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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jeffrey Nielsen, et al.,

Plaintiffs,

v.

David Shinn,

Defendant.

NO. 2:20-cv-01182-GMS-JZB

DEFENDANT'S MOTION TO DISMISS

"[N]othing in the Constitution prevents prisoners in either the state or federal system from being detained in privately operated prisons." *Pinaud v. Cty. of Suffolk*, 52 F.3d 1139, 1161 (2d Cir. 1995) (Jacobs, J., concurring). Despite that straightforward proposition, Plaintiffs allege that Arizona's statutes authorizing the use of private prisons violate three constitutional Amendments. Every court that has confronted such claims has rejected them. As a matter of law, lawful incarceration in a privately operated prison is not slavery, nor is it cruel and unusual punishment. A prisoner also does not have a protected liberty interest in the location of his incarceration or the operator of his facility. And the statutes do not deprive prisoners in private facilities equal protection under the law. Plaintiffs' allegations do not state a constitutional claim, nor do they plausibly allege a facial or as-applied challenge to the statutes or a violation of their constitutional rights. The Court should dismiss their Complaint. *See* Fed. R. Civ. P. 12(b)(6).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background.

A. Plaintiffs' Allegations.

Plaintiffs are five inmates in the custody of the Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR") and the Arizona State Conference of the National Association for the Advancement of Colored People ("Arizona NAACP").[1] (Dkt. 1, ¶¶ 2–7.) The Individual Plaintiffs are incarcerated at Florence West or Phoenix West, prison complexes that are operated by The GEO Group, Inc. ("GEO"). (*Id.*, ¶¶ 12, 37.) They are incarcerated at those private facilities pursuant to a contract between ADCRR and GEO. (*Id.*, ¶¶ 2–6, 24; *see also* Exhibits 1, 3.) They sue ADCRR Director David Shinn in his official capacity. (*Id.*, ¶ 12.)

Plaintiffs allege that ADCRR's use of privately operated prisons violates the Eighth, Thirteenth, and Fourteenth Amendments. (*Id.*, ¶ 61.) They allege that ADCRR transfers approximately 20% of the ADCRR inmate population to several "for profit prison corporations" and pays them "a predetermined daily rate … for each day each prisoner occupies a cell or bed in a private prison." (*Id.*, ¶¶ 22–26, 31, 37, 56.) These contracts, they allege, create a "profit motive" for the private operators and incentivizes them to "reduce programs and services" and "the cost of [staff]" in an effort to save money. (*Id.*, ¶¶ 31, 34, 36, 46.) They further allege that private operators "maximize profit" by "holding [inmates] in prison as long as possible, taking actions which may reduce their opportunity of parole or early release." (*Id.*) According to Plaintiffs, these "financial incentives" "create serious risks of erroneous deprivations of liberty for each prisoner in private prisons" and jeopardize their "safety, security, and welfare." (*Id.*, ¶¶ 49, 54.)

Plaintiffs seek: (1) a declaration that the "Arizona statutes that authorize prison privatization are unconstitutional"; (2) a declaration that "prison privatization and the

[1] Plaintiffs have agreed to correct the spelling of Plaintiff Brian "Boudreaux" (spelled "Boudreau"). Defendants intend to challenge the Arizona NAACP's standing in a subsequent motion, if necessary, due to page constraints here.

resulting contracts violate the Constitution of the United States"; (3) an "injunction that forbids [Director] Shinn and his successors from placing prisoners in private prisons and that requires Shinn to begin the process of discontinuing ADCRR's use of private prisons"; and (4) an "award" for "other and further relief that is just and appropriate."[2] (*Id.*, Prayer for Relief, ¶¶ B–F.) The Court screened the Complaint and ordered Defendants to file an answer or otherwise respond by appropriate motion.[3] (Dkt. 5 at 7.)

B. ADCRR's Statutory Authority to Use Private Facilities.

A.R.S. § 41-1609(B) authorizes ADCRR to "contract with any private … institution that is located inside or outside [Arizona] for facilities or the operation of facilities that are dedicated to the confinement of persons who are committed to the department." To be eligible for performing this service, the private contractor must demonstrate that it has:

> 1. The qualifications, operations and management experience and experienced personnel necessary to carry out the terms of the contract.
>
> 2. The ability to comply with applicable correctional standards and any specific court order, if required.
>
> 3. A demonstrated history of successful operation and management of other secure facilities.

A.R.S. § 41-1609.01(B). The contractor must also: provide "financial statements for the previous five years" and "other financial information as requested" and provide "an adequate plan of insurance, specifically including coverage or insurance for civil rights claims and liabilities as approved by the [State]"; and "agree[] to be liable for the costs of any emergency, public safety or security services provided to the contractor by the state or any political subdivision of the state." A.R.S. §§ 41-1609.01(K), 41-1609.03.

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[2] Plaintiffs have stated that they do not seek an award of monetary damages. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

[3] The Screening Order did not expressly find that the Complaint stated a claim. If, however, the Court were to construe this Motion as a motion for reconsideration, Defendant requests leave to file outside the 14-day timeframe. Defendant waived service (Dkt. 6) and timely filed by the answer deadline. The novel (and number of) legal issues raised in the Complaint required additional time to research and prepare this Motion, and the parties met and conferred regarding their viability.

The private contractor must also offer "a level and quality of services that are at least functionally equal to those that would be provided by [ADCRR]," A.R.S. § 41-1609.01(H), and "offer[] cost savings to" the State, A.R.S. § 41-1609(G). If the contract involves correctional services for minimum or medium security inmates, the contractor must "provide at least the same quality of services as [ADCRR] at a lower cost or … services superior in quality to those provided by [ADCRR] at essentially the same cost." A.R.S. § 41-1609.02(B). In making that determination, the Director must consider security, inmate management and control, inmate programs and services, facility safety and sanitation, administration, food service, personnel practices and training, inmate health services, and inmate discipline. *Id.*

A contract for correctional services "shall not authorize, allow or imply a delegation of authority or responsibility" to a private contractor for any of the following:

> 1. Developing and implementing procedures for calculating inmate release dates.
>
> 2. Developing and implementing procedures for calculating and awarding sentence credits.
>
> 3. Approving the type of work inmates may perform and the wages or sentence credits that may be given to inmates engaging in the work.
>
> 4. Granting, denying or revoking sentence credits, placing an inmate under less restrictive custody or more restrictive custody or taking any disciplinary actions.

A.R.S. § 41-1609.01(M); *see also* A.R.S. § 41-1609(C) (requiring "[a]ll contracts involving the detention or incarceration of adult offenders" to conform to this requirement). The Director is responsible for assigning inmates to any private facility, and each year he must report this information to the Arizona Legislature and the joint select committee on corrections. A.R.S. § 41–1609.02(C)–(D).

C. ADCRR's Private Facilities.

Plaintiffs allege that ADCRR contracts with three private prison corporations, which manage six facilities. (Dkt. 1, ¶ 37.) The contracts involving those private facilities are

attached as Exhibits 1–8.[4] Under each contract, ADCRR agreed to pay a per diem rate and, except at Phoenix West, guarantees a minimum occupancy. (*See* Ex. 1 at 3, 72, 101; Ex. 2 at 58, 83, 95; Ex. 3 at 7, 41; Ex. 4 at 13, 27, 111–112; Ex. 5 at 70; Ex. 7 at 31, 83; Ex. 8 at 43, 93.)[5] Each contract is for an initial term of 10 years with two 5-year renewal options (for ADCRR). (*Id.*) Except for Marana Community Correctional Treatment Center, which ADCRR already owns, ADCRR has the option to purchase the private facility at the expiration of the contract.[6] In each contract, ADCRR dictates the programs and services that must be provided, security requirements, and staffing requirements, certifications, and training ("equivalent" to ADCRR training). (Ex. 1 at 145–153, 155–168; Ex. 2 at 103–110, 116–122; Ex. 3 at 48–54, 57–62, 64–65, 68–73, 77–81; Ex. 4 at 106–109, 121–130, 133–144; Ex. 7 at 44–51, 54–68; Ex. 8 at 27, 33–34, 51–57, 60–74.) The contractor must comply with all ADCRR orders, written instructions, and manuals, and with all court orders and state and federal laws. (Ex. 1 at 109; Ex 2 at 78; Ex. 3 at 45; Ex. 4 at 83, 107–08, 171; Ex. 5 at 84, 110–112, 192; Ex. 7 at 12–13; Ex. 8 at 12, 38–40, 96.) In addition, ADCRR: must approve any of the contractor's institutional orders, post orders, personnel procedures, and manuals; monitors the contractor's performance; and may impose penalties (including termination) for noncompliance. (*Id.*) The contracts specify that only ADCRR can calculate inmate release and parole eligibility dates; calculate and award sentencing credits; deny or revoke sentencing credits; place the inmate in more restrictive custody; or approve disciplinary actions for violation of the inmate rules of discipline. (Ex. 1 at 111; Ex. 2 at 79–80; Ex. 3 at 46; Ex. 4 at 88; Ex. 5 at 90; Ex. 7 at 14–15; Ex. 8 at 17.)

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[4] The Court may consider these contracts without converting Defendant's Motion to a summary judgment motion because the Complaint "necessarily relies" on them, their "authenticity ... is not contested," and/or they are "matters of public record." *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001); *see* https://app.az.gov/page.aspx/en/ctr/contract_browse_public.

[5] References to page numbers in Exhibits 1–9 are to the PDF page number.

[6] A portion of the per diem rate is applied to the contractor's amortization schedule for the costs of constructing the facility. Those amounts reduce the purchase option price over time and reduce the balance to zero at the end of the maximum 20-year contract term. (Ex. 1 at 102, 136–140; Ex. 2 at 97–101; Ex. 3 at 26, 43, 62–63, 102–103; Ex. 4 at 115–119; Ex. 5 at 5, 119–123; Ex. 7 at 35–39.)

Each facility has a distinct prisoner population:

- **Arizona State Prison – Florence West**: In 2002, ADCRR entered into a contract with Correctional Services Corporation ("CSC") (now GEO) for the construction and management of a 600-bed, adult male minimum custody facility—400 beds for DUI inmates and 200 beds for return-to-custody inmates (those awaiting hearings for parole violations). (Ex. 1 at 71 and 101.)
- **Arizona State Prison – Phoenix West**: In 2002, ADCRR entered into a contract with CSC (now GEO) for the management of a 400-bed facility for adult male minimum custody DUI inmates. (Ex. 3 at 34.)
- **Central Arizona Correctional Facility**: In 2005, ADCRR entered into a contract with CSC (now GEO) for the construction and management of a 1,000-bed facility for adult male low-medium custody (Level 3) sex offenders. (Ex. 7 at 7, 31.)
- **Arizona State Prison – Kingman**: In 2008, ADCRR entered into a contract with Management and Training Corporation for the construction and management of a 2,000-bed facility for adult male minimum custody prisoners. (Ex. 2 at 69–70.) In 2015, ADCRR assigned this contract to GEO. (Ex. 9.)
- **Arizona State Prison – Red Rock**: In 2012, ADCRR entered into a contract with Corrections Corporation of America ("CCA") (now CoreCivic, Inc.) for 1,000 beds to manage adult male medium security prisoners at CCA's Red Rock facility. (Ex. 4 at 1, 53, 73.) In 2015, ADCRR and CCA entered into a second contract for an additional 1,000 beds, which required an expansion (construction) of the facility. (Ex. 5 at 2–4; Ex. 6.)
- **Marana Community Correctional Treatment Facility**: In 2013, ADCRR entered into a contract with Management and Training Corporation for the operation and management of the State's 500-facility to house adult male minimum security prisoners. (Ex. 8 at 6.)

II. Standard of Review.

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (1986)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 555, 557) (internal citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 662. A complaint must allege sufficient factual matter that is "plausible on its face." *Id*. at 678.

III. The Court Should Dismiss All Claims in the Complaint.

A. Plaintiffs Fail to State a Thirteenth Amendment Claim.

Section 1 in the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States…." U.S. Const. amend. XIII, § 1. "[T]he primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War." *United States v. Kozminski*, 487 U.S. 931, 942 (1988); *see also Civil Rights Cases*, 109 U.S. 3, 23, 25 (1883) (holding that the Thirteenth Amendment "simply abolished slavery" and "merely abolishes slavery").

Section 2 in the Thirteenth Amendment "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (quoting *Civil Rights Cases*, 109 U.S. at 20); *see* U.S. Const. Amend. XIII, § 2. For example, pursuant to this Section, Congress enacted the Civil Rights Act of 1866. *See Civil Rights Cases*, 109 U.S. at 22; *see also City of Memphis v. Greene*, 451 U.S. 100, 125 n.38 (1981) (discussing statutes enacted pursuant to the Thirteenth Amendment).

Plaintiffs do not contend that ADCRR's use of private prisons constitutes "involuntary servitude" or that they are subject to involuntary servitude. Nor do they allege that the use of private prisons violates any federal statute, or that they are subject to conditions that violate a federal statute. Plaintiffs contend only that the use of private prisons constitutes "slavery." (Dkt. 1, ¶¶ 74–81.) This is incomprehensible for many reasons, but two easily dispose of this claim. First, nothing in the privatization statutes or the Complaint resembles the re-institutionalization of African slavery. *See Civil Rights Cases*, 109 U.S. at 22 ("The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents."). There are no allegations concerning compulsory labor, color, or race. Likening the use of private prisons to the evil institution of African slavery "severely stretch[es] its short simple words and do violence to its history." *Palmer v. Thompson*, 403 U.S. 217, 226 (1971); *see also Civil Rights Cases*, 109 U.S. at 24 ("It would be running the slavery argument into the ground.").

Second, "[t]he Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute." *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (internal citation omitted); *see also Serra v. Lappin*, 600 F.3d 1191, 1196 (9th Cir. 2010) (quoting U.S. Const. amend. XIII, § 1) (Thirteenth Amendment "expressly excepts from that general prohibition forced labor 'as a punishment for crime whereof the party shall have been duly convicted.'"). Plaintiffs do not deny that they were duly convicted of their crimes, nor do they allege that the privatization statutes permit incarceration of non-convicted prisoners in private prisons. (Dkt. 1, ¶¶ 18–21.) Plaintiffs also do not allege that their sentences have been elongated (denied parole or sentencing credits) because of conduct by the operator of the private facility where they are incarcerated. Indeed, this is prohibited by the very statute that Plaintiffs challenge.

To make their claim seem plausible, Plaintiffs color it with imagery and metaphors. They allege that, because "prison corporations" are paid and presumably profit, prisoners in private facilities are "fungible assets," "human inventory," and "units of profit" used to "grow their businesses." (Dkt. 1, ¶¶ 43, 56.i, 61.a., 76.) In "this sense," they allege, private

contractors "commodify human beings," and prisoners become "slaves to the prison corporation." (*Id*., ¶¶ 43, 61.a.) The procurement process, they allege, is akin to a "public auction." (*Id*., ¶ 56.g.) None of these allegations, however, transform their claim into a Thirteenth Amendment violation. Inmates in private facilities are duly convicted prisoners, and ADCRR requires that each private-prison operator provides services that meet or exceed those provided in state-operated prisons. Private facilities are not engaging in African slavery. That a profit may or may not be derived from performing a much needed service is not unconstitutional.

Every court confronted with such allegations have rejected them. For example, in *Pischke v. Litscher*, 178 F3d 497, 499 (7th Cir. 1999), Wisconsin inmates argued that the state statute authorizing private prison contracts violated the Thirteenth Amendment. The Seventh Circuit called that contention "foolish," "thoroughly frivolous," a "complete lack of merit," and a "waste [of] money." *Id*. at 500–01. The reasoning was plain: "The Thirteenth Amendment, which forbids involuntary servitude, has an express exception for persons imprisoned pursuant to conviction for crime. Nor are we pointed to or can think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government." *Id*.

The Tenth Circuit has also rejected this claim. *See Rael v. Williams*, 223 F.3d 1153, 1154 (10th Cir. 2000) ("[T]he fact that an inmate is transferred to, or must reside in, a private prison, simply does not raise a federal constitutional claim."); *Montez v. McKinna*, 208 F.3d 862, 866 n.4 (10th Cir. 2000) ("We agree with the Seventh Circuit's reasoning that no provision of the Constitution would 'be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government,' regardless of its location.") (quoting *Pischke*); *accord Patscheck v. Snedeker*, 135 F. App'x 188, 190 (10th Cir. 2005); *Florez v. Johnson*, 63 F. App'x 432, 435 (10th Cir. 2003); *Moore v. Johnson*, 49 F. App'x 265 (10th Cir. 2002); *Nguyen v. McKinna*, 210 F.3d 390, *1 & n.2 (10th Cir. 2000) (unpublished); *Karls v. Hudson*, 182 F.3d 932 (10th Cir. 1999)

(unpublished); *see also Dunn v. Prince*, 2008 WL 11429942, at *5 (E.D. Tex. Feb. 15, 2008), *report and recommendation adopted*, 2008 WL 11429943 (E.D. Tex. Feb. 28, 2008), *aff'd*, 327 F. App'x 452 (5th Cir. 2009) ("The Plaintiff's Thirteenth Amendment claim based solely on the fact that he was housed in a facility operated by CiviGenics is frivolous and fails to state a claim upon which relief may be granted.").

Although the Supreme Court has never directly addressed this issue, it has "implie[d] that a state may constitutionally contract with a private entity to either manage its prison system or to privately incarcerate individuals convicted under its criminal statutes." *Lambert v. Sullivan*, 35 F. Supp. 2d 1131, 1134 (E.D. Wis. 1999). For example, in *Richardson v. McKnight*, 521 U.S. 399, 401 (1997), the court addressed "whether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983." It would be "odd for the Supreme Court to reach that issue if it harbored any doubts about the constitutionality of private incarceration." *Lambert*, 35 F. Supp. 2d at 1134. Indeed, the Supreme Court set forth a lengthy discussion regarding the history of private-prison operators and noted that "correctional functions have never been exclusively public." *Richardson*, 521 U.S. at 404–07. In subsequent decisions, the Court addressed whether to recognize an implied damages (*Bivens*) action for a constitutional violation against a private-prison corporation and employees of a private-prison corporation. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012). In neither case did the Supreme Court question the constitutionality of private prisons.[7]

[7] In *Richardson*, the Court held that private-prison employees—although considered state actors and therefore liable under § 1983—are not entitled to qualified immunity. 521 U.S. at 413. This was because "marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance." *Id.* at 410. In other words, "a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement … [and] … a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job." *Id.* at 409. These marketplace pressures and exposure to civil liability, as well as statutory criteria and contractual requirements, provide a level of oversight and accountability that undermine Plaintiffs' narrative that private-prison operators are incentivized to cut corners to maximize profits. Cutting corners could erase any profit and jeopardize their contract.

Plaintiffs' transfer to a privately operated prison does not convert them into slaves, nor does their lawful incarceration in a state-operated facility suddenly violate the Thirteenth Amendment once they step foot in a private facility. The Court should dismiss this claim.

B. Plaintiffs Fail to State an Eighth Amendment Claim.

The Eighth Amendment proscribes "cruel and unusual punishments." U.S. Const. amend. VIII. This protection, however, "is limited." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). "After incarceration, only the 'unnecessary and wanton infliction of pain' constitutes cruel and unusual punishment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham*, 430 U.S. at 670). "What is necessary to establish an 'unnecessary and wanton infliction of pain[]' … varies according to the nature of the alleged constitutional violation." *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). For example, a prisoner alleging unconstitutional conditions of confinement must allege deliberate indifference to a "substantial risk of serious harm," *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); a prisoner alleging inadequate medical care must allege deliberate indifference to their "serious medical needs," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); and a prisoner alleging excessive force must allege that the force was applied "maliciously and sadistically for the very purpose of causing harm," *Whitley*, 475 U.S. at 320–21.

Plaintiffs' Complaint does not allege any of these things. (Dkt. 1.) Although it alleges—at a hypothetical and abstract level—that the private "contract model" creates a "profit motive" for prison corporations to employ "cost-cutting measures" that "conflict with safety, security, and the individual welfare of those within private prisons" and "reduc[e] expenditures" (Dkt. 1, ¶¶ 32.j, 34, 36, 46, 54), it does not allege that these deprivations are actually occurring at any private facility, that Plaintiffs are in fact being exposed to them, or that they are resulting in constitutionally deficient conditions. Moreover, Plaintiffs' allegations that prison corporations have "strong incentives … to reduce" educational and job-training opportunities (*id.*, ¶¶ 34, 46) do not even state an Eighth Amendment claim. *See Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (holding that

diminished "job and educational opportunities … do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments"); *accord Baumann v. Arizona Dep't of Corr.*, 754 F.2d 841, 846 (9th Cir. 1985).

Conclusory allegations that prison corporations are "jailers that profit," and that inmates in private facilities are "treat[e]d as property" (Dkt. 1, ¶ 84) do not state an Eighth Amendment claim either. Plaintiffs' profit-motive theory simply does not allege any "deprivation" or "punishment." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *see also Sipes v. Sampson*, 2009 WL 2488085, at *5 (W.D. Mich. Aug. 13, 2009) ("[T]he mere fact of incarceration does not violate the Eighth Amendment."). Therefore, the Court should dismiss this claim.

C. Plaintiffs Fail to State a Fourteenth Amendment Due Process Claim.

Plaintiffs allege that placement in a private facility constitutes a deprivation of the "protected liberty interests of persons incarcerated," in violation of the Fourteenth Amendment's Due Process Clause. (Dkt. 1, ¶ 88.) The Supreme Court has held, however, that a prisoner's transfer to a different facility, either intrastate or interstate, does not implicate a protected liberty interest even if the transferee facility has less desirable conditions. *See Meachum v. Fano*, 427 U.S. 215, 225 (1976) ("Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. … That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules."); *Olim v. Wakinekona*, 461 U.S. 238, 248 (1983) ("[A]n interstate prison transfer, including one from Hawaii to California, does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself."). The Court has refused to create a protected liberty interest in a prisoner's situs because it would "involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum*, 427 U.S. at 228–29. "The federal courts do not sit to supervise state prisons." *Id.*

Applying *Meachum* and *Olim*, courts have consistently rejected claims that a prisoner's transfer to a private prison implicates a protected liberty interest, holding that "[a] prisoner has a legally protected interest in the conduct of his keeper, but not in the keeper's identity." *Pischke*, 178 F.3d at 500–01; *see also Frazier v. Johnson*, 33 F. App'x 484 (10th Cir. 2002) ("Frazier argues that his incarceration in a county facility administered by a private company, rather than a state facility, violates his due process and equal protection rights. We can perceive no federal constitutional component to this claim."); *Poulos v. McKinna*, 210 F.3d 390 (10th Cir. 2000) (unpublished) ("[W]e find Poulos's claims that the transfer [to a private prison] violated due process and the Supremacy Clause without merit."); *Gering v. GEO Grp. Inc.*, 2017 WL 784594, at *4 (M.D. Fla. Mar. 1, 2017) ("Plaintiff's argument that his commitment to the FCCC is unconstitutional merely because the facility is privately operated by a for-profit real estate investment trust does not state a 42 U.S.C. § 1983 claim."); *Rhodes v. Fletcher*, 2005 WL 3003478, at *3–4 (E.D. Ky. Nov. 8, 2005) ("Based on the weight of this authority, the plaintiff's due process claim relating to the private operation of the LAC lacks merit and must be dismissed."); *Green v. New York State Dep't of Corr. Servs.*, 2003 WL 22169779, at *4 (N.D.N.Y. Aug. 27, 2003) ("It is well-settled that the transfer of prisoners from one correctional facility to another, without more, does not implicate a protected liberty interest. … This is true whether the inmate is transferred within the same correctional system to correctional facilities in another state, to privately run correctional facilities, or from state to federal facilities."); *Lewis v. Sullivan*, 135 F. Supp. 2d 954, 961 (W.D. Wis. 2001), *rev'd on other grounds*, 279 F.3d 526 (7th Cir. 2002) ("In and of itself, such a claim is legally frivolous, because the law is firmly established that prisoners have no right to be housed in any particular institution and may be housed out-of-state, even in a privately run facility.").

So has the Ninth Circuit. In *White v. Lambert*, a Washington inmate alleged that his due process (liberty) interests were violated as a result of his transfer "to a private prison solely motivated by profit." 370 F.3d 1002, 1013 (9th Cir. 2004), *overruled on other grounds by Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010). The court held that this

"constitutional challenge … [was] properly rejected by the district court."

> [T]he Supreme Court in *Olim v. Wakinekona* rejected this type of argument. ... Incarceration in a private prison does not change this analysis because state prison facilities have never "been exclusively public." The state court's determination that White's due process claim failed was not "contrary to" or "an unreasonable application of, clearly established Federal law."

Id. (internal citations omitted); *accord Ohman v. Arizona Dep't of Corr.*, 2019 WL 961105, at *3 (D. Ariz. Jan. 22, 2019), *report and recommendation adopted sub nom., Ohman v. United States*, 2019 WL 955234 (D. Ariz. Feb. 27, 2019); *see also Adkins v. Corr. Corp. of Am.*, 301 F. App'x 710, 711 (9th Cir. 2008) ("Summary judgment was proper because, contrary to Adkins' contention, his transfer to an out-of-state private prison did not implicate the Due Process Clause of the Fourteenth Amendment."). Because Plaintiffs have no liberty interest in remaining in a state-operated facility, their due process claims fail. *See Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) ("A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution.").

D. Plaintiffs Fail to State a Fourteenth Amendment Equal Protection Claim.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Statutes facing an equal-protection challenge are subject to a rational basis review unless it involves a suspect class or substantially burdens a fundamental right. *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003). Here, prisoners are not a suspect class, *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998), and as discussed above, the statute does not implicate any fundamental right. Thus, Plaintiffs must demonstrate not only that they are "similarly situated" to those in state-operated facilities, *Cleburne*, 473 U.S. at 439, but that the privatization statutes are "rationally related to legitimate governmental objectives," *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Plaintiffs cannot demonstrate either one.

Plaintiffs' allegations foreclose any finding that prisoners in private facilities are in "situations [that] are arguably indistinguishable" from prisoners in state facilities. *Ross v.*

Moffitt, 417 U.S. 600, 609 (1974); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (Equal Protection Clause prohibits disparate treatment of individuals "who are in all relevant respects alike"). They expressly allege that private facilities provide *different* opportunities and present *different* conditions than state facilities. *See Frazier v. Zavaras*, 2011 WL 4537001, at *6 (D. Colo. Sept. 30, 2011) ("Plaintiff was not similarly situated to those other inmates precisely because those other inmates are housed at different facilities."); *Boulware v. Fed. Bur. of Prisons*, 518 F. Supp. 2d 186, 190 (D.D.C. 2007) ("In determining whether a prisoner is being denied equal protection of the laws, the class to which he belongs consists of the persons confined as he was confined, subject to the same conditions to which he was subject.").

The fact that prisoners in both private and state facilities are all prisoners is immaterial. *See Outley v. Penzone*, 2019 WL 5088734, at *5 (D. Ariz. Aug. 1, 2019), *report and recommendation adopted*, 2019 WL 4051810 (D. Ariz. Aug. 28, 2019) ("But Plaintiff proffers no basis to conclude that his situation is indistinguishable from inmates at other jail units."); *Byrd v. Arpaio*, 2007 WL 9723160, at *2 (D. Ariz. May 30, 2007) ("[I]nmates are not entitled to identical treatment as other inmates merely because they are all inmates."). "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940); *see also Outley*, 2019 WL 5088734, at *5 ("Plaintiff suggests nothing that requires that inmates must be treated the same at all jail units."). Plaintiffs also do not allege that Director Shinn intentionally discriminated them, or discriminates against any prisoner transferred to a private facility. *See Somuano v. Geo Grp., Inc.*, 2012 WL 227737, at *5–6 (W.D. Pa. Jan. 5, 2012), *report and recommendation adopted*, 2012 WL 242890 (W.D. Pa. Jan. 25, 2012) ("Even if the Court assumes, arguendo, that Plaintiff has satisfied the 'similarly situated requirement,' he is still required to show that the alleged difference in treatment was the result intentional or purposeful discrimination.").

Furthermore, the privatization statutes bear a "rational relationship to a legitimate state purpose." *Saddiq v. Trinity Servs. Grp.*, 198 F. Supp. 3d 1051, 1055 (D. Ariz. 2016);

see also Walker v. Gomez, 370 F.3d 969, 975 (9th Cir. 2004) (test is "whether a valid rational connection exists between defendants' actions and a legitimate penological interest"). For example, private contracts offer "cost savings" for the State. (Dkt. 1, ¶ 28, citing A.R.S. § 41-1609(G).) Indeed, even critics of the private prison industry recognize its potential benefits, including maximizing State resources, relieving overcrowding, and increased accountability. *See, e.g.*, David E. Pozen, *Managing A Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & Pol. 253, 261–62 (2003); Developments in the Law III: A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons, 115 Harv. L. Rev. 1868, 1870–1875 (2002). Plaintiffs do not provide any allegations that the Arizona Legislature's enactment of the privatization statutes was "malicious, irrational or plainly arbitrary." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). The Court should dismiss this claim. *See Frazier*, 33 F. App'x 484 (rejecting equal protection claim brought by state inmate housed in private facility).

IV. Plaintiffs Fail to State Either a Facial or As-Applied Challenge to the Privatization Statutes.

Although the Complaint challenges the constitutionality of "Arizona statutes that authorize prison privatization" (Dkt. 1, Prayer for Relief, ¶ B), it never identifies or specifies *which* statute, section, or subsection Plaintiffs are challenging. For that reason alone, the Complaint fails to state a claim. The Complaint also does not make clear whether it is raising a facial challenge or an as-applied challenge, although their request for relief and supporting allegations (which do not discuss the individual Plaintiffs at all) leave no room for an as-applied challenge. *See Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) (an "as-applied attack" challenges "one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance"). Nonetheless, it fails to state a claim under either theory. *See id.* at 857 (noting that "the substantive legal tests used in the two challenges are 'invariant'") (quotation omitted).

A plaintiff can only succeed on a facial challenge to a statute by "establish[ing] that no set of circumstances exists under which the Act would be valid." *United States v.*

Salerno, 481 U.S. 739, 745 (1987). "[S]uch challenges are considered the most difficult to mount successfully." *Willis v. City of Seattle*, 943 F.3d 882, 886 (9th Cir. 2019). Facial challenges are disfavored because "[c]laims of facial invalidity often rest on speculation," they "run contrary to the fundamental principle of judicial restraint," and they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008). Courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id*.

Plaintiffs' challenge is entirely speculative. It relies on a series of presumptions to create one allegedly unconstitutional circumstance, but it ignores many other circumstances that do not result in the same. For example, it cynically presumes that a private contractor that is awarded a contract *will*: (1) attempt to "increase corporate profits and corporate executive compensation" and in fact profit; (2) employ "cost-cutting measures [that] conflict with safety, security and the individual welfare of those within the private prisons"; (3) "reduce programs and services" and "expenditures for such things as medical care, dental care, education and training"; (4) consider prisoners "assets" and use them "to entice investments and use as collateral to borrow and grow their businesses"; and (5) take actions that "may reduce their opportunity of parole or early release." (Dkt. 1, ¶¶ 32.j, 34, 43, 43, 46, 49–50.) It also presumes that a private facility: (1) is less safe and secure; (2) does not adequately train and certify their staff; and (3) and engages in "sub-standard contract performance." (*Id*., ¶¶ 35–36, 46, 52.)

On their face, however, the privatization statutes do not allow, much less *require*, this conduct. To the contrary, they require qualified private operators to comply with the applicable correctional standard of care and provide a level of service that meets or exceeds the level of service provided by ADCRR. *See* A.R.S. §§ 41-1609.01(B), -(H), 41-1609.02(B). Contractors are also prohibited from taking measures that affect inmate release dates or sentencing credits. A.R.S. § 41-1609.01(M). The contracts make this clear as well.

(*See* Exhibits 1–8, *supra*.) Certainly, one can imagine a set of circumstances in which the use of a private prison does not violate the Constitution, simply by operating in a matter contrary to Plaintiffs' allegations. Indeed, even they concede that the statutes make their claims only theoretically possible. (*See* Dkt. 1, ¶ 32.i ["ADCRR enables private for-profit prison corporations to make profits…"]; ¶ 43 ["In this sense, ADCRR enables private prison corporations to commodify human beings…"].) Plaintiffs also do not allege that ADCRR is part of some scheme to profit, that the Director or any ADCRR employee financially benefits from the private contracts, or that the Director intentionally discriminates against any particular inmate in assigning them to a private facility. Therefore, in addition to failing to state a constitutional claim or a violation of any individual Plaintiffs' constitutional rights, Plaintiffs have failed to plead a plausible statutory challenge.

V. Conclusion.

For these reasons, the Court should dismiss Plaintiffs' Complaint.

DATED this 17th day of August, 2020.

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CERTIFICATE OF CONFERRAL

Undersigned counsel certifies that, before filing this Motion, Defendant's counsel notified Plaintiffs' counsel of the issues asserted herein and met and conferred, but the parties were unable to agree that the Complaint was curable in any part by a permissible amendment (with the exception of moving to correct the spelling of Plaintiff Bordeaux's name).

/s/ Nicholas D. Acedo

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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I hereby certify that on this same date, I served the attached document by U.S. Mail, postage prepaid, on the following, who is not a registered participant of the CM/ECF System:

/s/ Nicholas D. Acedo

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