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January 26, 2009

Ms. Molly Dwyer, Clerk of Court  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939  
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Re: Coronado, et al. v. Napolitano, et al., Case No. 08-17567

Dear Ms. Dwyer:

Enclosed please find Plaintiffs/Appellants' opening brief in the above-referenced case.

Plaintiffs/Appellants filed their Notice of Appeal on November 13, 2008. According to the Court's briefing schedule, the opening brief was due on January 5, 2009. On December 23, 2008, Plaintiffs/Appellants filed a motion for an extension of time requesting permission to file their opening brief by January 26, 2009. The Court's ruling on that motion is pending.

Pursuant to Circuit Advisory Rule 31-2.2, Plaintiffs/Appellants submit their opening brief and respectfully ask the Court to accept this submission which is being filed on the date requested in their motion for an extension of time.

Please feel free to contact me if you have any questions.

Sincerely,

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No. 08-17567

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

v.

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

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

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**Brief of Appellants**

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## **STATEMENT OF JURISDICTION**

This is an appeal of the district court's dismissal of Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 42 U.S.C. §§ 1971(d) and 1973j(f), and 42 U.S.C. § 1983. The district court had supplemental jurisdiction under 28 U.S.C. § 1367(a) to hear Plaintiffs' state law claims. Plaintiffs filed a timely notice of appeal on November 13, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

I. Whether the State of Arizona may require, as a qualification to vote, that a person convicted of a felony pay the court fines and/or restitution associated with his or her sentence prior to otherwise automatically restoring the person's right to vote?

II. Whether the affirmative sanction of Section 2 of the Fourteenth Amendment, which provides that a state may, without loss of representation, deny voting rights to persons convicted of "rebellion, or other crime," is limited to crimes that were felonies at common law?

## **STATEMENT OF THE CASE**

Pursuant to Arizona law, a person convicted of any felony loses the right to vote. Ariz. Const. art. VII, § 2(c); Ariz. Rev. Stat. §§ 13-904(A)(1), 16-101(A);

21-201(3). The state, however, enacted a re-enfranchisement scheme which automatically restores the voting rights of a person convicted of a single felony provided the person completes his or her term of prison, parole, and probation, and completes payment of any fine or restitution. Ariz. Rev. Stat. § 13-912. Those individuals who have more than one felony conviction must apply for judicial restoration of their rights or seek a pardon. Ariz. Rev. Stat. §§ 13-905(A) and (B).

Plaintiffs Armando Coronado, Joseph Rubio, and Michael Garza each have only one felony conviction. They are not in prison, on parole, or on probation, but owe outstanding legal financial obligations (“LFOs”) associated with their sentences, namely court fines and/or restitution. These plaintiffs would be eligible for automatic restoration of their voting rights but for the state’s requirement that LFOs be satisfied first. They challenge Arizona’s LFO requirement as an unconstitutional voter qualification in violation of the Fourteenth Amendment’s Equal Protection Clause, the Twenty-Fourth Amendment, the Privileges and Immunities Clauses of the federal and state constitutions, and the “Free and Equal Elections” clause of the Arizona Constitution.

In addition, all of the plaintiffs challenge the state’s authority to deny their right to vote based on their past offenses. Section 2 of the Fourteenth Amendment allows states, without loss of representation, to disfranchise people convicted of “rebellion, or other crime.” The “other crime” exception in Section 2 was limited

to common law felonies, not the crimes for which Plaintiffs were convicted, specifically drug crimes and a domestic violence offense. The common law felony claims Plaintiffs raised in their original and amended complaints are based on the legislative history of the Fourteenth Amendment, including the language of the Reconstruction and Readmission Acts, which Congress enacted during the same period as the Fourteenth Amendment to allow the former Confederate States to be readmitted to the Union. The language of the Acts expressly provides that only disfranchisement for crimes “as are now felonies at common law” was permissible. The legislative history of the Fourteenth Amendment shows that this limiting definition applies to the “other crime” exception in Section 2 as well. Therefore, Plaintiffs contend that the state has no affirmative sanction to disfranchise them based on their non-common law felony convictions.

The district court dismissed Plaintiffs’ original complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, and dismissed the amended complaint for failure to state a claim and on the ground that Plaintiffs lacked standing to challenge the LFO requirement as an invidious form of discrimination. Plaintiffs appeal that erroneous decision.

### **STATEMENT OF FACTS**

Plaintiff Coronado was convicted of a felony drug offense on August 6, 1990, sentenced to imprisonment, and ordered to pay \$2,740.00 in court fines and

\$100.00 to a victim compensation fund. Amend. Compl. at ¶ 7. He received an absolute discharge from the Department of Corrections on May 3, 1994, and applied for restoration of his civil rights on October 25, 1999. Id. The state denied his rights restoration application because he still owes \$2,840.00 plus all interest that has accrued on his debt. Id. Plaintiff Garza was sentenced to prison and probation for a felony drug offense on December 4, 1992, and ordered to pay over \$3,700.00 in court fines and restitution which he has not satisfied. Id. at ¶ 9. Although he received an absolute discharge, he has not satisfied his LFOs. Id. at ¶ 9. Thus, he also is ineligible for restoration of his voting rights. Id.

Plaintiff Rubio was convicted of attempted aggravated domestic violence in January 2006, sentenced to probation, and ordered to pay \$55.00 towards the cost of his supervision. Id. at ¶ 8. He applied for restoration of his civil rights once he completed probation, but was denied because he had not paid the \$55.00 associated with his sentence. Id. Plaintiffs Michele Convie and Raymond Lewis were convicted of multiple drug offenses and, therefore, the restoration of their voting rights is subject to the state's discretion. Id. at ¶¶ 10-11.

Plaintiffs filed their original complaint on June 6, 2007, challenging the constitutionality of Arizona's felon re-enfranchisement law on the ground that Arizona's LFO requirement is an unlawful voter qualification. Compl. at ¶¶ 57-71. Plaintiffs' also alleged that Section 2 of the Fourteenth Amendment does not

authorize the state to deny their right to vote based on their convictions for non-common law felonies. Id. at ¶¶ 73-83.

Defendants Napolitano and Brewer filed Fed. R. Civ. P. 12(b)(6) motions to dismiss the original complaint for failure to state a claim on August 13, 2007, and September 20, 2007, respectively. The district court granted Defendants' motion without prejudice on January 22, 2008. Plaintiffs filed an amended complaint on February 21, 2008, which contained additional allegations related to the negative and disparate impact Arizona's LFO requirement has on indigent people, and to the racial disparities in the criminal justice system which undermined Congress' intent in passing the Fourteenth Amendment given Congress' concern that felon disfranchisement laws would result in denying African Americans equal political participation. Amend. Compl. at ¶¶ 46, 63.

Defendants renewed their motion to dismiss Plaintiffs' amended complaint which the district court granted with prejudice on November 6, 2008, before the parties had an opportunity to engage in discovery. Plaintiffs filed the instant appeal on November 13, 2008.

### **STANDARD OF REVIEW**

This Court reviews de novo a district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008); Outdoor Media Grp., Inc. v. City of Beaumont,

506 F.3d 895, 899 (9th Cir. 2007); Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 770 (9th Cir. 2006); South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 782 (9th Cir. 2008).

This Court also reviews de novo the question of standing. Sacks, 466 F.3d at 770; S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 474 (9th Cir. 2001).

### **SUMMARY OF THE ARGUMENT**

The Supreme Court repeatedly has reaffirmed the importance of the right to vote as the foundation of our democracy. Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964). Although a state may erect electoral standards to determine who is qualified to vote, such standards cannot be arbitrary, capricious, or result in invidious discrimination. Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992). To do so would run counter to the bedrock principles of fairness and equality for which Section 1 of the Fourteenth Amendment, the Twenty-Fourth Amendment, and the Privileges and Immunities Clause, as well as the state laws upon which Plaintiffs also rely, stand.

Arizona's LFO requirement serves as a real and serious barrier which has prevented Plaintiffs Coronado, Rubio, and Garza from having their voting rights automatically restored. There is no question that the requirement is a voter qualification and makes the payment of a fee a condition to voting. This

requirement cannot stand in the face of legal precedent which provides that laws discriminating against individuals on the basis of wealth or make payment of any fee a condition for voting are unconstitutional. Harman v. Forsennius, 380 U.S. 528, 539 (1965); Harper v. Va. State Board of Elections, 383 U.S. 663, 666 (1966).

In addition, given that the right to vote is fundamental, the Supreme Court has required that any denial or abridgement of that right must serve a compelling governmental interest and cannot be supported by remote or tangential state objectives. Anderson, 460 U.S. at 789; Burdick, 504 U.S. at 434. The legislative history shows that the exemption from loss of representation contained in Section 2 of the Fourteenth Amendment was limited to disfranchisement for participation in rebellion or conviction of crimes that were felonies at common law, which does not include the crimes for which Plaintiffs were convicted. Thus, the denial of their right to vote is supported by no affirmative sanction and is unconstitutional.

Plaintiffs have raised cognizable legal theories upon which they were entitled to relief. If given an opportunity to engage in discovery and present evidence, they would have been able to further support their claims. Instead, the district court prematurely dismissed the case without giving Plaintiffs an opportunity to litigate their case. Because Plaintiffs presented sufficient allegations to support their claims, and given the fact that there is legal support for their position, the district court erred in granting Defendants' motion to dismiss.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN IGNORING THE “POWERFUL PRESUMPTION” AGAINST DISMISSING A COMPLAINT FOR FAILURE TO STATE A CLAIM.

The district court dismissed Plaintiffs’ amended complaint, without discovery and without a trial, for failure to state a claim. In doing so it ignored the letter and intent of the Federal Rules and decisions of this Court.

As this Court has held, Rule 8(a) of the Federal Rules of Civil Procedure establishes a “powerful presumption against rejecting pleadings for failure to state a claim.” Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997) (internal quotation omitted). Indeed, courts generally view Fed. R. Civ. P. 12(b)(6) motions with disfavor and rarely grant them. Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 (9<sup>th</sup> Cir. 1986), abrogated on other grounds by Yee v. City of Escondido, 503 U.S. 519, 525 (1992). See generally Erickson v. Pardus, 551 U.S. 89 (2007) (reiterating that a complaint “need only give the defendant fair notice of what the claim is and the grounds upon which it rests”) (internal quotation omitted).

The presumption against rejecting a complaint for failure to state a claim applies with even greater force in civil rights cases. See Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9<sup>th</sup> Cir. 1992) (“Civil rights complaints are to be liberally construed.”). Given that this case involves the most important right that we have as American citizens, i.e., the right to vote, and for the reasons discussed

in detail below, the district court erred in concluding that Plaintiffs failed to state a claim upon which relief could be granted.

**II. ARIZONA’S REQUIREMENT THAT PLAINTIFFS SATISFY THEIR LEGAL FINANCIAL OBLIGATIONS AS A PRECONDITION TO VOTING IS AN UNCONSTITUTIONAL VOTER QUALIFICATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.**

Plaintiffs contend that Arizona’s requirement that convicted felons pay all LFOs associated with their sentences prior to automatically getting their voting rights restored violates the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed that contention for failure to state a claim on the grounds that: (1) Plaintiffs lacked standing because they “fail to allege that they are indigent;” (2) Plaintiffs, as convicted felons, “have no fundamental right to vote;” (3) “indigent persons are not a protected, or suspect, class for purposes of equal protection;” and (4) Arizona’s LFO requirement “applies to all convicted felons equally.” (Excerpts p. 5; Excerpts p. 36). The court applied a “rational basis review” to the challenged fine provisions and held that they “serve the interests in punishing and deterring criminal activity,” and “force an offender to recognize and accept responsibility for the consequences of the criminal activity.” (Excerpts p. 37).

**A. Plaintiffs Have Standing To Raise Their Equal Protection Claim.**

In order to have standing to challenge the constitutionality of a statutory provision, a plaintiff must allege a personal injury caused by the defendant's conduct which a court can redress. Skaiff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 837 (9<sup>th</sup> Cir. 2007); Williams v. Boeing Co., 517 F.3d 1120, 1127 (9<sup>th</sup> Cir. 2008); Am. Fed'n of Gov't Employees Local 1 v. Stone, 502 F.3d 1027, 1032 (9<sup>th</sup> Cir. 2007). See also Valley Forge Christian Coll. v. Ams. For Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) ("Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision'"). At least one named plaintiff must have suffered an injury directly resulting from the defendant's actions in order to have standing to seek relief on behalf of himself or the class of persons. Williams v. Boeing Co., 517 F.3d at 1127; Casey v. Lewis, 4 F.3d 1516, 1519 (9<sup>th</sup> Cir. 1993). It is sufficient to establish standing if a court's decision can be directed towards redressing or protecting the complaining party against further injury, regardless of whether it may collaterally benefit others. Warth v. Seldin, 422 U.S. 490, 499 (1975).

General allegations in the complaint of harm from the defendant's actions are sufficient for purposes of establishing standing at the pleadings stage. Am. Fed'n of Gov't Employees Local 1 v. Stone, 502 F.3d 1027, 1032 (9<sup>th</sup> Cir. 2007). Standing does not depend on the merits of a plaintiff's claims, but on whether the plaintiff is entitled to relief under the constitutional and statutory provisions upon which the plaintiff's claims rest. Warth, 422 U.S. at 500 ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"). "On a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct may suffice [because the court] 'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" Williams v. Boeing Co., 517 F.3d at 1127, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The court must construe the complaint and draw all reasonable inferences from the complaint in the light most favorable to the non-moving party. Am. Fed'n, 502 F.3d at 1032 (finding that plaintiff, a union, had standing to sue on behalf of a fired employee even though employee's membership in union was not alleged based on employee's efforts to recruit union members and "Prayer for Relief" in complaint which sought to enjoin defendant from retaliating against the employee and/or other members of the union).

Plaintiffs' amended complaint sufficiently sets out the basis for standing. Arizona law automatically restores the voting rights of any one convicted of only

one felony, provided the person completes prison, parole, and probation, and pays all court-imposed restitution and fines. Ariz. Rev. Stat. § 13-912(a)(1) and (2). Plaintiffs Coronado, Rubio, and Garza allege that they each have only one felony conviction and are no longer in prison, on parole, or on probation, but owe either outstanding restitution or costs associated with their sentence. Amend. Compl. at ¶¶ 7-9. They contend that denying restoration of voting rights “based on one’s failure or inability to satisfy the LFO requirement“ is an unconstitutional voter qualification and has a disparate impact on indigent people. Amend. Compl. at ¶¶ 3, 59-74 (emphasis added). The amended complaint makes clear that, but for Defendants’ enforcement of Section 13-912(a)(2), Plaintiffs would be eligible for automatic restoration of their voting rights. Amend. Compl. at ¶¶ 7-9, 23-34. In the “Prayer for Relief,” Plaintiffs specifically ask this Court to declare that denial of their right to vote “based on their failure or inability to pay LFOs” violates federal and state law. Amend. Compl. at ¶ 2.

It is not necessary for plaintiffs to be indigent in order to challenge the LFO requirement. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966), in finding the state’s poll tax unconstitutional, made it clear that it was irrelevant whether a voter was indigent or could pay the tax. The state was deemed to violate the equal protection clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to

paying or not paying this or any other tax.” *Id.* at 666 (emphasis added). Thus, an affluent voter would have standing to challenge “payment of any fee” as a condition to voting. By the same token, whether Plaintiffs are indigent or not has no relation to their standing to challenge the payment of LFOs as an electoral standard. Furthermore, the outstanding restitution orders for Plaintiffs Coronado and Garza were issued over 15 years ago, making it reasonable to infer they do in fact lack resources to pay those debts. As discussed, such inferences must be drawn in favor of Plaintiffs at this stage of the case.

Plaintiffs have identified a personal injury – denial of automatic restoration of their voting rights for failure to pay fees – which they have suffered as a direct result of Defendants’ enforcement of Section 13-912(a)(2), and that injury could be redressed by a favorable court decision. The district court erred in ruling that Plaintiffs did not have standing to challenge Section 13-912(a)(2) as a violation of the Equal Protection Clause.

**B. Arizona’s Re-enfranchisement Scheme Restores The Right To Vote And, Therefore, Must Comport With Equal Protection Standards.**

The right to vote is fundamental and protected by more constitutional amendments than any right we enjoy as Americans, *i.e.*, the First, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, Twenty-Sixth, and Twenty-Seventh. See Reynolds v. Sims, 377 U.S. 533, 555 n.28 (1964) (noting the “expansion of the

right of suffrage” by the various constitutional amendments as well as the civil rights legislation enacted by Congress in 1957 and 1960). As the Court held in Wesberry v. Sanders, 376 U.S. 1, 17 (1964): “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” Because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,” the Supreme Court has consistently characterized the right to vote as a “fundamental political right.” Reynolds v. Sims, 377 U.S. at 562 (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. Dist. No. 15, 395 U.S. 621, 626 (1969).

The district court concluded that Plaintiffs did not have a fundamental right to vote, relying upon Richardson v. Ramirez, 418 U.S. 24, 54 (1974), in which the Court held that “the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . .” 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, 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.

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

Plaintiffs' do not claim that the right to vote may not be taken away from persons convicted of crimes that were felonies at common law, even though not required and not universally done by all States. Plaintiffs also acknowledge that once taken away the right does not have to be restored. However, once a state adopts a scheme to restore this fundamental right, it may not require satisfaction of an unconstitutional condition.

While Section 2 contains an “affirmative sanction,” the Supreme Court subsequently has held that felon disfranchisement laws must be applied in a non-discriminatory manner consistent with Section 1 of the Fourteenth Amendment, which guarantees all U.S. citizens “the equal protection of the laws.” In Hunter v. Underwood, 471 U.S. 222 (1985), the Court invalidated under the Equal Protection Clause Alabama’s felon disfranchisement scheme which the state had adopted for the purpose of discriminating against African Americans. 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.” 471 U.S. at 233. In Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977), the court similarly held that an Alabama law which disfranchised men, but not women, convicted of spousal abuse violated the Equal Protection Clause. Hunter shows that the affirmative sanction of Section 2 notwithstanding, laws pertaining to the voting rights of people with convictions must comport with principles of fairness and equality under the Equal Protection Clause of Section 1. The mere fact that someone has been convicted of a crime does not, as the district court erroneously held, deprive him or her of that protection. See Excerpts p. 36 (“felons have no fundamental right to vote”). A felon cannot be denied the right to vote for a reason that violates the Equal Protection Clause. See Bullock v. Carter, 405 U.S. 134, 141 (1972) (while a state may determine voter qualifications, “this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment”).

In addition, while a state may disfranchise persons convicted of certain felonies, once it provides a method of restoration of voting rights it must also comply with Section 1 of the Fourteenth Amendment. A state could not, for example, provide for restoration of voting rights of men only, or whites only. Such provisions would violate Section 1 both because they impose unconstitutional classifications and because they deny the fundamental right to vote to women and non-whites. See Lubin v. Panish, 415 U.S. 709, 713 (1974) (“the Equal Protection

Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population") (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). Returning to our examples, to deny women and non-whites the right to challenge their continued and selective disfranchisement on the grounds that they were felons who did not have the fundamental right to vote would also be in violation of Section 1. Yet, the district court's rationale would deny them the right to challenge their discriminatory disfranchisement.

In Bynum v. Conn. Comm'n on Forfeited Rights, 410 F.2d 173, 175-76 (2<sup>nd</sup> Cir. 1969), the court addressed the issue of whether a state, "having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can then deny access to this relief, solely because one is too poor to pay the required fee." The plaintiff in Bynum was convicted of burglary and sentenced to probation. After completing his term of probation, he sought restoration of his voting rights, but alleged that he was unable to pay the \$5.00 fee to apply for rights restoration. Id. at 175. The court reasoned that, "[w]hile there may well be civil fees to which the equal protection clause does not

apply . . . the issue raised here is so closely intertwined with the exercise of the political franchise (where the doctrine of equal protection does apply . . . ) that we cannot dismiss the problem out of hand.” Id. at 177. Although the Bynum court remanded the case for further determination regarding the plaintiff’s economic status, the court’s conclusion that the plaintiff stated a valid equal protection claim is directly applicable to the instant case.

The district court, however, held that Bynum was distinguishable because the \$5.00 fee was required to petition for restoration of voting rights, while the payment of LFOs is part of Plaintiffs’ sentences. (Excerpts p. 35). The fact that payment of fines and restitution are part of a sentence does not insulate them from constitutional review under Section 1 of the Fourteenth Amendment when it comes to restoration of voting rights. In Townsend v. Burke, 334 U.S. 736, 741 (1948), for example, the Court held that a sentencing procedure that “is inconsistent with due process of law . . . cannot stand.” The Court has consistently held that sentences are subject to review under the due process clause and other provisions of the constitution. See e.g., Furman v. Georgia, 408 U.S. 238, 241 (1972) (the Eighth Amendment is applicable to the states through the privileges and immunities and due process clauses of Section 1 of the Fourteenth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed violates

the Eighth and Fourteenth Amendments); Atkins v. Virginia, 536 U.S. 304 (2002) (the execution of mentally retarded criminals is prohibited by the Eighth Amendment). The district court committed error in concluding that a classification imposed as part of a sentence is insulated from review under the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

Plaintiffs neither challenge nor seek to be relieved from any aspect of their sentences. Instead, they oppose, as an unlawful voter qualification, the payment of any fee, including payment of court-imposed restitution and fines, as a precondition to being able to vote. The district court's determination that Arizona's LFO requirement is not an electoral standard, like the \$5.00 fee in Bynum, is clearly erroneous. Just as the plaintiff in Bynum alleged that the \$5.00 application fee was a real and serious obstacle for purposes of getting his voting rights restored, Plaintiffs face the same obstacle in the instant case.

**C. The Requirement Of Payment Of LFOs Is An Unconstitutional Voter Qualification.**

In Farrakhan v. Washington, 338 F.3d 1009, 1016 (9<sup>th</sup> Cir. 2003), involving a challenge to the State of Washington's felon disfranchisement law under Section 2 of the Voting Rights Act, this Court held that felon disfranchisement is a voting qualification. Likewise, any requirement a state erects for purposes of a convicted felon getting his or her voting rights restored also is a voting qualification. See Lubin v. Parish, 415 U.S. at 713 ("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.”). See also Dunn v. Blumstein, 405 U.S. at 336 (it is well established 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, 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) (emphasis added).

Although the case law is clear, the district court concluded that “indigent persons are not a protected, or suspect, class for purposes of equal protection.” (Excerpts p. 10).<sup>1</sup> Classifications based on wealth are “traditionally disfavored,” Harper v. Va. State Bd. of Elections, 383 U.S. at 668, and conditioning participation in the political process on the “ability to pay” a fee will be sustained only if a state can show a compelling interest for doing so. Bullock v. Carter, 405 U.S. at 149. In Harper, in striking down Virginia’s poll tax, even as to those who could afford to pay it, the Court held that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” 383 U.S. at 668. The Court reasoned that “[t]o introduce wealth or payment of a fee as

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<sup>1</sup> Notably, the district court subsequently contradicted its own holding by acknowledging that “a state may not make ‘the affluence of the voter or payment of any fee an electoral standard.’” Excerpts p. 38.

a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant. In this context – that is, as a condition of obtaining a ballot – the requirement of fee paying causes an ‘invidious’ discrimination . . . that runs afoul of the Equal Protection Clause.” Id. The Court concluded that “a State violates the Equal Protection Clause whenever it makes the affluence of the voter or payment of any fee an electoral standard.” Id. at 666. See also Griffin v. Illinois, 351 U.S. 12, 18 (1956) (“a State can no more discriminate on account of poverty than on account of religion, race, or color”). Requiring the Plaintiffs here to pay fines and costs as a condition for obtaining the ballot is a similar form of discrimination that violates the Equal Protection Clause.

The Supreme Court repeatedly has reaffirmed that the Equal Protection Clause outlaws invidious forms of discrimination. See generally City of Boerne v. Flores, 521 U.S. 507, 528 (1997); Shaw v. Hunt, 517 U.S. 899, 923 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 246 (1995); Quinn v. Millsap, 491 U.S. 95, 105 (1989). That the “payment of any fee” standard of the Equal Protection Clause is fully applicable to persons convicted of offenses is evident from numerous decisions of the Supreme Court which have invalidated laws denying convicted felons access to certain rights based on their economic status. In Bearden v. Georgia, 461 U.S. 660 (1983), for example, the Court ruled that a state may not 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.” Id. at 672-73. In Williams v. Illinois, 399 U.S. 235, 240-41 (1970), the Court invalidated a law which allowed the state to imprison a convicted person who failed to satisfy the financial obligations associated with his sentence. The Court reaffirmed its “allegiance to the basic command that justice be applied equally to all persons.” 399 U.S. at 241. In Roberts v. LaVallee, 389 U.S. 40, 42 (1967), a case involving a state prisoner who appealed a trial court’s denial of his request for a free transcript of lower court proceedings, the Court noted that “[o]ur decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.” See also Douglas v. California, 372 U.S. 353, 356 (1963) (denial of appellate counsel to indigent defendants violated the Equal Protection Clause).

The fact that Arizona could permanently disfranchise some convicted felons does not mean that the wealth based prohibition of the Equal Protection Clause does not apply to the requirement of payment of fines and costs. In Griffin, the petitioners sought to appeal their criminal convictions and challenged the denial of

their request that the costs for obtaining trial transcripts be waived because of their indigence. 351 U.S. at 13-16. The Supreme Court recognized that Illinois was not required to provide appellate review, but held that because it had done so it could not “discriminate . . . against some convicted defendants on account of their poverty.” Id. at 18. The Court concluded that the petitioners were entitled to equal protection against invidious discrimination throughout the appellate process to the same extent as convicted felons who could afford to pay the transcript costs. Id. at 17-18 (“[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial”). Similarly, because Arizona allows restoration of voting rights, it may not condition that restoration upon payment of fines or costs, nor deprive Plaintiffs of the opportunity to get their voting rights automatically restored merely because they cannot afford to satisfy financial obligations.

Section 13-912(a)(2) subjects Plaintiffs Coronado, Rubio, and Garza to a severe restriction – denial of automatic restoration of voting rights – based on their failure or inability to pay their LFOs. Although Plaintiffs have satisfied their terms of prison, parole, and probation, the opportunity for them to have their voting rights automatically restored is illusory and, in the cases of Coronado and Garza, unattainable for over 15 years. The result is that Plaintiffs are foreclosed from regaining the right to vote solely on the basis of their economic status. Because

wealth has nothing to do with one's qualifications to vote, Arizona's LFO requirement exemplifies invidious discrimination in the voting context.

**1. The district court's standard of equal treatment was not an appropriate Equal Protection standard.**

The district court ruled that Section 13-912(a)(2) is constitutional because the requirement applies to all felons equally. (Excerpts p. 10). The Supreme Court, however, has rejected the notion that the mere equal application of a statute containing a suspect classification is sufficient to remove any taint of invidious discrimination. In Loving v. Virginia, 388 U.S. 1, 8 (1967), the state argued that its miscegenation statutes were constitutional because they "punish equally both the white and the Negro participants in an interracial marriage." In rejecting that argument, the Court held that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." Id. at 9. Similarly, the equal application to all felons of a statute that discriminates against those who are poor cannot withstand scrutiny under the Equal Protection Clause. See Williams v. Illinois, 399 U.S. at 242 ("a law non-discriminatory on its face may be grossly discriminatory in its operation").

**2. The district court should have reviewed Plaintiffs' LFO claims under a heightened standard.**

Since the challenged state law is a suspect wealth based classification that denies a fundamental right, the court should have analyzed Plaintiffs' Equal Protection claim under the standards announced in Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992). 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 that the Fourteenth Amendment protects. Anderson, 460 U.S. at 789 (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 that the state puts forward to justify the burden that its law or policy imposes on a plaintiff. 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. at 434 (internal citations omitted). See also Hill v. Stone, 421 U.S. 289, 295 (1975) ("restrictions on the franchise other than residence, age, and citizenship

must promote a compelling state interest in order to survive constitutional attack”); Hussey v. City of Portland, 64 F.3d 1260, 1266 (1995) (finding that city ordinance which offered a subsidy on sewer connection rates to nonresidents who consented to annexation as landowners and electors “disproportionately” affected the poor and thus, was an unreasonable and severe restriction on the right to vote).

In a recent challenge to Indiana’s requirement that voters present photo identification at the polls, the Court reaffirmed that courts should carefully scrutinize state-imposed voter qualifications to examine whether such burdens are “justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” Crawford v. Marion County Election Bd., 2008 WL 1848103 \*6 (2008), quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992). Although the court upheld the Indiana law, it emphasized that had the state not provided for free the document necessary to cast a ballot, the Indiana law would be unconstitutional. Id. at 1620-1621. As the Court explained, “[t]he fact that most voters already possess a valid driver’s license, or some other form of acceptable identification, would not save the statute under [the Court’s] reasoning in Harper, if the State required voters to pay a tax or a fee to obtain a new photo identification.” Id.

The need to apply a heightened level of scrutiny in the instant case is further buttressed by the Supreme Court’s decision in Harper v. Va. State Bd. of Elections. In invalidating Virginia’s poll tax the Court held: “We have long been mindful that

where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.” Harper, 383 U.S. at 669, citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Reynolds v. Sims, 377 U.S. at 581 (rejecting “a clearly rational state policy” as justifying a violation of the equal protection standard). A state’s important regulatory interests may justify a challenged electoral standard only if the standard is reasonable and nondiscriminatory. Burdick v. Takushi, 504 U.S. at 434.

The right to vote is fundamental and Arizona’s re-enfranchisement scheme automatically restores that fundamental right for people with only one felony conviction. The restoration process for that category of people is not discretionary and Plaintiffs oppose Arizona’s LFO requirement as an unlawful voter qualification. The district court should have analyzed Plaintiffs’ Equal Protection claim under a standard of strict scrutiny because the right to vote is fundamental.

**D. Arizona’s LFO Requirement, As A Voter Qualification, Does Not Serve A Compelling Governmental Interest.**

Because Arizona’s re-enfranchisement scheme affects a fundamental right and distinguishes among a class of felons based on their economic status, the state may only maintain the LFO requirement if it can establish that it serves a compelling governmental interest. Burdick, 504 U.S. at 434. Defendants cannot meet their burden. The state has several alternative means by which to collect

restitution and fines, such as requesting a lien against the person's personal property, having their wages garnished, or seeking other civil remedies against the person. Ariz. Rev. Stat. 13-806(A); Ariz. Rev. Stat. 13-806(H); Fed. Deposit Ins. Corp. v. Colosi, 977 P.2d 836 (Ariz. Ct. App. 1998). Furthermore, studies show that voting actually serves to promote rehabilitation and curb recidivism.<sup>2</sup> Moreover, as the Court held in Harman v. Forssenius, "Constitutional deprivations may not be justified by some remote administrative benefit to the state." 380 U.S. 528, 542 (1965).

Moreover, Burdick requires the district court to determine whether the challenged voter qualification is "reasonable and non-discriminatory." 504 U.S. at 434. That is a higher level of review than the rational basis test the district court applied. As noted above, Arizona's LFO requirement results in invidious discrimination because it requires payment of a fee as a voter qualification. As the Supreme Court repeatedly has held, the payment of any fee cannot serve as an electoral standard. Harper, 383 U.S. at 668. Section 13-912(a)(2) is also unreasonable under Harper because Plaintiffs' inability to satisfy their LFOs has absolutely no bearing on whether they are rehabilitated and qualified to cast a ballot. Thus, Section 13-912(a)(2) violates the Equal Protection Clause and cannot stand.

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<sup>2</sup> See Erika Wood, Restoring the Vote, p. 11-12, Brennan Center for Justice, available at [http://brennan.3cdn.net/8782cc82daf02b9431\\_29m6ibzbu.pdf](http://brennan.3cdn.net/8782cc82daf02b9431_29m6ibzbu.pdf).

**III. ARIZONA'S LFO REQUIREMENT IS EQUIVALENT TO A POLL TAX OR OTHER TAX WHICH THE TWENTY-FOURTH AMENDMENT OUTLAWED AS A QUALIFICATION TO VOTE.**

Plaintiffs contend that Section 13-912(a)(2) is equivalent to a “poll tax or other tax” banned by the Twenty-Fourth Amendment because the statute conditions the automatic restoration of their right to vote on the payment of LFOs. Amend. Compl. at ¶¶ 65-67. The district court dismissed this claim on the grounds that: (1) “Plaintiffs have no right to vote for the Arizona statutes to abridge;” and (2) “Arizona laws do not make ability to pay ‘an electoral standard,’ but limit re-enfranchisement to those who have completed their sentences.” (Excerpts pp. 38-39).

Section 2 of 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.” One of the primary reasons Congress adopted the Twenty-Fourth Amendment was its concern that poll taxes exacted a price for voting and would be used to disfranchise the poor. Harman, 380 U.S. at 539 (“Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax.”). Congress and the states were insisting that a price not be placed on the right to vote. 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) (emphasis added). Congress likened the poll tax to property ownership requirements, and concluded that a person’s wealth has 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.

Arizona has provided for the restoration of voting rights of persons convicted of felonies, but it has conditioned that restoration upon payment of fees and costs. In doing so, the state is in direct violation of the Twenty-Fourth Amendment. The district court, however, held that the Twenty-Fourth Amendment did not apply, although it cited no cases or legislative history to support the proposition that the restoration of felon voting rights was exempt from the ban on taxes or fees. 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.” Rhode Island v. Massachusetts, 37 U.S. 657, 723 (1838). Accord, Morton v. Mancari, 417 U.S.

535, 551 (1974). The only way to harmonize Section 2 of the Fourteenth Amendment and the subsequently enacted Twenty-Fourth Amendment is to conclude that while the Fourteenth Amendment provides a sanction for disfranchising certain felons, it does not exempt a state from the ban on taxes or fees when it provides for restoration of voting rights. To read the two amendments as the district court did would create disharmony and undercut the very purpose of the Twenty-Fourth Amendment.

It is also irrelevant for Twenty-Fourth Amendment purposes that LFOs are not a traditional tax levied upon each person in the state. In Harman, the Supreme Court struck down under the Twenty-Fourth Amendment Virginia's requirement that a person must either pay a poll tax or file a certificate of residence in order to vote. 380 U.S. at 533. The Court ruled that the requirement that a certificate of residence, which was not itself a tax, be filed was unconstitutional because it "serv[ed] the same function as the poll tax." Id. at 542. See also Weinschenk v. State, 203 S.W.3 201 (2006) ("[A]ll fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law.").

Although Arizona's LFO requirement only affects some felons, the Twenty-Fourth Amendment's prohibition applies even if only a single person must pay any fee in order to vote. See Hill v. Stone, 421 U.S. at 292, 298 (striking down a Texas

law that did not give equal weight to ballots cast by voters who failed to render property for taxation, regardless of whether those who rendered property actually paid any tax). See also United States v. Texas, 252 F. Supp. 234, 252 (W.D. Tex. 1966) (“invalidating Texas’ poll tax system even though only a portion of potential voters were required to pay tax). The Twenty-Fourth Amendment, like the Fourteenth Amendment, “nullifies sophisticated as well as simple-minded modes’ of impairing the right guaranteed.” Harman, 380 U.S. at 540-41. See also Harper, 383 U.S. at 666 (the “payment of any fee as an electoral standard” violates the Fourteenth Amendment). The payment of LFOs serves the same function as a poll tax and is an impermissible burden on the right to vote in violation of the Twenty-Fourth Amendment.

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, thus, 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. Common Cause/Georgia

further supports plaintiffs' contention that the state's LFO requirement is a poll tax or fee in violation of the Twenty-Fourth Amendment.

Arizona's LFO requirement serves the same function as a poll tax – its satisfaction is a material requirement to Plaintiffs getting their voting rights automatically restored. But for the LFO requirement, Plaintiffs Coronado, Rubio and Garza would be eligible to vote. The fact that payment of LFOs was part of Plaintiffs' sentences is irrelevant. Plaintiffs do not challenge their sentences, including the criminal courts' imposition of LFOs. These financial obligations may be imposed and collected by the state, but Arizona cannot use the denial of the right to vote as a collection method. The completion of prison, parole, and probation does not depend on a person's economic status. However, the payment of LFOs does. Because the LFO requirement disproportionately impacts those who are incapable of paying, Section 13-912(a)(2) is discriminatory in its operation and, therefore, is a form of invidious discrimination which is unconstitutional. The district court failed to recognize this important distinction. Section 13-912(a)(2) violates both the spirit and letter of the Twenty-Fourth Amendment because it conditions the right to vote on payment of a fee.

If allowed to conduct discovery, Plaintiffs would have presented evidence showing that many ex-felons in Arizona are simply unable to pay all of their LFOs, including Plaintiffs. Some ex-felons, conversely, are able to meet 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. Arizona's LFO requirement is precisely the "disenfranchisement of the poor" that the Twenty-Fourth Amendment prohibits because it serves as an absolute bar for those who are otherwise eligible to vote but simply cannot afford to pay. Consequently, the district court erred in dismissing Plaintiffs' Twenty-Fourth Amendment claim.

**IV. ARIZONA'S LFO REQUIREMENT DENIES PLAINTIFFS THE OPPORTUNITY TO PARTICIPATE IN ELECTIONS ON AN EQUAL BASIS WITH OTHER CONVICTED FELONS, IN VIOLATION OF ARTICLE 2, § 21 OF THE ARIZONA CONSTITUTION.**

Article 2, § 21 of the Arizona Constitution provides: "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." The district court dismissed this claim on the ground that Article 2, § 21 does not apply to Plaintiffs because, as convicted felons, they do not have the right to vote. (Excerpts p. 39).

For the reasons set about above, Plaintiffs maintain that the state's re-enfranchisement scheme contains a constitutionally impermissible qualification for voting – the payment of a fee. People with criminal convictions who lack the means to satisfy the LFO requirement cannot enjoy the state's automatic restoration process in the same manner as more affluent felons. Because of their economic status, Plaintiffs' ability to access the ballot box is neither "free" nor

“equal” as the Arizona Constitution mandates. Therefore, Plaintiffs stated a legal claim under Article 2, § 21 for which the court may grant relief. The district court’s dismissal of this claim was improper.

**V. THE CHALLENGED SCHEME VIOLATES THE FEDERAL AND STATE PRIVILEGES AND IMMUNITIES CLAUSES.**

Section 1 of the Fourteenth Amendment states: “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: “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 the federal counterpart. Empress Adult Video and Bookstore v. City of Tuscon, 59 P.3d 814, 828 (Ariz. 2002); Standhardt v. Super. Ct. ex rel. County of Maricopa, 77 P.3d 451, 464 n.19 (Ariz. 2003); Arizona v. Bonnewell, 2 P.3d 682, 686 (Ariz. 1999).

The district court dismissed Plaintiffs’ privileges and immunities claim on the ground that Arizona’s requirement that people with felony convictions complete their sentence as a precondition to having their voting rights restored applies to all felons equally. (Excerpts pp. 40-41). Plaintiffs reassert, as argued above, that Arizona’s LFO requirement has a disparate impact on them based on their economic status. They remain ineligible to access the state’s automatic

restoration scheme based on an invalid voter qualification. This practice results in invidious discrimination and, therefore, they have stated a claim under the privileges and immunities clauses of the federal and state constitutions.

## **VI. THE DISTRICT COURT ERRONEOUSLY DISMISSED PLAINTIFFS' COMMON LAW FELONY CLAIM.**

### **A. Introduction**

Plaintiffs claimed that the phrase “other crime” contained in Section 2 of the Fourteenth Amendment was limited to crimes that were felonies at common law, and that as a consequence their disfranchisement for modern statutory or minor offenses was unconstitutional. The district court dismissed the claim because, in its view, it was not supported by a “plain reading of § 2.” (Excerpts p. 42; Excerpts p. 15). In so doing the court below improperly ignored the accepted understanding of the word “crime” at the time the Fourteenth Amendment was adopted, the applicable legislative history of Section 2, and the reliance upon that history in Richardson v. Ramirez, 418 U.S. at 43-55. It also made a determination on the merits without allowing Plaintiffs the opportunity to present relevant historical facts and expert opinions.

The legislative history shows that Congress repeatedly limited the scope of the term “crime” to mean “felonies at common law.” The district court’s expansive interpretation of Section 2 and disfranchising offenses to encompass any and all crimes, no matter how minor or when created, would also render

unconstitutional the limited definition of disfranchising offenses - those that were felonies at common law - contained in the Reconstruction and Enabling Acts. Those acts, which were passed within months after Congress adopted the Fourteenth Amendment, could not prohibit the states from doing what, in the view of the district court, Section 2 expressly authorized them to do. Such a result would be incongruous and totally inconsistent with the intent of Congress in enacting Section 2 and the Reconstruction and Enabling Acts. The district court's opinion also improperly makes the definition of "any crime" dependent upon state law.

**B. The Understanding Of The Word "Crime" At The Time Of Adoption Of The Fourteenth Amendment.**

At the time the Fourteenth Amendment was adopted, the word "crime" was understood to denote only the most serious offenses. In Schick v. United States, 195 U.S. 65, 68 (1904), the Court held that the third clause of Section 2 of Article III of the Constitution, which provides that the "trial of all Crimes, except in Cases of Impeachment, shall be by Jury," did not extend to misdemeanors. In reaching this conclusion, 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. Accordingly, in view of "the popular understanding of the meaning of the word 'crimes,' . . . it is obvious that the intent was to exclude from

the constitutional requirement of a jury the trial of petty criminal offenses.” Id. at 70. See also United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) (the Constitution “must be interpreted in light of the common law, the principles and history of which were familiarly known to the framers of the Constitution”); Shaw v. Merchants’ Nat’l Bank, 101 U.S. 557, 565 (1879) (a statute should “not be construed as making any innovation upon the common law which it does not fairly express”); Smith v. Alabama, 124 U.S. 465, 478 (1888)(“[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”); Moore v. United States, 91 U.S. 270, 274 (1875) (“[t]he language of the Constitution and of many acts of Congress could not be understood without reference to the common law”); Perrin v. United States, 444 U.S. 37, 42 (1979) (“unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning [at the time of enactment]”).

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. In Schick v. United States, 195 U.S. at 69, the Court held that “Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England.” And according to Blackstone, “in

common usage the word ‘crimes’ is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of ‘misdemeanor’ only”. Id. at 69-70. Common law felonies included murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. Jerome v. United States, 318 U.S. 101, 108 n.6 (1943). See also Bannon v. United States, 156 U.S. 464, 467-468 (1895) (felony “is used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands and goods of the offender”); California v. Martin, 214 Cal. Rptr. 873, 876 n.4 (Ct. App. 1985); State v. Murphy, 24 A. 473, 474 (1892).

The crimes of which Plaintiffs were convicted - modern statutory drug and domestic violence offenses - were not felonies at common law, regardless of the penalty imposed. Accordingly, they are not included within the phrase “other crime” contained in Section 2. Since the “affirmative sanction” of Section 2 for states to disfranchise persons convicted of “participation in rebellion, or other crime” recognized in Richardson v. Ramirez, 418 U.S. at 54, applies only to those convicted of crimes that were felonies at common law, Plaintiffs were unconstitutionally disfranchised by the state of Arizona.

**C. Richardson Did Not Decide the Felony at Common Law Issue Presented Here.**

The district court implied that Richardson addressed and decided the issue of whether the phrase “other crime” was limited to crimes that were felonies at common law. See Excerpts p. 42: (“The Court in Richardson undertook to determine whether the relevant language of § 2 . . . was ‘intended to have a different meaning than would appear from its face.’”) Richardson, however, does not address the definition of “other crime,” but only whether the phrase constituted an exemption from the sanction of reduced congressional representation. The issue of whether the phrase “other crime” was limited to crimes that were felonies at common law was never raised by the parties and was never decided by the Court. As Webster v. Fall, 266 U.S. 507, 511 (1925), provides, questions “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.” Accord, United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 38 & n.8 (1952); Texas v. Cobb, 532 U.S. 162, 169 (2001) (“Constitutional rights are not defined by inferences from opinions which did not address the question at issue.”).

**D. The District Court Should Have Relied Upon The Legislative History Of The Fourteenth Amendment When Analyzing Plaintiffs’ Common Law Felony Claims.**

Aside from the understanding of the meaning of the word “crime” at the time of its adoption, the legislative history of the Fourteenth Amendment

demonstrates that Congress intended the “other crime” exception contained in Section 2 to apply only to common law felonies. After considering and debating numerous changes to its language, Congress proposed the final version of 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.

See Richardson, 418 U.S. at 42. 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 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 . . . . (Emphasis added.)

See Richardson, 418 U.S. at 49. Thus, Congress expressly 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 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 former Confederate States (with the exception of Tennessee, which had been readmitted on July 24, 1866, and was not subject to the Reconstruction Act) 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.

Several states had felon disfranchisement laws prior to their readmission into the Union, and members of Congress were concerned that they would abuse an exception for felons to disfranchise African Americans. For example, Senator Drake of Missouri expressed his concern that without limitations in the Readmission 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 applicable 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 Readmission Acts that any disfranchisement for crimes that were felonies at common law be made “under laws equally applicable to all inhabitants of said State.” Richardson, 418 U.S. at 51-52

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.” Richardson, in its discussion of the meaning and understanding of Section 2 of the Fourteenth Amendment, not only underscored the restrictive language in the Reconstruction Act that disfranchisement was permissible only “for participation in the rebellion or for felony at common law,” but concluded that the Readmission Acts were “convincing evidence of the historical understanding of the Fourteenth Amendment.” Richardson, 418 U.S. at 49, 53.

The conclusion that “other crime” was limited to felonies at common law was endorsed by the opinion of five members of a divided en banc panel in Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996). Citing Richardson, 418 U.S. at 48-52, the five judges, who were the only members of the panel to address the issue, concluded that:

the contemporary history concerning existing state constitutions and the approval of germane provisions of the constitutions of formerly rebellious states readmitted to the Union after the Civil War supports a construction of the term ‘other crime’ as equating to common law felonies.

Baker v. Pataki, 85 F.3d at 933. This construction of Section 2 was further supported by the fact that “the use of the terms ‘den[y] . . . or in any way abridge[ ]’ in § 2 of the Fourteenth Amendment . . . precludes any contention that this

provision was intended to afford greater protection to state laws that permanently and totally disfranchised felons than to state laws that impose a more selective ban.” Id.

The district court here committed reversible error in ignoring and refusing to rely upon the legislative history discussed in Richardson, relying instead on Caminiti v. United States, 242 U.S. 470, 485 (1917), for the proposition that “[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise.” (Excerpts p. 15). The “plain language” rule of statutory construction is only applicable where the “intent of Congress is clear and unambiguously expressed by the statutory language at issue.” Zuni Pub. Sch. Dist. No. 89 v. Department of Educ., 550 U.S. 81 (2007). The phrase “other crime” in Section 2 is linked in the same sentence with the phrase “participation in rebellion.” It is far from unambiguous based on the “plain language” of the phrase that “other crime” means any crime or refers instead to offenses of comparable severity to rebellion. Under the circumstances, the plain language of Section 2 does not require or permit the result reached by the district court.

Moreover, the canon of noscitur a sociis requires that the meaning of a word be ascertained by reference to the meaning of words associated with it. See United States v. Williams, 128 S.Ct. 1830, 1839 (2008) (“the common sense canon of noscitur a sociis . . . counsels that a word is given more precise content by the

neighboring words with which it is associated”); S.D. Warren Co. v. Me. Bd. Of Env'tl. Prot., 547 U.S. 370, 378 (2006) (“[t]he canon, noscitur a sociis, reminds us that ‘a word is known by the company it keeps’”) (internal citations omitted). If “other crime” is to be given meaning by “rebellion,” or known by the company it keeps in Section 2, it cannot mean any crime, but is restricted to crimes comparable in magnitude to rebellion. In addition, the adjective “other,” which modifies the word “crime,” refers back to “rebellion” reinforcing that “other crime” cannot mean any crime.

The canon of lenity also undercuts the construction of the word “crime” by the district court, i.e., any “‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” United States v. Bass, 404 U.S. 336, 347 (1971) (internal citations omitted). Accord, Simpson v. United States, 435 U.S. 6, 14 (1978).

Caminiti, 242 U.S. at 482, moreover, involved the construction of a congressional statute, the so-called White Slave Traffic Act of June 25, 1910, and not a constitutional amendment. As Richardson, 418 U.S. at 43, makes clear, “[t]he problem of interpreting the ‘intention’ of a constitutional provision is, as countless cases of this Court recognize, a difficult one.” For that reason, the Court examined the legislative history to determine what “was intended by Congress,” and based its decision, inter alia, on “the understanding of those who adopted the

Fourteenth Amendment.” Id. at 43, 54. A similar rule of examining the legislative history to determine congressional intent in enacting constitutional provisions has been regularly applied in other cases. See e.g., Wesberry v. Sanders, 376 U.S. at 18 (relying upon legislative history in concluding that Article I, Section 2 of the Constitution required congressional districts to contain “equal numbers of people”); City of Boerne v. Flores, 521 U.S. at 520-24 (relying upon the “Fourteenth Amendment’s history” in determining the meaning and scope of the Enforcement Clause of Section 5); Schick v. United States, 195 U.S. at 69 (construing the word “Crimes” as used in “all Crimes” in Article III, Section 2 of the Constitution “in the light of its history”) (internal citations omitted).

The district court’s error is further evident from the fact that courts routinely rely upon the relevant legislative history in construing the intent of Congress and the meaning of statutes when a fundamental right such as voting is involved. In Allen v. State Bd. of Elections, 393 U.S. 544, 566-67 (1969), for example, the Court thoroughly examined the legislative history in concluding that Congress intended Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to have “the broadest possible scope” reaching “any state enactment which altered the election law of a covered State in even a minor way.” In Morse v. Republican Party of Va., 517 U.S. 186, 208-09 (1996), the Court similarly relied upon “[t]he legislative history” in concluding that Congress intended Section 5 to reach a political party’s

adoption of a filing fee for delegates to a state's nominating convention. See also South Carolina v. Katzenbach, 383 U.S. 301, 308, 334 (1966) (relying extensively upon the legislative history in upholding challenged provisions of the Voting Rights Act); McDaniel v. Sanchez, 452 U.S. 130, 147 (1981) (examining the legislative history in construing Section 5 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"); Oregon v. Mitchell, 400 U.S. 112, 132 (1970) ("[i]n enacting the literacy test ban . . . Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race") (opinion of Black, J.); Katzenbach v. Morgan, 384 U.S. 641, 656 (1966) (Congress had a factual basis to conclude that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause"); County Council of Sumter County v. United States, 555 F. Supp. 694, 707 n.13 (D. D.C. 1983) (three-judge court) (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"); NW Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 233 (D.D.C. 2008) (three-judge court) (relying upon "legislative history" in holding that the utility district was not eligible to bailout from coverage

under Section 5 of the Voting Rights Act). See also Hurd v. Hodge, 334 U.S. 24, 32 (1948) (relying upon “legislative debates” during the Thirty-Ninth Congress in holding that § 1 of the Civil Rights Act of 1866 was intended to prohibit judicial enforcement of racially restrictive covenants). The district court erred in ignoring relevant legislative history and giving Section 2 an expansive scope completely inconsistent with the intent of Congress.

In McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995), the court also relied upon the legislative history in rejecting the simplified “plain language” analysis adopted by the district court in this case. McLaughlin, 947 F. Supp. at 976, held that the disfranchisement of a person convicted of a misdemeanor crime of “false pretenses” was subject to strict scrutiny rather than the rational basis standard of Richardson, and accordingly violated the Fourteenth Amendment. In doing so, it noted that Richardson, based upon an extensive analysis of the legislative history, “makes clear that the “rebellion, or other crime,” language of § 2 does not encompass misdemeanors.” Id. at 974 (citing Richardson, 418 U.S. at 43-55). The district court in this case, however, ignored such distinctions and held that persons convicted of any crime may be disfranchised. (Excerpts p. 43) (“the language of § 2 means what it says--persons convicted of crime may be excluded from the franchise”). Such a construction of Section 2 is insupportable.

The district court also attempted to justify ignoring the legislative history by saying that the Readmission Acts applied to “former Confederate states, whereas the Fourteenth Amendment applies to all states in the Union.” (Excerpts p. 43). However, the fact that the Readmission Acts applied only to certain states does not mean that the acts are a fire wall and have no relevance in construing the meaning of Section 2. In Schick v. United States, 195 U.S. at 71, for example, the Court relied upon territorial acts enacted by Congress which “authorized the prosecution of petty offenses in the police courts of cities, without a jury” in concluding that misdemeanors were not required by the Constitution to be tried before juries. In Richardson, as noted above, the Court also relied extensively upon the Readmission Acts as “convincing evidence of the historical understanding of the Fourteenth Amendment.” 418 U.S. at 53. The error of the district court in refusing to consider the relevance of the Readmission Acts in determining the meaning of Section 2 is apparent.

The Reconstruction Act was enacted by the same Congress (the Thirty-Ninth) that adopted the Fourteenth Amendment, and both provisions addressed the same subject. The intent of Congress in enacting the Reconstruction Act, as well as the subsequent Readmission Acts (by the Fortieth and Forty-First Congresses), is plainly relevant in construing congressional intent in enacting Section 2.

**E. Section 2 And The Reconstruction and Readmission Acts Must Be Read In Pari Materia.**

The phrase “other crime” in Section 2 must be read in pari materia with the “felony at common law” phrase of the Reconstruction and Readmission Acts in order to give them proper meaning. The rule of in pari materia is based on the premise that a legislative body uses a particular word or phrase “with a consistent meaning in a given context.” Erlenbaugh v. United States, 409 U.S. 239, 243 (1972). For that reason, “a ‘later act can . . . be regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting,’ and ‘is therefore entitled to great weight in resolving any ambiguities and doubts.’” Id. at 243-44 (quoting United States v. Stewart, 311 U.S. 60, 64-5 (1940)). Thus, if there were any ambiguity as to the meaning of “other crime” in Section 2, that ambiguity was removed by the subsequent Reconstruction and Readmission Acts which make it clear that disfranchising crimes are limited to those which were felonies at common law.

A court is also “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.” Rhode Island v. Massachusetts, 37 U.S. at 723. Accord, Morton v. Mancari, 417 U.S. at 551 (“when two statutes are capable of co-existence, it is the duty of the courts,

absent a clearly expressed congressional intention to the contrary, to regard both as effective”). Both the provisions of the Reconstruction and Readmission Acts and the framers’ motivation to protect the citizenship rights of African Americans through passage of the Thirteenth, Fourteenth, and Fifteenth Amendments indicate 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 Reconstruction and Readmission 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.

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 demonstrates that Congress did not intend to give such power to the states.<sup>3</sup> Laws should not in any event be

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<sup>3</sup> Plaintiffs in Coronado alleged that “[g]iven the racial disparities within the federal and state criminal justice systems, Arizona’s felon disfranchisement scheme results in minorities being denied the right to vote at much greater rates than whites.” Amend. Compl. at ¶ 46. Although they were not given an opportunity to present evidence, the allegation supports Plaintiffs’ contention that Arizona’s overbroad

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).

**F. The District Court’s Interpretation Of Section 2 Would Render The Reconstruction and Readmission Acts Unconstitutional.**

If Section 2 and the Reconstruction and Readmission Acts are not read in pari materia, but are determined to have different meanings, then ratification of the Fourteenth Amendment in 1868 would necessarily have nullified or rendered unconstitutional the common law felony provisions of those acts. States could not be constitutionally prohibited by the Reconstruction and Readmission Acts from doing what Section 2 of the Constitution expressly permitted them to do.

Where there is a conflict between a federal statute and the Constitution, the Constitution necessarily prevails. In City of Boerne v. Flores, for example, the Court invalidated the Religious Freedom Restoration Act of 1993 under the Fourteenth Amendment. In doing so, it held:

Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the ‘provisions of [the Fourteenth Amendment].’

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interpretation of the “other crime” exception in Section 2 undercuts the primary reason Congress passed the Fourteenth Amendment.

521 U.S. at 519. Thus, Congress would have no power to deprive states of the right to disfranchise persons convicted of crimes that were not felonies at common law if the Fourteenth Amendment expressly authorized them to do so. Such a construction of Section 2 would render the Reconstruction and Readmission Act nullities.

Similarly, in Oregon v. Mitchell the Court concluded that Congress had exceeded its enforcement powers by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections. In reaching this conclusion, the Court held that the legislation intruded into an area reserved by the Constitution to the States. 400 U.S. at 125. Again, if the analysis of the district court were correct, the Reconstruction and Readmission Acts intrude into an area reserved by the Constitution to the states. If Section 2 of the Fourteenth Amendment allows states to disfranchise persons convicted of crimes that were not felonies at common law, then the prohibitions against doing so contained in the Reconstruction and Readmission Acts would necessarily be unconstitutional. The fact that the acts were aimed at particular states would do nothing to mitigate the unconstitutional exercise of congressional power. As the Court held in Boerne, 521 U.S. at 529, “[i]f Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law unchangeable by ordinary means.’” (citation omitted).

Since the Enabling Acts contain no savings clause, the entire acts would be deemed to be unconstitutional and the readmission of the Confederate States would be unlawful. Such a construction would be directly contrary to the rule that when two statutes are capable of co-existence, it is the duty of the courts to regard both as effective. To hold otherwise would produce an absurd result which would totally negate the intent of Congress in passing the Reconstruction and Enabling Acts. To avoid an unconstitutional result, the affirmative sanction of Section 2 should be limited to felonies at common law.<sup>4</sup>

**G. The Definition of “Other Crime” Is Not A Matter of State Law.**

The error in the district court’s ruling is further evident from the fact that it makes the definition of “other crime” dependent upon state law and exempts Arizona from disfranchising individuals only for common law felonies because the state was admitted into the Union after passage of the Fourteenth Amendment. (Excerpts pp. 14-15). Based on the court’s reasoning, states could, for example, define disfranchising “crime” as used in Section 2 as felonies at common law, or they could define “crime” as any offense. However, as a general proposition, the application of federal enactments is not dependent upon state law. Seaboard Air

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<sup>4</sup> Plaintiffs note that 28 U.S.C. § 2403 provides: “In any action , suit or proceeding in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene.”

Line Ry. v. Horton, 233 U.S. 492, 503 (1914); Jerome v. United States, 318 U.S. at 104 (the term “any felony” in the Bank Robbery Act did not include state offenses). Also, under the Constitution’s supremacy clause, state laws that conflict with federal law are invalid. U.S. Const. art. 6, § 2; Allis-Chalmers, Corp. v. Lueck, 471 U.S. 202, 208 (1985); English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990).

In Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989), the Court held the term “domicile” in the Indian Child Welfare Act, 25 U.S.C. § 1911(a), was not to be defined by state law. First, the Court reasoned that “the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term.” Id. at 44. Second, “Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions.” Id. at 45. The purpose of Section 2 was to impose a penalty of reduced representation upon any state that deprived its African American citizens the right to vote. Oregon v. Mitchell, 400 U.S. at 169 (Harlan, J., concurring in part and dissenting in part). Under the circumstances, Congress could not have intended to give states, particularly the Confederate states, the power to avoid that penalty by creating new offenses and defining all offenses as “other crime.” The integrity of the penalty in Section 2, the achievement of its purposes, and nationwide uniformity required that “other crime” be limited to

felonies at common law and not be defined by individual states. Because Arizona's authority for disfranchising individuals based on a criminal conviction derives from Section 2, Arizona is subject to the proper interpretation of "other crime" and its admission into the Union after the Fourteenth Amendment's passage does not immunize it from the reach of Section 2 in any way.

### **CONCLUSION**

The district court erred in dismissing Plaintiffs' LFO and common law felony claims. Plaintiffs should have been allowed to engage in discovery regarding the factual allegations in the amended complaint, including the issue of standing. This Court should reverse the district court's dismissal of Plaintiffs' amended complaint, and remand the case for further proceedings.

### **STATEMENT OF RELATED CASES**

This case is related to Harvey v. Napolitano, No. 08-17253 (9th Cir.), which involves an identical challenge to the State of Arizona's felon disenfranchisement law on the ground that Section 2 of the Fourteenth Amendment only provides states an affirmative sanction to disenfranchise people convicted of crimes that were felonies at common law. On December 10, 2008, Defendants Napolitano and Brewer filed a motion to consolidate this case with Harvey which Plaintiffs do not oppose. This Court's ruling on Defendants' motion is pending.

**CERTIFICATION OF COMPLIANCE PURSUANT  
TO FED. R. APP. P. 32(a)**

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

DATED this 26th day of January, 2009.

/s/Nancy Abudu

## CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2009, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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