UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARMANDO CORONADO; JOSEPH RUBIO; MICHAEL GARZA; MICHELE CONVIE; and RAYMOND LEWIS, JR., Plaintiffs, vs. JANET 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.	)	**CIVIL ACTION NO. 07-01089 PHX-SMM**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT JANET NAPOLITANO'S MOTION TO DISMISS THE COMPLAINT

Plaintiffs, by and through counsel, file this response in opposition to Defendant Janet Napolitano's Fed. R. Civ. P. 12(b)(6) motion to dismiss the complaint for failure to state a claim. For the reasons set forth below, plaintiffs respectfully request that this Court deny defendant's motion.

I. SUMMARY OF THE ARGUMENT

In the complaint, plaintiffs raise two cognizable legal claims. First, plaintiffs contend that Arizona's felon re-enfranchisement scheme, which requires persons with felony convictions to pay all court ordered fines, fees, or restitution (legal financial obligations, or LFOs) as a condition for voting, violates the state and federal constitutions. Plaintiffs maintain that Arizona's present policy erects an economic barrier to the ballot box and, thus, discriminates

against those seeking to restore their voting rights but who cannot afford do so because of their economic status. In support of the motion to dismiss, defendant almost exclusively relies upon the state's ability to disfranchise individuals with criminal convictions. However, the fact that a state may deny felons the right to vote does not allow the state to impose unconstitutional restrictions on the restoration of that right. Furthermore, there is no discernible relationship between the state's requirement that a person pay all of their LFOs prior to restoration of their voting rights and the furtherance of a compelling or legitimate governmental interest. As such, plaintiffs' claim is well within traditional equal protection analysis.

Second, Plaintiffs assert that the state's disfranchisement of persons convicted of crimes which were not felonies at common law is unconstitutional. As discussed below, the legislative history behind the Fourteenth Amendment, as well as the statutes which readmitted confederate states into the Union after the Civil War, demonstrate that Congress only intended the phrase "other crime" in Section 2 of the Fourteenth Amendment to apply to felonies at common law. Consequently, Arizona's felon disfranchisement law contravenes the U.S. Constitution.

The federal rules strongly favor allowing plaintiffs an opportunity to fully present their case, including factual and expert testimony, and not have the lawsuit short circuited at the first stage of the proceedings. Because plaintiffs' complaint contains cognizable legal claims, this Court should permit this case to go forward and deny defendant's motion to dismiss the complaint.

II. THE APPLICABLE LEGAL STANDARDS

It is "only the extraordinary case in which dismissal is proper" for failure to state a claim. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). A court may dismiss

a complaint as a matter of law only if the complaint: (1) lacks a cognizable legal theory; or (2) fails to contain sufficient facts to support a cognizable legal claim. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). When ruling on a motion to dismiss, the court must assume that the complaint's factual allegations are true and should construe all inferences from them in the non -moving party's favor. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002); Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Although conclusory allegations are insufficient to defeat a Fed. R. Civ. P. 12(b)(6) motion, the federal rules only require that the plaintiff put the defendant on notice as to what the legal claim is and the grounds upon which the claim rests. Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989).

Plaintiffs' complaint contains cognizable legal theories and sufficient facts to support a cognizable legal claim. Thus, defendant's motion to dismiss should be denied.

III. ARIZONA'S REQUIREMENT THAT PEOPLE WITH FELONY CONVICTIONS PAY THEIR COURT IMPOSED MONETARY OBLIGATIONS AS A PRECONDITION TO HAVING THEIR VOTING RIGHTS RESTORED VIOLATES THE UNITED STATES AND ARIZONA CONSTITUTIONS.

A. Arizona's Re-Enfranchisement Scheme Violates the Equal Protection Clause of the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment provides in relevant part that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 2 of the Fourteenth Amendment provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of

> such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime**,** the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number the male citizens twenty-one years of age in such State.
>
> (emphasis added).

The Arizona Constitution states: "No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights." Ariz. Const. art. VII, § 2C. A person convicted in Arizona of one felony is eligible for restoration of their civil rights if the person has: (1) completed their term of probation or received an absolute discharge from imprisonment; and (2) paid any court ordered fines or restitution. Ariz. Rev. Stat. § 13-912. Thus, the law requires that a person with a felony conviction pay all LFOs associated with their sentence before being eligible to vote.

Defendant, relying primarily upon Richardson v. Ramirez, 418 U.S. 24 (1974), argues that plaintiffs' Fourteenth Amendment equal protection claim fails as a matter of law because Section 2 of the Fourteenth Amendment grants states the right to disfranchise felons. Def.'s Mot. to Dismiss at 5. In Richardson, the Court held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . ." Id. at 54. The Court did not, however, hold or suggest that there was a similar affirmative sanction to condition re-enfranchisement upon payment of a fee or LFOs.

Plaintiffs' claims involving the payment of LFOs as a condition for voting are not about felon disfranchisement, but rather about felon re-enfranchisement. This distinction was explicitly recognized in Bynum v. Connecticut Commission on Forfeited Rights, 410 F.2d 173

(2d Cir. 1969). In Bynum, the plaintiff, while acknowledging that the state could bar him and other ex-felons from the ballot box, challenged a state requirement that ex-felons pay a $5.00 fee before petitioning for restoration of voting rights. See id. In concluding that plaintiff stated a substantial claim under the Fourteenth Amendment, the court characterized the "focal question" as whether the state, "once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can deny access to this relief, solely because one is too poor to pay the required fee." Id. at 175-76.[1]

Not only is there nothing in Richardson to indicate or suggest that a state's re - enfranchisement scheme is exempt from constitutional review, but the decision's "affirmative sanction" has itself been subsequently limited by the Court. In Hunter v. Underwood, 471 U.S. 222, 233 (1985), the Court invalidated under the Fourteenth Amendment Alabama's scheme of disfranchising persons convicted of misdemeanor offenses because the state legislature had adopted the scheme to discriminate against African Americans. As for the argument that § 2 of the Fourteenth Amendment authorized the disfranchisement of persons convicted of crimes, the Court held: "we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [state law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez . . . suggests to the contrary." Id. Similarly, in Hobson v. Pow, 434 F.Supp. 362 (N.D. Ala. 1977), another post-Richardson case, the court held unconstitutional an Alabama law that disfranchised men, but not

[1] The distinction between challenges to felon disfranchisement and re-enfranchisement schemes was also recognized by Chief Justice Alexander in his dissenting opinion in Madison v. State, 163 P.3d 757, 779 (Wash. 2007), a case raising similar issues of payment of LFOs as a condition for re-enfranchisement. According to Alexander, "[t]his case is not . . . about felon disenfranchisement. Rather, it is a case about felon re-enfranchisement." Id. Defendant relies heavily upon the majority opinion in Madison, but it is clear that the decision of a state court on a federal constitutional issue is not binding or precedential in a federal court. See Angel v. Bullington, 330 U.S. 183, 189 (1947).

women, convicted of spousal abuse. According to the court, "equal protection is violated when different punishment for offenses is grounded merely on the basis of gender." Id. at 366.

The Supreme Court, moreover, has held that while a state may punish people for conviction of crimes, it may not increase or continue that punishment for failure to pay financial obligations. In Williams v. Illinois, 399 U.S. 235 (1970), the Court ruled that a state cannot hold an indigent defendant in confinement beyond the maximum term specified by statute because of his failure to pay court imposed costs. The Court concluded that "once the State has defined the outer limits of incarceration necessity to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." Id. a 241-42. The ruling in Williams was extended in Tate v. Short, 401 U.S. 395 (1971), where the Court held that a state could not convert a fine into a jail term solely because the defendant was indigent and could not immediately pay the fine in full.

Similarly, in Bearden v. Georgia, 461 U.S. 660, 672 (1983), the Court ruled that a state cannot revoke an indigent defendant's probation for failure to pay a fine and restitution without first determining whether the defendant made any bona fide attempts to pay the debt or whether an alternative form of punishment existed. The Court reasoned that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." Id. at 672-73. Williams, Tate, and Bearden, are consistent with the Court's sensitivity to the treatment of indigents in the criminal justice system. While there is no question that individuals may be deprived of their freedom upon conviction of

crimes, the Court has recognized that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956) (invalidating a state practice of granting appellate review only to persons who could afford a trial transcript).

Likewise, to deprive plaintiffs of the right to vote simply because of their inability to pay LFOs would also violate the Fourteenth Amendment. "[V]oting cannot hinge on ability to pay . . . for it is a 'fundamental political right . . . preservative of all rights.'" M.L.B. v. S.L.B., 519 U.S. 102, 124 n.14 (1996) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)) (reversing dismissal of plaintiff's case on ground that statute which required plaintiff to pay record preparation fees prior to appealing revocation of her parental rights violated equal protection clause). The Supreme Court has held that a state's sole interest when it comes to voting "is limited to the power to fix qualifications." Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) (invalidating a state's $1.50 poll tax). Whenever a state adopts a process for determining who is qualified to vote, individuals have a substantive right under the equal protection clause to participate in elections on an equal basis as other qualified voters. Lubin v. Parish, 415 U.S. 709, 713 (1974). See also Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (recognizing that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). Once a state grants the right to vote on equal terms, it may not value one person's vote more than another's through either arbitrary or disparate treatment. Bush v. Gore, 531 U.S. 98, 104-105 (2000). See also Bullock v. Carter, 405 U.S. 134 (1972) (invalidating a requirement that candidates pay a fee to get on the ballot); Lubin v. Panish, 415 U.S. 709 (1974) (invalidating a state's ballot access fee). Having chosen to allow

re-enfranchisement, the state must act "in accord with the dictates of the Constitution." Evitts v. Lucey, 469 U.S. 387, 401 (1985).

As the Supreme Court held in Griffin v. Illinois, 351 U.S. at 18, a state cannot exercise its discretion "in a way that discriminates against some convicted defendants on account of their poverty." 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. Having once granted the right to vote on equal terms, a state may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

Defendant's interpretation of Richardson v. Ramirez would eviscerate Constitutional protections of the right to vote. Section 2 of the Fourteenth Amendment actually tolerated racial discrimination against voters. Under that section, States could discriminate based on race and no court could have enjoined the discrimination until later jurisprudence was developed. The penalty imposed by the Constitution for such discrimination was the reduction of congressional representation. We look elsewhere for Constitutional protection against such discrimination. As for race, that is found in the Fifteenth Amendment. Similar protections are found in the Nineteenth (gender) and Twenty-Sixth (age) Amendments. Protection against discrimination based on wealth, for federal elections, is found in the Twenty-Fourth Amendment, a protection extended to all elections by Harper v. Virginia Bd. of Elections in the Court's interpretation of the Fourteenth Amendment. See discussion infra. Under defendant's crabbed view of the right to vote, Arizona could extend the right to vote to persons who are age 17, provided they paid some fee. That would not violate the Twenty-sixth Amendment, which protects the right to vote of those who are eighteen years of age or older. However, it would violate the Fourteenth and

Twenty-fourth Amendments. Just because the Twenty-Sixth Amendment actually tolerates discrimination based on youth does not license other discrimination against those outside the protection of that particular amendment. However, that is exactly defendant's argument: that because the Fourteenth Amendment, as interpreted by Richardson v. Ramirez, tolerates discrimination based on the commission of a criminal offense, other Constitutional protections of the right to vote are abrogated.

The state, having chosen to restore the right to vote to persons who have completed their terms of probation or who have received an absolute discharge from imprisonment, cannot then discriminate against indigent felons by requiring the payment of LFOs as a condition for re-enfranchisement. Arizona's re-enfranchisement scheme violates the equal protection clause because it conditions the right to vote on one's ability to pay LFOs.

1. The state's re-enfranchisement scheme is subject to strict scrutiny.

Defendant contends that even if Arizona's re-enfranchisement scheme impinges upon the right to vote, it is rationally related to an important state interest. Def.'s Mot. to Dismiss at 5. To the contrary, there is little question that the right to vote is fundamental and that limitations on that right are subject to strict scrutiny.

The Supreme Court has repeatedly held that the right to vote is fundamental. See Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws"). Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," the right to vote is a "fundamental political right." Reynolds v. Sims, 377 U.S. 533, 562 (1964) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). Its fundamental role in

the functioning of America's democratic institutions means that "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." Kramer v. Union Free Sch. No. 15, 395 U.S. 621, 626 (1969) (state statute which limited the franchise in certain school districts to owners or lessees of taxable property and parents or guardians of children in public schools denied equal protection to those excluded).

Because the right to vote is fundamental, state statutes that distribute the vote to some citizens while denying it to others are subject to strict scrutiny. Kramer, 395 U.S. at 627. Such classifications "cannot be upheld unless . . . supported by sufficiently important state interests" that are "closely tailored to effectuate only those interests." Zablocki v. Redhail, 434 U.S. 374, 388 (1978). See also Kramer, 395 U.S. at 627 (exclusions from the franchise must be "necessary to promote a compelling state interest"); Dunn v. Blumstein, 405 U.S. at 336 ("a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction").

When determining whether or not a state election law or policy violates the equal protection clause, a court must first consider the character and magnitude of the asserted injury to the rights protected by the Fourteenth Amendment. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (applying strict scrutiny standard in ruling that an Ohio statute which required independent candidates running for President to file their nomination papers earlier than political party candidates violated equal protection clause). The court then should identify and evaluate the precise interests the state puts forward to justify the burden that its law or policy imposes on a plaintiff. See id. "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." Id. Once a state election law subjects equal protection rights to "severe" restrictions, the state law must be "'narrowly drawn to advance a state interest of compelling importance.'" Burdick v. Takushi, 504 U.S. 428, 434 (1992). For election and voting issues, Burdick raised the level of the traditional Fourteenth Amendment analysis. Unlike other areas where some state actions may survive based on a rational basis test, under Burdick restrictions on voters must at a minimum be both "reasonable" and "nondiscriminatory." Id.

Here, the state's re-enfranchisement scheme subjects indigents to severe restrictions, i.e., the denial of the right to vote contingent on failure to pay money. The state cannot show that these restrictions are narrowly drawn to advance a compelling state interest. As the Court held in Harper v. Virginia State Board of Elections, 383 U.S. at 666, "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." The Court emphasized that "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." Id. at 670. The Court reasoned that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process" and that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." Id. at 668. The Court further determined that the constitutional analysis would be the same regardless of "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." Id. at 668.

Arizona has done what Harper prohibits; it has made wealth and payment of a fee a condition for voting. As a consequence, its re-enfranchisement scheme is unconstitutional.

2. Even assuming, arguendo, that heightened scrutiny is not appropriate in this case, the state's classification is not rationally related to any state interest.

Even if this Court were to conclude that heightened scrutiny is not warranted in this case, the level of scrutiny does not drop down to rational basis review. As noted above, voting restrictions must, at a minimum, be "reasonable" and "nondiscriminatory." Burdick v. Takushi, 504 U.S. at 434. Merely being rational does not suffice under Burdick and Anderson v. Celebrezze. That said, the state's classification must still be rejected on equal protection grounds because it is not even rationally related to any state interest. As the Supreme Court explained in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985), even in the absence of heightened scrutiny, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

Defendant argues that by requiring the payment of LFOs as a precondition to restoring one's voting rights, the state furthers its interests "in deterring crime, punishing crime, and compensating societal victims of their crime." Def.'s Mot. Dismiss at 8. However, the Supreme Court has stated that "[t]he use of the franchise to compel compliance with other, independent state objectives is questionable in any context." Hill v. Stone, 421 U.S. 289, 299 (1975). See also Carrington v. Rash, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state"); Harmon v. Forssenius, 380 U.S. 528, 542 (1965) ("constitutional deprivations [including the right to vote] may not be justified by some remote administrative benefit to the State"); Zablocki v. Redhail,

434 U.S. at 389 (a state may not deny the fundamental right to marry to those with outstanding child support obligations on the theory that such denial would provide an incentive to make support payments).

Furthermore, the Court has ruled that, if there are alternative means to achieve the state's interests without burdening the right to vote, the state must choose those "less drastic means." Dunn v. Blumstein, 405 U.S. at 343. Arizona has other available means by which to collect court fines and restitution. For example, the state or a victim may request a court ordered lien against the ex-felon's personal property, have their wages garnished, or seek other civil remedies against the person. See Ariz. Rev. Stat. 13-806(A); Ariz. Rev. Stat. 13-806(H); Federal Deposit Insurance Corp. v. Colosi, 977 P.2d 863 (Ariz. Ct. App. 1999). In light of the array of other collection devices available to the state, it is difficult to see how the denial of the fundamental right to vote makes available any additional financial resources that are not already otherwise accessible. This is particularly true with regard to those who are indigent.

There is also no reason to believe that the non-payment of an often sizeable financial obligation immediately upon release from supervision can in any way be used as a proxy for determining a citizen's commitment to abide by the laws. If anything, the LFO requirement creates a serious barrier to rehabilitation and reintegration into society, thus undermining the state's stated interest in reducing crime.

As recognized by the Supreme Court, to deny a citizen access to a fundamental right "for failing to do that which they cannot do" is irrational and cannot survive under any level of judicial scrutiny. Zablocki v. Redhail, 434 U.S. at 394 (Stewart, J., concurring). Because the relationship between the state's re-enfranchisement scheme and its asserted goals is attenuated at

best, the classification cannot be found to have a rational basis. Arizona's re-enfranchisement scheme unnecessarily locks out a substantial number of its citizens from the procedures available to regain the fundamental right to vote. Because this restriction cannot survive scrutiny under a strict or even a rational basis standard, the law violates the equal protection clause of the Fourteenth Amendment.

B. Arizona's Re-Enfranchisement Scheme Violates the Twenty-Fourth Amendment.

Defendant also argues that plaintiffs have failed to assert a claim under the Twenty-fourth Amendment because: (1) plaintiffs have no constitutionally protected right to vote because of their felony convictions; and (2) even though Arizona law mandates that plaintiffs pay their LFOs prior to restoration of their voting rights, such a requirement does not constitute an electoral standard. Def.'s Mot. to Dismiss at 9. However, Supreme Court decisions striking down statutes which are analogous to Arizona's LFO requirement clearly demonstrate that defendant's arguments lack merit.

The Twenty-fourth Amendment provides that a citizen's right to vote in federal elections "shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 2. Congress adopted the Twenty-fourth Amendment out of a number of concerns - that the poll tax exacted a price for voting, that it disfranchised the poor, that it was "adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner," the payment deadlines did not allow candidates sufficient time to build a base of supporters, and political parties were exerting their wealth to secure blocks of voters. See Harman v. Forssenius, 380 U.S. at 539-40.

In adopting the amendment, Congress wanted to prevent the United States or any state from denying a citizen the right to vote based on an individual's failure to pay a poll tax or other tax. H.R. Rep. No. 87-1821 (1962), reprinted in 1962 U.S.C.C.A.N. 4033. The House Judiciary Committee concluded that the poll tax was "merely an obstacle to the proper exercise of a citizen's franchise," and the Attorney General stated that his main objection to the poll tax was that "it clogs voter registration and limits participation in the processes of government." H.R. Rep. No. 87-1821, reprinted in 1962 U.S.C.C.A.N. 4033 , 4035. In a house floor debate, one of the amendment's proponents stated that "the payment of money . . . should never be permitted to reign as a criterion of democracy." 87 Cong. Rec. H17657 (1962) (statement of Rep. Fascell). In passing the Twenty-fourth Amendment, Congress and the states were insisting that a price not be placed on the right to vote. Congress likened the poll tax to property ownership requirements, and concluded that a person's wealth had no place in determining a person's right to vote. The Twenty-fourth Amendment's primary purpose was to eliminate an unnecessary and unfair obstacle to voting, and to encourage the electorate to be more active in the political process.

In Harmon v. Forssenius, 380 U.S. at 544, the Court struck down Virginia's poll tax as violating the Twenty-fourth Amendment. In doing so, it found the tax undermined many of the concerns expressed by Congress, and that the administrative process for obtaining a voting certificate was too burdensome on voters. Id. at 541-42, 544. The completion of a prison sentence, probation, and parole is something that all convicted felons are capable of doing. The payment of LFOs, including court fees, restitution, and interest, is fundamentally different because it depends on a person's wealth, and discriminates against those who are incapable of paying. Many ex-felons in Arizona are simply unable to pay all of their LFOs. Some ex-felons,

conversely, are able to pay these obligations immediately after completing prison, probation, and parole. The only bar to the right to vote for ex-felons in the first group is their inability to pay. Thus, defendant's assertion that "Arizona's civil rights restoration law does not make affluence or the payment of any fee an electoral standard" is false. Def.'s Mot. Dismiss at 9.

Plaintiffs are aware of only one reported decision that has addressed a challenge to a state's re-enfranchisement scheme as violating the Twenty-fourth Amendment. In Johnson v. Bush, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005), the court affirmed the district court's dismissal of plaintiffs' claim that Florida's felon disfranchisement scheme violated the Twenty-fourth Amendment, but only because Florida allowed a person to request a waiver of the restitution requirement when petitioning for clemency. The court further held that "[i]n doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax." Id.

In Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1366-67 (N.D. Ga. 2005), the court issued a preliminary injunction enjoining the state of Georgia from requiring those voting in person to present government issued photo IDs for which they had to pay. In granting the injunction, the court found that paying for an ID was a "material requirement" in order to vote, and amounted to a poll tax in violation of the Twenty-fourth Amendment. Id. at 1370. The court also found it irrelevant that a fee waiver option existed for those who were indigent: "the fact that some individuals avoid paying the cost for the Photo ID does not mean that the Photo ID card is not a poll tax." Id.

In practice, Arizona's requirement that all LFOs be paid before restoring an ex-felon's voting rights is precisely the "disenfranchisement of the poor" that Congress sought to eliminate.

Harmon, 380 U.S. at 539. It serves as an absolute bar for those who are otherwise eligible to vote but simply cannot afford to pay. The result is that Arizona's re-enfranchisement scheme actually ends up disfranchising the poor, often permanently, in violation of the Twenty-fourth Amendment.

C. The Challenged Scheme Violates Arizona's Free and Equal Elections Clause.

Article 2, Section 21 of the Arizona Constitution provides that: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Defendant argues that plaintiffs have failed to state a claim under this provision of the state constitution because ex-felons do not have a right to vote under the Arizona Constitution. Def.'s Mot. to Dismiss at 10.

Arizona state courts have acknowledged that the right to vote "is a fundamental right," and that a poll tax would infringe upon that right. Arizona Farmworkers Union v. Agricultural Employment Relations Bd., 712 P.2d 960, 964 (1985). See also City of Tucson v. Pima County, 19 P.3d 650, 659 (2001) (a poll tax is an example of "an unlawful classification"). The state's re-enfranchisement scheme directly contravenes the state constitutional requirement that elections be "free and equal." As set out above, elections are not free to plaintiffs, and others similarly situated, who must pay LFOs in order to vote. Nor are the elections equal, in that indigents unable to pay LFOs are completely excluded from the franchise. Not only are they treated differently from all others in the voting population, but they are treated differently from others who committed identical offenses. In addition, the state's scheme is a significant interference with the right to vote and prevents plaintiffs and other similarly situated from the free exercise of the right of suffrage. The challenged scheme violates the guarantees in Article 2,

Section 21. Therefore, Plaintiffs have stated a cognizable legal claim that the challenged re-enfranchisement scheme violates the Arizona Constitution.

D. The Challenged Scheme Violates the Federal and State Privileges and Immunities Clauses.

Section 1 of the Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Article 2, Section 13 of the Arizona Constitution provides that: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Arizona courts have ruled that the state privileges and immunities clause provides the same protections as its federal counterpart. Empress Adult Video and Bookstore v. City of Tuscon, 59 P.3d 814, 828 (2002)**;** Standhardt v. Superior Court ex rel. County of Maricopa**,** 77 P.3d 451, 464 n.19 **(**2003); Arizona v. Bonnewell, 2 P.3d 682, 686 (1999).

Defendant again argues that the state's requirement that plaintiffs pay their LFO's prior to getting their rights restored does not violate the federal or state privileges and immunities clauses because plaintiffs do not have the right to vote in the first place. Def.'s Mot. to Dismiss at 11. Defendant also asserts that the Arizona law does not discriminate among the class of felons because all felons are required to pay LFOs before being eligible for restoration of their voting rights. Id. In addition, defendant maintains that even if Arizona's law does discriminate among the class of felons, such discrimination is rationally related to the state's interest in deterring crime, punishing crime, and compensating victims. Id. at 12-13.

When examining a state election law under the privileges and immunities clause, courts should not only look at the face of the statute, but whether the law has a disparate impact on a

particular group of persons. See Anderson v. Celebrezze, 460 U.S. at 789 (invalidating a state's early filing deadline as placing an unconstitutional burden on independent candidates). Even though Arizona's LFO requirement may appear neutral on its face, plaintiffs intend to prove that Arizona's LFO requirement negatively and disproportionately impacts indigent people. The result is that poor people, many of whom were already poor and disadvantaged in areas such as education, employment, and housing, are further locked out of the political process.

Moreover, as plaintiffs have argued above, the state's LFO requirement is not even rationally related to the state's asserted interests in reducing and punishing crime or compensating victims, and certainly does not serve a compelling governmental interest. Instead, the law further expands the already wide gulf between the wealthy and the poor in the exercise of voting rights even among the class of felons and, in many instances, serves to permanently disfranchise indigent people. Thus, Plaintiffs have stated a cause of action under the state and federal privileges and immunities clauses.

IV. PLAINTIFFS' COMMON LAW FELONY CLAIM PRESENTS A COGNIZAGBLE LEGAL THEORY.

Defendant contends that plaintiffs' common law felony claim, raised under the Fourteenth Amendment, the state's Free and equal elections clause Clause, and the federal and state privileges and immunities clauses, also fails because the "other crime" exception in Section 2 of the Fourteenth Amendment applies to all felonies, not just felonies at common law. Def.'s Mot. to Dismiss at 13. As shown more fully below, plaintiffs' common law argument is supported by: (1) the popular understanding at the time the Fourteenth Amendment was adopted that the word "crime" meant treason or other felony at common law; (2) the necessity of avoiding a conflict between the Fourteenth Amendment and the post-Civil War reconstruction

and enabling acts; (3) Congress' desire to prevent states from circumventing the reduction of representation sanction of Section 2 through ingenious methods of vote denial; (4) rules of statutory and constitutional construction that favor restricting the term "other crime" to felony at common law; and (5) the absence of legal precedent or rule for a broad interpretation of the word "crime" to include non-common law felonies. The Ninth Circuit has cautioned lower courts against dismissing a complaint merely because the pleadings contain a novel legal theory. See McGary v. City of Portland, 386 F.3d 1259, 1270 (9th Cir. 2004) ("dismissals 'are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development.'") (internal citations omitted).

In determining the meaning and intention of a constitutional provision, a court must look, not simply at the language of the provision, but at the entire legislative history, including the deliberations of congressional committees and floor debates. Richardson v. Ramirez, 418 U.S. at 43 (conducting an extensive examination of the legislative history in "interpreting the 'intention' of a constitutional provision"). Such a rule of construction is especially appropriate when a fundamental right, such as voting, is involved, when courts routinely examine the relevant legislative history. See, e.g., McDaniel v. Sanchez, 452 U.S. 130, 147 (1981) (examining the legislative history in construing Section 5 of the Voting Rights Act); South Carolina v. Katzenbach, 383 U.S. 301, 308, 334 (1966) (examining the legislative history in upholding provisions of the Voting Rights Act); City of Rome v. United States, 446 U.S. 156, 182 (1980) (relying upon "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination"); County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694,

707 n.13 (D. D.C. 1983) (rejecting a challenge to the Voting Rights Act and noting that "Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982.").

A. Plaintiffs' Common Law Felony Claim Raises a Cognizable Legal Theory Under the Fourteenth Amendment.

1. The legislative history of the Fourteenth Amendment demonstrates that Congress intended the "other crime" exception to apply only to common law felonies.

After considering and debating numerous changes to its language, Congress finally proposed Section 2 of the Fourteenth Amendment in June 1866, as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime**,** the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number the male citizens twenty-one years of age in such State.

(emphasis added)

In March 1867, Congress passed "An act to provide for the more efficient Government of the Rebel States," known as the Reconstruction Act, which required the former Confederate States seeking readmission to the Union to ratify the Fourteenth Amendment and grant universal suffrage to all males regardless of race, color, or previous condition of servitude. Act of March 2, 1867 c. 153, 14 Stat. 428. Section 5 of the Reconstruction Act provided:

> [W]hen the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous

> condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law . . . said State shall be declared entitled to representation in Congress . . . .

Id. (emphasis added); Richardson, 418 U.S. at 49. Thus, Congress provided that the former rebellious southern states would not be permitted to disfranchise persons for conviction of offenses that were not felonies at common law.

Congress subsequently adopted a series of statutes known as Enabling or Readmission Acts in 1868 and 1870 which granted the Confederate States readmission into the Union and representation in Congress. The Readmission Act for Arkansas, the first state readmitted, provided that the state ratify the Fourteenth Amendment and that:

> [T]he State of Arkansas is entitled and admitted to representation in Congress as one of the States of the Union upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State.

Act of June 22, 1868, c. 69, 15 Stat. 71 (emphasis added). The remaining ten former Confederate states were subsequently readmitted upon condition that they would never deprive persons of the right to vote "except as a punishment for such crimes as are now felonies at common law." Richardson, 418 U.S. at 51-52. Thus, consistent with the Reconstruction Act, as well as the Fourteenth Amendment, the readmitted states would not be allowed to disfranchise persons convicted of offenses that were not felonies at common law.

Although several states had felon disfranchisement laws prior to their readmission into the Union, members of Congress were concerned that states would abuse an exception for felons to disfranchise African Americans. For example, Senator Drake of Missouri expressed his

concern that without limitations in the enabling acts, states might misuse the exceptions for felons to disfranchise blacks. As he explained:

> There is still another objection to the condition as expressed in the bill, and that is in the exception as to the punishment for crime. The bill authorizes men to be deprived of the right to vote as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted. There is one fundamental defect in that, and that is that there is no requirement that the laws under which men shall be duly convicted of these crimes shall be equally applicable to all the inhabitants of the State. It is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws to colored men.

Richardson, 418 U.S. at 52; Cong. Globe, 40th Cong., 2d Sess., 2600 (1868). In response to these concerns, Congress added additional language to the enabling 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 51-52.

The legislative history shows that during the debates regarding the Fourteenth Amendment, little attention was paid to the wording of the "other crime" exception of Section 2. However, the legislative history of the various enabling acts discussed above shows that Congress repeatedly and expressly equated the term "other crime" as used in Section 2 with the phrase "felony at common law." Id. Had it not done so, ratification of the Fourteenth Amendment in 1868 would have nullified or rendered unconstitutional the common law felony provisions of the enabling acts.

Congress could not have intended to give states a way of circumventing the sanction of loss of representation by allowing disfranchisement for offenses of any description. Otherwise, a state could disfranchise for petty or minor offenses, such as traffic violations or jay walking. The stated intent of Congress to safeguard black voting from state disfranchising laws strongly

indicates that Congress did not intend to give such power to the states. Laws should not in any event be interpreted in such a way as to sanction "extreme or absurd results," United States v. Katz, 271 U.S. 354, 362 (1926), or that "will defeat rather than effectuate the Constitutional purpose." United States v. Classic, 313 U.S. 299, 316 (1941). In addition, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning [at the time of the enactment]." Perrin v. United States, 444 U.S. 37, 42 (1979).

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 and the legal system for every state except Louisiana. Common law felonies included crimes such as murder, manslaughter, mayhem, rape, arson, burglary, robbery, and larceny. People v. Martin, 214 Cal. Rptr. 873, 876 n.4 (Ct. App. 1985); Jerome v. United States, 318 U.S. 101, 108 n.6 (1943); United States v. Bannon, 156 U.S. 464, 467-468 (1851) (felony "is used to designate such serious offenses as were formerly punishable by death, or by for forfeiture of the lands and goods of the offender"); State v. Murphy, 24 A. 473, 474 (1892). It is certain that crimes of which plaintiffs were convicted - drug offenses and domestic violence - were not felonies at common law regardless of the penalty imposed.

In Schick v. United States, 195 U.S. 65, 69-70 (1904), the Court determined that the word "Crimes" as used in "all Crimes" in Article III, § 2 of the Constitution, was to be interpreted "in light of the popular understanding of the word 'crimes,'" which excluded misdemeanors from trial by jury. The Court held that "[t]he interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." Id. at 69. See also United States v.

Wong Kim Arc, 169 U.S. 649, 654 (1898) ("[t]he language of the constitution, as has been well said, could not be understood without reference to the common law"); Shaw v. Merchants' National Bank, 101 U.S. 557, 565 (1880) (a statute should "not be construed as making any innovation upon the common law which it does not fairly express").

Although the phrase "felonies at common law" did not appear in Section 2 of the Fourteenth Amendment, the provision must be read in harmony with the Readmission and Reconstruction Acts in order to give it proper meaning. See Rhode Island v. Massachusetts, 37 U.S. 657, 723 (1838) (a court is "bound to give to the constitution and the laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions"). The framers' motivation to protect the citizenship rights of African Americans through passage of the Thirteenth, Fourteenth, and Fifteenth Amendments indicates that Congress did not intend for Section 2 to sanction the disfranchisement of persons convicted of any criminal offense. That is apparent from the fact that southern states that disfranchised people convicted of non-common law felonies would have been violating the Readmission and Reconstruction Acts which explicitly contain the language "felony at common law." The provisions in these Acts are convincing evidence that Congress intended the "other crime" exception in Section 2 to refer to common law felonies. Additionally, pursuant to the rules of construction of criminal provisions, this Court should interpret the "other crime" exception in Section 2 as limiting felon disfranchisement to common law. See United States v. Bass, 404 U.S. 336, 347 (1971) ("'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (internal citations omitted); Simpson v. United States, 435 U.S. 6, 14 (1977) (same).

When two laws address the same subject, courts should give effect to both provisions if at all possible. Morton v. Mancari, 417 U.S. 535, 551 (1974). In Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964), the Court held that whenever two interpretations of the Constitution are possible, the interpretation should be adopted which avoids abridgment of the right to vote. (ruling that courts should interpret Section 2 of the Fourteenth Amendment and Article I, § 2 as requiring that Congressional districts must be equal in population).

The holding in Richardson, moreover, would not be contradicted in any way if it is limited to disfranchisement for felonies at common law. Although Richardson repeatedly cited the congressional record in which legislators specifically referred to "common law felonies," the plaintiffs in that case never raised the issue, nor was it decided by the Court, whether the "other crime" exception in Section 2 applied only to felonies at common law. As the Court has held, "[q]uestions which merely lurk in the record, neither brought to the attention of the court, nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. 507, 511 (1925). Accord, United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 38, n.8 (1952) (the Court does not decide questions that the parties do not raise).[2]

In addition, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." Texas v. Cobb, 532 U.S. 162, 169 (2001). Thus, the dicta in Perry v. Beamer, 933 F. Supp. 556, 559-60 (E.D. Va. 1996), as well as the Supreme Court's summary affirmance of cases which have upheld broad felon disfranchisement laws, does not foreclose a review of the issue in the instant lawsuit.[3]

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[2] Plaintiffs are unaware of any reported decision which has addressed or decided the common law felony issue presented in this case.

[3] Although the issue was not raised or addressed in Richardson, at least one commentator has argued that ratification of the Fifteenth Amendment in 1870 effectively repealed Section 2 of the

2. Given the expansion of the United States' criminal justice system over the past one hundred and fifty years, courts should re -examine the constitutionality of denying someone the right to vote based on a criminal conviction.

Since 1868, when Congress passed the Fourteenth Amendment, Arizona and other states have enacted entirely new categories of felonies. As the Supreme Court has noted: "while in earlier times 'the gulf between the felonies and the minor offences was broad and deep,' . . . today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies." Tennessee v. Garner, 471 U.S. 1, 14 (1984) (internal citations omitted). Arizona's criminal code alone now contains over 130 felony offenses. The U.S. incarceration rate has increased more than sevenfold since 1870 and has significantly risen since the 1970s. See Jaime Fellner and Marc Mauer, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States, p. 13, n. 44, Human Rights Watch and The Sentencing Project, available at http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf. There exists a much larger number of disfranchising crimes today than in 1868 when Congress enacted the Fourteenth Amendment. In 2001, the U.S. Department of Justice estimated that almost 5 million Americans were under some type of criminal supervision. See Bureau of Justice Statistics,

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Fourteenth Amendment. See Gabriel J. Chin, Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 Geo. L.J. 259 (2004). Chin argues that Section 2 permitted states to deny voting rights based on race, but imposed the penalty of reduced congressional representation on states which elected to do so. The Fifteenth Amendment, however, expressly prohibited states from denying or abridging the right to vote "on account of race, color, or previous condition of servitude." Because the Fifteenth Amendment is in conflict with or superceded Section 2, Chin contends it can be deemed to have repealed expressly or by implication the authority of states to disfranchise persons convicted of "other crimes." Whether or not that was the effect of the Fifteenth Amendment, its passage represents a clear restriction on the ability of states to disfranchise persons.

Criminal Offenders Statistics, U.S. Department of Justice, available at http://www.ojp.usdoj.gov/bjs/crimoff.htm#prevalence. Furthermore, although African Americans represent only twelve percent of the general U.S. population and three percent of the Arizona population, they are incarcerated at almost six times the rate as whites both nationally and in the state. See Marc Mauer and Ryan S. King, Uneven Justice: State Rates of Incarceration by Race and Ethnicity, p. 11, available at http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf; U.S. Department of Commerce, Census Bureau, The Black Population: 2000, available at http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf.

An important issue in this case is whether Congress intended for states to disfranchise citizens based on any felony conviction given the weighty statistical evidence showing that such laws have resulted in African Americans losing the right to vote at a significantly greater rate than whites. The above statistics, when coupled with the fact that Congress in the 1867 and 1868 debates were specifically concerned with ensuring black suffrage, demonstrate that felon disfranchisement laws are now significantly undermining the original intent of the constitution.

Defendant maintains that the Supreme Court's decision in Richardson forever forecloses any reexamination of felon disfranchisement laws under the equal protection clause. However, the Court has recognized that laws which it originally determined to be constitutional may be reconsidered due to our changing and evolving society. The Supreme Court has acknowledged:

> the 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.

Harper v. Virginia Board of Elections, 383 U.S. at 669. Similarly, in Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484 (1989), the Court held: "[a]lthough we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language . . . and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation."

In Brown v. Board of Education, 347 U.S. 483 (1954), the Court overturned Plessy v. Ferguson, 163 U.S. 537 (1896), which held that racially based "separate but equal" laws were constitutional. In doing so, the Court concluded that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the nation." Brown, 347 U.S. at 492-93. When viewed in light of its development and present place in American life, the enforcement of felon disfranchisement laws has resulted in racial disparities at the ballot box which Congress feared and warned against when it enacted the Fourteenth and Fifteenth Amendments. Because the state's disfranchisement scheme undermines the original intent of the Constitution, Plaintiffs' challenge to that scheme states a cause of action.

B. Arizona's Denial of Voting Rights to Individuals Convicted of Non-Common Law Felonies Violates the state's Free and Equal Election Clause.

Defendant argues that plaintiffs' claim under the state constitution's Free and equal elections clause fails because the word "felony" as it appears in the state felon disfranchisement law applies to all felonies, not just felonies at common law. Def.'s Mot. to Dismiss at 15-16.

The Fourteenth Amendment limits the types of crimes for which states may automatically disfranchise someone for the reasons plaintiffs have articulated above.

Article 2, Section 21 of the Arizona Constitution ensures that all elections are free and equal, and that the state does not interfere with the free exercise of the right to vote. Because federal law can invalidate or supersede a state law, this Court's finding that Section 2 only applies to felonies at common law necessarily would constrain the state's right to automatically disfranchise someone regardless of the crime committed. See U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 507 (1993). Thus, Arizona's refusal to recognize the narrow scope of Section 2 and enforce its own state felon disfranchisement law accordingly would be a clear violation of the state's free and equal elections clause. Plaintiffs have stated a claim under Article 2, Section 21 of the Arizona Constitution.

C. Arizona's Denial of Voting Rights to Individuals Convicted of Non-Common Law Felonies Violates the Federal and State Privileges and Immunities Clauses.

Finally, defendant contends that this Court should also dismiss plaintiffs' claim under the privileges and immunities clauses because neither Section 2 of the Fourteenth Amendment nor the state's felon disfranchisement law limit the category of disqualifying offenses. Def.'s Mot. to Dismiss at 17. However, for the reasons already provided above, the Fourteenth Amendment indeed does draw such a distinction. Thus, the state's denial of plaintiffs' right to vote based on their convictions for non-common law felonies contravenes the privileges and immunities clauses of the United States and Arizona Constitutions and plaintiffs have stated a cognizable legal claim.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court deny defendant's motion to dismiss the complaint.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served the foregoing upon Defendant Brewer by mailing copies, first class postage attached, addressed as follows:

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I further certify that a copy of the foregoing was served upon counsel of record for Defendants Napolitano, Rodriguez, and Purcell, addressed as follows, via electronic filing:

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