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14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE DISTRICT OF ARIZONA

16	Maria M. Gonzalez, et al.,	)	No. CV-06-1268-PHX-ROS(Lead)
17		)	No. CV-06-1362-PCT-JAT(Cons.)
18	Plaintiffs,	)	No. CV-06-1575-PHX-EHC(Cons.)
19		)	
20	vs.	)	GONZALEZ PLAINTIFFS'
21		)	CONSOLIDATED RESPONSE TO
22	State of Arizona, et al,	)	MOTIONS IN LIMINE
23		)	
24	Defendants.	)	(Assigned to the
25		)	Honorable Roslyn O. Silver)

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26 COME NOW Gonzalez Plaintiffs and file this, their Consolidated Response to  
Motions in Limine filed by State Defendants and joined by some County Defendants.

1 **I. INTRODUCTION**

2 State Defendants and certain County Defendants (“Defendants”) filed six  
3 motions in limine seeking to exclude various exhibits proposed by Gonzalez Plaintiffs.<sup>1</sup>  
4 Five of the motions relate to disclosures timely filed by Gonzalez Plaintiffs after this  
5 Court ordered Defendants to produce disputed documents requested by Gonzalez  
6 Plaintiffs in discovery. The remaining motion relates to admissible evidence that is  
7 properly included in the trial record. Defendants also filed a seventh motion seeking to  
8 exclude their own evidence that is already inadmissible.  
9

10 **II. ARGUMENT**

11 A. Gonzalez Plaintiffs Timely Disclosed Expert Reports and New Evidence  
12 After the Court Ordered Defendants to Produce Documents Sought by  
13 Gonzalez Plaintiffs in Discovery

14 This case has included several discovery disputes that were resolved by the  
15 Court. On three separate occasions, the Court ordered County Defendants and other  
16 county officials to turn over documents sought by Gonzalez Plaintiffs in discovery. *See*  
17 8/30/07 Hr’g Tr. At 25:20 – 26:24 (ordering County Defendants to produce unredacted  
18 rejected voter registration forms); Dkt. No. 554 (ordering County Defendants to produce  
19 copies of uncounted conditional provisional ballot envelopes); Dkt. Entry No. 661  
20

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21 <sup>1</sup> The motions are: Motion in Limine Re ACORN Survey Forms; Defendants’ Motion  
22 in Limine Regarding Pending Criminal Investigations; Defendants’ Motion in Limine  
23 Regarding Untimely Disclosures; Motion in Limine Re Plaintiff Expert Opinions;  
24 Defendants’ Motion in Limine Regarding Late Disclosure of Witnesses; Motion in  
25 Limine Re Deposition Testimony of Arturo Rosales and Agnes Laughter; State and  
26 Twelve County Defendants’ Supplement to Motion in Limine Regarding Untimely  
Disclosures. Today, this Court terminated Dkt. 819 (Motion *in Limine* Regarding  
Untimely Disclosures) as duplicative of Dkt. 823 (Motion *in Limine* Regarding  
Exclusion of Untimely Evidence).

1 (denying motions to quash or objections filed by Graham, Pima, Pinal, Yavapai,  
2 Greenlee, Maricopa, La Paz, and Santa Cruz County Treasurers [Docs. 614, 619, 620,  
3 631, 634, 637, 644, 646] and ordering them to produce copies of uncounted conditional  
4 provisional ballot envelopes).

5  
6 Following production of these documents, the Court adjusted the Scheduling  
7 Order to permit Plaintiffs to analyze the discovery and produce expert reports. Plaintiffs  
8 also relied on these documents to contact voters affected by Proposition 200, as  
9 discussed with the Court in the status conferences held on August 30, 2007 and  
10 September 28, 2007. *See, e.g.* 8/30/07 Hr’g Tr. at 28:3 - 20; 41:7 – 42:6 and 9/28/07  
11 Hr’g Tr. at 10:18 – 11:15; 12:20 – 13:18; 18:22 – 19:11.

12  
13 Despite being ordered to produce the requested discovery documents, County  
14 Defendants did not complete their responses to Plaintiffs’ request for rejected voter  
15 registration forms until December, 2007. *See* Exhibit A to Dkt. No. 451 (emails  
16 showing late disclosures of voter registration forms by County Defendants); *see also*  
17 Dkt. Nos. 465 (Yavapai County late responses to written discovery on 12/06/07); 470  
18 (Pinal County late responses to written discovery on 12/10/07); 471 (Apache County  
19 late responses to written discovery on 12/10/07).

20  
21 The production of uncounted provisional and conditional provisional ballots by  
22 the County Defendants was delayed through two rounds of briefing until the Court  
23 ordered the County Treasurers to produce these documents on February 21, 2008. *See*  
24 Dkt. Entry No. 661. Gonzalez Plaintiffs received the last batches of uncounted  
25 conditional provisional ballot envelopes in mid-March 2008. *See, e.g.* Dkt. 683 - 695  
26

1 (Notices of Service by Counties regarding production of uncounted conditional  
2 provisional ballots).

3 Defendants now move the Court to exclude the expert reports and witnesses  
4 disclosed following Plaintiffs' receipt of the disputed documents, claiming that  
5 Plaintiffs' evidence is untimely. As demonstrated below, Plaintiffs' disclosures were  
6 timely and made in compliance with the Court's amended Scheduling Order.  
7

8 On January 4, 2008, Gonzalez Plaintiffs disclosed the names and preliminary  
9 reports of their five expert witnesses pursuant to the Court's Scheduling Order. At this  
10 point, Gonzalez Plaintiffs had recently received the information from the rejected voter  
11 registration forms and started the data-entry process in order to provide the information  
12 needed by Gonzalez Plaintiffs' expert to perform their analysis. Also at that point,  
13 County Defendants' production of the uncounted conditional provisional ballots was  
14 still months away.  
15

16 Gonzalez Plaintiffs timely served Defendants with their Rebuttal Reports on  
17 March 7, 2007. Two weeks later, Gonzalez Plaintiffs informed the Court at the March  
18 21, 2007 status conference that Gonzalez Plaintiffs had still not received all the  
19 uncounted conditional provisional ballots that County Defendants were required to  
20 produce. *See* 3/21/08 Hr'g Tr. at 6:5 – 9:2. Defendants conceded at least one county  
21 had not completed its disclosures. *Id.*  
22

23 On March 28, 2008 and April 25, 2008, Gonzalez Plaintiffs timely served  
24 Defendants with their Supplemental Reports pursuant to the Court's amended  
25 Scheduling Order. *See* Dkt. No. 740 (Final Amended Scheduling Order). On May 23,  
26

1 Gonzalez Plaintiffs timely served Defendants with their Rebuttal Reports in response to  
2 Defendants' expert report dated May 9, 2008. Finally, on June 4, pursuant to the  
3 Court's order that "The parties shall finally supplement all discovery, including material  
4 changes to expert witness opinions," Gonzalez Plaintiffs timely served Defendants with  
5 two short supplements.<sup>2</sup>  
6

7 None of the supplements served by Gonzalez Plaintiffs included new theories of  
8 analysis. *See, e.g., O2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d  
9 1355, 1368 (C.A.Fed. 2006) (affirming exclusion of supplemental expert reports that  
10 advanced a new theory not previously discussed by experts). The reports remained  
11 focused on the original analyses and were updated to reflect new information such as  
12 analysis of rejected voter registration forms, uncounted conditional provisional ballots  
13 or county-level election results.  
14

15 The reports are admissible because Defendants were not prejudiced by these  
16 reports and even declined to take the depositions of four of Gonzalez Plaintiffs' five  
17 expert witnesses. *See Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.* 240 F.3d 1,  
18 10 (1<sup>st</sup> Cir. 2001) (declining to exclude undisclosed substitution of testifying expert  
19 where defendant was not prejudiced and there was no meaningful change in the  
20 testimony). In sum, Gonzalez Plaintiffs' supplements were timely and complied with  
21

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22  
23 <sup>2</sup> The report of Dr. Engstrom merely reported the Ecological Inference results for  
24 one election he had already analyzed in his previous reports and included turnout data  
25 and scatterplots associated with his analysis. The report of Dr. Louis Lanier outlined  
26 how the turnout figure of Dr. Engstrom related to the voter roll and 2006 General  
Election official canvass.

1 the requirement of Fed. R. Civ. P. 26 (e) that parties supplement their expert  
2 disclosures.

3  
4 1. Dr. Rosales Rebuttal Report

5 Defendants argue that the Court should exclude the Rebuttal Report of Dr.  
6 Rosales, timely served with the other rebuttal reports on March 7, 2008, claiming it  
7 includes “new opinions.” *See* Dkt. No. 820 at 4. This report contains no new opinions  
8 but did respond to Defendants’ criticism stated in his February 27, 2008 deposition that  
9 he had an unclear citation and lack of detail in two sections of his report. Dr. Rosales  
10 explained in his deposition that he would respond to those criticisms with a correction  
11 of his report, which he subsequently prepared in time for the March 7, 2008 deadline. A  
12 redline comparison of the Preliminary and Rebuttal reports of Dr. Rosales, attached as  
13 Ex. A, demonstrates that there are no new opinions in the Rebuttal Report. Dr. Rosales  
14 merely corrected or added citations and updated two passages in his report. *See* Ex. B  
15 (deposition testimony describing his planned changes to report). In any event, Plaintiffs  
16 served the Rebuttal Report of Dr. Rosales long before the Court’s March 28, 2008  
17 deadline for Plaintiffs’ supplementation of their preliminary expert reports.

18  
19 2. Dr. Rodolfo Espino Rebuttal Report

20 Defendants seek to exclude the Supplemental Expert Report of Dr. Rodolfo  
21 Espino dated May 22, 2008, arguing it is not timely. *See* Dkt. 820 at 8. However, Dr.  
22 Espino’s May 22 report was timely filed in response to the expert report of Defendant’s  
23 expert Dr. Jeffrey Zax. Dr. Espino’s May 22 report, entitled “Reply to Dr. Jeffrey Zax’s  
24 Review of Rebuttal” responds only to criticisms by Dr. Zax of Dr. Espino’s report.  
25  
26

1 Such a response is contemplated by the Court's order that "Plaintiffs shall disclose any  
2 final rebuttal expert testimony by May 22, 2008." There are no new opinions set out in  
3 Dr. Espino's May 22 rebuttal report; in this report, Dr. Espino rebuts the criticisms  
4 presented by Dr. Zax and explicitly states that "My conclusions in my original report  
5 remain unchanged." Rebuttal Report at 1. Defendants declined to take Dr. Espino's  
6 deposition.  
7

### 8 3. Dr. Jorge Chapa Rebuttal Report

9 Defendants argue that Dr. Jorge Chapa's May 22, 2008 rebuttal report should be  
10 excluded because it is untimely. See Dkt. 820 at 8. However, Dr. Chapa's May 22  
11 report was timely filed in response to the expert report of Defendant's expert Dr. Jeffrey  
12 Zax. Dr. Chapa's May 22 report is titled "Rebuttal Statement of Dr. Jorge Chapa in  
13 Response to 'SUPPLEMENTAL EXPERT REPORT AND APPENDICES ON  
14 BEHALF OF STATE DEFENDANTS IN MARIA M. GONZALEZ, ET AL. V.  
15 STATE OF ARIZONA, ET AL. NO. CV06-1268-PHX-ROS, Jeffrey S. Zax, Ph. D.  
16 dated 9 May 2008.'"   
17

18 Dr. Chapa's May 22 rebuttal report is contemplated by the Court's order that  
19 "Plaintiffs shall disclose any final rebuttal expert testimony by May 22, 2008." There  
20 are no new opinions set out in Dr. Chapa's May 22 rebuttal report; in this report, Dr.  
21 Chapa only rebuts the criticisms presented by Dr. Zax. Defendants similarly declined to  
22 take Dr. Chapa's deposition.  
23

### 24 4. Dr. Lanier's Supplemental and Rebuttal Reports

1 Dr. Lanier analyzed both rejected voter registration forms and uncounted  
2 conditional provisional ballots and thus submitted a number of supplemental and  
3 rebuttal reports according to the deadlines set out in the Court's Scheduling Order.  
4 Defendants seek to exclude what they characterize as untimely opinions offered by Dr.  
5 Lanier but do not identify any specific opinions they claim are untimely.  
6

7 a. Dr. Lanier's Analysis of Rejected Voter Registration Forms

8 In order to perform his analysis of rejected voter registration forms, Dr. Lanier  
9 first had to receive the unredacted registration forms, the last of which were served on  
10 Gonzalez Plaintiffs in late November 2007 and early December 2008.<sup>3</sup> He then needed  
11 to transfer the information from those 38,000 forms into a database that would allow  
12 him to examine information in the aggregate, including determining the number of  
13 forms submitted by Spanish surnamed applicants and how many applicants  
14 subsequently re-applied successfully. Dr. Lanier's analysis of these forms was  
15 embodied in a report timely served on Defendants on March 28, 2008.<sup>4</sup>  
16  
17

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18 <sup>3</sup> Gonzalez Plaintiffs requested rejected voter registration forms as early as July  
19 10, 2006 in their First Request for Production of Documents to Maricopa County. The  
20 counties collectively refused to produce unredacted rejected voter registration forms for  
21 over one year until the Court ordered them to do so on August 30, 2007. *See* 8/30/07  
Hr'g Tr. At 25:20 – 26:24 (ordering County Defendants to produce unredacted rejected  
voter registration forms).

22 <sup>4</sup> One week before the Court's deadline, Plaintiffs served Defendants with Dr.  
23 Lanier's report analyzing the first batch of rejected voter registration forms data-entered  
24 into his database. On the March 28, 2008 deadline, Plaintiffs served Defendants with a  
25 report reflecting Dr. Lanier's analysis of the 31,015 forms data-entered to that date.  
26 Finally, on April 25, Plaintiffs served Defendants with a slight update to Dr. Lanier's  
earlier findings on rejected voter registration forms as a result of the addition of  
approximately 535 forms to the 31,015 previously analyzed. The addition of these 535  
forms did not change Dr. Lanier's analysis or conclusions but simply brought his report



1 affected individuals and for cost reasons could not be completed until Dr. Lanier had all  
2 the addresses that he would include in his study. Plaintiffs were thus required to wait  
3 until they had received the uncounted conditional provisional ballots in order to do this  
4 particular analysis.

5  
6 To the extent they claim that Plaintiffs should have been forced to bifurcate and  
7 pour additional resources into undertaking two separate analyses, in addition to  
8 waiting months for the production of discovery, Defendants' position is without merit.  
9 In this portion of Dr. Lanier's work, Plaintiffs could not separate "registration" and  
10 "ballots" into neat segments. Plaintiffs thus did what they could to cope with  
11 Defendants' extraordinarily late disclosures: wait until the disclosures were complete  
12 and then perform the geo-coding operation and demographic analysis of all affected  
13 voters for the April 25 report.

14  
15 Finally, on June 4 Gonzalez Plaintiffs provided Defendants with a 2-page  
16 supplement from Dr. Lanier that provided no new information or opinions. Instead, as a  
17 companion document to the short supplement provided by Dr. Engstrom regarding  
18 Latino voter turnout, Dr. Lanier noted that the rate at which Latino voters cast  
19 uncounted conditional provisional ballots exceeded their voter turnout. This  
20 information, which was not based on any scientific analysis, simply filled in that portion  
21 of Dr. Lanier's report discussing the impact of voter identification on Latinos.

22  
23 d. Dr. Lanier's Rebuttal Reports

24 Dr. Lanier's rebuttal reports, served timely on Defendants on the court-  
25 established deadlines for responding to Defendants' expert reports, include no new  
26

1 analysis and focus exclusively on rebutting the criticisms of Dr. Zax.<sup>5</sup> Defendants do  
2 not appear to complain that these rebuttal reports contain new opinions. *See* Dkt. 820 at  
3 6-7.

4 e. Defendants Never Deposed Dr. Lanier

5 Defendants claim that they incurred “significant expense” because Dr. Lanier  
6 failed to disclose unspecified opinions by March 28. As an initial matter, Defendants’  
7 argument ignores the fact that the Court directed Plaintiffs to supplement their reports  
8 by April 25. The Court then provided Defendants the opportunity to prepare additional  
9 expert testimony and Defendants served their second expert report related to Dr. Lanier  
10 on May 9, 2008. Defendants do not explain how their May 9, 2008 report involved  
11 additional expense above the cost of responding to the reports of April 25.  
12

13  
14 Importantly, Defendants did not take the deposition of Dr. Lanier. Although  
15 Plaintiffs made Dr. Lanier available for deposition, Defendants cancelled their arranged  
16 deposition of Dr. Lanier. *See* Dkt. 713. Defendants never subsequently sought to  
17 depose Dr. Lanier and thus incurred no expense associated with deposing him about his  
18 reports and their contents. Although Dr. Lanier has remained available for deposition,  
19 Defendants have chosen not to explore with him the opinions and bases for his reports  
20 in deposition.  
21

22 5. Dr. Engstrom Supplemental and Rebuttal Reports

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23  
24 <sup>5</sup> These are the rebuttal reports dated March 7, 2008 and May 23, 2008.  
25 Defendants do not allege that these reports contain new opinions or were not timely  
26 served. *See* Dkt. 820 at 6-7.

1 Defendants argue that Dr. Engstrom's reports served after March 28, 2008  
2 should be excluded because his work in the case did not relate to analysis of rejected  
3 voter registration forms and uncounted conditional provisional ballots. On the contrary,  
4 Dr. Engstrom's work relates directly to the analysis conducted by Dr. Lanier and these  
5 experts both worked to produce analysis for the court that helps explain the impact of  
6 Proposition 200's voting provisions.  
7

8 Dr. Engstrom conducted an analysis to determine whether elections in Arizona are  
9 racially polarized. Dr. Engstrom's reports were consistent from the beginning, utilizing  
10 three methodologies (bivariate ecological regression, ecological inference and  
11 homogenous precinct analysis) and focusing on elections in which voters were  
12 presented with a choice between Latino and non-Latino candidates. Dr. Engstrom  
13 concluded in his preliminary and March 28, 2008 reports that voting was racially  
14 polarized based on his analysis of 10 elections including the 2002 Democratic  
15 Gubernatorial Primary and the 2006 General Election for Secretary of State.  
16

17 Following his report of March 28, 2008, Dr. Engstrom provided two short additional  
18 supplements to fill in information related to his previous analysis. For example, his  
19 April 1, 2008 report (served on Defendants four days after the March 28 report) showed  
20 the results of his racially polarized voting analysis of the 2002 Democratic  
21 Gubernatorial Primary in 5 counties of Arizona. Similarly, Dr. Engstrom provided a  
22 short statement on June 4 to explain that although he was previously unable to obtain  
23 ecological inference results for the 2006 General Election for Secretary of State, an  
24 election he had already studied, he was ultimately able to get those results from his  
25  
26

1 computer and wanted to report them. Dr. Engstrom also reported the scatterplots and  
2 turnout estimates that are generated with his analysis of elections.

3 Defendants concede that the June 4, 2008 deadline in the Court's scheduling order  
4 permitted Dr. Engstrom to fill in these small areas of the report, such as supplying the  
5 ecological inference estimate for the 2006 General Election for Secretary of State. See  
6 Dkt. 820 at 6, quoting *Keener v. United States*, 181 f.R.D. 639, 640 (D. Mont. 1998)  
7 ("Supplementation under the rules means correcting inaccuracies, or filling the  
8 interstices of an incomplete report based on information that was not available at the  
9 time of the initial disclosure.") (emphasis added).

11 Dr. Engstrom offered no new opinions in his two short supplements, used no new  
12 techniques and analyzed no new elections. Rather he filled in information associated  
13 with the analysis he previously performed. Plaintiffs chose to make these short  
14 supplements as Dr. Lanier's analysis of rejected registration forms and uncounted  
15 conditional provisional ballots revealed the particular importance of racially polarized  
16 voting analysis for elections held in the wake of Prop 200's implementation and the  
17 importance of voter turnout information to the analysis of voters whose conditional  
18 provisional ballots went uncounted in the elections following Prop 200.

21 Finally, Defendants arranged to depose Dr. Engstrom and then cancelled his  
22 deposition. See Dkt. 712. Although Dr. Engstrom has remained available for  
23 deposition, Defendants have chosen not to explore with him the opinions and bases for  
24 these reports in deposition.

1                   6. Plaintiffs Timely Disclosed Individuals Identified After Plaintiffs  
2 Received the Rejected Voter Registration Forms and Uncounted Conditional  
3 Provisional Ballots from County Defendants.

4                   Following receipt of rejected voter registration forms and uncounted conditional  
5 provisional ballots, and entry of the information from those forms into the databases  
6 used by Dr. Lanier for his analysis, Gonzalez Plaintiffs sent the affected individuals  
7 letters. Pursuant to discussions with the Court, Gonzalez Plaintiffs' letter stated that the  
8 recipient of the letter was not obligated in any way to respond to the letter and that his  
9 or her voter information was protected by court order. *See Ex. D ; see also 8/30/07*  
10 *Hr'g Tr. at 28:3 - 20; 41:7 – 42:6 and 9/28/07 Hr'g Tr. at 10:18 – 11:15; 12:20 – 13:18;*  
11 *18:22 – 19:11..*

12                   Some of the affected individuals responded to these letters and chose to  
13 communicate with counsel for Gonzalez Plaintiffs regarding the circumstances  
14 surrounding their inability to register or vote. Some affected individuals decided they  
15 wanted to share their experiences with the Court and executed declarations in support of  
16 Gonzalez Plaintiffs' response to the motion for summary judgment. *See, e.g., Ex.s 527,*  
17 *536, 544, 546, 551, 553, 554, 554A, filed with Gonzalez Plaintiffs' response to the*  
18 *motion for summary judgment.*

19                   Gonzalez Plaintiffs disclosed to Defendants the names of these affected individuals  
20 as they learned of them. It was not possible to disclose the names of these individuals  
21 before the close of fact discovery on January 18, 2008 because Defendants delayed their  
22 disclosures of the rejected voter registration forms and uncounted conditional  
23  
24  
25  
26

1 provisional ballots and Gonzalez Plaintiffs could not write to the affected individuals  
2 until they had data-entered their names and addresses.

3 Defendants claim that they are prejudiced by a problem of their own making. If, for  
4 example, Defendants had disclosed the rejected voter registration forms requested by  
5 Plaintiffs in July 2006, all parties would have had ample time to contact rejected voters,  
6 learn about their situation and conduct discovery. Instead, Defendants filed repeated  
7 objections and motions to quash discovery and delayed production of critical documents  
8 in the case until as late as mid-March 2008. As a result, all parties have been prejudiced  
9 in their ability to develop the facts in this case and identify potential witnesses.  
10 Defendants cannot now complain that they are prejudiced by disclosures of people  
11 whose voting information Defendants withheld.

12  
13  
14 B. The Deposition of Agnes Laughter is Admissible and Plaintiffs do not  
15 Seek to Admit the Deposition of Dr. Arturo Rosales

16 Defendants seek to exclude from trial the deposition testimony of Dr. Arturo  
17 Rosales and Agnes Laughter which Plaintiffs designated as trial exhibits.<sup>6</sup> Ms. Laughter  
18 is unavailable as a witness at trial, and as such, under Fed. R. Evid. 804(b)(1) her  
19 deposition is former testimony admissible as an exception to the hearsay rule.

20  
21 1. Deposition of Agnes Laughter

22 Ms. Laughter's deposition testimony may be used as evidence at trial because she  
23 is unavailable to testify at trial in accordance with Fed. R. Civ. Proc. 32(a)(4)(B). Under  
24 this rule, it is proper to admit deposition testimony at trial when the declarant lives more

25 \_\_\_\_\_  
26 <sup>6</sup> Plaintiffs do not object to Defendants' motion as it pertains to Arturo Rosales.

1 than 100 miles from the place of trial. Ms. Laughter lives seven miles northeast of the  
2 Chilchinbeto Chapter House, located in Navajo County on the Navajo Reservation.  
3 (See Dec. of Agnes Laughter ¶ 3). This is approximately 300 miles from the place of  
4 trial, which will be held at the Sandra Day O'Connor U.S. Courthouse in Phoenix, AZ.  
5 Additionally, Ms. Laughter has no transportation and no driver's license, and as such it  
6 would be particularly burdensome for her to make the 600 mile round trip that would be  
7 required for her to provide in-court testimony. (See Dec. of Agnes Laughter ¶¶ 7, 12).

9 Further, Ms. Laughter's testimony regarding her personal experiences and  
10 circumstances pertaining to voting and possession of identification is relevant to  
11 Plaintiffs' claims at trial. Under Fed. R. Evid. 402, all relevant evidence is admissible.  
12 Ms. Laughter's testimony is relevant because it helps establish the extent of the burden  
13 on the right to vote that Proposition 200 places on both on certain portions of the  
14 Arizona population and on Arizona citizens in general. Her testimony speaks directly to  
15 the difficulty, expense and burden that Proposition 200 places on Arizona citizens and  
16 voters. Therefore her testimony is relevant to the determination of facts at trial. See Fed.  
17 R. Evid. 401. The fact that Ms. Laughter has been dismissed as a party to this lawsuit  
18 has no effect on the relevance of her testimony to the questions still before this court.  
19

20  
21 For these reasons, the Court should allow the use of Ms. Laughter's deposition  
22 testimony in lieu of live testimony at trial.

## 23 2. Dr. Rosales

24 Plaintiffs included the deposition of Dr. Rosales in their exhibit list in error and  
25 do not seek at this time to admit the deposition as an exhibit at trial.  
26

1 C. Plaintiffs' Exhibit Containing Voter Surveys by ACORN Is Admissible.

2 Gonzalez Plaintiffs also urge this Court to deny Defendants' Motion in Limine  
3 Re: ACORN Survey Forms. Dkt. Entry No. 817. Defendants seek to exclude the survey  
4 forms provided by the Association of Community Organizations for Reform Now  
5 (ACORN) because, they contend, the information in the forms is hearsay and they were  
6 untimely disclosed. Both of Defendants' arguments fail, as shown below.  
7

8 1. The Forms are Admissible

9 In their motion, Defendants state that, "presumably, plaintiffs intend to introduce  
10 either the ACORN forms or testimony about those forms to prove the names, race,  
11 address and possession of proof of citizenship by individuals who completed the  
12 forms." Dkt. Entry No. 817 at 4. This is an incorrect assumption.  
13

14 The forms were produced in response to a single, global Request for Production-  
15 propounded on all Gonzalez Plaintiffs- for "[a]ll documents relating to the impact, or  
16 potential impact, of the voting requirements of Prop. 200 on any efforts or attempts by  
17 the Gonzalez Plaintiffs to register Arizona residents to vote." As such, the forms are not  
18 intended to prove the existence of any fact written on the survey forms but to  
19 demonstrate the fact that ACORN attempted to register Arizona residents to vote.  
20 Given this use, the ACORN forms are not hearsay and are admissible. *See Haddad v.*  
21 *Lockheed Cal. Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983) (holding that employee  
22 complaints are not hearsay when offered not for the truth of the complaints, but instead  
23 to show the employer's receipt of complaints and the employer's "non-discriminatory  
24  
25  
26

1 intent in its employment practices"); *see also Csanyi v. Regis Corp.*, 2008 U.S. App.  
2 LEXIS 1725, \*2-3 (9th Cir. Ariz. Jan. 22, 2008) (citing *Haddard*).

3                   2. The ACORN Forms Were Timely Disclosed

4                   Defendants also argue that the ACORN forms were not timely disclosed  
5 by the January 18, 2008 discovery deadline, yet simultaneously admit that the forms are  
6 dated “in late March and early April 2008.” Dkt. Entry 817 at 3-5. Gonzalez Plaintiffs  
7 assert that many, of not all, of the forms did not exist on January 18, 2008, but were  
8 nonetheless produced to Defendants as soon as they became available. The disclosure  
9 at issue here was properly made pursuant to this Court’s Order of March 27, 2008 and  
10 Fed. R. Civ. P. 26(e)(1) and. *See* Dkt. Entry No. 740.

11                   The Court’s March 27, 2008 Order states, in part, that,

12                   [t]he parties shall finally supplement all discovery, including material changes to  
13 expert witness opinions and material disclosures, pursuant to FRCP 26(a)(3), of all  
14 exhibits to be used and all witnesses to be called at trial, on or before June 4, 2008...  
15 (underline in original).

16                   Dkt. Entry No. 740 at 3.

17                   Gonzalez Plaintiffs disclosed the ACORN survey forms on May 19, 2008. *See*  
18 Dkt. Entry No. 771. Thus, Gonzalez Plaintiffs’ supplementation of their responses to  
19 Defendants’ Request for Production was in lockstep with the Court’s instructions as  
20 well as the duty to supplement discovery under Fed. R. Civ. P. 26(e)(1).

21                   Since the forms are unquestionably responsive to a previous discovery request  
22 propounded by Defendants on all Gonzalez Plaintiffs, any failure to disclose them  
23 would have amounted to a breach of the obligations imposed by the Court’s Order and  
24 the requirement under Fed. R. Civ. P. 26(e)(1) to supplement discovery responses when  
25  
26

1 a party becomes aware of new information. *See Bunch v. United States*, 680 F.2d 1271,  
2 1280 (9th Cir. Wash. 1982) (noting duty to supplement when new, responsive  
3 information arises).

4 D. The Depositions of USCIS Were Timely and Defendants Were Aware of  
5 Gonzalez Plaintiffs' Repeated Attempts to Secure USCIS Witnesses for  
6 Deposition

7 Defendants seek in one Motion in Limine the exclusion of Fed. R. Civ. P.  
8 30(b)(6) depositions taken of United States Citizenship and Immigration Services  
9 (USCIS) claiming that the depositions were untimely and prejudice Defendants. *See*  
10 Dkt. 819.

11  
12 In fact, Defendants have been aware since December 2007 of Gonzalez  
13 Plaintiffs' attempts to depose USCIS and the failure of USCIS to appear in response to  
14 multiple subpoenas before April, 2008. *See* Ex. C (correspondence with Defendants  
15 and subpoenas related to USCIS deposition).

16 On December 21, 2007, Gonzalez Plaintiffs filed their Notice of Third Party  
17 Deposition of USCIS in this case. *See* Dkt. 510. In late December, Defendants  
18 communicated with Gonzalez Plaintiffs following their receipt of the notice and  
19 requested information regarding how to contact the attorney for USCIS and the  
20 availability of telephone conferencing for the deposition. When USCIS requested a  
21 postponement of the deposition, Gonzalez Plaintiffs informed Defendants of the  
22 rescheduled deposition and again made plans for Defendants to attend telephonically.  
23  
24 When USCIS failed to comply with the subpoena requiring its appearance at the  
25  
26

1 rescheduled January deposition, Gonzalez Plaintiffs again communicated with  
2 Defendants regarding their inability to secure USCIS for deposition.

3 Finally, USCIS agreed to appear at a deposition in April, 2008. Gonzalez  
4 Plaintiffs again timely notified Defendants of the deposition and the availability of  
5 teleconferencing. Defendants responded by sending a letter to counsel for ITCA  
6 Plaintiffs in the case stating that Defendants declined to attend. Upon learning of the  
7 letter, Gonzalez Plaintiffs repeated their offer of teleconferencing for the deposition.  
8

9 Because they have been informed at every step of Gonzalez Plaintiffs' attempts  
10 to secure the USCIS deposition, and they were willing and able to participate in the  
11 deposition either in person or by telephone, Defendants are not prejudiced by the taking  
12 of the deposition in April, 2008. Other than claiming the deposition was taken after the  
13 deadline for discovery, Defendants present no argument for prejudice. Gonzalez  
14 Plaintiffs made every effort to take the USCIS deposition before the close of fact  
15 discovery on January 18, 2008, but due to the refusal of the agency Gonzalez Plaintiffs  
16 were unable to secure the attendance of USCIS witnesses before serving three  
17 subpoenas over a period of four months.  
18

19 E. Plaintiffs' Two Trial Exhibits Disclosed June 16 do not Prejudice Defendants

20 Defendants argue in another Motion in Limine that Plaintiffs' last two trial  
21 exhibits, disclosed June 16, 2008, should be excluded because they are untimely and  
22 prejudice Defendants. See Dkt. 828 (seeking to exclude Gonzalez Plaintiffs' Trial  
23 Exhibits 963 and 964). This motion incorrectly portrays the exhibits at issue.  
24  
25  
26

1           The two exhibits were inadvertently omitted from Gonzalez Plaintiffs' exhibit  
2 list served on Defendants on June 13, 2008 with the response to Defendants' summary  
3 judgment motion. When Gonzalez Plaintiffs realized the omission, they immediately  
4 served Defendants with the two exhibits on June 16 and explained what they were. *See*  
5 Ex. E.  
6

7           Defendants have been in possession of Gonzalez Plaintiffs' Trial Exhibit 963  
8 since March 26, 2008. *See* Dkt. 738 (Notice of expert disclosures related to Dr.  
9 Lanier's March 21 report). This document is a spreadsheet prepared by Dr. Lanier and  
10 was disclosed as part of the materials associated with his expert reports. Gonzalez  
11 Plaintiffs' Trial Exhibit 964 is a summary chart of the information contained in Trial  
12 Exhibit 963. Defendants are not prejudiced when Plaintiffs designate as an exhibit a  
13 document that has been in Defendants' possession for months and an accompanying  
14 summary exhibit.  
15

16           F. Defendants' Motion in Limine to Exclude Their own Testimony is  
17           Unnecessary and an Attempt to "Backdoor" Inadmissible Evidence to  
18           Suggest Voter Fraud.

19           In reality, Defendants Motion in Limine seeking privilege for Maricopa County  
20 officials is not about the desire to exclude evidence, but is rather it is another backdoor  
21 attempt by Defendants to import inadmissible allegations of voter fraud into these  
22 proceedings.  
23

24           Defendants ostensibly seek a testimonial privilege for election officials about on-  
25 going investigations which are irrelevant and inadmissible in any case. Defendants are  
26 seeking privilege for county officials who are supposedly conducting sensitive, on-

1 going investigations into voter fraud. Such evidence - even to the extent that it is true  
2 that the county is conducting investigations - is irrelevant and inadmissible as proof of  
3 voter fraud and Defendants' motion in limine serves only as an attempt to suggest to the  
4 Court facts that Defendants cannot establish through admissible evidence.

5  
6 In *Cooper v. Sauser*, 956 F.2d 274 (9th Cir. 1992)(unpublished disposition) the  
7 Ninth Circuit upheld the district courts' refusal to admit evidence of criminal assault  
8 charges had been at one point been brought against the victim when these charges had  
9 not led to a conviction. In that case, the defendant had sought to admit evidence of his  
10 victim's criminal assault charges for the purpose of establishing that his victim had a  
11 propensity for violence. The Ninth Circuit upheld the trial court's exclusion of the  
12 evidence of the criminal charge as irrelevant.

13  
14 Here, any information regarding ongoing investigations would be even less  
15 probative of any fact at issue in this trial than the evidence excluded in *Cooper*. Here,  
16 the evidentiary question revolves solely around testimony regarding investigations, not  
17 convictions. Therefore, the existence of any investigation of purported voter fraud does  
18 nothing to help establish any material fact in question. *See Fed. R. Evid. 401*.

19  
20 That Defendants are attempting to bootstrap purported evidence of voter fraud by  
21 way of innuendo about "on-going investigations" is further demonstrated by the fact that  
22 any evidence that could be provided by county officials into these investigations would  
23 be inadmissible hearsay evidence in any regard. The county officials are not the  
24 individuals conducting the criminal investigation of any alleged voter fraud, and as such  
25 they have no first-hand knowledge of any on-going criminal investigations. As such,  
26

1 the testimony of county election officials about what they have heard is hearsay, and  
2 inadmissible in any regard. *See* Fed. R. Evid. 801; 802.

3 Plaintiffs do not object to the Defendants' request for privilege for on-going  
4 investigations into alleged voter fraud, so long as this Court excludes all evidence and  
5 testimony proffered by Defendants related to investigations or charges of voter fraud  
6 when there is no evidence of a conviction. Granting the privilege requested by  
7 Defendants means that Plaintiffs will be unable to present evidence regarding the  
8 nature, scope, or validity of such investigations. The inability of Plaintiffs to present  
9 evidence to rebut Defendants' allegations regarding voter fraud means that, if this court  
10 does not correspondingly bar *all* evidence related to the investigations, it will create a  
11 substantial danger of unfair prejudice to Plaintiffs. *See* Fed. R. Evid. 403. In this  
12 situation it is appropriate to bar such evidence from being admitted.  
13  
14

### 15 **III. CONCLUSION**

16 For the foregoing reasons, Gonzalez Plaintiffs respectfully request that the Court  
17 deny Defendants' seven motions in limine.  
18

19 DATED this 23 day of June, 2008.

Respectfully submitted,

20 By:           s/Nina Perales  
21 Nina Perales

22 Counsel for Plaintiffs  
23 Gonzalez, et al.

24 **CERTIFICATE OF SERVICE**

1 I hereby certify that on the 23rd day of June, 2008, I caused the foregoing  
2 document to be electronically transmitted to the Clerk's Office using the CM/ECF  
3 System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

4 COPY of the foregoing filed electronically  
5 this 23rd day of June, 2008.

6 COPY of the foregoing mailed with Notice  
7 of Electronic Filing this 23rd day of June, 2008 to:

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

13 s/Nina Perales  
14 Nina Perales