

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARMANDO CORONADO,
Plaintiff,
JOSEPH RUBIO; MICHAEL GARZA; MICHELE CONVIE;
RAYMOND LEWIS, Jr.,
Plaintiffs-Appellants,

v.

JANET NAPOLITANO, in her official capacity as Governor; JANICE K.
BREWER, in her official capacity as Secretary of State of Arizona; F. ANN
RODRIGUEZ, in her official capacity as Pima County Recorder; HELEN
PURCELL, in her official capacity as Maricopa County Recorder,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

Reply Brief of Plaintiffs-Appellants

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SUMMARY OF THE ARGUMENT

In their Answering Brief, Defendants maintain that, because the State of Arizona has the option not to restore Plaintiffs' voting rights, any qualifications the state sets for obtaining those rights is immune from constitutional attack. Defendants' argument fails in light of constitutional laws and Supreme Court precedent which have unequivocally prohibited states from requiring the payment of any monetary obligation as a prerequisite to voting. The fact that the state's legal financial obligations (LFO) requirement affects people with felony convictions is of no consequence when it comes to this basic and core democratic principle. Arizona's LFO requirement violates the federal and state constitutions by serving as the only obstacle to Plaintiffs Armando Coronado, Joseph Rubio, and Michael Garza getting their voting rights automatically restored.

Defendants' response to Plaintiffs' common law felony claim is equally without merit given the legislative history and canons of statutory construction which establish that Congress intended to limit the types of disfranchising crimes to those which existed at common law. Because Plaintiffs were not convicted of common law felonies, Defendants must show a compelling governmental interest for disfranchising them – a

standard which Defendants cannot meet for the reasons stated in Plaintiffs' opening brief and this reply.

Plaintiffs' amended complaint contained cognizable legal theories and, at a minimum, the district court should have allowed Plaintiffs to conduct and present discovery in support of their claims. The district court failed to provide Plaintiffs with such an opportunity and, therefore, the court's judgment should be reversed and the case should be remanded for further proceedings.¹

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE PROHIBITS STATES FROM ERECTING ECONOMIC BARRIERS TO THE BALLOT BOX EVEN IF THOSE BARRIERS APPLY TO PEOPLE WITH FELONY CONVICTIONS.

Defendants, relying solely on Richardson v. Ramirez, 418 U.S. 24 (1974), contend that "Plaintiffs have no claim under the Equal Protection Clause because Section 2 [of the Fourteenth Amendment] expressly authorizes Arizona to disenfranchise Plaintiffs for their felony convictions." Answering Brief of Defendants-Appellees, p. 13 (hereinafter "Defs.' Br."). They contend that, because Arizona has the discretion to restore voting

¹Plaintiffs note that oral argument in this case is especially warranted as Plaintiffs' claims present issues of first impression in this Court and a ruling on these issues will impact thousands of citizens.

rights, it also has the discretion to set any qualifications it sees fit when restoring that right. Id. at 13-14. However, the issue of whether Arizona may revoke a convicted person's right to vote is distinct from whether the state may require, as a precondition to restoring the right to vote, that LFOs be paid. The distinction is important because each issue requires a different analysis under the Equal Protection Clause. For the reasons set forth in Plaintiffs' opening brief and this reply, Arizona's LFO requirement is an unconstitutional voter qualification.

A. Richardson v. Ramirez Does Not Foreclose Plaintiffs' Challenge To Arizona's Re-enfranchisement Scheme.

Section 1 of the Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Defendants assert that, under Richardson v. Ramirez, Section 1 of the Fourteenth Amendment does not apply to state felon disenfranchisement laws. Defs.’ Br., p. 10. They also argue that Plaintiffs have drawn a false distinction between felon disenfranchisement and re-enfranchisement and that “[Plaintiffs’] challenge falls squarely within the holding of Richardson.” Id. at 13. However, Richardson only addressed the issue of whether a state may deny voting rights to a convicted person in accordance with the Equal Protection Clause, a point which is not at issue in this suit. Richardson does not speak to whether the same “affirmative sanction” applies to state re-

enfranchisement laws and there is nothing in the Court's opinion to suggest that it does.

In his dissent in Richardson, Justice Marshall noted that “[t]here is no indication that the framers of [Sections 1 and 2 of the Fourteenth Amendment] intended that special penalty [in Section 2] to be the exclusive remedy for all forms of electoral discrimination. This Court has repeatedly rejected that rationale.” 418 U.S. at 74 (Marshall, J., dissenting) (citing Reynolds v. Sims, 377 U.S. 533 (1964) and Carrington v. Rash, 380 U.S. 89 (1965)). “Rather, a discrimination to which the penalty provision of Section 2 is inapplicable must still be judged against the Equal Protection Clause of Section 1 to determine whether judicial or congressional remedies should be invoked.” Id. Justice Marshall went on to reason that, “[b]y providing a special remedy for disenfranchisement of a particular class of voters in Section 2, Congress did not approve all election discriminations to which the Section 2 remedy was inapplicable, and such discrimination thus are not forever immunized from evolving standards of equal protection scrutiny.” Id. at 75-76. Nothing in the Richardson decision supports Defendants’ contention that a state’s re-enfranchisement scheme is equally immune from constitutional scrutiny.

Furthermore, the Supreme Court's holding in Hunter v. Underwood, 471 U.S. 222 (1985), which Defendants argue is inapplicable, serves as a limitation on the Richardson court's perceived blanket approval of all felon disfranchisement laws. In Hunter, the Court recognized that a state's felon disfranchisement law is subject to the Equal Protection Clause, especially when the law is discriminatory in its application. The Supreme Court's willingness in Hunter to narrow its ruling in Richardson provides even stronger support for Plaintiffs' claim that Arizona's re-enfranchisement law is not immune from careful review under the Equal Protection Clause. The Court's ruling in Hunter further highlights the necessity of preserving the sanctity of the democratic process even when the rights at stake involve people with felony convictions.

Moreover, when Richardson was decided, California disfranchised any person convicted of an infamous crime, but allowed the person to seek restoration of civil and political rights, including the right to vote, upon release from incarceration. 418 U.S. at 31 n.7. There was no provision under the California law which required the payment of LFOs.² Id. The Court in Richardson did not apply the Equal Protection Clause to

² Following Richardson, the California legislature amended the law to allow people to vote upon completion of prison and parole, and this remains the law today. Cal. Const. art. II, § 4. California does not require the payment of LFOs.

California's re-enfranchisement scheme and the constitutionality of an economic barrier to the ballot box definitely was not at issue. Thus, the ruling in Richardson does not bar Plaintiffs' equal protection claim.

The fact that the state may revoke a convicted person's right to vote under Section 2 of the Fourteenth Amendment does not negate the fact that its restoration of that right must comport with Section 1. See Bush v. Gore, 531 U.S. 98, 104 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."). The state may not restore the right to vote in any way it sees fit, especially when it establishes a voter qualification that is irrelevant to voting and discriminates against citizens based on their wealth. The distinction Plaintiffs make between felon disenfranchisement and re-enfranchisement is a real and significant one, and the ruling in Richardson does not undermine the merits of Plaintiffs' claim.

B. Arizona's Requirement That Plaintiffs Pay Their LFOs As A Pre-Condition To Restoring Their Voting Rights Violates The Equal Protection Clause.

1. Anderson v. Celebrezze and Burdick v. Takushi set forth the proper legal standard for analyzing Plaintiffs' equal protection claim.

Defendants argue that the standard of review applied in Anderson v. Celebrezze, 460 U.S. 780 (1983) and Burdick v. Takushi, 504 U.S. 428

(1992) does not apply because Plaintiffs do not have a fundamental right to vote and, therefore, are not entitled to any protections under Section 1 of the Fourteenth Amendment. Defs.’ Br., p. 25 n.13. Defendants also contend that “[u]nless Plaintiffs challenge Arizona’s authority to disenfranchise them or continue to disenfranchise them based on race, they do not assert any equal protection claim under the Fourteenth Amendment or any of the cases they cite.” Id. at 21. Defendants’ interpretation and application of the Equal Protection Clause in this case is severely flawed.

In Harper v. Virginia State Board of Election, 383 U.S. 663, 669 (1966), the Supreme Court stated “[t]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.” The Supreme Court’s evolving equal protection standard in the context of voting was applied in Anderson and Burdick. The plaintiff in Anderson was an independent candidate running for President of the United States who challenged the state of Ohio’s requirement that independent candidates submit their nominating petitions earlier than political party candidates. 460 U.S. at 782-83. In striking down the Ohio

statute, the Court announced a new sliding scale standard of review based on its reasoning that equal protection challenges “to specific provisions of a State’s election laws [] cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions.” Id. The Court then laid out the following standard of review:

[Courts] must first consider the character and magnitude of the asserted injury to the rights that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson at 789.

In Burdick, which involved a plaintiff who challenged the state of Hawaii’s prohibition on write-in candidates, the Supreme Court reaffirmed this standard of review: “The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in Anderson.” 504 U.S. at 438. The Court went on to hold that:

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes

only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

Id. at 434 (internal citations omitted). See also Crawford v. Marion County Elec. Bd., 128 S.Ct. 1610, 1616 (2008) (“In later election cases we have followed Anderson’s balancing approach.”); Lemons v. Bradbury, 538 F.3d 1098, 1103 (9th Cir. 2008) (applying Anderson and Burdick standard of review in challenge to the manner in which Oregon verified referendum petition signatures). Both Anderson and Burdick set forth the proper standard of review when analyzing an equal protection claim, and the district court should have applied this standard. Plaintiffs were not required, as Defendants contend, to allege a claim of racial discrimination in order to maintain their challenge under the Equal Protection Clause. Defs.’ Br., p. 20-21.

2. Plaintiffs have stated a claim under the Equal Protection Clause, and the cases upon which they rely support their claim.

Defendants argue that “[m]ost of the authorities cited by Plaintiffs were decided outside of the felon disenfranchisement context and therefore do not account for the affirmative sanction of disenfranchisement in Section 2.” Id. at 15. Regardless of how Defendants characterize the LFO requirement, the law mandates the payment of a fee in order to vote. Cases

such as Reynolds v. Sims, 377 U.S. 533 (1964), Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), and Dunn v. Blumstein, 405 U.S. 330 (1972), establish the fundamental nature of the right to vote - a right which Arizona restores to felons based on certain criteria. This case is about the voting qualifications the state has erected for its re-enfranchisement scheme and those cases are applicable for purposes of determining which qualifications are and are not valid.

Voting, in and of itself, is fundamental in nature. Reynolds v. Sims, 377 U.S. at 554-55. See also Burdick, at 433 (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’”) (quoting Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)). Although Arizona stripped Plaintiffs of their right to vote when they were convicted, the state also created a mechanism by which Plaintiffs may get that fundamental right restored. In reviewing the constitutionality of Arizona’s re-enfranchisement scheme, it is the voting qualifications the state has established for restoration of the right that matters, not the fact of Plaintiffs’ conviction. Consequently, the Equal

Protection Clause requires that Arizona’s electoral standards when it comes to re-enfranchisement be carefully scrutinized.³

In Charfauros v. Board of Elections, 249 F.3d 941, 951 (9th Cir. 2001), this Court recognized that, “restrictions may be placed on the right to vote so long as ‘no discrimination is made between individuals, in violation of the Federal Constitution.’” (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965)). Furthermore, “[a] citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution” Baker v. Carr, 369 U.S. 186, 208 (1962). In Lemons v. Bradbury, this Court held that “‘while a state may decline to grant a right to legislate through ballot initiatives, it may not grant that right on a discriminatory basis.’” 538 F.3d at 1102 (quoting Idaho Coalition United for Bears v. Cengarusa, 342 F.3d at 1077 n.7). The ruling in Lemons directly applies to the instant case. Arizona has decided to grant Plaintiffs the right to vote, but has done so in a discriminatory manner through its LFO requirement.⁴

³ Defendants assert that, in order to maintain their equal protection claim, Plaintiffs must challenge their underlying criminal sentences. Defs.’ Br., p. 17. However, a criminal court’s discretion in imposing LFOs has no bearing on whether those LFOs may serve as a barrier to voting.

⁴ Defendants state that Plaintiffs have not alleged they are indigent and therefore cannot avail themselves of the Equal Protection Clause. Defs.’ Br., p. 20 n.7. However, Plaintiffs allege in the amended complaint that they

Cases such as Bearden v. Georgia, 461 U.S. 660 (1983), Williams v. Illinois, 399 U.S. 235 (1970), Griffin v. Illinois, 351 U.S. 12 (1956), and Bynum v. Conn. Comm’n on Forfeited Rights, 410 F.2d 173 (2nd Cir. 1969), require courts to carefully scrutinize monetary requirements in the context of voting rights and criminal justice. Because felon re-enfranchisement merges these two areas of law, it is only logical that this Court consider cases involving them. Plaintiffs place special emphasis on Bynum because it is the only federal appellate level case that is most analogous to Plaintiffs’ situation. The \$5.00 fee which Connecticut required the plaintiff to pay served as the only barrier to him getting his voting rights restored. In the same exact way, Arizona’s LFO requirement has barred Plaintiffs Coronado, Garza, and Rubio from getting their rights restored for years. “[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.” Charfauros, 249 F.3d at 951 (internal quotations omitted). A heightened standard of review is required in this case because Arizona’s LFO requirement treats people within the class of felons differently based on their economic status.

should not be denied the right to vote based on their failure or inability to satisfy the LFO requirement, and they cannot be penalized for not establishing their indigence when the district court dismissed the case before the parties could engage in discovery on that matter.

Even assuming that a lesser standard applies, Defendants still must show the challenged law is nondiscriminatory and reasonable. Burdick, 504 U.S. at 434. Because Arizona’s LFO requirement treats people within the class of felons differently based on their economic status, it is discriminatory. Given the other means available to the state and victims to collect court fees and restitution, the LFO requirement also is unreasonable and unnecessary. See Ariz. Rev. Stat. § 13-806(A) (“The state or any person entitled to restitution pursuant to a court order may file in accordance with this section a restitution lien.”); Ariz. Rev. Stat. § 13-806(H) (“[I]f the trial court sentences the defendant to pay a fine or awards costs of investigation or prosecution, the state may file a restitution lien pursuant to this section for the amount of the fine or costs.”). At a minimum, Plaintiffs should have been allowed to conduct discovery to further establish the discriminatory impact resulting from Defendants’ enforcement of the LFO requirement. By dismissing Plaintiffs’ equal protection claim at this early stage, the district court did not even afford Plaintiffs an opportunity to prove their claim, thus prematurely ending the litigation.

II. THE TWENTY-FORTH AMENDMENT'S PROHIBITION AGAINST "ANY POLL TAX OR OTHER TAX" APPLIES WITH EQUAL FORCE IN THE CONTEXT OF FELON RE-ENFRANCHISEMENT.

Defendants argue that Plaintiffs' claim under the Twenty-Fourth Amendment fails because, according to Defendants, Arizona's LFO requirement is not a "poll tax" and does not apply in the context of felon disfranchisement. Defs.' Br., p. 28. Defendants also contend that the LFO requirement is immune from review under the Twenty-Fourth Amendment because Plaintiffs' monetary obligations were part of their sentences, and all the state requires is that Plaintiffs complete their sentences before being allowed to vote. *Id.* at 30-31. Defendants also discourage this Court from considering any of the public policy reasons behind Congress' enactment of the Twenty-Fourth Amendment when analyzing the merits of Plaintiffs' claim. *Id.* at 32-33.⁵

The Twenty-Fourth Amendment prohibits a state from disqualifying a person from voting based on the failure or inability to pay a fee. This case is not about the other requirements the state has erected for restoring the right

⁵Defendants further argue that the dissent in *Madison v. State*, 161 Wash. 2d 85 (Wash. 2007) is inapplicable. Although Plaintiffs agree with Justice Alexander's dissent in *Madison*, the court's opinion is not binding on this Court and, therefore, has no precedential value. *Angel v. Bullington*, 330 U.S. 183, 189 (1947) (concluding that the decision of a state court on a federal constitutional issue is not binding or precedential in a federal court).

to vote such as completion of prison, parole, and probation. Defendants cannot avoid the Twenty-Fourth Amendment's prohibition by couching the state law as solely within the realm of felon disenfranchisement. Such an argument does not work because the state already has adopted a voting rights restoration scheme.

Section 13-912 of the Arizona Code provides that:

Any person who has not previously been convicted of any other felony shall automatically be restored any civil rights that were lost or suspended by the conviction if the person both: 1. Completes a term of probation or receives an absolute discharge from imprisonment [and] 2. Pays any fine or restitution imposed."

(emphasis added). Defendants repeatedly argue that the law is valid because it requires completion of sentence, regardless of the sentence imposed. Defs.' Br., pp. 29-31. In this lawsuit, Plaintiffs do not challenge the requirement that a person's term of imprisonment, parole, and probation be completed. In fact, Plaintiffs already have satisfied these conditions. Excerpts p. 19. The only reason why Plaintiffs Coronado, Rubio, and Garza are not eligible for Arizona's automatic rights restoration process is because of their outstanding LFOs. Plaintiffs are not saying that the disenfranchisement should necessarily end sooner, but that the payment of any monetary obligation cannot be a qualification for getting one's voting rights restored.

Furthermore, this Court should not view Plaintiffs' Twenty-Fourth Amendment claim in a vacuum without seriously considering the practical and real-life implications of upholding the LFO requirement. See e.g., Anderson, 460 U.S. at 792 (considering additional burdens early filing deadline would have on independent candidates such as difficulty in recruiting volunteers, raising campaign contributions, and getting media publicity). Congress' main reason for adopting the Twenty-Fourth Amendment was to eliminate the payment of any fee when it comes to voting. This objective was of paramount concern to Congress, and its prohibition reaches all electoral schemes that have that effect regardless of how the fee requirement is masked.

As Justice Marshall observed in Richardson, "[t]here is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government." 418 U.S. at 78 (Marshall, J., dissenting). Justice Marshall's reasoning still rings true today. By focusing solely on semantics, Defendants attempt to minimize the significance of the policy objectives Congress sought to achieve in adopting the Twenty-Fourth Amendment. See Harper, 383 U.S. at 668 ("To introduce

wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.”).

III. PLAINTIFFS HAVE STATED CLAIMS UNDER THE FEDERAL AND STATE PRIVILEGES AND IMMUNITIES CLAUSES, AND THE FREE AND EQUAL ELECTIONS CLAUSE OF THE ARIZONA CONSTITUTION.

Defendants assert that, because Arizona's LFO requirement applies to all felons, the voting qualification does not violate the privileges and immunities clauses, or the free and equal elections clause. Defs.' Br. at 35-38. For the reasons already articulated in Plaintiffs' opening brief and this reply, the LFO requirement results in an invidious form of discrimination against felons who lack the economic means to satisfy their LFO requirements, thus allowing wealthier felons to get their voting rights restored sooner than poorer ones. Such a system falsely suggests that wealthier felons are more deserving of the right to vote than poorer ones simply because they could afford to pay their LFOs. Completion of prison, parole, and probation is something that all felons have the capacity to do because it does not implicate anything other than one's time. However, once a person's economic status becomes a criterion for purposes of voting, the law unconstitutionally treats felons differently based on their economic status. Granting the right to vote to some, but not others based on an irrelevant factor such as wealth, violates the state and federal privileges and

immunities clauses as well as the free and equal elections clause of the Arizona constitution.

**IV. SECTION 2 OF THE FOURTEENTH AMENDMENT ONLY
APPLIES TO COMMON LAW FELONIES.**

**A. A State Must Have A Compelling Interest To Disfranchise
Persons Convicted Of Crimes That Were Not Felonies At
Common Law.**

In their Answering Brief, Defendants-Appellees respond to Plaintiffs' argument that the Fourteenth Amendment affirmatively sanctions disfranchisement only for crimes that were felonies at common law by incorporating their arguments addressing a similar claim in Harvey v. Brewer, No. 08-17253. In the Harvey brief, the Defendants contend: "Plaintiffs assert that because, as alleged, their felonies were based on crimes that did not exist at common law (such as a drug-related crime), Arizona may not take away their right to vote." Harvey v. Brewer, Answering Brief of Defendants-Appellees, p. 1 (hereinafter "Harvey Br."). That is not a correct characterization of Plaintiffs' felony at common law claim in this case.

Plaintiffs contend, rather, that pursuant to Richardson v. Ramirez, 418 U.S. 24 (1974), Section 2 of the Fourteenth Amendment provides an affirmative sanction to disfranchise only those persons convicted of crimes that were felonies at common law. Persons convicted of other crimes may

be disfranchised, but only if the state establishes a compelling interest for doing so. Hill v. Stone, 421 U.S. 289, 295 (1975) (“[R]estrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack.”); Harper, 383 U.S. at 670 (classifications which invade or restrain fundamental rights “must be closely scrutinized and carefully confined”); Burdick, 504 U.S. at 434 (accord). Defendants, however, have made no attempt to show that the State of Arizona has a compelling interest in disfranchising persons convicted of crimes that were not felonies at common law, nor did the district court conclude that they had an obligation to do so. The court ruled instead that Plaintiffs “have no fundamental right to vote.” (Excerpts p. 36).

Defendants further erroneously contend that adoption of Plaintiffs’ “interpretation of Section 2 would have worked a repeal of state laws” disfranchising those convicted of non common law felonies. Harvey Br., pp. 22, 40, 44, 46. Again, Plaintiffs contend that persons convicted of such crimes may be disfranchised, but only if the state establishes a compelling interest for doing so. The state’s interest in disfranchising persons who have been released from confinement or who are no longer on probation or parole would be minimal or non-existent. Indeed, the state would have a

compelling interest in restoring such persons to the voter roles as part of their rehabilitation.

On the date Richardson was decided, 27 states allowed ex-felons full access to the ballot. Congress had provided for the restoration of felon voting rights at the end of sentence or parole in the District of Columbia. The National Conference on Uniform State Laws, the American Law Institute, the National Probation and Parole Association, the National Advisory Commission on Criminal Justice Standards and Goals, the President's Commission on Law Enforcement and the Administration of Justice, the California League of Women Voters, the National Democratic Party, and the Secretary of State of California all strongly endorsed full suffrage rights for former felons. See Richardson, 418 U.S. at 83-85 (Marshall, J., dissenting). The application of an affirmative sanction to disfranchise persons convicted of any crime defined by a state as a felony, e.g., spitting on a sidewalk, as advocated by the Defendants in this case, would make a mockery of Section 1 of the Fourteenth Amendment and the sanctity of the right to vote. See Harvey Br., p. 14 (a state may disfranchise felons "without any qualification for the type of felony committed").

The Defendants concede, as they must, that the Court in Richardson "did not directly address whether statutory felonies are encompassed within

the term ‘other crime.’” Id. at 13. Having not addressed that issue, the Court could not have decided it, as Defendants erroneously contend. Id. at 15 (“[t]he Court resolved that question by holding that states could disfranchise all felons”) (emphasis in original).⁶

Defendants also fail to note that the two decisions of the Supreme Court relied upon by Richardson, 418 U.S. at 53, for the proposition that a state may constitutionally exclude convicted felons from the franchise, did not apply an affirmative sanction for the disfranchisement but a compelling interest standard. In Murphy v. Ramsey, 114 U.S. 15, 45 (1885), the Court upheld the exclusion of bigamists and polygamists from the franchise under territorial laws of Utah, after concluding that it was “necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union.” Davis v. Beason, 133 U.S. 333, 341 (1890), involved a similar Idaho territorial law which the Court upheld after concluding that “[f]ew crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment.” Disfranchisement for the crimes of which Plaintiffs were convicted in this case - drug offenses and domestic violence - is hardly “necessary in the

⁶None of the other decisions of the Supreme Court relied upon by Defendants raised or decided the felony at common law issue presented in this case, i.e., Gray v. Sanders, 372 U.S. 368 (1963) and Romer v. Evans, 517 U.S. 620 (1996).

founding of a free, self-governing commonwealth,” nor are the offenses the most “pernicious to the best interests of society.” Id. at 341, 344-45. Nothing in Murphy and Davis suggests that a state could disfranchise persons upon the conviction of any crime it deemed a felony, no matter how minor or trivial.⁷

Defendants further note that Richardson relied upon its summary affirmance of two decisions rejecting constitutional challenges to state laws disfranchising convicted felons, Fincher v. Scott, 352 F.Supp. 117 (M.D. N.C. 1972), aff’d, 411 U.S. 961 (1973), and Beacham v. Braterman, 300 F.Supp. 182 (S.D. Fla.), aff’d, 396 U.S. 12 (1969). Summary affirmance, however, does not have the same precedential value as an opinion of the Court treating an issue on the merits. Edelman v. Jordan, 415 U.S. 651, 671 (1974); Richardson, 418 U.S. at 82 n.27 (Marshall, J., dissenting). Moreover, nothing in Fincher or Beacham stands for the proposition that states have an affirmative sanction to disfranchise persons convicted of crimes that were not felonies at common law.

⁷Davis, with its approval of restrictions on voting, has been significantly undermined by subsequent decisions. In Romer, for example, the Court held that: “To the extent that Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.” 517 U.S. at 634. In addition: “To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome.” Id.

B. The Legislative History Supports Plaintiffs' Claim.

Defendants err in claiming that nothing in the legislative history “supports Plaintiffs’ proposed interpretation that the ‘crime’ language in Section 2 is limited to ‘felonies at common law.’” Harvey Br., p. 17. Without repeating in detail the discussion in their opening brief, Plaintiffs point out that the legislative history of the Reconstruction Act and the Enabling Acts shows that Congress repeatedly and expressly equated “other crime” as used in Section 2 of the Fourteenth Amendment with “felony at common law.” Richardson, in its discussion of the meaning and understanding of Section 2, not only emphasized the restrictive language in the Reconstruction Act that disfranchisement was permissible only “for participation in the rebellion or for felony at common law,” but concluded that the Readmission Acts, which contained identical language, were “convincing evidence of the historical understanding of the Fourteenth Amendment.” Id. at 49, 53.⁸

The fact that at the time of adoption of the Fourteenth Amendment states disfranchised persons for conviction of felonies or infamous crimes

⁸Defendants’ further claim that “Congress intended to permit even those former Confederate states to continue to disenfranchise based on crime,” Harvey Br., p. 22, is contradicted by the express language of the Reconstruction Act and the Enabling Acts, which limit disfranchisement to “participation in the rebellion or for felony at common law.”

does not mean, as Defendants argue, that the “rebellion, or other crime” language of Section 2 was intended to be without limitation. Indeed, members of Congress were aware that some states had felon disfranchisement laws and were concerned that they would abuse them to disfranchise African Americans. Senator Drake of Missouri, for example, expressed his concern that without limitations in the Readmission Acts, states might misuse the exceptions for felons to disfranchise blacks. In response to these concerns, Congress added language to the Readmission Acts that any disfranchisement for crimes that were felonies at common law be made “under laws equally applicable to all inhabitants of said State.” Richardson, 418 U.S. at 51-2. The existence of state laws in fact motivated Congress to limit disfranchisement to crimes that were felonies at common law.

Defendants’ further assertion that there is no legislative history to support Congressional concern “with the type of felony as a basis of disenfranchisement,” Harvey Br., p. 47, is refuted by the consistent use of the language “felony at common law” in the Reconstruction and Readmission Acts. Congress was aware of the crimes that were felonies at common law, and intended to limit the affirmative sanction of Section 2 to disfranchisement upon conviction of those crimes, rather than give the states

carte blanche to disfranchise for any offense they chose to designate as a crime.

In addition, because the readmitted southern states, and later Arizona, subsequently enacted disfranchising offenses that were not felonies at common law does not mean that they are not subject to the compelling state interest standard of Section 1 of the Fourteenth Amendment. Again, the Fourteenth Amendment does not prohibit a state from disfranchising persons convicted of crimes, but if those crimes were not felonies at common law it must show a compelling interest for doing so.

Defendants' reliance upon the National Voter Registration Act, 42 U.S.C. §§ 1973gg, et seq. , is misplaced for the same reasons. Harvey Br., pp. 52-53. In passing the act, Congress did nothing to expand the affirmative sanction of Section 2, nor did it alter in any way the requirement that states which disfranchise persons for conviction of offenses that were not felonies at common law show a compelling interest for doing so.

C. Defendants' Arguments Violate Accepted Canons of Statutory Construction.

Defendants also argue that the "term 'crime' in Section 2 should be afforded its plain meaning." Harvey Br., p. 38. Such an argument improperly ignores the accepted understanding of the word "crime" at the time the Fourteenth Amendment was adopted, as well as the legislative

history of Section 2 which shows that Congress repeatedly limited the scope of the term “crime” to mean “felonies at common law.” Richardson, 418 U.S. at 43-55.

Defendants’ argument also violates the rule of in pari materia, that a court is “bound to give to the constitution and laws such a meaning as will make them harmonize.” Rhode Island v. Massachusetts, 37 U.S. 657, 723 (1838). The rule is based on the premise that a legislative body uses a particular word or phrase “with a consistent meaning in a given context.” Erlenbaugh v. United States, 409 U.S. 239, 243 (1972). Thus, if there were any ambiguity as to the meaning of “other crime” in Section 2, it was removed by the Reconstruction and Readmission Acts which make it clear that disfranchising crimes are limited to those which were felonies at common law.

Defendants’ argument also violates the canon of noscitur a sociis, that “a word is given more precise content by the neighboring words with which it is associated.” United States v. Williams, 128 S.Ct. 1830, 1839 (2008). If “other crime” in Section 2 is to be given content by “rebellion,” with which it is directly associated, it cannot mean any crime but is restricted to crimes of comparable magnitude to rebellion.

D. Defendants' Reliance on the Use of the Word "Crime" in Other Constitutional Provisions Is Misplaced.

Defendants note that references to "crime" in other constitutional provisions, i.e., the Fifth, Sixth, and Thirteenth Amendments, are not limited to "common law felonies." Harvey Br., p. 28-30. That may be, but it is not dispositive of any issue raised in this case.

The use of the word "crime" in the Sixth Amendment is designed to protect the right of an accused to a speedy, fair, and impartial trial by jury. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("trial by jury in criminal cases is fundamental to the American scheme of justice"). Any limitation on the word "crime" to include only felonies at common law would contradict the basic purpose of the Sixth Amendment. By contrast, limiting the affirmative sanction of Section 2 of the Fourteenth Amendment to felonies at common law would safeguard the fundamental right to vote. The word "crime" in the two amendments serves a significantly different purpose, and its use should not be confused.

Moreover, the Supreme Court has in fact interpreted the word "crime" in the Sixth Amendment to exclude "petty crimes." Duncan, 391 U.S. at 159. See also Baldwin v. New York, 399 U.S. 66, 74 (1970) (defining a serious crime warranting a jury trial as one "where the possible penalty exceeds six months' imprisonment"). The limitation of the word "crime" in

the Sixth Amendment to “serious offenses,” Duncan, 391 U.S. at 158, indicates the appropriateness of a limited meaning of the word “crime” in Section 2 of the Fourteenth Amendment to felonies at common law.

The word “crime” in the Thirteenth Amendment also has a distinctly different meaning than in Section 2 of the Fourteenth Amendment. Its use in the Thirteenth Amendment means only that incarceration upon conviction of a crime does not constitute “slavery nor involuntary servitude” prohibited by the amendment.⁹ However, one convicted of a crime that is not a felony at common law has a right not to be disfranchised in the absence of a compelling state interest. The use of the word “crime” in the two amendments is not fungible, as Defendants contend, but serves entirely different purposes.

Similarly, the use of the word “crime” or “criminal case” in the Fifth Amendment’s protection against self-incrimination is designed to preserve “the integrity of a judicial system,” Tehan v. Schott, 382 U.S. 406, 415 (1966), and protect “the equality of the individual and the state.” In re Gault, 387 U.S. 1, 47 (1967). Any limitation on the word “crime” or

⁹ Notwithstanding the Thirteenth Amendment, excessive incarceration for the commission of a minor offense could still violate the “cruel and unusual punishments” clause of the Eighth Amendment. See Weems v. United States, 217 U.S. 349, 371 (1910) (the Eighth Amendment is directed “against all punishments which, by their length and severity, are greatly disproportionate to the offenses charged”) (internal citations omitted).

“criminal case” to include only felonies at common law would seriously undercut the protection against self-incrimination of the Fifth Amendment. By contrast, limiting the affirmative sanction of Section 2 of the Fourteenth Amendment to felonies at common law would safeguard the fundamental right to vote. The word “crime” in the two amendments serves a significantly different purpose, and its use should not be confused.

E. State Law Does Not Define The Scope Of Constitutional Law.

States are free, as Defendants contend, to classify offenses as felonies based upon their seriousness. Harvey Br., p. 34. That does not mean, however, states are also free to determine the parameters of federal constitutional law. A state could not, for example, determine which offenses were subject to jury trial under the Sixth Amendment. That judgment is for the federal courts to make. In Blanton v. City of North Las Vegas, 489 U.S. 538, 545 (1989), relied upon by Defendants, it was the Supreme Court, and not the State of Nevada or its courts, that made the ultimate determination whether the offense in question was subject to trial by jury within the meaning of the Sixth Amendment.

State law is similarly not the determiner, as Defendants suggest, of the meaning of Section 2 of the Fourteenth Amendment. Whether or not a state is free to classify crimes based on their seriousness, it is not the determiner

of which disfranchising offenses are subject to the affirmative sanction of Section 2, as opposed to those which are subject to close scrutiny under the compelling state interest standard. Those are decisions for Congress and the federal courts.

F. Plaintiffs Were Not Convicted Of Offenses That Were Felonies At Common Law.

Defendants admit that at one time “felonies may have been limited to those nine offenses” identified by Blackstone in his Commentaries, 4 W. Blackstone, Commentaries *94, *95, i.e., murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. Harvey Br., p. 41. In Schick v. United States, 195 U.S. 65, 69 (1904), the Court held that “Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England.” In Jerome v. United States, 318 U.S. 101, 108 n.6 (1943), the court affirmed that “at common law murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny were felonies. Wharton, Criminal Law (12th ed.) § 26.” Defendants argue, however, that the definition of felonies has been significantly expanded over the years by statutory enactments of Parliament, Congress, and the several states. Harvey Br., pp. 41-44. The fundamental flaw in Defendants’ argument is that offenses at common law do not include statutory offenses.

The common law is the body of law developed in England from judicial decisions based on custom and precedent, unwritten in statute and code, which constitutes the original basis of the English legal system, as well as the legal system for every state except Louisiana. Black's Law Dictionary (West Publishing Co.; St. Paul, MN., 2004); Webster's New Collegiate Dictionary (G. & C. Merriam-Webster Co.; Springfield, Mass., 1981). Thus, the subsequent enactment of statutory laws by Parliament, Congress, and the states does nothing to alter the meaning of "felony at common law" used in the Reconstruction and Readmission Act, nor the restriction of the affirmative sanction of Section 2 of the Fourteenth Amendment. A felony at common law by definition does not include a subsequently enacted statutory offense.

The debate over whether other crimes were also felonies at common law is academic for purposes of this litigation. There can be no dispute that the offenses for which Plaintiffs were convicted - drug and domestic violence offenses - were not offenses at common law. Indeed, they are statutory offenses which did not exist at common law.

CONCLUSION

For the reasons set forth in Plaintiff's opening brief and this reply, this Court should reverse the district court's dismissal of Plaintiffs' amended complaint, and remand the case for further proceedings.

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,418 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using MS Word in 14 point Times New Roman.

DATED this 18th day of May, 2009.

/s/Nancy Abudu

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2009, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

John Cosgrove
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/s/Nancy Abudu