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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)

**MOTION IN LIMINE RE
ACORN SURVEY FORMS**

**(Assigned to the
Honorable Roslyn O. Silver)**

1 **MOTION**

2 Defendants State of Arizona; Secretary of State Jan Brewer; Maricopa County
3 Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne;
4 Apache County Recorder LeNora Johnson and Apache County Elections Director Penny
5 L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections
6 Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila
7 County Elections Director Dixie Mundy; Graham County Recorder Wendy John and
8 Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta
9 Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County
10 Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave
11 County Recorder Joan McCall and Mohave County Elections Director Allen Tempert;
12 Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R.
13 Nelson; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections
14 Director Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai
15 County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan
16 Hightower Marler and Yuma County Elections Director Patti Madrill (collectively
17 “Defendants”), by and through undersigned counsel, move in limine to exclude
18 documents produced by plaintiff Association of Community Organizations for Reform
19 Now (“ACORN”) that purport to be voter registration “survey” forms. The documents
20 are hearsay and were untimely disclosed four months after the close of discovery in the
21 case.

22 **RESPECTFULLY SUBMITTED** this 16th day of June, 2008.

23 **ANDREW P. THOMAS**
24 **MARICOPA COUNTY ATTORNEY**

25 **TERRY GODDARD**
26 **ARIZONA ATTORNEY GENERAL**

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MEMORANDUM OF POINTS AND AUTHORITIES

Relevant Procedural Background

7 Pursuant to the Court's scheduling order in this matter, fact discovery closed on
8 January 18, 2008. [Dkt. 740 ¶ F] On October 9, 2007, State Defendants served
9 interrogatories on ACORN which sought, among other things, information about any
10 individuals whom ACORN contends would have standing to challenge the proof of
11 citizenship requirement. [See dkt. 801-2 (Tab 9, ACORN Interrogatory response no. 4)]
12 On November 8, 2007, ACORN responded that "ACORN has not yet identified any
13 members who fit the description in the Interrogatory." [*Id.*] ACORN never
14 supplemented that response. Defendants also served an interrogatory requesting
15 ACORN to identify each fact upon which it contends that the proof of citizenship
16 requirement has a discriminatory impact on Latinos in Arizona. [See dkt. 801-1 (Tabs 1
17 and 2, ACORN Interrogatory response no. 1)] ACORN responded in January 2008 and
18 again in February 2008 but identified no individuals who allegedly lack proof of
citizenship to register to vote.

19 On May 19, 2008, plaintiffs produced to Defendants a compact disk containing
20 approximately 500 documents titled, "ACORN Registration Information." Along with
21 the documents, ACORN produced a supplemental response to a defense request for
22 production of documents relating to the impact of the voting requirements of Prop 200
23 on Plaintiffs' efforts to register individuals to vote. ACORN's supplemental response
24 referred to the newly-produced forms.¹

25
26 ¹ State Defendants had served their requests for production on Gonzalez plaintiffs
27 collectively before ACORN joined as a plaintiff in the case. ACORN did not produce
28 any documents responsive to Defendants' request for production until ACORN served a
"supplemental response" on May 19, 2008.

1 No information was provided by plaintiffs about the forms, but the forms on their
2 face seek information regarding citizenship status, name, address, race, willingness to
3 testify in Court, and forms of proof of citizenship possessed by the person completing
4 the form. The forms are dated in late March and early April 2008. As explained below,
5 the ACORN forms should be excluded at trial because they are hearsay and because they
6 were untimely disclosed.

7 **A. The Information in the Forms Is Hearsay.**

8 Hearsay is “a statement, other than one made by the declarant while testifying at
9 the trial or hearing, offered in evidence for the truth of the matter asserted.” Fed. R.
10 Evid. 801(c). Presumably, plaintiffs intend to introduce either the ACORN forms or
11 testimony about those forms to prove the names, race, address and possession of proof of
12 citizenship by individuals who completed the forms. Such evidence or testimony is
13 inadmissible hearsay under Rule 801(c). *E.g., Opuku-Boateng v. California*, 95 F.3d
14 1461, 1471 (9th Cir. 1996) (testimony regarding a poll taken by the plaintiff’s employer
15 was hearsay and therefore inadmissible because it was being offered to prove the truth of
16 the statements provided in such poll); *N.L.R.B. v. First Termite Control Co.*, 646 F.2d
17 424, 426 (9th Cir. 1981) (bills of lading indicating the state of origin of purchased goods
18 was hearsay when introduced for the purpose of proving where the goods originated).²

19 **B. The ACORN Forms Were Untimely Disclosed.**

20 The Final Amended Scheduling Order entered by the Court provides that “[a]ll
21 fact discovery, including answers to interrogatories, production of documents,
22

23 ² The ACORN forms are not admissible under the business records exception set forth
24 in Fed. R. Evid. 803(6). “A document prepared for purposes of litigation is not a
25 business record because it is lacking in trustworthiness.” *Paddock v. Dave Christensen,*
26 *Inc.*, 745 F.2d 1254, 1258 (9th Cir. 1984) (affirming exclusion of records of audits
27 undertaken to determine compliance with collective bargaining agreements because the
28 audits were not made or kept in the ordinary course of business but instead were
prepared for purposes of litigation). The ACORN forms include the question “Would
you be willing to testify in a court or sign a statement about your registration experience
today?” Thus, they plainly were prepared in connection with this litigation. As such,
they do not fall under the business records hearsay exception.

1 depositions and requests to admit shall be completed by January 18, 2008.” [Dkt. 740
2 ¶ F]

3 ACORN apparently created documents in anticipation of litigation in late March
4 or early April 2008 and then waited until May 19, 2008, to produce them. Because
5 ACORN waited until four months after the close of discovery to disclose their
6 “surveys,” Defendants were unable to take any additional discovery about those forms,
7 how they were created, who created them and under what circumstances. In addition,
8 Defendants have no opportunity to cross-examine those individuals who supposedly
9 completed those forms. Admission of those forms would be unfair and potentially
10 prejudicial to Defendants, who had no prior knowledge of any such “surveys.”

11 **Relief Requested**

12 For the foregoing reasons, the Court should exclude the ACORN survey forms
13 from evidence at trial and any testimony about or based on those forms.

14 **RESPECTFULLY SUBMITTED** this 16th day of June, 2008.

15 **ANDREW P. THOMAS**
16 **MARICOPA COUNTY ATTORNEY**

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ARIZONA ATTORNEY GENERAL

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 16th day of June, 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:
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COPY of the foregoing emailed via the Court's
Electronic Court Filing ("ECF") this 16th day of June, 2008 to:

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/s/ H. Myers

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