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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PAGE MAIER,

Plaintiff,

vs.

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

Defendants.

CV '08 -17-TUC-CRP

CV NO.

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND NOMINAL MONETARY DAMAGES

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Name of Case: *Maier v. Napolitano*

There are no interested entities or persons to list in this Certificate.

January ____, 2008

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The above-named attorney represents all plaintiffs.

TABLE OF CONTENTS

I

INTRODUCTION

1. The Complaint seeks redress under 42 U.S.C. § 1983 for denial of the vote to Plaintiff and the consequent failure to accord her the equal protection of the laws in violation of the Fourteenth Amendment.

2. Plaintiff is not in prison or on parole or probation. She seeks the right to vote in Arizona under "the common law felony theory" which, with the exception of Counts Five, Six, and Seven in *Coronado v. Napolitano*, CV07 01089 PHX SMM, now pending in this Court before the Honorable Stephen M. McNamee and *Legal Services v. Bowen*, S 158259, an original action now pending in the California Supreme Court, has not previously been considered by any court.

3. The unusual nature of the claims being asserted requires a more detailed statement in this Complaint than would ordinarily be the case.

4. The plight of the Plaintiff is described by Judge Henry Wingate in *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S. D. Miss. 1995):

> Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly; rather, only when the circumstances and the law clearly direct.

Plaintiff seeks relief from this plight for herself and other ex-felons in Arizona not convicted of a common law felony.

5. The disenfranchisement of ex-felons does not serve a compelling governmental interest. To the contrary, denial of the right to vote hinders rehabilitation efforts and the conversion of ex-felons into law abiding and productive citizens, thus impeding efforts to reduce recidivism and prison overcrowding.

6. Plaintiff would be entitled to vote if Arizona honored the principle of no taxation without representation that gave birth to the American Revolution. [1] The exclusion of the Plaintiff from the voting process is self-perpetuating because the government of Arizona is structured to prevent most ex-felons, including the Plaintiff, from having any voice. Plaintiff challenges the basic assumption that the institutions of

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[1] *Slaughter-House Cases*, 83 U.S. 36, 115 (1873) (Bradley, J., dissenting, stated that "the principle that... regards taxation without representation as subversive of free government, was the origin of our own revolution"). In the Fourteenth Amendment debates, Senator Howard quotes from the fourth volume of Madison's writings regarding "the vital principle of free government that those who are to be bound by the laws ought to have a voice in making them." Cong. Globe, 39th Cong., 1st. Sess. 2767 (1866). During these same debates, Senator Henderson affirmed that the Virginia convention, on June 12, 1776 "proclaimed the true theory of republican government, when it declared that 'all men... have the right of suffrage and cannot be taxed... without their own consent or that of their [elected] representatives... nor bound by any law to which they have not in like manner assented....' " *Id.* at 3033. "[T]he republican doctrine that all governments must be founded on the consent of the governed" was urged by Senator Sherman in his successful effort to prevent the inclusion of a provision in the Reconstruction Act that would have mandated the exclusion of ex-Confederates from voting. Cong. Globe, 39th Cong., 2d. Sess. 1564 (1867).

state government in Arizona represent fairly all of the people. *See Kramer v. Union School District*, 395 U.S. 621, 628 (1969).

II

COMMON LAW FELONY THEORY

7. Plaintiff raises constitutional issues involving interpretation of the Equal Protection Clause in § 1 of the Fourteenth Amendment and the exception for "other crime" in the penalty of loss of representation and electoral votes in § 2 of the Amendment. She contends that the term "other crime" in § 2 of the Fourteenth Amendment is limited to felonies at common law.

8. An avalanche of U.S. Supreme Court decisions in the 1960's firmly established the doctrine that the Equal Protection Clause prohibits denial or abridgment of the right to vote of any person or group of persons, unless the denial or abridgment is necessary to support a compelling state interest that can be protected in no other way. *Hill v. Stone*, 421 U.S. 289, 297 (1975).

9. According to *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) the exception for "other crime" to the penalty of loss of representation in § 2 of the Fourteenth Amendment *affirmatively sanctions* the disenfranchisement of persons convicted of "other crime." *Id.* at 54. [2] As a consequence, persons convicted of "other crime" are

[2] *Richardson* is the only U.S. Supreme Court decision sustaining disenfranchisement.

"removed... from the protections afforded by [the Equal Protection Clause.]...." *League of Women Voters v. McPherson* (2006) 145 Cal. App. 4th 1469, 1478, n. 6.

10. The question which Plaintiff raises in the present case regarding the meaning of the term "other crime" was not decided in *Richardson* and is wholly unprecedented. Although no attempt is made to overrule *Richardson*, Plaintiff does not hesitate to point out that (1) the exemption granted by *Richardson* from the Equal Protection Clause violates the general rule against implicit exemptions from comprehensive constitutional provisions and (2) the exemption contradicts the language and plain meaning of the Equal Protection Clause. Plaintiff raises these points, not to obtain a ruling which this Court cannot provide, but to buttress her argument that the plain language of §§ 1 and 2 of the Fourteenth Amendment precludes expansion of the exemption granted by *Richardson* to include the disenfranchisement of ex-felons not convicted of a common law felony.

11. An estimated 77,136 ex-felons were disenfranchised in Arizona as of December 31, 2004. Manza and Uggen, *Locked Out: Felony Disenfranchisement and American* Democracy, 248-249, Table A3-3 (Oxford University Press, 2006). Plaintiff estimates that one-quarter of these were convicted of a common law felony and that the other three-quarters, approximately 57,000 Arizona citizens, would be entitled to vote if the term "other crime" is limited to common law felony. See Motion for Consolidation filed herewith, fn. 2.

12. Light is shed upon the meaning of the term "other crime" and the penalty of loss of representation from a very large number of sources. The legislative history cited in *Richardson* and the Response to the Motion to Dismiss in *Coronado* barely scratches the surface of the relevant legislative history. Counsel would be remiss if he did not "seize everything" that supports his client's claims, and so much does. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C. J.). Consequently, briefs presented by Plaintiff may exceed length limitations. Section 2 of the Fourteenth Amendment is *terra incognito.*

13. Plaintiff's case is based on the common and popular understanding of the word *crime* when the Fourteenth Amendment was adopted and the well established principle that the Fourteenth Amendment is interpreted in light of the common law.

14. This case presents two issues. The *first* issue is the *threshold* (*exemption*) issue of whether persons disenfranchised for an offense other than a common law felony are excluded from the protections against disenfranchisement afforded by the Equal Protection Clause. This issue boils down to the question whether the term "other crime" is limited to felonies at common law.

15. The *second* issue is the *violation* issue. This issue is not reached unless the term "other crime" is limited to common law felonies. Does the disenfranchisement of an ex-felon for a noncommon law felony deny the guarantee of equal protection in the

Fourteenth Amendment? The question to be answered is whether the disenfranchisement of ex-felons is necessary to support a compelling state interest.

16. Plaintiff presents numerous arguments in support of her contention that the term "other crime" is limited to common law felonies. For example, the exemption from the Equal Protection Clause granted by *Richardson* must be limited to common law felonies in order to harmonize the penalty with the Reconstruction and enabling acts enacted in 1867, 1868, and 1870. According to the Court in *Richardson*, 418 U.S. at 53, the provisions of these acts limiting disenfranchisement to common law felonies are "convincing evidence of the historical understanding of the Fourteenth Amendment." The following language of the Reconstruction Act is italicized by the Court: "*except such as may be disfranchised for participation in the rebellion or for felony at common law.*" *Id.* at 49.

17. The Court in *Richardson* relied primarily on a certain logical proposition (the Richardson proposition), which in its converse form requires the conclusion that the exception for "other crime" must be limited to common law felonies. According to the rules of logic, the Richardson proposition in its converse form must be true if the Richardson proposition is true.

18. Penalty free disenfranchisement for noncommon law felonies would have enabled the former slave states to disenfranchise large portions of their black populations

without loss of representation – a result which would have defeated the purpose of the penalty and could not have been intended by its framers.

19. The common law felonies are treason, murder, manslaughter, mayhem, rape, arson, burglary, robbery, larceny, and sodomy. *Jerome v. United States,* 318 U.S. 101, 108, n. 6 (1943). Drug and many other offenses which Arizona classifies as felonies are "noncommon law" felonies, hereinafter sometimes called "statutory" felonies, which were misdemeanors or nonexistent at common law.

20. If the term "other crime" is limited to common law felonies, the exemption from the Equal Protection Clause which is granted to the states under *Richardson* is necessarily limited to disenfranchisement for common law felonies. As a result, disenfranchisement for statutory felonies is not removed from the protections afforded by the Equal Protection Clause.

21. The only remaining question is whether the disenfranchisement of persons on parole for a statutory felony is necessary to protect a compelling state interest. The answer to this question is clearly "no" in the case of ex-felons. Consequently, the outcome of the present case depends entirely on whether the "term" "other crime" in § 2 of the Fourteenth Amendment is limited to common law felonies.

22. The conclusion that the term is so limited is compelled by (a) the popular understanding of the word *crime* in 1868, when the amendment was adopted, (b) the rule requiring the interpretation of words and phrases in the Fourteenth Amendment in light of

the common law, (c) the Reconstruction and enabling acts, (d) the intent of the framers of the Amendment, (e) the historical background of the Amendment, (f) the need to avoid an irreconcilable repugnancy between the Amendment and the acts, (g) the need to minimize the repugnancy between the all-inclusive provisions of the Equal Protection Clause and the exception for "other crime," (h) the rule against hidden exceptions to comprehensive constitutional provisions, and (i) other important rules of construction.

23. *Richardson* carved out an exemption from the operation of the Equal Protection Clause for laws which disenfranchise persons convicted of "other crime." The decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), also written by Justice Rehnquist, carved out an exception to the *Richardson* exemption in order to avoid a result contrary to the intent of the framers of the Fourteenth Amendment. The Court in *Hunter* struck down a disenfranchisement provision in the Alabama Constitution "[w]ithout again considering the implicit authorization of § 2 to deny the vote 'for participation in rebellion, or other crime'...." *Id.* at 233.

24. The Court in *Hunter* brushed aside Alabama's contention that its law was exempted from "the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the 'other crime' provision of § 2 of that Amendment." *Id.* The Court was "confident" that § 2 was not designed to permit disenfranchisement in the circumstances of *Hunter*. *Id.* This confidence justified an exception to the Richardson exemption, which, but for this exception, would have affirmatively sanctioned the Alabama law and

immunized it from equal protection attack. "[N]othing in [its] opinion in *Richardson*... suggest[ed] the contrary." *Id.*

25. *Hunter* stands for the proposition that an exception to the Richardson exemption is required whenever "§ 2 was not designed to permit" disenfranchisement in the circumstances of the case before the Court. The "implicit" exemption from equal protection attack should not be applied out of context in disregard of variant controlling facts not considered in *Richardson.*

26. "[T]he "understanding of those who adopted the Fourteenth Amendment... is of controlling significance...." *Richardson*, 418 U.S. at 54. The immunity from equal protection attack which was granted to the states in *Richardson* by virtue of the exception for "other crimes" should not be extended beyond the reasoning of *Richardson* to authorize disenfranchisement for offenses not included within the term "other crime." Such an extension would be contrary to the "understanding of those who adopted the Fourteenth Amendment" and therefore contrary to *Richardson* as well.

III

JURISDICTION AND VENUE

27. This case arises under the Constitution and laws of the United States. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1367(a), 42 U.S.C. § 1983, and the Fourteenth Amendment. This Court has

jurisdiction to grant both declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and Rules 57 and 65 of the Federal Rules of Civil Procedure.

28. Venue is proper under 28 U.S.C. § 1391(b), because Plaintiff Maier is situated within this Judicial District.

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS

29. The Fourteenth Amendment was proposed by the Thirty-ninth Congress in June, 1866 and ratified by the states in 1868. §§ 1 and 2 provide:

> Section 1. *No state shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws*. (Emphasis added.)
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein *shall be reduced* in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. (Emphasis added.)

30. The 1867 Reconstruction Act was enacted by the same Thirty-ninth Congress, composed of the same men, that proposed the Fourteenth Amendment. It

established the conditions for readmission of the ex-Confederate states to representation in Congress. Section 5 of the Reconstruction Act provided:

> That when 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*, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates and when such constitution shall have been submitted to Congress for examination and approval and Congress shall have approved the same [and when said State shall have ratified the Fourteenth Amendment and the Amendment shall have become part of the constitution] said State shall be declared entitled to representation in Congress. (Emphasis added.)

Act of March 2, 1867, c. 153, 14 Stat. 428; *Richardson,* 418 U.S. at 49.

31. The Fortieth and Forty-first Congreses enacted a series of acts (the enabling acts) in 1868 and 1870 which readmitted ten ex-Confederate states to representation in Congress. The enabling act for Arkansas, the first state to be readmitted under these acts, provides:

> [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....(Emphasis added.)

Act of June 22, 1868, c. 69, 15 Stat. 72; *Richardson*, 418 U.S. at 51. The same "fundamental condition" with only slight variations in language was included in nine additional enabling acts readmitting nine other ex-Confederate states to representation in Congress. *Richardson*, 418 U.S. at 52.

32. Section 2B of Article VII of the Arizona Constitution provides:

> ...the right to register, to vote, and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to and conferred upon males and females alike.

33. Section 2C in Article VII of the Arizona Constitution provides:

> No person who is adjudicated an incapacitated person shall be qualified to vote to any election, *nor shall any person convicted of treason or felony, be qualified to vote at any election* unless restored to civil rights. (Emphasis added.)

34. The following language in § 2C of Article VII has remained unchanged since the Arizona Constitution was adopted in 1912:

> ...nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Whether the framers of this language in § 2C of Article VII intended to limit the word "felony" to common law felony is an open question.

35. Section 16-101 of the Arizona Revised Statutes (A.R.S.) provides:

> Every resident of the state is qualified to register to vote [if he satisfies certain requirements and] [h]as not been *convicted of*

treason or a felony, unless restored to civil rights. (Emphasis added.)

36. A.R.S. § 16-152 provides:

> The form used for the registration of voters shall contain... [a] statement that the registrant has not been convicted of treason or a felony, or if so, that the registrant's civil rights have been restored... [and] shall be printed in a form prescribed by the secretary of state.

37. A.R.S. § 16-165 provides:

> The county recorder shall cancel a registration... [w]hen the person registered has been convicted of a felony and the judgment of conviction has not been reversed or set aside.

38. A.R.S. § 13-105 provides:

> In this title, unless the context otherwise requires... "Felony" means an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.

39. A.R.S. § 13-904 provides:

> A conviction for a felony suspends... [t]he right to vote.

40. A.R.S. § 13-912 provides:

> Any person who has not previously been convicted of another felony shall automatically be restored to any civil rights that were lost or suspended by the conviction if the person both: (1) Competes a term of probation or receives an absolute discharge from imprisonment. (2) Pays any fine or restitution imposed.

41. A.R.S. § 13-912 is particularly severe in comparison to the neighboring state of Nevada, even though Nevada as well as Arizona is among the 13 states that

disenfranchise some or all ex-felons for some period of time. In most cases, Nevada automatically restores voting rights to persons who have successfully completed parole or probation even though they are (1) unable to pay fines and restitution due to "economic hardship" verified by a parole or probation officer or (2) have been convicted of two or more felonies arising out of the same act, transaction, or occurrence, in which case the convictions are deemed by the State of Nevada to constitute a single conviction. Nevada Revised Statutes 176 A. 850, 213.090, 213.090, 213-155, 231.157.

V

PARTIES

Plaintiff

42. Plaintiff **Maier** is denied the vote because she has been convicted of one or more felonies which defendants consider to be felonies, but which were misdemeanors or nonexistent at common law. The plaintiff resides in Pima County, is of voting age, and is a citizen of the United States and the State of Arizona.

Defendants

43. Defendant **Janet Napolitano** is the Governor of the State of Arizona who has final responsibility for the enforcement and implementation of Arizona's election and voting laws. She is sued in her official capacity for actions taken by her under color of state law.

44. Defendant, **Janice K. Brewer** is the Secretary of State of Arizona ("Secretary of State"). She is sued in her official capacity on account of actions taken by her under color of state law. As Secretary of State, defendant BREWER is the chief election officer of the State of Arizona. A.R.S. § 16-142. "The form for the registration of electors" is printed in the "form prescribed by the secretary of state." A.R.S. § 16-152.

45. Defendants F. ANN RODRIQUEZ is the county recorder of Pima County. She is sued in her official capacity in connection with actions taken under color of state law. She is the official custodian of the voter registration books in Pima County and is responsible for the registration of voters in Pima County. A.R.S. 16-163, 16-165, 16-166, and 16-168. She cancels the registration of persons convicted of a felony. A.R.S. § 16-165.

VI

NO PRECEDENT PRECLUDES CONSIDERATION OF PLAINTIFF'S CLAIMS

46. The only reported case which discusses whether the term "other crime" in the Fourteenth Amendment includes noncommon law felonies is *Baker v. Pataki*, 85 F. 3d 919, 933 (2d Cir. 1996). *Infra* ¶ 49.

47. "Questions which merely lurk in the record, neither brought to the attention of the court, nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). The questions raised by Plaintiff in the present case lay hidden in *Richardson* and were not so decided in

Richardson as to constitute precedent. There is no barrier to a decision awarding voting rights to Plaintiff. *See* the opinion of Justice Rehnquist in *Texas v. Cobb*, 532 U.S. 162, 169 (2001). ("Constitutional rights are not defined by inference from opinions which do not address the question at issue").

48. According to Chief Justice Rehnquist in *Texas v. Cobb*, 532 U.S. at 169, the decision in *Brewer v. Williams*, 430 U.S. 387 (1977) was not a contrary precedent even though *Brewer* would have been decided differently had the principle of law announced in *Texas v. Cobb* been followed in *Brewer*. A lower court is not precluded from deciding an issue that is "squarely raised" for the first time merely because the U.S. Supreme Court has assumed (but not decided) a particular resolution of that issue. *Staley v. Jones*, 239 F. 3d 769, 776 (6th Cir. 2001) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63, n. 4); *See* also 18 James Moore *et al*, Moore's Federal Practice, § 134.04[5] at 134-142 (3d ed. 2006).

VII

HISTORICAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT

49. The provisions of the Reconstruction and enabling acts prohibiting disenfranchisement except for common law felonies are "convincing evidence of the historical understanding of the Fourteenth Amendment...." *Richardson*, 418 U.S. at 48-53. These provisions support "a construction of the term 'other crime' as equating to common law felonies." *Baker v. Pataki*, 85 F. 3d 919, 933 (2d Cir. 1996). "[T]he

'rebellion, or other crime' language of § 2 does not encompass misdemeanors." *McLaughlin v. City of Canton*, 947 F. Supp at 974.

50. When the Fourteenth Amendment was adopted, the word *crime* was popularly understood to mean *felony* as opposed to misdemeanor, and the word *felony* meant *felony at common law*. *Schick v. United States*, 195 U.S. 65, 69-70 (1904); *Bannon v. United States*, 156 U.S. 464, 467-468 (1895); *State v. Murphy*, 24 A. 473, 474, 17 R.I. 698 (R. I. 1892); 4 Blackstone's *Commentaries** 5, *94 (1769); and *Webster's American Dictionary of the English Language*, 283 (1854 ed.) and 312-313 (1867 ed.).

51. Terms and phrases in the Fourteenth Amendment are to be construed in accordance with the common law. *Schick*, 195 U.S. at 69; *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898); and *Minor v. Happersett*, 88 U.S. 162, 167 (1874). Whether the word crime is construed according to its popular understanding at the time of enactment or in light of the common law, it refers only to common law felonies.

VIII

EVENTS FROM 1865 TO 1872

52. The following events occurred during the period from January, 1865 through February, 1872:

Thirteenth Amendment proposed by Thirty-Eighth Congress.....January 31, 1865

Lee surrenders to Grant at Appomattox Courthouse.....April 9, 1865

Assassination of President Lincoln.....April 15, 1865

Formation of the Joint Committee of Fifteen on Reconstruction.....December 13, 1865

Ratification of the Thirteenth Amendment.....December 18, 1865

Mississippi and South Carolina adopt black codes.....November, 1865

Black Codes adopted by other southern states.....November, 1865-April, 1866

Antiblack Riot in Memphis.....May 1-3, 1866

Fourteenth Amendment is proposed by the Thirty-Ninth Congress. Section 1 provides that no state shall deny equal protection or due process to any person. Section 2 provides for reduction of representation for the disenfranchisement of adult males "except for participation in rebellion, or other crime".....June 13, 1866

Tennessee is readmitted to representation in Congress.....July 24, 1866

The Reconstruction Act of March 2, 1867 is enacted by the Thirty-Ninth Congress. It provides that ex-Confederate states seeking readmission must prohibit disenfranchisement "except for participation in the rebellion, or for felony at common law".....March 2, 1867

The Fortieth Congress enacts six enabling acts providing for the readmission to Congress of six ex-Confederate states subject to a "fundamental condition" prohibiting amendment to the state constitution depriving persons of the right to vote "except as a punishment for such crimes as are now felonies at common law".....June 22 and 25, 1868

Ratification of the Fourteenth Amendment.....July 21, 1868

Fifteenth Amendment proposed by the Fortieth Congress.....February 26, 1869

The Forty-first Congress enacts four enabling acts providing for the readmission to Congress of four more ex-Confederate states subject to a "fundamental condition" prohibiting amendment to the state constitution depriving persons of the right to vote "except as

a punishment for such crimes as are now felonies at common law"..
.....Jan. 26, Feb. 23, March 30, and July 15, 1870

Ratification of the Fifteenth Amendment.....March 30, 1870

The Forty-second Congress enacts a statute which provides for reduction of representation in accordance with § 2 of the Fourteenth Amendment.....February 2, 1872

IX

THE INTENT OF THE FRAMERS

53. The framers of the Amendment considered § 2 to be just as important as § 1. Thaddeus Stevens,[3] when he presented the revised version of the Fourteenth Amendment to the House on May 8, 1866 on behalf of the Joint Committee of Fifteen on Reconstruction, stated as follows:

> The second section I consider the most important in the article. It fixes the basis of representation in Congress....If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive. If they do not enfranchise the freedmen, it would give to the rebel States but thirty-seven

[3] "Old Thad," who at age 73 "dominated House Republicans with his wit and sarcasm" was the leader of the Representatives who with six Senators formed the Joint Committee of Fifteen on Reconstruction, which drafted the Fourteenth Amendment. Joseph B. James, *The Framing of the Fourteenth Amendment* 41-42 (1956).

> Representatives. Thus shorn of their power, they would soon become restive. Southern pride would not long brook a hopeless minority. True it will take two, three, possibly five years before they conquer their prejudices sufficiently to allow their late slaves to become their equals at the polls.

Cong. Globe, Thirty-ninth Congress, 1st Sess. 2459 (1866).

54. In the Congressional debates regarding the Fourteenth Amendment, Republican congressmen estimated that the ex-Confederate states would be entitled to thirteen additional representatives and electoral votes due to the abolition of slavery by the Thirteenth Amendment. There were no longer any persons who were not free, and consequently there were no persons who for purposes of representation counted only as three-fifths of a person. Article I, § 2, ¶ 3. The penalty of loss of representation in § 2 of the Fourteenth Amendment was the response of Congress to the fact that the old Southern leadership would enjoy more power than before the Civil War if the ex-Confederate states could disenfranchise black Americans without loss of representation. The penalty is the "structural successor" to the Three-fifths Clause. *Hayden v. Pataki*, 449 F. 3d 305, 351 (2d Cir. 2006) (Parker, J., dissenting). It provides that the Congressional representation of a state "shall be reduced" to the extent adult males are disqualified from voting for any reason other than "participation in rebellion, or other crime." Cong. Globe, 39th Cong., 1st Sess., 2767 (Senator Howard of Michigan 1866).

55. Congress was relying on the penalty of loss of representation to prevent the new representational power of the former slave states from redounding to the old Southern leadership. Bonfield, 46 Cornell L.Q. at 109; Joseph James, *The Framing of the Fourteenth Amendment* 33 (1956). ("Of all the movements influencing the Fourteenth Amendment which developed prior to the first session of the Thirty-ninth Congress, *that for Negro suffrage was the most outstanding*....The cry for a changed basis of representation was, in reality, subsidiary to this, and was meant by the Radicals to secure in another way what Negro suffrage might accomplish for them: removal of the danger of Democratic dominance as a consequence of Southern restoration"). (Emphasis added.)

56. An exception to the penalty for disenfranchisement for noncommon law felonies and misdemeanors, if allowed, would have enabled the former slave states to disenfranchise large numbers of black men without a corresponding loss of representation. Such an exception would not have been acceptable to the framers of the Fourteenth Amendment.

57. Those who adopted the Fourteenth Amendment never would have given the states *carte blanche* to escape the penalty through the disenfranchisement of their citizens for whatever misdemeanors or newly created felonies the states choose to enact. The power of the states to enact criminal laws was not curtailed by the First Amendment until 1925. *Gitlow v. New York*, 268 U.S. 652 (1925); *The*

Oxford Companion to the Supreme Court of the United States 426-427 (Oxford University Press 1992). Vagrancy laws were not struck down for vagueness by the U.S. Supreme Court until 1972. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

58. The Congressional record demonstrates an intent to draw a noose as tightly as possible around Southern creativity in order to eliminate any room to wiggle out of reach of the penalty. Cong. Globe, 39th Cong., 1st Sess. 2897 (1866) (Senate approval of amendment to penalty "to prevent a state from saying that although a person is a citizen of the United States, he is not a citizen of the State."); Cong. Globe, 39th Cong., 1st Sess. 3039-3040 (1866) (proposed amendments to limit the penalty to elections for the most numerous branch of the state legislature and to strike the words "or in any way abridged" from the penalty defeated in the Senate.)

59. The absence of discussion in the Congressional record regarding the terms "other crime" in the Fourteenth Amendment and "felony at common law" in the Reconstruction Act strongly suggests that both terms meant felony at common law. There would have been some discussion in Congress if the Fourteenth Amendment had been intended to affirmatively sanction penalty free disenfranchisement for offenses which were misdemeanors or nonexistent at common law and nine months later have prohibited disenfranchisement for these same offenses. Opponents of the Reconstruction Act would have argued that the

Act improperly prohibited disenfranchisement affirmatively sanctioned by the Amendment.

60. The most articulate spokesman for Southern interests, Senator Johnson of Maryland (a former slave state), who was a renowned constitutional lawyer, one of the most active debaters in the Senate, and a most accomplished attorney, did not object to the prohibition of disenfranchisement for offenses which were misdemeanors or nonexistent at common law. Instead he introduced an amendment to the Reconstruction Act that prohibited disenfranchisement except for felony at common law. Senator Johnson would have been the first to voice an objection to this exception if it prohibited disenfranchisement affirmatively sanctioned by the Amendment.

61. Only Congress can enforce the penalty. The framers of the penalty realized that its enforcement would be possible only if its supporters controlled Congress and that a Congress which favored enforcement would reject any claim that the exception for "other crime' permitted penalty-free disenfranchisement for offenses which were misdemeanors or nonexistent at common law. No circumstance was foreseen in which the Courts would rule on the meaning of the term "other crime" in the Fourteenth Amendment.

62. Unlike the penalty of loss of representation, the suffrage provisions of the Reconstruction and enabling acts could have been the subject of litigation.

Consequently, Senator Williams of Oregon, good lawyer that he was, substituted "felony at common law" in the Reconstruction Act in place of the term "other crime" that had been used in the Fourteenth Amendment. His apparent purpose in making this change was to avoid a spurious court claim that the word *crime* included offenses other than common law felonies. The legislative history shows that no change in meaning was intended by Senator Williams or Congress.

X

LOGICAL PROPOSITIONS BEARING ON THE MEANING OF § 2

63. The *Richardson* decision was based in large part on the "demonstrably sound proposition" that the Equal Protection Clause was not meant to bar outright denial of the vote for "other crime." The Court argued that this was so because denial of the vote is "expressly exempted from the less drastic remedy of reduced representation...." *Richardson*, 418 U.S. at 55. This proposition does not answer the question of whether the term "other crime" includes offenses which were not felonies at common law.

64. The converse of the Richardson proposition is that the less drastic remedy of loss of representation was meant to limit penalty-free disenfranchisement to common law felonies. This is so because denial of the vote for offenses other than common law felonies is prohibited outright by the

Reconstruction and enabling acts. The converse proposition must be true if the Richardson proposition is true. The acts are "convincing evidence of the historical understanding of the Fourteenth Amendment...." The language in the Reconstruction Act which prohibits disenfranchisement except for common law felonies is italicized by the Court in Richardson in order to emphasize its importance. *Richardson*, 418 U.S. at 53, 49.

XI

IMPLICIT EXEMPTIONS FROM
COMPREHENSIVE CONSTITUTIONAL PROVISIONS

65. No exemption from the plain and obvious import of a comprehensive constitutional provision ought to be admitted "unless the inference be irresistible." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339 (1816) ("all cases" in Article III, § 1 means all cases; thus the judicial power of the Supreme Court, which includes appellate power, extends to cases decided by state courts). The provisions of the Equal Protection Clause are just as comprehensive and all-inclusive as the provisions of Article III.

66. The exemption from the Equal Protection Clause for disenfranchisement is "implicit....." *See Hunter*, 471 U.S. at 233. Implicit exemptions which do not meet the exacting criteria of *Martin v. Hunter's Lessee, supra; Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 722 (1838); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378-380 (1821); *Loughborough v. Blake*, 18

U.S. (5 Wheat.) 317 (1820); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) and *Wesberry v. Sanders*, 371 U.S. 1 (1964), are not allowed. An implicit exemption from the all-inclusive provisions of the Equal Protection Clause for disenfranchisement for offenses which were misdemeanors or nonexistent at common law is not supported by an "irresistible reference."

67. In *Rhode Island v. Massachusetts*, 37 U.S. at 722, it was declared that "in construing the constitution as to the grants of powers to the United States and the restrictions upon the states, [the Court has] laid it down as a general rule, that where no exception is made in terms, none will be made by mere implication or construction."[4] Exemptions from comprehensive terms must not be based on "conjecture, supposition, or *mere reasoning* on the meaning or intention of the writing." *Id.* (emphasis added).

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[4] Accord (1) *Export Group v. Reef Industries*, 54 F. 3d 1466, 1473-1474 (9th Cir. 1995) (generally an exception is considered a limitation only on the matter which directly precedes it and is not to be implied; in addition, there is a presumption under the maxim "*expressio unius est exclusio alterius*" that "Congress would not enumerate specific exemptions [in one section] but leave the exemptions in another section to judicial identification."); (2) *Shook v. District of Columbia*, 964 F. Supp. 416, 428 (D.D.C. 1997) ("The phrase 'any' department or agency is all-inclusive....As a rule, where a broad term is used, inferring an exception or exclusion is not favored."); (3) *WWW Machinery v. Werkzeugmaschinehandel*, 960 F. Supp. 734, 742, n. 7 (S.D.N.Y. 1997) ("Established canons of statutory construction...instruct that ' '[g]enerally an exception is considered a limitation only upon the matter which directly precedes it' and that 'exceptions are not to be implied.' ' ").

68. An implicit exemption can only be sustained on the "spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." *Cohens v. Virginia*, 19 U.S. at 379 (Marshall, C. J.). The "spirit and true meaning" of §§ 1 and 2 do not support an implicit exemption from the Equal Protection Clause for disenfranchisement for offenses which were misdemeanors or nonexistent at common law.

XII

THE RECONCILIATION OF CONFLICTING ENACTMENTS

69. It is the duty of the courts to reconcile seeming repugnancies in the Constitution. *Cohens v. Virginia*, 19 U.S. at 393 (Marshall, C.J. 1821). The language of the Equal Protection Clause is unqualified in its scope. In order to minimize the repugnancy between the Equal Protection Clause and § 2, the exception from the Equal Protection Clause for "other crime" should be made as small as possible. It should be confined to disenfranchisement for common law felonies.

70. "[T]he exclusion of felons [convicted of "other crime"] from the vote has an *affirmative sanction* in § 2 of the Fourteenth Amendment...." *Richardson*, 418 U.S. at 54 (emphasis added). The Reconstruction and enabling acts are in direct conflict with the Fourteenth Amendment if § 2 of the Amendment

affirmatively sanctions disenfranchisement prohibited by the acts. *See Rhode Island v. Massachusetts*, 37 U.S. at 723. Unless this conflict is eliminated, the provisions of the Reconstruction and enabling acts prohibiting disenfranchisement for offenses which were misdemeanors or nonexistent at common law were nullified upon ratification of the Fourteenth Amendment. Such nullification is preposterous. If it occurred, ten ex-Confederate states were readmitted to Congress without an enabling act. The Court is "bound to give to the constitution and the laws such a meaning as will make them harmonize...." *Rhode Island*, 37 U.S. at 723.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court:

1. For a declaration that denial of the right to register to vote and vote to Plaintiff on the ground that she has been convicted of one or more noncommon law felonies violates the Equal Protection Clause unless she is (a) incarcerated in a penitentiary, (b) has not completed probation, (c) has not received an absolute discharge from imprisonment and parole, or (d) is disqualified from registering to vote or vote for a reason unrelated to one or more noncommon law felony convictions;

2. For preliminary and permanent injunctions forbidding defendants and their agents, employees, and representatives from denying the right to register to

vote and vote as provided in (1) above and directing defendant BREWER to prepare and circulate a state registration form in accordance with (1) above;

3. For nominal damages for denial of the right to vote;

4. For expenses, costs, fees, and other disbursements associated with the filing and maintenance of this action, including reasonable attorneys' fees, pursuant to 42 U.S.C. §§ 1988 and 1973*l*(e);

5. For the exercise of continuing jurisdiction to enforce the judgment in Plaintiff's favor; and

6. Such other and further relief as to the Court seems proper and just.

January 3, 2008

Respectfully submitted,

By:

John R. Cosgrove
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Pro Hac Vice Motion Pending
Cal. Bar No. 029799