. Because felons do not have the right to vote under the  
21 Arizona Constitution, requiring them to complete their sentence, including the payment  
22 of financial penalties, does not violate the Free and Equal Elections Clause.  
23  
24  
25  
26  
27  
28

1           **D.     Arizona’s Felon Disenfranchisement Law Does Not Violate the**  
2           **Privileges and Immunities Clauses of the Arizona and U.S.**  
3           **Constitutions.**

4                   **1.     The Arizona equal privileges and immunities clause.**

5           Arizona’s equal privileges and immunities (*i.e.*, equal protection) clause  
6 provides, “No law shall be enacted granting to any citizen, class of citizens, or  
7 corporation other than municipal, privileges or immunities which, upon the same terms,  
8 shall not equally belong to all citizens or corporations.” Ariz. Const. art. 2 § 13.

9           Plaintiffs do not identify any law that grants to any citizen or class of citizens  
10 any privilege which does not, on the same terms, belong to all citizens. The “privilege”  
11 about which Plaintiffs complain is the right to vote. That right has not been granted to  
12 citizens on different terms. Instead, the right is granted to all, with the qualification  
13 (upheld by *Richards*) that certain classes of citizens, including felons, may be excluded.  
14 Stated another way, Plaintiffs are not similarly situated to citizens who are qualified to  
15 vote. *E.g.*, *Stults Eagle Drug Co., v. Luke*, 48 Ariz. 467, 475, 62 P.2d 1126, 1130  
16 (Ariz. 1936) (privileges and immunities provision secures equality of opportunity “to  
17 all persons and corporations similarly situated, and that is all that said constitutional  
18 provision undertakes to guarantee”); *Lindsay v. Cave Creek Outfitters, L.L.C.*, 207  
19 Ariz. 487, 494, 88 P.3d 557, 564 (App. 2003) (Arizona privileges and immunities  
20 provision does not proscribe all unequal treatment, but rather it requires only the equal  
21 treatment of persons similarly situated in a given class).

22           Moreover, among similarly situated felons, Arizona’s law does not treat  
23 members of the class differently. Arizona requires *all* felons to complete all the terms  
24 of their sentences, including payment of financial penalties. *See* A.R.S. §§ 13-912(A), -  
25 -905, -906. The fact that some felons’ own conduct results in financial penalties as part  
26 of their sentence does not transform the civil rights restoration law into one imposing  
27 unequal treatment on members of the felon class.

28           In *Madison v. Washington*, the Washington Supreme Court interpreted a  
provision in that State’s constitution that is substantively identical to Arizona’s

1 privileges and immunities provision. The court noted that the concerns of favoritism  
2 toward the wealthy, which were a basis for the constitutional provision, were “not  
3 triggered by Washington’s felon disenfranchisement scheme because it grants the  
4 ‘privilege’ of restoration of voting rights ‘upon the same terms . . . equally . . . to all  
5 citizens.’” *Madison*, 2007 WL 2128346, at \*6. The court stated:

6       Additionally, the Washington Constitution disqualifies voters on equal  
7 terms—that is, when individuals have been convicted of committing a  
8 felony. Finally, Washington’s statutory disenfranchisement scheme  
9 provides for the restoration of voting rights to felons on equal terms—that  
10 is, only after individuals have satisfied all of the terms of their sentences.  
11 If those terms include payment of [legal financial obligations], then the  
12 full payment of [those obligations] is one of the prerequisites to  
13 restoration of voting rights. The system of only restoring voting rights to  
14 felons who have satisfied all of the terms of their sentences, including  
15 fully paying their [financial obligations], does not constitute a grant of  
16 favoritism or a granting of a privilege on unequal terms, in violation of  
17 article I, section 12, because the same standard is applied evenly to all  
18 felons seeking restoration of their voting rights.

19 *Id.*

20       Even if Arizona’s law could be viewed as treating members of the same class  
21 differently, that law must be upheld under a rational basis review. Arizona appellate  
22 courts construe the privileges and immunities constitutional provision to have the same  
23 effect as the federal Equal Protection Clause. *E.g.*, *Ariz. v. Bonnewell*, 196 Ariz. 592,  
24 596, 2 P.3d 682, 686 (App. 1999) (stating that the effects of the Arizona Constitution  
25 art. 2 § 13 and the Fourteenth Amendment of the U.S. Constitution “are essentially the  
26 same”). Arizona courts similarly apply rational basis review to privileges and  
27 immunities challenges where a statute does not impact a fundamental right or a suspect  
28 class. *E.g.*, *id.* (“Because the statute implicates neither a fundamental right nor a  
suspect class, we apply a rational basis test.”); *Ariz. Downs v. Ariz. Horsemen’s Found.*,  
130 Ariz. 550, 555, 637 P.2d 1053, 1058 (Ariz. 1981) (where a “statute does not impact  
upon a fundamental right or a suspect class, the statute will be upheld if it has any  
conceivable rational basis to further a legitimate governmental interest”).

As explained above in section II.A.2, Arizona’s civil rights restoration law is

1 rationally related to Arizona's interest in deterring crime, punishing crime, and  
2 compensating societal victims of their crime.

3 **2. The Federal Privileges and Immunities Clause.**

4 Plaintiffs' claim based on the federal privileges and immunities provision of the  
5 Fourteenth Amendment should be dismissed because, as explained above in section  
6 II.A.1, section 2 of that amendment expressly permits the disenfranchisement of felons.  
7 Although *Richardson* addressed the equal protection language of section 1 of that  
8 amendment, the Court's reasoning applies with equal force to any privileges and  
9 immunities argument based on that same constitutional section. *See, e.g., Richardson*,  
10 418 U.S. at 43 (adopting the state's argument that "those who framed and adopted the  
11 Fourteenth Amendment could not have intended to prohibit outright in § 1 of that  
12 Amendment that which was expressly exempted from the lesser sanction of reduced  
13 representation imposed by § 2 of the Amendment").

14 **III. THE COURT SHOULD DISMISS ALL CLAIMS BASED UPON THE TYPE OF  
15 FELONIES OF WHICH PLAINTIFFS WERE CONVICTED.**

16 **A. There Is No Equal Protection Claim Based on the Type of Felony  
17 Committed by Plaintiffs.**

18 Each of Plaintiffs' three remaining claims (Counts 5-7) is based on the mistaken  
19 assertion that crimes that were not deemed felonies at common law may not provide a  
20 constitutional basis for disenfranchisement. [*See* Compl. ¶¶ 43-44, 74-76, 79, 83]  
21 Plaintiffs assert that the language used in nineteenth century federal legislation,  
22 including the Reconstruction Act of 1867 and various confederate state readmission  
23 acts, establishes that the Fourteenth Amendment authorizes disenfranchisement of  
24 individuals convicted only of crimes that were felonies at common law. [*See id.* ¶¶ 36-  
25 42]

26 The Fourteenth Amendment, however, contains no such limiting language. As  
27 explained previously, section 2 of that amendment reduced states' representation in the  
28 federal government to the extent such states denied the vote to eligible individuals  
"except for participation in rebellion, or other crime." U.S. Const. XIV Amend. § 2.

1 That amendment does not limit the disenfranchisement to individuals convicted of  
2 felonies at common law. Under *Richardson*, that provision permits states to take away  
3 the rights of *all* felons to vote. The *Richardson* court did not distinguish between the  
4 types of felonies committed by the plaintiffs in that case. Indeed, one of the felons  
5 challenging California's disenfranchisement law had been convicted of the "non  
6 common law felony" of drug possession. 418 U.S. at 32 n.9. Thus, neither the plain  
7 language of the Constitution nor the reasoning or language of *Richardson* supports  
8 Plaintiffs' argument that the type of felony committed determines whether the felon  
9 may be disenfranchised.

10 Moreover, other courts consistently have upheld felon disenfranchisement laws  
11 without distinguishing among the particular crimes that gave rise to the  
12 disenfranchisement. *E.g.*, *Perry v. Beamer*, 933 F. Supp. 556, 559-60 (E.D. Va.)  
13 (rejecting the notion that the type of felony—common law or non common law—  
14 determines whether the state could disenfranchise felons: "The Supreme Court,  
15 however, apparently gave no import to this distinction, and this Court shall do the  
16 same."), *aff'd*, 99 F.3d 1130 (4<sup>th</sup> Cir. 1996); *Fincher v. Scott*, 352 F. Supp. 117, 118  
17 (M.D.N.C. 1972) (upholding against an equal protection challenge a North Carolina  
18 disenfranchisement law that excluded all persons convicted "of any crime the  
19 punishment for which now or may hereafter be imprisonment in the State's prison"),  
20 *aff'd*, 411 U.S. 961 (1973); *Beacham v. Brateman*, 300 F. Supp. 182, 183-84 (S.D.  
21 Fla.) (upholding a Florida law that excluded from the franchise all persons convicted  
22 "of any felony by any court of record and whose civil rights have not been restored"),  
23 *aff'd*, 396 U.S. 12 (1969); *cf. Merritt v. Jones*, 533 S.W.2d 497, 500-01 (Ark. 1976)  
24 (rejecting felon's argument that Arkansas constitutional disenfranchisement provision  
25 excluding persons "convicted of felonies" applied only to felonies at common law; the  
26 word felonies "is plain and unambiguous" and court would apply its common  
27 meaning).

28 One federal appellate court upheld against an equal protection challenge a South  
Carolina disenfranchisement law which excluded all persons who had been convicted

1 of any one of an enumerated list of crimes. *Allen v. Ellisor*, 664 F.2d 391, 392, 397-98  
2 (4<sup>th</sup> Cir.), *vacated on other grounds*, 454 U.S. 807 (1981). The plaintiffs in *Allen*  
3 asserted that equal protection review was appropriate where the state law “identif[ie]d  
4 the disqualifying crimes specifically, thus including some crimes as disqualifying and  
5 omitting others.” *Id.* at 396. Although the plaintiffs’ challenge was not based on a  
6 distinction between common law and non common law felonies, the court’s decision  
7 and extensive discussion of precedent on felon disenfranchisement leave no room for  
8 such a distinction.

9 The court noted that none of the Supreme Court’s decisions addressing equal  
10 protection outside of the felon disenfranchisement context suggests “that the states are  
11 without power to continue their historic exclusion from the franchise of persons  
12 convicted of *all or certain types of felonies*.” *Id.* at 393 (emphasis added). The court  
13 concluded that section 2 of the Fourteenth Amendment “immunizes any classification  
14 of disqualifying crimes, whether the classification is stated in terms of ‘felonies’  
15 generally, or of some felonies, or of certain specified crimes.” *Id.* at 397-98. Although  
16 the Supreme Court ultimately vacated the Fourth Circuit’s decision in *Allen*, the Court  
17 did so on grounds of mootness following the amendment of the South Carolina law at  
18 issue. *See Allen v. Ellisor*, 454 U.S. 807 (1981). The South Carolina legislature  
19 amended the law to eliminate the designation of certain felonies and to disqualify *all*  
20 persons “serving a term of imprisonment resulting from a conviction of a crime.” *See*  
21 S.C. Code § 7-5-120 (1976).

22 Neither the Fourteenth Amendment nor the authorities addressing felon  
23 disenfranchisement laws supports Plaintiffs’ claims based on an irrelevant distinction in  
24 the type of felonies they committed. Accordingly, the Court should dismiss Plaintiffs’  
25 equal protection claim asserted under Count Five.

26 **B. The Type of Felony Committed by Plaintiffs Does Not Provide a  
27 Basis for a Claim under the Free and Equal Elections Clause.**

28 Arizona’s Constitution expressly excludes from the franchise all persons  
convicted of a felony. Ariz. Const. art. 7 § 2(C). As explained in section II.C above,

1 that provision can (and must) be read in harmony with Arizona’s Free and Equal  
2 Elections provision. There is no basis for distinguishing among the particular offenses  
3 that have been defined as felonies by the Legislature for purposes of Arizona’s felon  
4 disenfranchisement provision.

5 The word “felony” in Arizona’s felony disenfranchisement provision (art. 7 § 2)  
6 must be given the meaning that is generally understood to define that term. *E.g.*,  
7 *McElhanev Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (Ariz. 1982)  
8 (“When the words of a constitutional provision are not defined within it, the meaning to  
9 be ascribed to the words is that which is generally understood and used by the  
10 people.”); *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting*  
11 *Comm’n*, 211 Ariz. 337, 352, 121 P.3d 843, 858 (App. 2005) (in interpreting the  
12 Arizona Constitution, stating that the court will not go beyond the plain language of the  
13 provision unless the language is unclear and that “we give words their natural, obvious  
14 and ordinary meaning unless defined otherwise in the constitution”), *review denied*  
15 (Jan. 4, 2006). The Arizona legislature has defined “felony” to mean “an offense for  
16 which a sentence to a term of imprisonment in the custody of the state department of  
17 corrections is authorized by any law of this state.” A.R.S. § 13-105(16).<sup>4</sup>

18 The drafters of article 7, section 2(C) of Arizona Constitution easily could have  
19 chosen to qualify “felony” with the phrase “at common law.” They did not. There is  
20 no basis for ignoring the provision’s plain language in favor of distinguishing among  
21 felony types for purposes of construing Arizona’s Free and Equal Elections Clause.  
22 Accordingly, Plaintiffs’ claim based on that distinction as asserted in Count Six should  
23 be dismissed.<sup>5</sup>

---

24 <sup>4</sup> The legislative definition of felony largely has remained the same throughout the  
25 State’s history. *See, e.g.*, Rev. Stat. of Ariz. Penal Code § 17 (1913) (defining felony as  
26 “a crime which is punishable with death or by imprisonment in the state prison”).

27 <sup>5</sup> The framers’ omission of the limiting words “at common law” in the felon  
28 disenfranchisement provision is most sensible given the policy considerations underlying  
such disenfranchisement. “[I]t can scarcely be deemed unreasonable for a state to decide  
that perpetrators of serious crimes shall not take part in electing the legislators who make



1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 13th day of August, 2007, I caused the foregoing  
3 document to be electronically transmitted to the Clerk's Office using the CM/ECF  
4 System for filing and transmittal of a Notice of Electronic Filing to the following  
CM/ECF Registrants:

5 Laughlin McDonald  
6 Neil Bradley  
7 Nancy G. Abudu  
American Civil Liberties Union  
8 Voting Rights Project  
9 2600 Marquis One Tower  
245 Peachtree Center Ave., NE  
10 Atlanta, GA 30303-1227  
11 [lmcdonald@aclu.org](mailto:lmcdonald@aclu.org)  
12 [nbradley@aclu.org](mailto:nbradley@aclu.org)  
[nabudu@aclu.org](mailto:nabudu@aclu.org)  
13 *Attorneys for Plaintiffs*

14 Daniel Pochoda  
15 Legal Director  
American Civil Liberties Union  
16 Foundation of Arizona  
PO Box 17148  
17 Phoenix, AZ 85011-0148  
18 [dpochoda@acluaz.org](mailto:dpochoda@acluaz.org)  
19 *Attorneys for Plaintiffs*

20 COPY of the foregoing mailed with Notice of  
21 Electronic Filing this 13th day of August, 2007 to:

22 The Honorable Stephen M. McNamee  
23 United States District Court  
24 Sandra Day O'Connor U.S. Courthouse, Suite 624  
401 West Washington Street, SPC 59  
25 Phoenix, AZ 85003-2158

26  
27 \_\_\_\_\_ /s Elizabeth A. Stark

28 15344