

1 TERRY GODDARD
Attorney General
2 Firm Bar No. 14000
3 Mary O'Grady, No. 011434
Solicitor General
4 Steven A. Lamar, No. 004140
Senior Litigation Counsel
5 Carrie J. Brennan, No. 018250
6 Barbara A. Bailey, No. 018230
Assistant Attorneys General
7 1275 West Washington Street
Phoenix, Arizona 85007-2926
8 Tel: (602) 542-7826
9 Fax: (602) 542-8308
Attorneys for the State of Arizona and
10 the Arizona Secretary of State

11 **IN THE UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 MARIA M. GONZALEZ, et al.,
14 Plaintiffs,
15 v.
16 STATE OF ARIZONA, et al.
17 Defendants.

No. CV06-01268 PHX ROS
No. CV06-1362 PCT ROS (Cons)
No. CV06-1575 PCT ROS (Cons)

BRIEF BY DEFENDANTS
STATE OF ARIZONA AND
ARIZONA SECRETARY OF STATE
RE: THE IMPACT OF CRAWFORD
V. MARION COUNTY ELECTION
BOARD

(Assigned to the Honorable
Roslyn O. Silver)

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Preliminary Statement

The Supreme Court’s decision in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), leaves no room for doubt that Arizona’s voting identification requirement is constitutional. *Crawford* is equally dispositive of Plaintiffs’ equal protection challenge to Arizona’s proof of citizenship law. Both the voting identification and proof of citizenship requirements are reasonable restrictions that are relevant to an individual’s qualification to vote. *Crawford* recognizes and approves of the important state interests furthered by such requirements. *Crawford* also makes clear that plaintiffs challenging such restrictions bear a heavy burden of proving that the restrictions are excessively burdensome in light of those strong state interests.

Plaintiffs in this case long asserted that they would survey those individuals whose voter registration forms were rejected for failure to provide proof of citizenship and those individuals who voted a conditional provisional ballot that was not subsequently counted. On the respective deadlines to produce the results of those surveys, however, Plaintiffs informed Defendants that their survey expert would not testify and that they had no reports to serve. Moreover, after two years of litigation, there is not a single plaintiff in any of these consolidated cases who cannot vote or register due to the requirements of Proposition 200.

Under *Crawford*, Plaintiffs’ equal protection challenges must fail because none of them is unable to register or vote for lack of identification or proof of citizenship and they have not shown the extent to which the requirements impose any burden on others. Accordingly, State Defendants expect to move for summary judgment on all claims, including the equal protection claims, by the dispositive motion deadline (June 6), which is set immediately to follow the close of final supplementation of all discovery in the case.

A. The Indiana Law and the Claims Brought in *Crawford*.

In an amicus brief in support of the *Crawford* petitioners, one of the law firms prosecuting *this* case described the Indiana voting identification requirements as “the most restrictive voter ID provisions in the Nation.” [Br. of Lawyers Committee for Civil Rights Under Law, *et al.*, as amicus curiae for petitioners, *Crawford v. Marion County*

1 *Election Bd.*, brief at 2007 WL 3407030, at *28 (filed Nov. 13, 2007)]. The law
2 challenged in *Crawford* requires citizens voting in person either on Election Day or
3 during early voting to present photo identification issued by the government. *Crawford*,
4 128 S. Ct. at 1613. The requirement does not apply to mail-in balloting. *Id.*

5 Indiana issues photo identification cards at no cost to its citizens. *Id.* at 1621. To
6 obtain such a card, however, “a person must present at least one ‘primary’ document,
7 which can be a birth certificate, certificate of naturalization, U.S. veterans photo
8 identification, U.S. military photo identification, or a U.S. passport.” *Id.* at 1621 n.17.
9 Indiana, “like most states, charges a fee for obtaining a copy of one’s birth certificate,”
10 which fee may range from \$3 to \$12. *Id.* In addition, the person must present a
11 “secondary” document and a “proof of residency” document. 140 Ind. Admin. Code
12 (“I.A.C.”) § 7-4-2(c). A secondary document may consist of other identification cards,
13 licenses, permits, transcripts, and marriage and divorce papers, among other items. *Id.*
14 § 7-4-2(d). A proof of residency document may consist of a voter registration card,
15 social security card, vehicle registration, affidavit of residency, and change of address
16 confirmation, among other items. *Id.* § 7-4-2(e).¹

17 Indiana’s photo identification requirement does not apply to persons living and
18 voting in a state-licensed facility, such as a nursing home. *Crawford*, 128 S. Ct. at 1613.
19 In addition, a person who fails to show the required photo identification nonetheless may
20 vote a provisional ballot and have her ballot counted if she travels to the county seat
21 within ten days after each election and provides the requisite identification or completes
22 an affidavit of either indigence or religious objection to being photographed. Ind. Code
23 § 3-11.7-5-2.5(b), (c). In Indiana, voters may vote absentee (by mail or in person) only
24 if they meet certain criteria, relating to factors such as age, disability or availability.²

25 ¹ Alternatively, a person may present two primary documents and a proof of residency
26 document. 140 I.A.C. § 7-4-2(c).

27 ² See http://www.in.gov/sos/08_IN_Primary_%20Media_Kit.pdf, at p. 4. To be eligible
28 to vote absentee in Indiana, voters must meet at least one of the following criteria: have
an expectation of being absent from the county on Election Day during polling hours;
have a disability; be at least 65 years old; have official election duties outside the
precinct; be scheduled to work during the entire time that the polls are open; be

1 The plaintiffs in *Crawford* included state and local Democratic Party committees,
2 elected officials, individual electors, and nonprofit organizations representing minority,
3 poor, disabled and elderly voters. *Crawford*, 128 S. Ct. at 1614, 1622. The challengers
4 claimed that Indiana’s voter identification law violated the equal protection clause by
5 placing a substantial burden on the right to vote. *Id.* at 1614. The case did not involve
6 any claims under federal statutory laws (*e.g.*, the Voting Rights Act or Civil Rights Act).

7 **B. The *Crawford* Opinion and Holding.**

8 The Court held that Indiana’s voter identification law furthered important state
9 interests and that its challengers failed to bear their “heavy burden of persuasion” that
10 the statute was unconstitutional in all its applications. *Id.* at 1617, 1622-23. Two
11 aspects of the Court’s decision are especially important to this case. First, the Court
12 recognized specific state interests that are furthered by the voter identification law.
13 Those interests include the deterrence and detection of voter fraud and public confidence
14 in the integrity of the electoral process. *Id.* at 1617. The Court recognized those
15 interests even though there was no evidence that Indiana itself had ever experienced in-
16 person voter fraud. *Id.* at 1619.

17 The Court held that the identification requirement was a reasonable measure to
18 ensure that only eligible voters were permitted to vote. *See id.* at 1624 (“The application
19 of the statute to the vast majority of Indiana voters is amply justified by the valid interest
20 in protecting ‘the integrity and reliability of the electoral process.’”) In so holding, the
21 Court distinguished between restrictions on voting that were relevant to a person’s
22 qualifications to vote and those restrictions that were not related to voter eligibility. *Id.*
23 at 1616 (explaining that the Court had struck down the \$1.50 poll tax in *Harper v.*
24 *Virginia Bd. of Elections* because “it was irrelevant to the voter’s qualifications”).

25 Second, the Court found that the *Crawford* plaintiffs offered no credible evidence
26 of the number of registered voters who lacked the requisite identification or could not
27 get it. *Id.* at 1622-23, n.20. The Court acknowledged that as many as 43,000 state
28 voters may not have possessed photo identification at the time the Indiana law was

prevented from voting for religious reasons during polling hours; be a participant in the
state’s confidentiality program.

1 adopted. The relevant inquiry, however, was the number of individuals who actually *did*
2 *not have or could not get* the necessary identification. *See id.* at 1623 n.20. Moreover,
3 the plaintiffs presented little evidence that they themselves were unable to vote as a
4 result of the identification requirement. *Id.* at 1622-23.

5 For example, one plaintiff was an elderly woman who had experienced difficulty
6 obtaining an identification card. *Id.* at 1622. The woman had recently obtained her birth
7 certificate, however, and intended to return to the bureau of motor vehicles to obtain an
8 identification card. *Id.* Six other elderly plaintiffs lacked identification but either
9 possessed birth certificates or did not show how difficult it would be for them to obtain
10 one. *Id.* One elderly plaintiff stated that she had unsuccessfully attempted to obtain an
11 out-of-state birth certificate and another plaintiff stated that he did not know how to
12 obtain an out-of-state birth certificate. Such a showing was insufficient, however, to
13 invalidate the entire statute.³ Moreover, plaintiffs presented no evidence about the
14 number of indigent voters who lack copies of their birth certificates. *Id.* at 1623 n.20.

15 The Court concluded:

16 In sum, on the basis of the record that has been made in this
17 litigation, we cannot conclude that the statute imposes excessively
18 burdensome requirements on any class of voters. A facial challenge must
19 fail where the statute has a plainly legitimate sweep. When we consider
20 only the statute's broad application to all Indiana voters we conclude that it
21 imposes only a limited burden on voters' rights. The precise interests
22 advanced by the State are therefore sufficient to defeat petitioners' facial
23 challenge to [Indiana's voting identification law].

24 *Id.* at 1623 (internal quotation marks and citations omitted).

25 **C. *Crawford* Is Dispositive of Plaintiffs' Equal Protection Claims.**

26 **1. *Overview of the remaining case and how Crawford applies.***

27 The Court previously granted summary judgment in favor of Defendants on the
28 majority of the claims asserted in the pleadings in these consolidated cases. [See dkt
330]⁴ Thus, following defense motions, the only claims remaining are those based on

³ The Court noted that Indiana's elderly have the option of voting absentee without presenting photo identification. *Id.*

⁴ The Court also granted Defendants' motion to dismiss newly-asserted claims in

1 the equal protection clause, Section 2 of the Voting Rights Act and Title VI of the Civil
2 Rights Act.

3 Moreover, within approximately the last month, Defendants reached agreement
4 with all Native American plaintiffs to resolve without further litigation those plaintiffs’
5 challenge to Arizona’s voting identification requirement. As a result of that agreement,
6 the Navajo Nation case (No. CV 06-1575) is to be dismissed upon preclearance of
7 revised procedures for Native American electors. [See dkt. 749, 754] The claims of the
8 Native American plaintiffs in the ITCA case (No. CV 06-1362) challenging the voting
9 identification requirement likewise are to be dismissed upon such preclearance.⁵

10 With regard to the remaining claims, *Crawford* is dispositive of the equal
11 protection claims for the reasons explained below. Moreover, although not the subject
12 of this brief, Defendants believe that Plaintiffs’ statutory claims should be decided on
13 summary judgment because they do not involve any genuine issue of material fact.

14 **2. Voting identification requirement.**

15 The *Crawford* case is strikingly similar to Plaintiffs’ equal protection case here,
16 with one notable difference—the identification requirement in Indiana is considerably
17 *more* restrictive than Arizona’s. Arizona electors are not limited to government-issued
18 photo identification. Instead, electors have many options for complying with Arizona’s
19 voting identification requirement.

20 For in-person voting on Election Day, Arizona’s law requires an elector to
21 present either “one form of identification that bears the name, address and photograph of
22 the elector or two different forms of identification that bear the name and address of the
23 elector.” A.R.S. § 16-579(A). Valid forms of photo identification include: valid
24 Arizona driver license; valid Arizona non-operating identification license; tribal
25 enrollment card or other form of tribal identification; and valid United States federal,
26 state, or local government issued identification.⁶

26 Gonzalez Plaintiffs’ First Amended Complaint. [See dkt. 611]

27 ⁵ The ITCA Native American plaintiffs, however, continue to challenge the proof of
28 citizenship requirement for registration.

⁶ “An identification is ‘valid’ unless it can be determined on its face that it has expired.”

1 Valid forms of non-photo identification include:

2 Utility bill of the elector that is dated within 90 days of the date of
3 the election (electric, gas, water, solid waste, sewer, telephone, cellular
4 phone, or cable television);

5 Bank or credit union statement that is dated within 90 days of the
6 date of the election;

7 Valid Arizona vehicle registration;

8 Indian census card;

9 Property tax statement of the elector's residence;

10 Tribal enrollment card or other form of tribal identification;

11 Vehicle insurance card;

12 Recorder's certificate; and

13 Valid United States federal, state, or local government issued
14 identification, including a voter registration card issued by the County
15 Recorder.

16 [Arizona Secretary of State Elections Procedures Manual (October 2007),
17 http://www.azsos.gov/election/Electronic_Voting_System/2007/Manual.pdf, at p. 128]

18 Under *Crawford*, Plaintiffs have the burden of coming forward with credible
19 evidence about the number of individuals who are actually burdened by the
20 identification law and the extent of any such burden. After two years of litigation,
21 however, there is **no** evidence of the number of Arizona electors who lack sufficient
22 identification for voting in person at the polls. Plaintiffs previously urged the Court to
23 order production of thousands of conditional provisional ballots from each of Arizona's
24 fifteen county treasurers so that Plaintiffs could survey those voters to find out each
25 voter's circumstances with regard to identification.

26 On April 25, 2008, the deadline for Plaintiffs to produce the results of their voting
27 identification survey, they instead sent a letter to defense counsel withdrawing their
28 survey expert as a testifying expert and redesignating him as a consulting expert. [See
letter attached at Tab 1] Plaintiffs offered no explanation for their complete reversal of

[Arizona Secretary of State Elections Procedures Manual (October 2007),
http://www.azsos.gov/election/Electronic_Voting_System/2007/Manual.pdf, at p. 128]

1 course, but it is reasonable to conclude that whatever survey they conducted did not
2 support their case.⁷

3 Moreover, apart from the absence of any evidence of the number of Arizona
4 electors who actually lack sufficient voting identification, none of the named plaintiffs is
5 unable to vote in-person at the polls for lack of identification. To the contrary, discovery
6 has revealed that each of the named plaintiffs who challenges the identification
7 requirement in fact possesses sufficient identification to vote in-person on Election Day
8 and to have his or her vote counted.⁸

9 It is not surprising that Plaintiffs have not offered any evidence that Arizona's
10 identification requirement imposes a burden on the right to vote. It is easy to comply
11 with Arizona's identification requirement. Most electors have a valid driver's license or
12 non-operating license. In addition, many of Arizona's counties (including its two largest
13 counties) accept as a form of non-photo identification election mail sent by the county to
14 the elector before an election. Thus, many voters are provided sufficient identification
15 by the counties at no charge in the form of voter registration cards and official election
16

17 ⁷ Plaintiffs offered evidence during the preliminary injunction hearing in 2006
18 that **87.4%** of Arizona's registered voters possessed a valid Arizona driver's license or
19 non-operating license. [See Decl. of Counsel in Supp. of Mot. for Partial Summ. J. by
20 Defs. State of Arizona and the Arizona Secretary of State, dkt. 282-1 (filed June 4, 2007)
21 ("Dkt. 282-1") ¶ 5, Tabs 4 (deposition testimony of Ronald Anthony Sissons) at 77:15-
22 21] Thus, by Plaintiffs' own evidence, the large majority of Arizona electors possess
23 sufficient voting identification. The only other evidence presented or disclosed by
24 Plaintiffs in this case regarding the number of individuals who actually lack sufficient
25 identification was part of that same expert opinion evidence during the preliminary
26 injunction proceedings. Plaintiffs' expert, Ronald Anthony Sissons, estimated the
27 numbers of individuals who possessed certain forms of voting identification. Mr.
28 Sissons did not offer any evidence, however, about the number of Arizona citizens who
do not have *any* voting identification or the number of individuals who cannot get any
such identification.

⁸ See State Defs.' Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) (Lack of
Standing) Directed to Gonzalez Plaintiffs and Mem. in Supp. Thereof, dkt. 434, at 5-7;
Mot. to Supplement the Record in Supp. of State Defs.' Mot. to Dismiss Pursuant to Fed.
R. Civ. P. 12(b)(1), dkt. 616, at 1-2; State Defs.' Mot. to Dismiss Pursuant to Fed. R.
Civ. P. 12(b)(1) (Lack of Standing) Directed to Agnes Laughter, dkt. 433, at 2-4.

1 mail. [Dkt. 282-1 ¶¶ 6-9, Tabs 5-8]⁹ Finally, unlike the restrictive early voting criteria
2 in Indiana, any and every Arizona voter may vote (without identification) during early
3 voting, which permits them to vote by mail or even to take their ballot to the polls on
4 Election Day.

5 Although Indiana’s law contains a provision for indigent electors to travel to the
6 county seat within ten days of the election to complete an affidavit of indigence, the
7 absence of that provision does not render Arizona’s law unconstitutional for two
8 reasons. First, as explained above, Arizona’s law specifies many more forms of
9 identification than does Indiana’s law that may be used as voting identification.

10 Second, Plaintiffs have not demonstrated any burden (either to themselves or to
11 others) caused by the absence of an indigence exception in Arizona’s law. As explained
12 above, there is no evidence of the extent to which Arizona electors lack sufficient
13 identification for voting in person at the polls. There *is* evidence, however, that
14 identification sufficient to comply with the voting identification requirement is provided
15 for free by the counties. As was the case in *Crawford*, Plaintiffs “have not demonstrated
16 that the proper remedy—even assuming an unjustified burden on some voters—would
17 be to invalidate the entire statute.” *Crawford*, 128 S. Ct. at 1623.

18 **3. Proof of citizenship requirement.**

19 Like the voting identification requirement, Arizona’s proof of citizenship
20 requirement is a reasonable measure to ensure that only eligible individuals register to
21 vote. *Crawford* makes clear that such restrictions generally should be upheld unless the
22 challengers offer credible evidence that the restriction imposes an excessive burden that
23 outweighs the important state interests. Here, Plaintiffs must offer evidence of the
24 number of individuals both who are eligible to register *and* who do not possess requisite
25 proof and cannot obtain it.

26 ⁹ For the few voters who are not provided with a second form of non-photo
27 identification in the form of official election mail, a free Recorder’s Certificate can be
28 obtained at the County Recorder’s Office and used as a second form of non-photo
identification.

1 On more than one occasion, Plaintiffs have represented to the Court and
2 Defendants that they intended to offer such evidence in the form of an expert survey of
3 those individual whose registration forms were rejected for failure to provide proof of
4 citizenship. On March 28, 2008, however, the Plaintiffs revealed that their survey expert
5 would not testify after all. [See letter attached at Tab 2] As with Plaintiffs’ voting
6 identification evidence, Plaintiffs did not explain why they decided to withdraw their
7 expert from testifying. They plainly would not have done so, however, had that
8 evidence supported their case.

9 Although Plaintiffs have served reports in which their proffered experts opine that
10 Proposition 200 has had an “impact” on Arizona registration, there is **no** evidence
11 whatever about the number of individuals in Arizona who are eligible to register to vote
12 and who cannot do so because they lack proof of citizenship. Neither is there any
13 evidence about the number of individuals who cannot obtain such proof.

14 Moreover, as with the plaintiffs who challenge the voting identification
15 requirement, none of the plaintiffs challenging Arizona’s proof of citizenship
16 requirement actually lacks proof of citizenship to register to vote. Indeed, one of those
17 plaintiffs (Maria Gonzalez) is currently registered to vote.¹⁰ Another plaintiff, Jesus
18 Gonzalez, admits that he possesses a certificate of naturalization, which contains an alien
19 registration number that may be used as proof of citizenship.¹¹ Although Plaintiffs were
20 asked during discovery to identify any individuals of whom they were aware who do not
21 possess proof of citizenship, they have identified no such individuals who are not
22 already registered to vote.

23 *Crawford* holds that plaintiffs who seek to invalidate a statute that is intended to
24 ensure voter eligibility must demonstrate with credible evidence the burden it imposes.
25 Because Plaintiffs have not met that burden here, State Defendants expect to move for
26 summary judgment on Plaintiffs’ equal protection claims challenging the voter
27 identification and proof of citizenship requirements of Prop 200.

28 ¹⁰ See dkt. 434, at 3-4 (and citations to the record).

¹¹ See dkt. 434, at 4-5 (and citations to the record).

1 **D. Plaintiffs’ Remaining Claims Should Be Decided on Summary**
2 **Judgment in Accordance with the Court’s Briefing Schedule.**

3 Under the Court’s Final Amended Scheduling Order, dispositive motions are due
4 by June 6, 2008, which date was set immediately to follow the deadline for final
5 supplementation of all discovery, including expert discovery. The Court’s Order
6 specifically excepted dispositive motions that would be governed by the impending
7 *Crawford* decision. Now that *Crawford* has been decided, however, State Defendants
8 expect to move by the dispositive motion deadline for summary judgment on all claims
9 against all remaining plaintiffs in these cases.

10 RESPECTFULLY SUBMITTED this 13th day of May 2008.

11 TERRY GODDARD
12 Arizona Attorney General

13 s/ Barbara A. Bailey
14 Mary O’Grady
15 Solicitor General
16 Steven A. Lamar
17 Senior Litigation Counsel
18 Carrie J. Brennan
19 Barbara A. Bailey
20 Assistant Attorneys General
21 Attorneys for the State of Arizona and the
22 Arizona Secretary of State
23
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25
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 13th day of May 2008, I electronically transmitted
3 the attached document to the Clerk's Office using the ECF System for filing, and
4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
5

6 David J. Bodney
7 Karen J. Hartman-Tellez
8 Steptoe & Johnson LLP
9 201 East Washington St., Ste. 1600
10 Phoenix, Arizona 85004-2382
11 dbodney@steptoe.com
12 khartman@steptoe.com

13 David B. Rosenbaum
14 Thomas L. Hudson
15 Sara S. Greene
16 Osborn Maledon, P.A.
17 2929 N. Central, 21st Floor
18 Phoenix, Arizona 85012-2793
19 drosenbaum@omlaw.com
20 thudson@omlaw.com
21 sgreene@omlaw.com

22 Jon Greenbaum
23 Benjamin Blustein
24 Lawyers' Committee For
25 Civil Rights Under Law
26 1401 New York Avenue, Ste. 400
27 Washington, D.C. 20005
28 jgreenbaum@lawyerscommittee.org

29 Neil Bradley
30 ACLU Southern Regional Office
31 2600 Marquis One Tower
32 245 Peachtree Center Avenue
33 Atlanta, Georgia 30303
34 nbradley@aclu.org

1 Elliot M. Mincberg
2 People for the American
3 Way Foundation
4 2600 M Street, NW, Ste. 400
5 Washington, DC 20036
6 eminberg@pfaw.org

7 Daniel B. Kohrman
8 AARP Foundation Litigation
9 601 E Street, N.W., Ste. A4-240
10 Washington, DC 20049
11 dkohrman@aarp.org

12 Joe P. Sparks
13 Susan B. Montgomery
14 Sparks, Tehan & Ryley PC
15 The Inter Tribal Council of Arizona, Inc.
16 7503 First Street
17 Scottsdale, Arizona 85251
18 joe-sparks@qwest.net

19 David J. Becker
20 People for the American Way Foundation
21 2000 M Street, NW, Suite 400
22 Washington, D.C. 20036
23 dbecker@pfaw.org

24 Daniel R. Ortega, Jr.
25 Roush McCracken Guerrero
26 Miller & Ortega
27 650 N. 3rd Avenue
28 Phoenix, Arizona 85003
danny@rmgmoinjurylaw.com

Nina Perales
Mexican American Legal Defense and Education Fund
110 Broadway, Ste. 300
San Antonio, Texas 78205
nperales@maldef.org

1 M. Colleen Connor
2 MCAO Division of County Counsel
3 222 N. Central Avenue, Ste. 1100
4 Phoenix, Arizona 85003
connorc@mcao.maricopa.gov

5 Dennis I. Wilenchik
6 Kathleen Rapp
7 Wilenchik and Bartness, P.C.
8 2810 N. Third Street
9 Phoenix, Arizona 85004
diw@wb-law.com
kathleenr@wb-law.com

10 Judith M. Dworkin
11 Marvin S. Cohen
12 Patricia Ferguson-Bohnee
13 SACKS TIERNEY P.A.
14 4250 N. Drinkwater Blvd. 4th
15 Scottsdale, Arizona 85251-3693
Judith.Dworkin@sackstierney.com

16 Criss E. Candelaria
17 Bradley Carlyon
18 Apache County Attorneys Office
19 PO Box 637
20 St. Johns, Arizona 86025
bcarlyon@apachelaw.net

21 Melvin R. Bowers, Jr.
22 Lance B. Payette
23 Navajo County Attorneys Office
24 PO Box 668
25 Holbrook, Arizona 86025
lance.payette@co.navajo.az.us

26 Brenna L. Clani
27 Navajo County Department of Justice
28 PO Box 2010
Window Rock, Arizona 86515
brennalclani@navajo.org

1 Jean E. Wilcox
2 Coconino County Attorney's Office
3 110 East Cherry Ave.
4 Flagstaff, Arizona 86001
5 jwilcox@coconino.az.gov

6 **COPY** also served the following business day, the 14th day of May 2008, by
7 U.S. Mail with Notice of Electronic Filing, on the following, who may not be a
8 registered participant of the ECF System:

9 The Honorable Roslyn O. Silver
10 United States District Court
11 Sandra Day O'Connor U.S. Courthouse, Suite 624
12 401 West Washington Street, SPC 59
13 Phoenix, AZ 85003-2158

14 /s Elizabeth Stark

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