

**Ninth Circuit No. 08-17567**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

No. CV07-1089-PHX-SMM

**ANSWERING BRIEF OF DEFENDANTS-APPELLEES  
IN APPEAL NO. 08-17567**

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 1983. The district court had supplemental jurisdiction under 28 U.S.C. § 1367(a) of Plaintiffs' state law claims. Plaintiffs appealed on November 13, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that Arizona's disenfranchisement of felons until such time as they complete all the terms of their criminal sentences, including the payment of financial penalties, neither violates the Fourteenth Amendment, which authorizes states to disenfranchise all felons permanently if states so choose, nor otherwise violates the federal or Arizona constitutions?

2. Did the district court correctly hold that the Fourteenth Amendment, which affirmatively sanctions disenfranchisement for "crime," permits Arizona to disenfranchise persons convicted of any felony, including felonies that were not felonies at common law?<sup>1</sup>

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<sup>1</sup> The second issue presented for review is the subject of the appeal in *Harvey, et al. v. Brewer, et al.* (No. 08-17253), which was consolidated with this appeal by order of the Court on April 27, 2009. [See dkt. 18 (No. 08-17567)] Because Defendants-Appellees fully briefed that issue in their answering brief in the *Harvey* appeal, which was filed on April 16, 2009, this brief incorporates those arguments by reference.

## STATEMENT OF THE CASE

Plaintiffs brought this action in June 2007 in the District of Arizona to challenge Arizona's felon disenfranchisement laws. [SER 16; ER 46]<sup>2</sup> Plaintiffs are comprised of five individuals who were convicted of one or more felonies and who consequently lost their civil rights, including the right to vote. [SER 17-18 ¶¶ 7-11]

Plaintiffs asserted seven federal and state law claims that were based primarily on two legal theories: (1) Arizona's law providing that convicted felons lose their right to vote until they have completed all the terms of their sentences, including both imprisonment and payment of fines and restitution, discriminates on the basis of wealth and therefore violates the equal protection provisions and other provisions of the federal and state constitutions; and (2) Arizona's law disenfranchising all persons convicted of any felony, including a statutory felony, violates the federal and state constitutions because states may disenfranchise individuals for crime only if the person's offense was a "felony at common law." [SER 24-27 ¶¶ 56-83]

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<sup>2</sup> "SER" refers to the Supplemental Excerpts of Record, which is filed herewith by the Defendants-Appellees.

Plaintiffs sued Governor Janet Napolitano, Secretary of State Janice Brewer, and the county recorders of Maricopa and Pima Counties. [SER 19 ¶¶ 12-15]<sup>3</sup> Plaintiffs' complaint sought both a declaratory judgment that Arizona's law is unconstitutional and preliminary and permanent injunctions against Defendants' continuing to disenfranchise Plaintiffs. [SER 27-28 ¶¶ (2)-(4)] Plaintiffs also sought nominal damages for the loss of their right to vote and attorneys' fees and costs. [SER 28 ¶¶ (5)-(6)]

State Defendants moved to dismiss the complaint for failure to state a claim upon which relief may be granted. The district court granted that motion on January 22, 2008. [ER 45] Plaintiffs subsequently amended their complaint on April 30, 2008. [SER 2] Upon motion, the district court dismissed the amended complaint with prejudice on November 6, 2008. [ER 16] Plaintiffs appealed on November 13, 2008. [ER 2]

Because one of the issues in this appeal is raised in the separate appeal of *Harvey, et al. v. Brewer, et al.* (No. 08-17253), which is currently pending before the Court, State Defendants-Appellees moved to consolidate the appeals on

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<sup>3</sup> Janet Napolitano was named in this action in her official capacity as governor and Janice Brewer was named in her official capacity as secretary of state. After Governor Napolitano's resignation on January 20, 2009, Secretary Brewer was sworn in as governor and was succeeded as secretary of state by Ken Bennett. Pursuant to Fed. R. App. P. 43(c), Governor Brewer and Secretary Bennett are automatically substituted as the Defendants-Appellees Governor and Secretary of State, respectively, in this matter.

December 11, 2008. [See dkt. 11 (No. 08-17253)] The Court consolidated the appeals on April 27, 2009, after opening briefs had been filed in each of the appeals. [Dkt. 18 (No. 08-17567)]

## STATEMENT OF FACTS

### A. Background of Arizona's Felon Disenfranchisement Laws.

Since Arizona became a state, its constitution has limited the right to vote for convicted felons. With regard to voter qualifications, the Arizona Constitution provides, in part: “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. 7, § 2(C).

In accordance with that constitutional mandate, Arizona statutory law provides that “[a] conviction for a felony suspends the following civil rights of the person sentenced: 1. The right to vote.” Ariz. Rev. Stat. (“A.R.S.”) § 13-904(A)(1). Under state law, persons convicted of criminal offenses are required to pay restitution to their victims and may be sentenced to punitive fines along with incarceration or other punitive terms. *See* A.R.S. § 13-603(C)-(E), -801, -804, -821.

In Arizona, a person who has been convicted of a single felony automatically regains his civil rights if the person both “[c]ompletes a term of

probation or receives an absolute discharge from imprisonment” and “[p]ays any fine or restitution imposed.” *Id.* § 13-912(A). Thus, upon completion of both the imprisonment and payment of financial penalties imposed as a result of a felon’s criminal conviction, that person’s civil rights are restored.<sup>4</sup> Those rights include the right to vote.

For persons who have been convicted of two or more felonies, restoration of civil rights is not automatic. Such felons must apply to the superior court to have their civil rights restored. *Id.* § 13-905 (setting forth the application process for restoration of civil rights for persons who have completed probation); *id.* § 13-906 (setting forth the application process for restoration of civil rights for persons who have been discharged from prison). The superior court judge by whom the felon was sentenced has discretion whether to grant restoration of the felon’s civil rights upon application. *Id.* § 13-908.<sup>5</sup>

In Arizona, a felony is “an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.” *Id.* § 13-105(18). The legislative definition of felony in Arizona largely has remained the same throughout Arizona’s history as a territory

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<sup>4</sup> The right to possess a weapon is not automatically restored, however. A.R.S. § 13-912(B). In addition, the right to vote of persons convicted of counterfeiting election returns is not automatically restored. *See id.* § 16-1011(C).

<sup>5</sup> If the person was convicted of two or more felonies in federal court, the person may apply for restoration of civil rights to the presiding judge of the superior court in the county of the person’s residence. A.R.S. § 13-909(A).

and state. *E.g.*, Howell Code, ch. XI, pt. 1, § 4 (1864) (defining felony as “a public offense punishable by death, or by imprisonment in a Territorial prison”); Rev. Stat. of Ariz. Territory Penal Code § 17 (1901) (defining felony as “a crime which is punishable with death or by imprisonment in the territorial prison”); Rev. Stat. of Ariz. Penal Code § 17 (1913) (defining felony as “a crime which is punishable with death or by imprisonment in the state prison”).

**B. Plaintiffs’ Allegations and Proceedings Below.**

In their original complaint, Plaintiffs alleged that they are residents of Maricopa and Pima Counties, respectively, and that they have been convicted of felony offenses. [SER 17-18 ¶¶ 7-11] Specifically, Plaintiff Rubio was convicted of attempted aggravated domestic violence. [SER 18 ¶ 8] Plaintiffs Convie and Lewis were convicted of five felony drug offenses and two felony drug offenses, respectively. [SER 18 ¶¶ 10-11] Plaintiffs Coronado and Garza each were convicted of one felony drug offense. [SER 17-18 ¶¶ 7, 9]

Plaintiffs Coronado, Rubio and Garza alleged that their felony sentences included an order to pay restitution and court costs associated with their convictions. [SER 17-18 ¶¶ 7-9] They alleged that Arizona denied or would deny their request to restore their civil rights, including the right to vote, because they have not completed the financial obligation portion of their criminal sentences. [*Id.*] Plaintiffs Convie and Lewis did not allege either that they owe any such fines

as part of their felony sentences or that they have applied to have their civil rights restored under Arizona law.

On January 22, 2008, the district court dismissed Plaintiffs' original complaint because the court found that the complaint did not state a claim upon which relief could be granted. Specifically, the court found that based on the Fourteenth Amendment, as interpreted in *Richardson v. Ramirez*, 418 U.S. 24 (1974), Arizona permissibly could disenfranchise a felon until such time as that person completed his or her entire sentence, including the payment of any fines. [ER 35-37]

The court also found that the requirement that felons complete their sentences by paying off any fines imposed thereby did not amount to any "tax" on their right to vote in violation of the Twenty-Fourth Amendment. [ER 37-39] The district court rejected Plaintiffs' claim that only "common law felonies" may provide a basis for crime-based disenfranchisement under the Fourteenth Amendment. [ER 42-44] The district court further found that Plaintiffs had not stated a claim under state or federal privileges and immunities provisions. [ER 40-41]

Plaintiffs filed an amended complaint on April 30, 2008. [SER 2] Their amended complaint was nearly identical to the original complaint, except the amended complaint added several allegations: that the number of persons with

criminal convictions has increased since the passage of the Fourteenth Amendment, that racial disparities exist in the criminal justice system resulting in a disparate impact on racial minorities, that Arizona's law disparately impacts indigent persons, and that Arizona's admission to the Union was conditioned on the State's limiting disenfranchisement to "only those individuals convicted of common law felonies." [SER 9, 11, 13 ¶¶ 45, 46, 63, 78]

Like the original complaint, the amended complaint did not allege that Plaintiffs were either indigent or members of a racial minority. Neither did the amended complaint challenge the legality of Plaintiffs' criminal sentences, including the financial penalties, or claim that the sentences were the result of any racial disparities. The amended complaint did not allege that Arizona enacted its felon disenfranchisement provisions (or any other provision) with racially discriminatory intent.

On November 6, 2008, the district court dismissed the amended complaint with prejudice because it found that the additional allegations did not cure the deficiencies in Plaintiffs' legal theories. [ER 16] Judgment was entered that same day. [SER 1]

### **SUMMARY OF THE ARGUMENT**

Section 2 of the Fourteenth Amendment ("Section 2"), the constitutional provision that is at the center of this appeal, affirmatively sanctions the removal of

the right to vote from those individuals who choose to engage in crime. That express authority applies notwithstanding other provisions of the Constitution that protect the right to vote for those citizens who act within the confines of our democratically made laws.

More than thirty years ago in *Richardson* the Supreme Court interpreted the affirmative sanction of Section 2 to permit states to disenfranchise some or all felons. *Richardson's* holding was not limited to those persons currently serving the terms of their criminal sentences. Rather, *Richardson* held that states may permanently disenfranchise those persons who engage in crime and are convicted therefor, even after those persons have completed their sentences.

If states may take away the right to vote from felons forever, states may do so at least until such time that a felon completes his lawfully imposed sentence. Under the holding and reasoning of *Richardson*, Plaintiffs have no equal protection claim. Even if they did, however, that claim would fail. Arizona's laws easily meet rational basis review, which would be the appropriate level of review because Plaintiffs, as disenfranchised felons, have no fundamental right to vote.

With regard to Plaintiffs' legal theories, no amount of discovery or "expert testimony" can save Plaintiffs' claims because those claims lack any legal basis at the outset.

## ARGUMENT

Standard of review: The Court should review *de novo* an order granting a motion to dismiss for failure to state a claim upon which relief can be granted. *E.g., In re Broderbund/ Learning Co. Sec. Litig.*, 294 F.3d 1201, 1203 (9th Cir. 2002) (accepting as true all material allegations of a complaint but affirming the dismissal of the complaint because it did not support the fact of damages, which was a legal element of the alleged securities violation).

**I. THE FEDERAL CONSTITUTION PERMITS STATES TO DISENFRANCHISE ALL FELONS, INCLUDING THOSE WHO HAVE NOT COMPLETED ALL THE TERMS OF THEIR SENTENCES.**

**A. Under *Richardson*, Equal Protection Claims that May Lie in Other Voting Contexts Do Not Apply to Felon Disenfranchisement Challenges.**

**1. *Section 2 of the Fourteenth Amendment precludes any equal protection challenge here.***

In *Richardson*, the Supreme Court addressed the constitutionality of California's felon disenfranchisement law. *Richardson*, 418 U.S. at 26-29, 56. The challengers to that law were convicted felons who had completed the terms of their sentences and paroles. *Id.* at 26. The challengers claimed that the equal protection clause of the Fourteenth Amendment (*i.e.*, Section 1 of that amendment) prohibited California from continuing to disenfranchise the challengers once they had completed their respective criminal sentences. *Id.* at 33. In support of their

argument, the challengers cited previous cases in which the Court had upheld the right to vote under the equal protection clause. *Id.*

The *Richardson* Court rejected the challengers' arguments, however, and upheld the constitutionality of California's law. In so holding, the Court analyzed Section 2 of the Fourteenth Amendment, which specifically pertains to disenfranchisement for crime. Section 2 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 of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (bold, underscoring added).

After considering the legislative history of Section 2, the many state disenfranchisement laws in existence at the time the Fourteenth Amendment was ratified, and other legislation that had been contemporaneously enacted, the Court held that Section 2 expressly sanctioned states' authority to disenfranchise for criminal conviction. *Richardson*, 418 U.S. at 54. The Court concluded that:

[Section] 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was

expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.

*Id.* at 55.

Thus, because Section 2 expressly sanctioned disenfranchisement for criminal conviction, the protections otherwise afforded by Section 1's equal protection provision did not apply in the specific area of criminal disenfranchisement. Consequently, the Court's jurisprudence on the right to vote in other contexts was inapposite in the felon disenfranchisement context. Stated another way, none of those equal protection cases involved a separate constitutional provision that expressly sanctioned the specific form of disenfranchisement:

We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

*Id.* at 54.

Like the challengers in *Richardson*, Plaintiffs here attempt to establish a traditional equal protection claim based on Section 1 of the Constitution and the cases interpreting that provision. As the Court held in *Richardson*, however, the equal protection clause does not prohibit states from exercising the express

authority granted in Section 2 of that same amendment. *Id.* at 54-55. Accordingly, Plaintiffs have no claim under the equal protection clause because Section 2 expressly authorizes Arizona to disenfranchise Plaintiffs for their felony convictions. *See id.*

Plaintiffs attempt to circumvent the holding and import of *Richardson* by characterizing their claim as one based on felon re-enfranchisement, not disenfranchisement. According to Plaintiffs, it is Arizona's refusal to restore their right to vote that gives rise to an equal protection violation under Section 1 of the Fourteenth Amendment.

Whichever way Plaintiffs characterize their claim, however, their challenge falls squarely within the holding of *Richardson*. Plaintiffs' challenge to the so-called conditions of their re-enfranchisement is in reality nothing other than a challenge to the period of their disenfranchisement. Stated another way, Plaintiffs claim that the State should discontinue their disenfranchisement sooner rather than later.

Even Plaintiffs concede, however, that under *Richardson* Arizona could disenfranchise them *permanently* if the State so decided. Implicit in the holding of *Richardson* that states may permanently disenfranchise felons is the notion that states may do so at least until such time as the felon completes his or her entire sentence.

Indeed, the challenge brought in *Richardson* and the Court's disposition of that challenge undermine any fictional distinction between claims based on felon disenfranchisement and re-enfranchisement. The plaintiffs in *Richardson* challenged California's refusal to *restore* their voting rights even though they had served all of their felony sentences. *Id.* at 33 (challenging the denial of voting rights of ex-felons). Thus, although the plaintiffs challenged the state's refusal to re-enfranchise them, the *Richardson* Court treated their claim analytically as one of disenfranchisement. *Id.* at 56.

Similarly, this Court has recognized that felons who lost the right to vote are injured by the state's *disenfranchisement* of those individuals, not by the state's failure to re-enfranchise those individuals. *Farrakhan v. Washington*, 338 F.3d 1009, 1022 (9th Cir. 2003) (rejecting a challenge under the Voting Rights Act to Washington's restoration of civil rights scheme); *see also Madison v. Washington*, 163 P.3d 757, 771 (Wash. 2007) (rejecting an equal protection challenge identical to the claim raised in this appeal, and stating that "it is not Washington's *re-enfranchisement* statute that denies felons the right to vote but rather the continuing applicability of its disenfranchisement scheme").

For those reasons, Plaintiffs' equal protection challenge to the period of their disenfranchisement must fail.

**2. *None of Plaintiffs' equal protection cases decided outside the felon disenfranchisement context supports their claim here.***

Most 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. Plaintiffs nonetheless cite those cases (at 18) to argue that they have a “fundamental right” to vote even though Plaintiffs concede that Arizona may remove that right from convicted felons. Plaintiffs do not explain why a right that has been constitutionally taken away based on a felony conviction should “spring to life” once a felon has completed a portion of his or her sentence. None of Plaintiffs’ authorities stands for any such proposition.

For example, Plaintiffs repeatedly cite *Reynolds v. Sims*, 377 U.S. 533 (1964), for the unremarkable notion that the right to vote is fundamental and protected by the Constitution. *Reynolds*, however, involved the constitutionality of the apportionment of the Alabama legislature and had nothing to do with the voting rights of felons. *Reynolds*, 377 U.S. at 537. Neither *Reynolds* nor any other case cited by Plaintiffs holds, or even suggests, that convicted *felons* have a fundamental right to vote.

Plaintiffs’ other cited cases similarly addressed the constitutionality of voting laws in other contexts and did not involve felon disenfranchisement or Section 2. *E.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969)

(addressing the constitutionality of a state law providing that individuals must own property or be parents to vote in certain school district elections); *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972) (addressing a state's residency requirement for registering to vote); *Bullock v. Carter*, 405 U.S. 134, 135 (1972) (addressing the constitutionality of a state requirement of a candidate filing fee for ballot access).<sup>6</sup>

Moreover, *Kramer*, *Dunn* and *Bullock* were expressly distinguished by the Court in *Richardson* precisely because those cases did not involve any challenges to which the affirmative sanction of Section 2 applied. *Richardson*, 418 U.S. at 54 (“As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely.”)

In addition, Plaintiffs' citation (at 18-19) to several cases that addressed the constitutionality of criminal sentences provides no support for an equal protection claim here. It is not disputed that criminal sentences must be imposed in accordance with the Eighth and Fourteenth Amendments. Plaintiffs do not explain,

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<sup>6</sup> Plaintiffs' other cases are similarly inapposite. *E.g.*, *Lubin v. Panish*, 415 U.S. 709, 710 (1974) (addressing a state filing fee requirement for ballot access); *Wesberry v. Sanders*, 376 U.S. 1, 2-3 (1964) (addressing the constitutionality of a state's congressional districts as drawn).

however, why that proposition supports any claim that their disenfranchisement should be shorter in duration than what currently is mandated by Arizona law.

Plaintiffs' complaint does not allege, nor do Plaintiffs argue, that the sentences imposed on them as a result of their felony convictions were "cruel and unusual" or otherwise unconstitutional. They do not dispute that Arizona may impose incarceration, probation, fines or restitution as punishment for felonies. Arizona's continued disenfranchisement of them does not convert their otherwise lawful criminal sentences into "cruel and unusual punishment."

**3. *Plaintiffs' remaining cases did not involve continued disenfranchisement for the duration of a felon's criminal sentence.***

Plaintiffs cite only three equal protection cases involving felon disenfranchisement. None of those cases, however, holds that requiring a felon to complete all the terms of his or her sentence violates the equal protection clause. *Hunter v. Underwood*, 471 U.S. 222 (1985), stands for the unremarkable proposition that states may not enact disenfranchisement laws for the purpose of racial discrimination.

In *Hunter*, Alabama made certain crimes a basis for disenfranchisement for the express purpose of excluding African-Americans from the franchise, where such racial minority was believed to comprise the bulk of the population committing those crimes. *Hunter*, 471 U.S. at 222, 226-27.

The Court's decision turned on the discriminatory motivation for Alabama's disenfranchisement provision. *Id.* at 233 ("Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."). The Court stated that, although Section 2 authorized disenfranchisement for crime, that provision did not permit states purposefully to discriminate based on race. *Id.* *Richardson* did not suggest the contrary. *Id.*

Plaintiffs argue (at 16) that under *Hunter* convicted criminals are protected by the equal protection clause and that the treatment of the voting rights of such persons must comply with that provision. *Hunter* cannot be read so broadly and still be squared with *Richardson*. Instead, under *Richardson* and *Hunter*, states may remove the right to vote for felony conviction and are not ever required to restore that right as long as that disenfranchisement is not imposed for a racially discriminatory purpose. In this case, there is no allegation that Arizona enacted its disenfranchisement laws with any racially discriminatory motive.

Neither do Plaintiffs allege that Arizona disenfranchises similarly-situated felons in a discriminatory manner. For that reason, Plaintiffs' reliance on *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977), is similarly misplaced. In *Hobson*, Alabama distinguished in its disenfranchisement of criminals based on gender.

Specifically, one of the offenses giving rise to disenfranchisement was wife-beating. *Hobson*, 434 F. Supp. at 365-66. The court found that the law that disenfranchised a man for assault of his wife but did not disenfranchise others for the same conduct was impermissible. *Id.* at 366 (“In the present case, men and women who are convicted of spousal assault and battery are treated differently: only men are denied the right to vote.”).

Arizona does not distinguish—on grounds of wealth or otherwise—between who is disenfranchised based on their felony offenses. *All* convicted felons are disenfranchised for the same conduct. Moreover, *all* felons may have their rights restored if and when they complete the terms of their entire sentence. In any event, because Plaintiffs do not allege that they were disenfranchised based on race or gender, neither *Hunter* nor *Hobson* supports their claim here.

Finally, the pre-*Richardson* decision in *Bynum v. Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969), does not support any equal protection claim here. In *Bynum*, the challenged fee was imposed on persons who had completed all the terms of their sentence (and thus were eligible to have their rights restored) and were applying for restoration of voting rights. *See Bynum*, 410 F.2d at 174 n.1.

Unlike Plaintiffs here, the challenger in *Bynum* did not challenge his eligibility to petition for restoration of civil rights based on the completion of his

felony sentence. Instead, the fee at issue in *Bynum* was completely divorced from the challenger's felony sentence. *See id.* at 174-75, 174 n.1 (describing the restoration process to require a felon's discharge from probation or parole). *Bynum* does not stand for the proposition that a state may not require felons to complete their lawfully imposed sentences before becoming eligible to apply to have their rights restored.<sup>7</sup>

**4. *Plaintiffs' felon "voter qualification" argument fails because Plaintiffs do not challenge the imposition of their disenfranchisement based on racial discrimination.***

As with Plaintiffs' other cited authorities, the cases they cite (at 19-23) in support of their "unconstitutional voter qualification" argument do not support any equal protection claim here. Although the *Farrakhan* court noted that felon disenfranchisement is a voting qualification, the court did not hold that requiring felons to complete their sentences before restoring their civil rights was unconstitutional.

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<sup>7</sup> Although the *Bynum* court held that the challenger had presented a substantial issue, the court did not decide the merits of the plaintiff's claim. Rather, the court ordered that a three-judge panel be convened to consider the merits of the challenge. *Bynum*, 410 F.2d at 177. In addition, the court noted that the panel should determine the "exact degree of *Bynum*'s poverty." *Id.* Thus, the court apparently believed that ability to pay bore some relation to the merits of the claim. Here, Plaintiffs did not allege (in either their original or amended complaint) that they are unable to complete their criminal sentences by paying the fines imposed as a result of their convictions.

The *Farrakhan* plaintiffs brought a Voting Rights Act claim, not an equal protection claim. *Farrakhan*, 338 F.3d at 1011. They claimed that discrimination in Washington's criminal justice system resulted in a denial of their right to vote on account of race in violation of the Act. *Id.* at 1013. Thus, unlike Plaintiffs here, the *Farrakhan* plaintiffs claimed they were disenfranchised in the first instance on a racially discriminatory basis. *Id.* at 1021. Moreover, because those plaintiffs offered no evidence on summary judgment of racial discrimination in the restoration of their rights, they could not state a Voting Rights Act claim based on the state's restoration of rights laws. *Id.*

Plaintiffs here do not allege that they improperly were disenfranchised based on race. Although they allege that minorities are disenfranchised disproportionately to whites, Plaintiffs do not allege any racial discrimination with regard to either Arizona's disenfranchisement of felons or the State's law regarding restoration of civil rights.<sup>8</sup> Unless 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.

Moreover, none of Plaintiffs' remaining authorities addressed the voting rights of persons who lost such right as a direct consequence of their criminal

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<sup>8</sup> Neither does any plaintiff allege that he or she is a racial minority.

actions. The Court in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), addressed a poll tax imposed by Virginia on every individual in the state who was qualified to vote or register to vote. *Harper*, 383 U.S. at 664 n.1. *Harper* did not suggest that convicted felons from whom the state had properly removed the right to vote gained that right again after completion of a portion of their criminal sentences.<sup>9</sup>

Plaintiffs' cases that address the rights of felons in other contexts are similarly inapposite because they involve issues of freedom from incarceration—not restoration of voting rights.<sup>10</sup> Because none of those cases involved the right to vote, they did not account for the affirmative sanction in Section 2 which authorizes the disenfranchisement of felons that *Richardson* holds may endure permanently. Thus, those authorities do not support any equal protection claim here. *E.g.*, *Madison*, 163 P.3d at 768-69 (distinguishing criminal procedure jurisprudence that addressed personal liberty rights because those cases do not

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<sup>9</sup> *Harper* is addressed more fully in Section II(A) below regarding Plaintiffs' poll tax argument.

<sup>10</sup> *E.g.*, *Griffin v. Illinois*, 351 U.S. 12, 13 (1956) (addressing the right to a trial transcript for appellate review of a criminal conviction); *Bearden v. Georgia*, 461 U.S. 660, 661 (1983) (addressing whether the state could revoke probation and thus incarcerate a defendant for failure to pay a fine); *Williams v. Illinois*, 399 U.S. 235, 238 (1970) (addressing whether a state could continue to incarcerate a defendant for failure to pay fines); *Roberts v. LaVallee*, 389 U.S. 40, 40-41 (1967) (addressing habeas corpus relief for a defendant incarcerated after the state failed to provide a copy of a hearing transcript requested by the defendant to prepare his defense); *Douglas v. California*, 372 U.S. 353, 354 (1963) (addressing the right to counsel on appeal of an incarcerated criminal defendant).

account for the constitutional provision that permits voting rights to be removed from convicted felons).<sup>11</sup> The equal protection clause does not protect the right to vote for felons who have lost that right under Section 2, absent intentional racial discrimination.

**B. Even under a Traditional Equal Protection Analysis, Plaintiffs Have Not Stated a Claim for Relief.**

Even if an equal protection claim were cognizable absent an allegation of intentional racial discrimination, Plaintiffs have not stated a claim for relief. Equal protection claims must be reviewed only for a rational basis unless the claim implicates a fundamental right or a suspect class. *E.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that a classification involving neither a fundamental right nor a suspect class is reviewed for a rational basis). Felons are not a suspect class. *E.g.*, *United States v. Hancock*, 231 F.3d 557, 565 (9th Cir. 2000) (recognizing that

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<sup>11</sup> The same is true of Plaintiffs' remaining authorities (cited at 21). None of those cases addressed voting in the felon context and therefore do not account for the affirmative sanction of Section 2. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (addressing Congress' authority to enact the Religious Freedom Restoration Act); *Quinn v. Millsap*, 491 U.S. 95, 106-07 (1989) (addressing the constitutionality of a requirement of land ownership for eligibility to serve on a public board); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (addressing the constitutionality of racial preferences in the awarding of federal contracts); *Shaw v. Hunt*, 517 U.S. 899, 901-02 (1996) (addressing the constitutionality of a state redistricting plan).

the defendant who was a multiple misdemeanor convict was not a member of a protected class for purposes of an equal protection challenge).<sup>12</sup>

Plaintiffs' heightened scrutiny argument thus is based entirely on the mistaken premise that felons continue to possess the right to vote even after the State has properly removed that right. Indeed, Plaintiffs repeatedly contend that their "right" to vote is "fundamental." Having lost their right to vote as a consequence of choosing to commit felony offenses, however, Plaintiffs no longer have any such right—fundamental or otherwise. *Richardson*, 418 U.S. at 56; *Owens v. Barnes*, 711 F.2d 25, 27 (3rd Cir. 1983) (holding that under *Richardson* the right to vote of convicted felons is not fundamental); *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (stating that the right of felons to vote is not fundamental); *see also Madison*, 163 P.3d at 768 (holding that under *Richardson*, felons do not have a fundamental right to vote and applying rational basis review to Washington's felon disenfranchisement law).

In *Owens*, the Third Circuit applied a rational basis review and rejected a felon's challenge to Pennsylvania's disenfranchisement law, which disenfranchised felons until they were released from incarceration. The court stated:

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<sup>12</sup> Plaintiffs' assertion (at 24-25) that indigence is a suspect class is mistaken. Neither indigent prisoners nor indigent persons generally are a suspect class for equal protection analysis. *E.g.*, *Rodriguez v. Cook*, 169 F.3d 1176, 1179 (9th Cir. 1999) (citing cases); *Harris v. McRae*, 448 U.S. 297, 323 (1980) (stating that the Court has "held repeatedly that poverty, standing alone is not a suspect classification").

In this case, plaintiff makes no claim of unequal enforcement nor of any discrimination among those felons who are incarcerated. Instead, plaintiff claims that because the right to vote is “fundamental” Pennsylvania cannot abridge or limit it on the basis of incarceration without showing that classification is necessary to promote a compelling state interest.

Plaintiff’s argument fails because the right of convicted felons to vote is not “fundamental”. That was precisely the argument rejected in *Richardson*.

*Owens*, 711 F.2d at 27.

Like the challenger in *Owens*, Plaintiffs have no fundamental right to vote. Thus, they are not entitled to strict scrutiny review (or any heightened scrutiny) of their challenge.<sup>13</sup>

Thus, Arizona’s law must be upheld as long as it is rationally related to a legitimate government interest. *E.g.*, *Hancock*, 231 F.3d at 566 (where a law neither implicates a fundamental right nor targets a suspect class, courts apply a rational basis review in deciding equal protection challenges); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) (“government actions that do not affect fundamental rights or liberty interests and do not involve suspect classifications will be upheld if . . . they are rationally related to a legitimate state

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<sup>13</sup> Accordingly, Plaintiffs’ citation (at 25-27) to cases in which the Supreme Court applied a heightened standard of review is inapposite. Contrary to Plaintiffs’ assertions, 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 where, as here, the challenged restriction does not affect a fundamental right. As explained above, felons do not have a fundamental right to vote once the State removes that right under the authority of Section 2. *Richardson*, 418 U.S. at 54.

interest”). Moreover, the person attacking the validity of the law has the burden “to negative every conceivable basis which might support it.” *Heller*, 509 U.S. at 319-20 (stating that a classification involving neither a fundamental right nor a suspect class is accorded a strong presumption of validity) (internal quotation marks omitted).

Arizona’s law regarding the restoration of civil rights classifies felons into two groups: those who complete their criminal sentences and those who do not. As the district court found, Arizona has a rational basis for requiring completion of a felony sentence before restoring civil rights.

The court found that the imposition of financial penalties as part of a felony sentence “serve[s] the interests in punishing and deterring criminal activity.” [ER 37 (citing *Polykoff v. Collins*, 816 F.2d 1326, 1337 (9th Cir. 1987))] Indeed, Arizona’s Legislature has made a policy choice about the financial penalties that may be imposed as a result of a felony conviction. *See* A.R.S. §§ 13-603(C), (D), -801, -804, 821. Similarly, the people of Arizona, in adopting the Victims’ Bill of Rights, made a policy choice that persons convicted of crimes—not their victims—should pay for the economic losses directly caused by that criminal conduct. *See* Ariz. Const. art. 2, § 2.1(8).

Requiring persons who choose to commit felony crimes to complete their entire sentence before restoring their civil rights is rationally related to Arizona’s

interest in deterring crime, punishing crime, and compensating the societal victims of their crime. *E.g.*, *Madison*, 163 P.3d at 772 (“The State clearly has an interest in ensuring that felons complete all of the terms of their sentence, and there is no requirement that the State restore voting rights to felons until they do so.”).

Moreover, Arizona has a legitimate interest in regulating the franchise, including determining the qualification of voters. *E.g.*, *Richardson*, 418 U.S. at 53 (noting that states may consider a person’s criminal record in determining voter qualifications); *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445, 449-52 (2d Cir. 1967) (discussing the historical justifications for disenfranchising criminals); *Madison*, 163 P.3d at 771 (finding that the state had an interest in “limiting political participation of those unwilling to abide by laws and in requiring the completion of all sentence elements before the right to vote is restored”).

Arizona has important state interests in ensuring that convicted felons complete their sentences—whatever those sentences may be—before those persons are restored their civil rights. Plaintiffs have neither alleged nor argued that there is no conceivable basis to support Arizona’s felon disenfranchisement laws. Neither have Plaintiffs argued that they could do so if their complaint were reinstated and they were permitted discovery.<sup>14</sup>

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<sup>14</sup> Although heightened scrutiny is not appropriate for the reasons explained, if the Court were to apply such a standard of review, Plaintiffs’ argument (at 27-28) that a compelling state interest has not been shown is not relevant to the determination

**II. ARIZONA’S REQUIREMENT THAT CONVICTED FELONS COMPLETE THEIR SENTENCES BEFORE BEING RESTORED THEIR CIVIL RIGHTS IS NOT A POLL TAX.**

**A. The District Court Correctly Rejected Plaintiffs’ Poll Tax Claim.**

As with their equal protection argument, Plaintiffs’ poll tax argument is premised on the mistaken notion that felons possess a fundamental right to vote. As demonstrated above, however, Plaintiffs no longer have any such right. *E.g.*, *Madison*, 163 P.3d at 770 (holding that a requirement that felons pay financial penalties was not a poll tax under *Harper*, and stating that “[c]onvicted felons . . . no longer possess that fundamental right as a direct result of their decisions to commit a felony”). Implicit in Plaintiffs’ argument is that once they have completed all the terms of their sentence except for the payment of any financial penalties, a right to vote suddenly springs to life. They offer no authority for such a notion, which is contrary to the holding of *Richardson*.<sup>15</sup>

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of the legal issues before the Court. Because the district court rejected Plaintiffs’ equal protection claim under a rational basis review, the burden of proof never shifted to the State to prove any compelling state interest. Should the Court apply a heightened standard of review, however, the State would be entitled to an opportunity to make such a showing.

<sup>15</sup> Neither do Plaintiffs explain how the Twenty-Fourth Amendment provides the source of a right that does not otherwise exist for certain individuals. Although Plaintiffs assert that the purpose of that amendment was “to eliminate an unnecessary and unfair obstacle to voting” and to encourage participation in the political process, nothing about either those asserted purposes or the Amendment itself purports to restore a right to vote that has been lawfully removed based on Section 2 of the Fourteenth Amendment.

The fact that Plaintiffs no longer possess any right to vote distinguishes their challenge from each of those brought in the cases cited by Plaintiffs (at 31-32). In the leading Supreme Court cases that addressed poll tax claims, the challenged poll tax was imposed on all citizens of the state who were *eligible* to vote. *Harper*, 383 U.S. at 664 n.1 (addressing a poll tax imposed on every resident of the state for state elections); *Harman v. Forssenius*, 380 U.S. 528, 529 (1965) (addressing a poll tax imposed on every eligible voter for federal elections).

By contrast, Arizona does not require persons who otherwise are eligible to vote to pay any fee to vote. Unlike the challengers in *Harper* and *Harman*, Plaintiffs are not voting-eligible citizens whose right to vote is denied or abridged by a requirement that they pay a tax. In addition, the “fee” about which Plaintiffs complain is no tax at all. Plaintiffs’ financial penalties, which include victim restitution and punitive fines, are not a “tax” exacted as a privilege for voting. Instead, those penalties were part of a sentence for crimes deemed sufficiently serious to warrant imprisonment in the State’s prisons.<sup>16</sup>

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<sup>16</sup> Like *Harper* and *Harman*, the remaining cases cited by Plaintiffs in support of their poll tax argument addressed poll taxes imposed on eligible citizens who possessed a fundamental right to vote. *E.g.*, *Weinschenk v. Missouri*, 203 S.W.3d 201, 204 (Mo. 2006) (addressing under state law the requirement that “properly registered” voters pay for photo identification to vote); *Hill v. Stone*, 421 U.S. 289, 300 (1975) (addressing a requirement of rendering property for taxation to vote that was imposed on “persons otherwise qualified to vote”); *United States v. Texas*, 252 F. Supp. 234, 239 (W.D. Tex. 1966) (addressing a poll tax levied on every qualified voter under sixty-one years of age in the state, and noting that convicted

Those penalties cannot be divorced from the context in which they arose: a felony conviction. Plaintiffs offer no authority for the notion that their properly-imposed fines are converted into an unconstitutional “tax” once Plaintiffs meet other terms of their criminal sentences.<sup>17</sup>

Plaintiffs’ poll tax argument fails for an additional reason, however. The poll taxes invalidated by the Supreme Court were unconstitutional because they “invidiously discriminated.” *E.g.*, *Harper*, 383 U.S. at 666. “Invidious” election restrictions are those that are unrelated to the voter’s qualifications. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (discussing the basis for invalidating the poll tax at issue in *Harper*).

Arizona’s requirement that convicted felons complete all of the terms of their sentence is not an invidious restriction unrelated to voter qualifications. Although Plaintiffs’ attempt to frame the law as requiring payment of a fine for the privilege of voting, that characterization does not accurately reflect Arizona’s law.

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felons “whose civil rights have not been restored are disqualified from voting”); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1331 (N.D. Ga. 2005) (addressing in preliminary injunction proceedings a photo identification requirement imposed on “all registered voters”).

<sup>17</sup> For that reason, Plaintiffs’ assertion that striking down Arizona’s restoration of rights law is the only path to harmonizing the Fourteenth and Twenty-Fourth Amendments is mistaken. Section 2 permits disenfranchisement at least until such time as a felon completes his or her felony sentence. The Twenty-Fourth Amendment protects the right to vote of those citizens who are otherwise eligible to vote. There is no difficulty in reconciling the two to permit a state reasonably to require the completion of a criminal sentence before restoring a right that has been properly removed under Section 2.

For example, a person who was able to pay restitution but whose sentence included a ten-year term of imprisonment would not be eligible for restoration of rights merely by payment of the restitution. Instead, such person would be required to complete the term of incarceration as well as pay any imposed fines.

Whether a person has completed all terms of the sentence properly imposed as a result of a previous criminal conviction is indeed related to a person's qualification to vote. In determining voter qualifications, states may properly take into account factors such as the criminal record of individuals. *E.g., Richardson*, 418 U.S. at 53 (stating that a person's criminal record is an example of those factors that states may consider in determining the qualifications of voters). Consideration of an individual's criminal record includes a determination of whether the person has paid the debt to society that was caused by that person's decision to commit a felony.

Arizona's requirement that felons complete all the terms of their sentences is not a fee paid in exchange for the right to vote. Instead, that requirement ensures that all the terms of a criminal sentence are completed.<sup>18</sup>

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<sup>18</sup> Although Plaintiffs assert (at 12) that a requirement that felons complete all the terms, including financial terms, of their sentences before being restored the right to vote has a disparate impact on indigent people, Plaintiffs' complaint offers no basis to support their own standing to assert such a claim. Plaintiffs do not allege that any of them is incapable of paying, notwithstanding their argument to that effect on appeal.

**B. Amicus-Curiae Arguments Provide No Basis for Finding a Poll Tax.**

In a brief primarily containing policy arguments about the wisdom of felon disenfranchisement and asserted statistics that purportedly should affect the Court's analysis, amicus curiae remarkably asserts: "in reality the only reason Plaintiffs are not 'qualified' to vote under Arizona's law is their inability to pay fees." [Br. of Amicus-Curiae at p. 31]

In fact, the reason Plaintiffs are no longer eligible to vote is that they made a decision both to disregard the laws by which the vast majority of Arizona citizens abide and to commit crimes that undisputedly harmed the society in which we live.

Amicus-curiae's entire argument is based on the uncontroversial notion that voting-eligible citizens cannot be charged for the right to vote. Neither the Twenty-Fourth Amendment nor any of the cases cited by amicus-curiae, however, suggests that the amendment was intended to grant an affirmative right to vote to those individuals who—through no one's actions but their own—lost that right because of their serious crimes.

Moreover, amicus-curiae's policy arguments are not properly directed to this Court. Plaintiffs assert as fact "studies" and "statistics" relating to the criminal justice system and voting patterns of racial minorities, among other things, for the purported purpose of presenting the intent of the Twenty-Fourth Amendment. Amicus-curiae's assertions about the demographics of the felony population,

however, are merely an argument that the Court should decide the constitutionality of state law based on the “correct” public policy—as determined by amicus-curiae.

The *Richardson* Court rejected such an argument when interpreting states’ constitutional authority to disenfranchise convicted felons. *See Richardson*, 418 U.S. at 55 (rejecting amici curia policy arguments regarding re-enfranchisement as necessary for the rehabilitation of ex-felons; stating that such arguments should be “addressed to the legislative forum which may properly weigh and balance them” and that “it is not for us to choose one set of values over the other”). This Court should do the same.

Amicus-curiae argues that fines imposed on some felons “effectively operate as taxes” because those fines purportedly are used for public purposes. [See Br. of Amicus-Curiae at pp. 10-12] Whichever way in which amicus-curiae characterizes those fines, however, it is not disputed that such fines are part of a felon’s sentence. Neither does amicus-curiae challenge the legality of those fines as part of a felon’s imposed sentence. Like Plaintiffs, however, amicus-curiae improperly attempts to separate lawfully-imposed fines from the context in which those fines arose—Plaintiffs’ felony convictions.

In addition, the cited case does not support amicus-curiae’s argument (at 16-17) that the courts should consider “racial barriers to political participation” when determining whether a law constitutes an unconstitutional poll tax. The *Farrakhan*

court considered a Voting Rights Act claim, not whether a state law imposed a poll tax in violation of the Twenty-Fourth Amendment. *Farrakhan*, 338 F.3d at 1011-12. Voting Rights Act claims (unlike poll tax claims) are dependent upon a finding of racial discrimination in voting. *See id.* at 1014-15 (citing the Voting Rights Act, which prohibits the denial or abridgement of the right to vote on account of race or color).

Finally, amicus-curiae's argument based on the dissent in *Madison* ignores the majority opinion of that case, which specifically rejected the same reasoning pressed by amicus-curiae here. The *Madison* court recognized that the dissent's reliance on an analogy between the right to be free from incarceration and the right to vote broke down in light of Section 2 of the Fourteenth Amendment. *Madison*, 163 P.3d at 768-69.

The analogy the dissent draws between the two rights is flawed. We agree that both the right to vote and the right to be free from incarceration are protected by the equal protection clause of section 1 of the Fourteenth Amendment. However, the dissent fails to grapple with the impact of section 2 of the Fourteenth Amendment upon the right to vote *for felons*. Section 2 contains no parallel language restricting felons' right to be free from incarceration. Thus the dissent's analogy is of limited value. The dissent's conclusion that, like freedom from incarceration, voting "remains a fundamental right, and when all other conditions of a sentence have been fulfilled, felons cannot be deprived further of their right to vote for failure to pay [fines]," is unsupported.

*Id.* (alteration added).

**III. ARIZONA’S FELON DISENFRANCHISEMENT LAW ACCORDS WITH THE PRIVILEGES AND IMMUNITIES PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.**

**A. The Complaint Does Not State a Claim Under Arizona’s Equal Privileges and Immunities Provision.**

Arizona’s equal privileges and immunities (*i.e.*, equal protection) clause provides that “[n]o 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.” Ariz. Const. art. 2, § 13.

The “privilege” about which Plaintiffs complain is the right to vote. That right, however, has not been granted to Arizona’s citizens on different terms. The right to vote is possessed by all who otherwise meet the criteria for registration, including age, citizenship and residence, with the qualification (upheld in *Richardson*) that felons may be excluded from that right. Thus, Plaintiffs do not identify or challenge any law that grants to a citizen or class of citizens a privilege which does not, on the same terms, belong to all citizens.

Because Plaintiffs are not similarly situated to citizens who are qualified to vote, they have not stated an equal protection claim under Arizona’s constitution. *E.g.*, *Stults Eagle Drug Co. v. Luke*, 62 P.2d 1126, 1130 (Ariz. 1936) (stating that the privileges and immunities provision secures equality of opportunity “to all persons and corporations similarly situated, and that is all that said constitutional

provision undertakes to guarantee”); *Lindsay v. Cave Creek Outfitters, L.L.C.*, 88 P.3d 557, 564 (Ariz. App. 2003) (stating that the Arizona privileges and immunities provision does not proscribe all unequal treatment, but rather it requires only the equal treatment of persons similarly situated in a given class).

Moreover, even among similarly situated excluded felons, Arizona does not treat members of the class differently. Arizona requires *all* felons to complete all the terms of their sentences before being restored the right to vote. *See* A.R.S. §§ 13-905, 13-906, 13-912(A). The only aspect of the restoration process that varies among members of the class is the terms of their respective sentences. Those terms, however, derive as a direct consequence of each felon’s individual conduct.

In *Madison*, the Washington Supreme Court interpreted a provision in that state’s constitution that is substantively identical to Arizona’s privileges and immunities provision. The court noted that the concerns of favoritism toward the wealthy, which were a basis for the constitutional provision, were “not triggered by Washington’s felon disenfranchisement scheme because it grants the ‘privilege’ of restoration of voting rights ‘upon the same terms . . . equally . . . to all citizens.’” *Madison*, 163 P.3d at 766 (quoting the Washington Constitution).

Like the law challenged in *Madison*, Arizona’s law “disqualifies voters on equal terms—that is, when individuals have been convicted of committing a

felony.” *See id.* In addition, Arizona’s restoration of rights law “provides for the restoration of voting rights to felons on equal terms—that is, only after individuals have satisfied all of the terms of their sentences.” *See id.*

Even if Arizona’s law could be viewed as treating members of the same class differently, that law must be upheld under a rational basis review. As with the federal courts’ interpretation of the Fourteenth Amendment, Arizona courts apply rational basis review to privileges and immunities challenges where a statute implicates neither a fundamental right nor a suspect class. *E.g., Arizona v. Bonnewell*, 2 P.3d 682, 686 (Ariz. App. 1999); *Arizona Downs v. Arizona Horsemen’s Found.*, 637 P.2d 1053, 1058 (Ariz. 1981).

As explained in Section I(B) above, Arizona’s civil rights restoration law is rationally related to legitimate state interests, including deterring crime, punishing crime, compensating societal victims of crime, and regulating the franchise.

**B. The Complaint Does Not State a Claim Under the Federal Privileges and Immunities Provision.**

Although *Richardson* addressed the equal protection language of Section 1 of the Fourteenth Amendment, the Court’s reasoning, as discussed in section I(A) above, applies with equal force to any privileges and immunities argument based on that same constitutional section. Accordingly, the district court correctly held

that Plaintiffs' federal privileges and immunities claim fails for the same reasons as does their equal protection claim. [ER 40-41]<sup>19</sup>

**IV. ARIZONA'S FELON DISENFRANCHISEMENT LAW DOES NOT VIOLATE THE STATE'S CONSTITUTIONAL PROVISION FOR FREE AND EQUAL ELECTIONS.**

The free and equal elections clause of the Arizona Constitution provides that "[a]ll 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." Ariz. Const. art. 2, § 21. That provision, however, must be read harmoniously and consistently with other provisions of that same constitution. *E.g., Arizona ex rel. Nelson v. Jordan*, 450 P.2d 383, 386 (Ariz. 1969) (courts have a duty to harmonize separate provisions "so that the constitution is a consistent workable whole").

As noted previously, Arizona's constitution expressly excludes from the franchise "any person convicted of treason or felony," unless the person has been restored to civil rights. Ariz. Const. art. 7, § 2(C). Those two constitutional provisions easily can be read in harmony to guarantee the free exercise of the right to vote for such persons who have such a right, and to exclude felons from those persons who have such a right.

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<sup>19</sup> As the district court recognized, it is not established that the right to vote is a "privilege or immunity of the citizens of the United States," although the court accepted such a privilege as established for purposes of the motion to dismiss. [ER 40] In an early case brought under the Fourteenth Amendment, the Supreme Court held that the right to vote was not a privilege under that Amendment. *Minor v. Happersett*, 88 U.S. 162, 174, 178 (1874).

**V. FOR THE REASONS ARGUED BY APPELLEES IN THE CONSOLIDATED APPEAL, SECTION 2 APPLIES TO ALL FELONIES, NOT ONLY “FELONIES AT COMMON LAW.”**

Plaintiffs’ final argument, as set forth in section VI of their brief, is based on the same legal claim that is at issue in the *Harvey* appeal and repeats the same arguments made by the *Harvey* appellants. Defendants-Appellees fully addressed those arguments in their answering brief in the *Harvey* appeal and thus do not repeat those arguments here.

Since the time of the preparation of Defendants-Appellees’ brief in the *Harvey* appeal, the California Supreme Court denied review in a case that asserted a challenge identical to Plaintiffs’ “common law felony” challenge here. *See Legal Servs. for Prisoners with Children v. Bowen*, 87 Cal. Rptr. 3d 869 (Ct. App. 2009), review denied Apr. 15, 2009. Pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28-6, the *Bowen* opinion was submitted as supplemental authority in the *Harvey* appeal on April 29, 2009.

As explained in that supplemental submission, the *Bowen* opinion thoroughly considered and expressly rejected each of the “common law felony” arguments made by Plaintiffs here, in upholding California’s disenfranchisement of all felons. *Id.* at 876-80. Defendants-Appellees incorporate herein the arguments and authorities set forth in their answering brief and supplemental submission in the *Harvey* appeal.

## CONCLUSION

For the reasons set forth above, the Court should affirm the district court's judgment in all respects.

Respectfully submitted this 4th day of May, 2009.

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees inform the Court that the following related case is pending in the Ninth Circuit: *Harvey, et al. v. Brewer, et al.*, (Ninth Cir. No. 08-17253). Like the present case, the *Harvey* case is appealed from the District of Arizona and challenges Arizona's felon disenfranchisement laws based on a claim that only crimes that were felonies at common law may provide a constitutional basis for disenfranchisement under the Fourteenth Amendment.

The *Harvey* appeal is prosecuted by separate plaintiffs and defended by the Arizona Governor, Secretary of State, and Pima County Recorder. Defendants-Appellees moved to consolidate this appeal with the *Harvey* appeal on December 11, 2008. [See Ninth Cir. dkt. 12 (No. 08-17253)] That motion was granted on April 27, 2009 [See Ninth Cir. dkt. 21 (No. 08-17253)].

The opening brief in the *Harvey* appeal was filed on February 24, 2009. Defendants' answering brief was filed on April 16, 2009. [See Ninth Cir. dkt. 19 (No. 08-17253)]

Dated this 4th day of May, 2009.

/s/ Barbara A. Bailey  
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,441 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

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 it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 4th day of May, 2009.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using 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 a copy of the foregoing document by First-Class Mail, postage prepaid, to the following participants on the 4th day of May, 2009 to:

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I further certify that pursuant to Fed. R. App. P. 25(d) and Rule 4(a)(2) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases (11/10/2008), on the 4th day of May, 2009, four copies of the Excerpts of Record were sent via Federal Express to:

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