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13 Attorneys for Gonzalez Plaintiffs

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		)	RESPONSE IN OPPOSITION TO
22	State of Arizona, et al,	)	STATE DEFENDANTS' REPLY IN
23		)	SUPPORT OF MOTION TO
24	Defendants.	)	STRIKE PORTIONS OF ITCA's
25		)	FACTUAL SUBMISSION
26		)	

(Assigned to the  
Honorable Roslyn O. Silver)

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**I. INTRODUCTION**

On June 26, 2008 this Court ordered Defendants to file a Reply in support of their Motion to Strike Portions of ITCA’s Factual Submission, *see* Dkt. Entry No. 851 (“Motion to Strike”), and to address “among other things, whether Plaintiffs’ expert reports are unreliable under Fed. R. Evid. 703.” Dkt. Entry No. 876.

Although the Court’s Order directed Defendants to address ITCA’s factual submission, and ITCA’s only expert witness is Tony Sissons, Defendants instead ignored the Court’s directive, claiming that “[t]he Court ordered briefing on whether *Gonzalez* plaintiffs’ expert reports are unreliable under Fed. R. Evid. 703.” *See* Dkt. Entry No. 879, Reply in Support of Motion to Strike Portions of ITCA Plaintiff Factual Submission in Response to Motion for Summary Judgment by Defendant Arizona Secretary of State (“Reply”), at 2 (emphasis added).

Furthermore, Defendants did not argue in their Motion to Strike that Gonzalez Plaintiffs’ expert reports were unreliable. *See* Dkt. Entry No. 851 at 2-3 (arguing only that Gonzalez Plaintiffs’ expert reports are hearsay). Defendants attempt to raise new arguments in their Reply that are not presented in their original Motion to Strike.

For the reasons set out below, Defendants have neither addressed the relevant legal standard governing the admission of expert witness testimony under Fed. R. Evid. 703 nor satisfied that standard with respect to their request to exclude Gonzalez Plaintiffs’ expert witnesses Dr. Louis Lanier and Dr. Rodolfo Espino.

**II. ARGUMENT**

A. Defendants’ Reply Neither Addresses nor Satisfies Their Burden Under Fed. R. Evid. 703

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Fed. R. Evid. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 703 directs itself to the question whether otherwise inadmissible evidence, most commonly hearsay evidence, may be admitted at trial if it forms the basis of an expert opinion. “The central purpose of Rule 703 is to promote efficiency by expanding the acceptable bases for expert testimony to include inadmissible evidence such as hearsay.” 29 CHARLES ALAN WRIGHT, VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6272 (1997).

Rule 703 provides that trial courts may admit otherwise inadmissible evidence if they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]” Thus, the Court’s request for briefing on the issue “whether Plaintiffs’ expert reports are unreliable under Fed. R. Evid. 703” focuses on the reliability of the information underlying those expert reports. *See U.S. v. W.R. Grace*, 504 F.3d 745, 761 (9<sup>th</sup> Cir. 2007) (reversing in part and remanding case when district court excluded expert testimony without conducting appropriate Rule 703 inquiry into reliability of evidence relied upon by experts).

1 Defendants have not, and cannot, challenge the reliability of the information  
2 relied upon by Drs. Lanier and Espino in their expert reports because Defendants  
3 supplied that material themselves. In order to form their conclusions, Dr. Lanier and  
4 Dr. Espino analyzed the Arizona voter rolls provided to Plaintiffs by State Defendants.  
5 Dr. Lanier further analyzed rejected voter registration forms and uncounted conditional  
6 provisional ballots provided to Plaintiffs by County Defendants.  
7

8 Nowhere in their Reply do Defendants suggest that the information they  
9 provided to Plaintiffs is unreliable or not “of a type reasonably relied upon by experts in  
10 the particular field in forming opinions or inferences upon the subject[.]” Fed. R. Evid.  
11 703. Thus, Defendants cannot assert now that the expert reports should be excluded  
12 under Fed. R. Evid. 703.  
13

14 B. Defendants’ Attempt to Convert Their Reply Into an Untimely Motion  
15 Under Rule 702 is Unsuccessful

16 Instead of following the Court’s Order to focus their Reply on “whether  
17 Plaintiffs’ expert reports are unreliable under Fed. R. Evid. 703,” Dkt. Entry No. 876 at  
18 1, Defendants instead try to argue that two of Gonzalez Plaintiffs’ expert reports should  
19 be excluded under Rule 702. For this reason alone, the Reply should be struck for  
20 failure to comply with the Court’s Order. However, the Reply also lacks merit because  
21 it does not address the relevant legal standards under Fed. R. Evid. 702.  
22

23 Defendants request the Court exclude the reports of Dr. Louis Lanier and Dr.  
24 Rodolfo Espino because “they (1) are not supported by the experts’ own stated data; and  
25  
26

1 (2) are not based upon reliable methodology.” See Dkt. Entry No. 879 at 2. These are  
2 arguments properly made under Fed. R. Evid. 702 which provides:

3 If scientific, technical, or other specialized knowledge will assist the trier  
4 of fact to understand the evidence or to determine a fact in issue, a witness  
5 qualified as an expert by knowledge, skill, experience, training, or  
6 education, may testify thereto in the form of an opinion or otherwise, if  
7 (1) the testimony is based upon sufficient facts or data, (2) the testimony  
8 is the product of reliable principles and methods, and (3) the witness has  
9 applied the principles and methods reliably to the facts of the case.

10 Defendants do not contend that Dr. Lanier and Dr. Espino lack the necessary  
11 expertise to conduct their studies. Instead, Defendants focus their Rule 702 arguments  
12 on the methodology and factual determinations made by these experts.

13 First, Defendants’ argue that the facts developed by Dr. Lanier and Dr. Espino do  
14 not demonstrate disparate impact on Latino voters and prospective voters. However,  
15 arguments regarding the persuasiveness of evidence developed by expert witnesses  
16 belong at trial and not in a motion to exclude evidence. See *Dukes v. Wal-Mart, Inc.*,  
17 509 F.3d 1168, 1179 (9<sup>th</sup> Cir. 2007) (“Wal-Mart’s contention that the district court was  
18 required to subject Dr. Bielby’s testimony to the *Daubert* test, simply because the  
19 conclusion he reached seemed unpersuasive absent certain corroborating evidence, is  
20 misplaced. See *Daubert*, 490 U.S. at 595 (“The focus, of course, must be solely on  
21 principles and methodology, not on the conclusions that they generate.”)).

22 Furthermore, Defendants’ Reply is certainly not the place to assert that because  
23 Arizona’s population is rising, and thus overall voter registration is rising, Plaintiffs  
24 cannot demonstrate that Prop 200 has had a disparate negative impact on Latinos. See  
25 Dkt. Entry No. 879 at 2-3. In light of the fact that Arizona’s population continues to  
26

1 grow and increase the state’s voter registration, it is specious to argue that this growth  
2 precludes any finding that Latinos have experienced a disparate negative impact on their  
3 political participation as a result of Prop 200.

4 C. Defendants’ Motion and Reply do not Address any Expert Analysis of  
5 Rejected Voter Registration Forms or Uncounted Conditional Provisional  
6 Ballots

7 Although Defendants state broadly that “the data disclosed in the reports of Drs.  
8 Lanier and Espino do not support their conclusions of disparate impact,” Dkt. Entry No.  
9 879 at 2, it is important to note at the outset that Defendants do not discuss, or even  
10 acknowledge, the Gonzalez Plaintiffs’ expert analyses of rejected voter registration  
11 forms and uncounted conditional provisional ballots produced by the Counties.

12 After Gonzalez Plaintiffs received the final unredacted voter registration forms  
13 from the County Defendants in November and December 2007, they produced expert  
14 analysis of these forms demonstrating that Latinos have experienced a disparate  
15 negative impact as a result of Prop 200’s voter registration provisions.<sup>1</sup> This analysis  
16 was completely separate from the analysis conducted by Dr. Lanier for his January 4,  
17 2008 report and is not addressed by Defendants in their Reply. *See, e.g., id.* at 2-6  
18 (criticizing Dr. Lanier’s January 4, 2008 report and not addressing the analyses of Dr.  
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23 <sup>1</sup> Gonzalez Plaintiffs requested rejected voter registration forms as early as July  
24 10, 2006 in their First Request for Production of Documents to Maricopa County. The  
25 counties collectively refused to produce unredacted rejected voter registration forms for  
26 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).

1 Lanier conducted after receiving rejected voter registration forms and uncounted  
2 conditional provisional ballots).

3 In order to perform his analysis of rejected voter registration forms, Dr. Lanier  
4 first had to receive the unredacted registration forms, the last of which were served on  
5 Gonzalez Plaintiffs in late November 2007 and early December 2007. He then needed  
6 to transfer the information from those 38,000 forms into a database that would allow  
7 him to examine information in the aggregate, including determining the number of  
8 forms submitted by Spanish surnamed applicants and how many applicants  
9 subsequently re-applied successfully. Dr. Lanier's analysis of these forms was  
10 embodied in a report timely served on Defendants on March 28, 2008.<sup>2</sup>

11  
12 In his study, Dr. Lanier analyzed 31,015 properly completed voter registration  
13 forms that were rejected by County Defendants because they did not satisfy Prop 200's  
14 proof of citizenship requirements. Dr. Lanier compared the individuals who submitted  
15 these rejected forms to the voter registration applicants who successfully registered in  
16 the same time period. Dr. Lanier found, and Defendants do not challenge, that Latinos  
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20 <sup>2</sup> One week before the Court's deadline, Plaintiffs served Defendants with Dr.  
21 Lanier's report analyzing the first batch of rejected voter registration forms data-entered  
22 into his database. On the March 28, 2008 deadline, Plaintiffs served Defendants with a  
23 report reflecting Dr. Lanier's analysis of the 31,015 forms data-entered to that date.  
24 Finally, on April 25, Plaintiffs served Defendants with a slight update to Dr. Lanier's  
25 earlier findings on rejected voter registration forms as a result of the addition of  
26 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  
in line with the total number of rejected voter registration forms that had finally been  
data-entered.

1 were *more* likely than non-Latinos to be rejected for voter registration because of Prop  
2 200's registration requirements. *See* Gonzalez Plaintiffs' Corrected SJ Exs. 572, 573.

3  
4 Dr. Lanier further examined the group of people who were rejected for voter  
5 registration because of Prop 200 and then made a second application and were  
6 successful in registering. Among this group, Dr. Lanier found, and Defendants do not  
7 challenge, that Latinos were *less* likely than non-Latinos to make a second and  
8 successful voter registration application. *Id.*

9  
10 Dr. Lanier concluded that because Latinos were more likely to be rejected for  
11 voter registration on Prop 200 grounds, and less likely to register successfully after  
12 being rejected, Latinos experienced a disparate negative impact on voter registration  
13 because of Prop 200's registration requirements. Defendants neither address nor contest  
14 Dr. Lanier's conclusions and the analysis underlying these conclusions.

15  
16 Similarly, Dr. Lanier analyzed uncounted conditional provisional ballots  
17 produced by County Defendants. Dr. Lanier found, and Defendants do not challenge,  
18 that Latinos cast 10.3 percent of uncounted conditional provisional ballots in the 2006  
19 General Election. Because Latinos comprised only 2.6 percent to 4.2 percent of voters  
20 in that election, Dr. Lanier concluded that the effect of the Prop 200 ID requirement fell  
21 disproportionately on Latino voters. *See* Gonzalez Plaintiffs' Corrected SJ Exs. 573,  
22 574, 576. Dr. Lanier further found, and Defendants do not contest, that Latino rejected  
23 registration applicants and uncounted conditional provisional ballots come from areas of  
24 Arizona where the population: is less likely to speak English well, possesses less  
25

1 schooling, and earns a lower household income than the averages for the state and are  
2 also from areas where the population is more highly Latino in makeup. *See* Gonzalez  
3 Plaintiffs’ Corrected SJ Ex. 574 at 5. Defendants do not mention or challenge these  
4 findings or the analysis underlying these findings in their Reply. *See generally* Dkt.  
5 Entry No. 879.

6  
7 D. Defendants Limit Their Criticism of Dr. Lanier to his Analysis Preceding  
8 the Release of Rejected Voter Registration Forms by the Counties

9 Ignoring Dr. Lanier’s findings that the evidence produced by the County  
10 Defendants demonstrate disparate negative impact of Prop 200 on Latinos, Defendants  
11 instead claim that, with respect to Dr. Lanier’s January 4, 2008 report, which was  
12 written before he had the opportunity to analyze the documents produced by the  
13 counties, “Dr. Jeffrey Zax [] demonstrated that Dr. Lanier’s ‘predictions’ were based on  
14 misspecified regression analyses.” However, Dr. Lanier’s timely filed rebuttal reports  
15 of March 7, 2008 and May 23, 2008 demonstrated that Dr. Zax’s critique and  
16 suggestions as to alternative methods of analysis were irrelevant and could not  
17 accomplish the goal of isolating the effect of Prop 200. *See* Dkt. Entry Nos. 570, 575.

18  
19 In his reports, Dr. Zax, testifying for Defendants, did not criticize the use of  
20 regression analysis by Dr. Lanier and did not claim that regression analysis is not well-  
21 accepted in the field of economics and political science. Instead, Dr. Zax contends that  
22 Dr. Lanier should have used different variables in his regressions.

23  
24 In those two rebuttal reports, Dr. Lanier easily explained that Dr. Zax was  
25 scientifically incorrect in his assertion that since there are eight years in the data used in  
26

1 Dr. Lanier's initial report regressions, there must be seven independent variables that  
2 must be used in a regression model of voter registration behavior. *See id.*

3 Dr. Zax produced no scientific basis for his claim that Dr. Lanier's regression  
4 must include seven variables as opposed to the variables used by Dr. Lanier. Dr. Zax  
5 cited no scholarly works, instead simply claiming Dr. Lanier had committed an error.  
6 Dr. Zax performed no regression analysis himself to support his claim that Dr. Lanier's  
7 specifications yielded inaccurate results, admitting in his last declaration that he had  
8 produced "no evidence as to whether [Dr. Lanier's] analyses or conclusions would be  
9 contradicted by regressions which were specified correctly." *See* Dkt. Entry No. 880,  
10 Declaration of Dr. Jeffery Zax, at 3.  
11

12 Finally, Dr. Zax conceded in his deposition that if Dr. Lanier had used the seven  
13 year-specific variables discussed by Dr. Zax, those variables would have removed Dr.  
14 Lanier's ability to produce a coefficient for the effect of Prop 200 on voter registration.  
15 *See* Dep. of Dr. Jeffery Zax, 3/12/08, 68:25 -72:15, attached as Ex. A.  
16

17 Dr. Lanier properly employed a time trend variable in his regression analysis in  
18 order to be able to separate the effects of Prop 200 from normal fluctuations in voter  
19 registration that occur over time. Dr. Zax admitted that using the year-specific dummy  
20 variables he advocated would have eliminated the time trend variable employed by Dr.  
21 Lanier. *See* Ex. A at 68:25-69:14. Dr. Lanier also properly employed a presidential  
22 year variable in his regression analysis in order to be able to separate the effects of Prop  
23 200 from normal fluctuations in voter registration that occur in presidential election  
24 years. Dr. Zax admitted that using the year-specific dummy variables he advocated  
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1 would have eliminated the presidential year variable employed by Dr. Lanier. *See Ex.*  
2 *A at 69:15-19.*

3 Dr. Zax finally admitted he had conducted no analysis to test whether his  
4 criticisms of Dr. Lanier, and his claims that Dr. Lanier should have used different  
5 specifications for his regression, would have yielded different or more accurate results.  
6 *See Ex. A at 72:14-15.* Thus, not only did Dr. Zax claim that Dr. Lanier should have  
7 conducted his regressions so as *not* to produce an estimate of the specific effects of Prop  
8 200 on voter registration, Dr. Zax produced no analysis himself to demonstrate that Dr.  
9 Lanier's estimates were inaccurate in any way.<sup>3</sup>

11 Similarly, Dr. Zax's criticism of Dr. Lanier's test of statistical significance is not  
12 properly the basis of a motion to exclude evidence because it goes to the weight of the  
13 evidence, not its admissibility. Furthermore, Dr. Zax provided no evidence that the test  
14 of statistical significance used by Dr. Lanier was inaccurate because Dr. Zax performed  
15 no test of his own. In deposition, Dr. Zax admitted that he had not devised a test of  
16 statistical significance for the situation involving changes in voter registration following  
17 Prop 200 and might not be able to accomplish such a task. *See Ex. A at 134:22* ("I  
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21 <sup>3</sup> When asked in deposition if his proposed model (with seven, year-specific dummy  
22 variables) could discern the effect of Prop 200, Dr. Zax testified that: his instinct  
23 suggested that it could be done; that he had not attempted to do so; that he had only  
24 conceived of his method for discerning the specific effect of Prop 200 in the preceding  
25 12 minutes of the deposition (although this discernment is the primary objective of the  
26 regression analysis he was critiquing and, presumably, the regression analysis he was  
proposing); that he had not examined his proposed method's properties formally; and  
that there may be subtleties in this problem which he had not recognized. *See Ex. A at*  
*72:3 – 74-19.*

1 personally have not worked through how one would or even if one could account for it  
2 appropriately.”)

3           In his rebuttal reports, Dr. Lanier explained that Dr. Zax’s criticisms of his test  
4 of statistical significance missed a practical point of the regression analysis and that the  
5 binomial test of proportions employed by Dr. Lanier was appropriate to the task at hand.  
6 *See Gonzalez Plaintiffs’ Corrected SJ Exs. 570, 575.* Dr. Zax’s criticism of the use of  
7 the binomial test of proportions, without an alternative suggestion and unaccompanied  
8 by any analysis, falls far short of demonstrating any flaws in Dr. Lanier’s analysis. Dr.  
9 Zax’s repeated complaints that Dr. Lanier has not changed his analysis in response to  
10 Dr. Zax’s criticisms similarly does not demonstrate any deficiencies in Dr. Lanier’s  
11 analysis. *See Dkt. Entry No. 880 at 1-3.*

12           Finally, Defendants’ attempt to minimize the demonstrated effects of Prop 200  
13 on registration does not help their Motion to Strike or Reply. Dr. Zax asserts in his  
14 untimely declaration that the number of voters and voter registration applicants rejected  
15 because of Prop 200 is “negligible” when compared to the state’s voter rolls. *See id.* at  
16 4. It is unclear what scientific analysis Dr. Zax performed to conclude that over 40,000  
17 individuals represent a “negligible” number but in any event the statement does not go  
18 to the question of admissibility of Dr. Lanier’s reports under Fed. R. Evid. 702.

19           Similarly, whether or not the total number of voters registered in Arizona is increasing  
20 over time does nothing to undermine Dr. Lanier’s methodology or conclusion that  
21 Latinos represent a disproportionately high number of those prevented from voting by  
22 Prop 200. *See id.* According to the U.S. Census, Arizona’s voting age population rose  
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1 by more than 447,000 between 2004 and 2008.<sup>4</sup> This increase in population, and the  
2 overall increase in voter registration associated with the growth in Arizona's population,  
3 does not explain away the fact that Prop 200 resulted in the rejection of over 37,000  
4 voter registration applications and 4,000 voters who went to the polls on Election Day.

5 E. Defendants' Criticisms of Dr. Espino's Reports Misapprehend the Nature of his  
6 Analysis

7 Dr. Espino examined actual voter registration applications that were accepted by  
8 the counties in Arizona 941 days before and 941 days after the implementation of Prop  
9 200. This analysis did not involve using regression analysis to estimate a number, trend  
10 or effect. Dr. Espino examined real numbers of people joining the voter rolls  
11 throughout the state and did not estimate that number.  
12

13 Dr. Espino found that in the wake of Prop 200, approximately 18 less Latinos  
14 were registered in Arizona each week and 133 less non-Latinos per week were  
15 registered when compared to the period before Prop 200. Because Latinos comprise a  
16 smaller proportion of Arizona's eligible voter population, Dr. Espino noted that these  
17 declines represent a greater negative effect on Latinos than non-Latinos, although both  
18 groups were affected by Prop 200. *See* Gonzalez Plaintiffs' Corrected SJ Ex. 565 at 5-  
19 6.  
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21  
22 <sup>4</sup> The U.S. Census reports that Arizona's adult population rose from 4,092, 291 to  
23 4,668,889 between 2004 and 2007. *See* American Community Survey, U.S. Census, found at  
24 [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US04&-qr\\_name=ACS\\_2004\\_EST\\_G00\\_DP1&-ds\\_name=&-lang=en&-redoLog=false](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US04&-qr_name=ACS_2004_EST_G00_DP1&-ds_name=&-lang=en&-redoLog=false), attached as  
25 Ex. C, and <http://www.census.gov/popest/states/asrh/tables/SC-EST2007-01.csv>, attached as  
26 Ex. D.

1 Dr. Espino also looked at voter registrations in individual counties and observed  
2 that in certain counties, such as Greenlee and Yuma, Latino voter registrations dropped  
3 significantly as a proportion of all registrations following implementation of Prop 200.  
4 *See id.* Dr. Espino found that in Greenlee County, Latinos comprised 25.76 of the  
5 voters registered in the 31 months preceding Prop 200 but only 18.58 percent of the  
6 voters registered in the 31 months following Prop 200. Similarly, Dr. Espino found that  
7 in Yuma County, Latinos comprised 37.18 percent of the voters registered prior to  
8 January 1, 2005 but only 31.67 percent of the voters registered in the period following  
9 Prop 200. *See Gonzalez Plaintiffs' Corrected SJ Ex. 565 at 6.*

11 Defendants' expert Dr. Zax does not contest these findings. Instead, Dr. Zax  
12 directs his arguments to the weight of the evidence found by Dr. Espino. As explained  
13 above, arguments regarding the weight of evidence are for trial, not a pre-trial motion to  
14 strike evidence under Rule 702.

16 For example, Dr. Zax argues in his February 15, 2008 report that Dr. Espino  
17 should exclude all voter registration data from his analysis that appears in the *year and*  
18 *a half* before implementation of Prop 200 and the *year and a half* following  
19 implementation of Prop 200. *See Expert Report of Dr. Jeffery Zax, 2/15/2008, attached*  
20 *as Ex. B.* Dr. Zax provides no scholarly support for his contention that Dr. Espino  
21 should delete important data from his analysis. Furthermore, his suggested deletions  
22 render an analysis of the effects of Prop 200 impossible.

24 In addition, Dr. Zax argues that Dr. Espino should have performed regression  
25 analysis on the numbers of people registering to vote in the period before and after Prop  
26

1 200. Dr. Espino correctly explained that such analysis is unnecessary when all the  
2 numbers are known to the expert and there is no need to estimate the number of voter  
3 registrations that were successful after Prop 200.

4 Both of Dr. Zax's criticisms (that Dr. Espino should have deleted data and that he  
5 should have performed regressions) are based on a fundamental misunderstanding of  
6 Dr. Espino's analysis. Dr. Espino analyzed whether Latino registrations declined *as a*  
7 *percent* of total registrations in the wake of Prop 200. Because Dr. Espino focused his  
8 analysis on Latino registrations within the context of all registrations, he did not need to  
9 delete data to control for similar time periods. As explained by Dr. Espino:  
10

11 We can expect normal cyclical ups and downs to the total number of  
12 voters registered in a jurisdiction - usually an upswing in the early  
13 part of an election year and then a down surge following the election  
14 date. However, if all individuals, irrespective of race, are being  
15 registered at the same proportion, then we should see a constant line  
across in time. Clearly, that is not the case [with] the percentage of  
Hispanic voters in each of the 62 months examined here.

16 *See Gonzalez Plaintiffs' Corrected SJ Ex. 561 at 2.*

17 Similarly, because Dr. Espino examined the decline in Latino registrations as a  
18 percent of total registrations in the periods before and after Prop 200, he did not need to  
19 perform regressions to examine time trends. His comparison of registrations in the  
20 period of 31 months preceding Prop 200 and the 31 months following Prop 200, and his  
21 conclusion that Latino registrations were proportionally lower following Prop 200, does  
22 not require an analysis within these periods of the relationship between Prop 200 and  
23 individual months.  
24

1           Nevertheless, Dr. Espino rebutted Dr. Zax's arguments by performing regression  
2 analyses on periods before Prop 200 and periods after in his March 7, 2008 rebuttal  
3 report. *See* Gonzalez Plaintiffs' Corrected SJ Ex. 565 at 11-18. These regressions were  
4 correctly specified despite Dr. Zax's later arguments that they were not. In response to  
5 Dr. Zax's contention that Dr. Espino excluded the intercept term for his two regressions,  
6 Dr. Espino explained that in order to provide a measure of equality between the two  
7 time periods, he choose to eliminate the intercept term. Without eliminating the  
8 intercept term, each time period would have a different intercept and, in effect, each  
9 time period would have a different starting point for the average registration rate for  
10 Hispanics and non-Hispanics, thus rendering time periods incomparable. *See* Gonzalez  
11 Plaintiffs' Corrected SJ Ex. 526 at 3-4.

12  
13           Dr. Espino furthermore has demonstrated that Dr. Zax's insistence upon fitting a  
14 single regression line to both time periods (before and after Prop 200) forces the average  
15 rate of Hispanic voter registration before Proposition 200 to influence the slope of the  
16 line in the period following implementation. In examining whether voter registration  
17 rates changed between two time periods, it is necessary to set the line for each time  
18 period separately. *See id.* at 4.

19  
20           Similar to his criticism of Dr. Lanier, Dr. Zax does not support his criticisms of  
21 Dr. Espino with any analysis of the data regarding voter registration, although it was in  
22 possession of State Defendants and certainly available to him. Instead of performing  
23 regression, Dr. Zax simply drew lines on Dr. Espino's charts using his eyes and, at  
24 times, the services of a graphic artist. Dr. Zax then admitted in deposition that the  
25  
26

1 charts he presented in his February 15 report did not show the results of any statistical  
2 analysis but instead showed his drawing of horizontal lines across voter registration  
3 data, without respect to whether the data itself would have yielded zero slope lines in a  
4 regression analysis. *See* Ex. B; Ex. A at 183:24-187:20. Dr. Zax further admitted that  
5 he had never done such a thing before in his professional career. *Id.* at 185:25-186:5.  
6

7 In the end, Defendants' attempt to exclude Dr. Lanier's and Dr. Espino's  
8 analyses is based on a failure to explore the experts' analyses and conclusions in  
9 deposition (Defendants declined to take the depositions of both Dr. Lanier and Dr.  
10 Espino), a complete lack of evidence rebutting Dr. Lanier's and Dr. Espino's findings  
11 (Dr. Zax performed no analysis of the data in the case), and an untimely expert  
12 declaration that does not undermine the qualifications or scientific methodology of  
13 Gonzalez Plaintiffs' experts.  
14

15 F. Gonzalez Plaintiffs Request the Court Strike the June 27, 2008  
16 Declaration of Dr. Jeffrey Zax as an Untimely Expert Report

17 Finally, Gonzalez Plaintiffs move to strike the untimely declaration of Dr. Zax  
18 submitted on June 27, 2008 in support of Defendants' Reply. *See* Dkt. Entry No. 880.  
19 This report arrives long after the Court's May 9, 2008 deadline for supplementation of  
20 Defendants' expert reports. *See* Dkt. Entry No. 740.

21 Furthermore, the untimely declaration of Dr. Zax contains new, undisclosed  
22 opinions. Dr. Zax's declaration contains numerous criticisms of Gonzalez Plaintiffs'  
23 final expert reports, submitted on May 22, 2008 in compliance with the Court's Final  
24 Scheduling Order. *See* Dkt. Entry No. 880 at ¶¶10, 11, 13, 14, 15, 16, 17, and 20. The  
25 Court did not provide for any additional information from experts following the final  
26

1 supplementation deadline of June 4, 2008 and Dr. Zax's June 27 declaration contains  
2 new opinions to which Plaintiffs cannot respond. For this reason, Gonzalez Plaintiffs  
3 request that it be struck.

4 **III. CONCLUSION**

5 For the reasons set out above, Gonzalez Plaintiffs respectfully request that the  
6 Court strike the untimely declaration of Dr. Jeffrey Zax, Dkt. Entry No. 880, and deny  
7 Defendants' Motion to Strike Portions of ITCA Plaintiff Factual Submission in  
8 Response to Motion for Summary Judgment.

9 DATED this 30th day of June, 2008. Respectfully submitted,

10  
11  
12 By: s/Nina Perales  
13 Nina Perales

14 Counsel for Plaintiffs  
15 Gonzalez, et al.

16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on the 30<sup>th</sup> day of June, 2008, I caused the foregoing  
18 document to be electronically transmitted to the Clerk's Office using the CM/ECF  
19 System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

20 COPY of the foregoing filed electronically  
21 this 30<sup>th</sup> day of June, 2008.

22 COPY of the foregoing mailed with Notice  
23 of Electronic Filing this 30<sup>th</sup> day of June, 2008 to:

24 The Honorable Roslyn O. Silver  
25 United States District Court  
26 Sandra Day O'Connor U.S. Courthouse, Suite 624  
401 West Washington Street, SPC 59  
Phoenix, AZ 85003-2158

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s/Nina Perales  
Nina Perales