

1 ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

2 By: Colleen Connor (# 015679)
Deputy County Attorney
3 MCAO Firm No. 00032000

CIVIL DIVISION
4 222 North Central Avenue, Suite 1100
Phoenix, Arizona 85004-2206
5 Telephone (602) 506-0128
connorc@mcao.maricopa.gov

6 Dennis I. Wilenchik (# 05350)
7 Kathleen Rapp (# 023982)
WILENCHIK AND BARTNESS, P.C.
8 The Wilenchik & Bartness Building
2810 North Third Street
9 Phoenix, Arizona 85004
Telephone (602) 606-2810

10 DIW@wb-law.com; KatheenR@wb-law.com
Attorneys for County Defendants

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

13 **MARIA M. GONZALEZ; JESUS M.
14 GONZALES; BERNIE ABEYTIA;
LUCIANO VALENCIA; DEBBIE
15 LOPEZ, SOUTHWEST VOTER
REGISTRATION EDUCATION
16 PROJECT; VALLE DEL SOL;
FRIENDLY HOUSE; CHICANOS POR
17 LA CAUSA, INC.; and ARIZONA
HISPANIC FORUM,**

18 **Plaintiffs,**

19 **v.**

20 **STATE OF ARIZONA, JAN BREWER,
in her official capacity as the Secretary of
21 State of the State of Arizona, et al.,**

22 **Defendants.**

**No. CV06-1268-PHX ROS (Lead)
No. CV06-1362-PCT-JAT
No. CV06-1575-PHX-EHC**

**DEFENDANTS' MOTION IN
LIMINE REGARDING PENDING
CRIMINAL INVESTIGATIONS**

**(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, respectfully move in limine to
18 exclude testimony and questioning regarding pending criminal investigations.

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

20 **ANDREW P. THOMAS**
21 **MARICOPA COUNTY ATTORNEY**

22 **TERRY GODDARD**
ARIZONA ATTORNEY GENERAL

BY: s/ Dennis I. Wilenchik
WILENCHIK & BARTNESS, P.C.
Dennis I. Wilenchik, Esq.
Kathleen E. Rapp, Esq.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004

BY: s/ Dennis I. Wilenchik for
Mary O’Grady
Solicitor General
Steven A. LaMar
Senior Litigation Counsel
Carrie J. Brennan
Barbara A. Bailey

1 COLLEEN CONNOR
2 Deputy County Attorney
3 222 North Central Avenue, Suite 1100
4 Phoenix, Arizona 85004-2206
5 *Attorneys for County Defendants*

Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2926
*Attorneys for the State of Arizona
and the Arizona Secretary of State*

6 MEMORANDUM OF POINTS AND AUTHORITIES

7 Relevant Procedural Background

8 During the course of discovery Plaintiffs have sought information regarding
9 instances of voter fraud in Arizona. Among the other evidence of fraud that has been
10 disclosed are instances that are connected with continuing investigations in Maricopa
11 County. At depositions, Maricopa County officials were instructed not to testify
12 regarding these on-going investigations because it would be likely to violate and
13 compromise investigatory privileges and could breach the integrity of the investigation.
14 Likewise, Defendants request that the Court be sensitive to the same issues, preserve the
15 privilege and exclude any testimony sought from County officials or other witnesses
16 regarding on-going criminal investigations for the same reasons.

17 **A. Law enforcement investigations are privileged and should be 18 protected**

19 There is a qualified privilege with respect to law enforcement investigations. *In*
20 *re Sealed Case*, 856 F.2d 268 (D.C.Cir.1988). The purpose of the law enforcement
21 privilege is to “prevent disclosure of law enforcement techniques and procedures, to
22 preserve the confidentiality of sources to protect witnesses and law enforcement
personnel, to safeguard the privacy of individuals involved in an investigation, and
otherwise to prevent interference with an investigation.” *In re Dep't of Investigation of
the City of New York*, 856 F.2d 481, 484 (2d Cir.1988) (citations omitted). “[T]he
privilege is designed not only to facilitate investigations, but also to protect individuals
whose reputation may be damaged by disclosure of investigative leads or statements
from witnesses developed during the investigation.” *Id.* at 486. While County elections

1 officials might not normally be considered law enforcement, they must be included
2 under this privilege – either as witnesses or the primary enforcers of Arizona’s election
3 laws – in order to protect the integrity of election fraud investigations. To do otherwise,
4 would leave elections officials without any means to effectively investigate and aid law
5 enforcement in the criminal prosecutions of those who are flouting Arizona’s election
6 laws.

7 These investigations are still on-going, which means that they fall squarely within
8 the privilege. *See Am. Civil Liberties Union v. Finch*, 638 F.2d 1336, 1344 (5th Cir.
9 Mar.1981). The Court must balance whether Plaintiffs’ need for the information
10 outweighs the adverse effect that revelation would have on the investigations. *See*
11 *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223, 99 S.Ct. 1667, 1675, 60
12 L.Ed.2d 156 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79
13 S.Ct. 1237, 1241, 3 L.Ed.2d 1323 (1959); *In re Grand Jury Proceedings, Miller Brewing*
14 *Co.*, 687 F.2d at 1090-91. Here, there is no need for any testimony regarding the on-
15 going investigations. There is ample evidence of voter registration fraud, even without
16 touching on testimony regarding on-going investigations. Furthermore, no evidence of
17 fraud is even needed for the State’s Voter ID and Voter Registration laws to be upheld.
18 *Crawford v. Marion County Election Bd.*, 128 S. Ct. at 1617, 1619.

19 Thus, there is no need for Plaintiffs to question County officials, or anyone else,
20 regarding on-going investigations of voter fraud. Defendants respectfully request that
21 the Court exclude any such testimony from trial. If the Court is in need of further
22 information to make this decision, it can be provided in camera, upon request. *See In re*
U.S. Dept of Homeland Security, 459 F.3d 565, 570-71 (5th Cir.2006)

Relief Requested

For the foregoing reasons, Defendants respectfully request that the Court exclude
the use of any testimony regarding on-going investigations of voter fraud, for any
purpose at all.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

RESPECTFULLY SUBMITTED this 16th day of June, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

TERRY GODDARD
ARIZONA ATTORNEY GENERAL

BY: s/ Dennis I. Wilenchik
WILENCHIK & BARTNESS, P.C.
Dennis I. Wilenchik, Esq.
Kathleen E. Rapp, Esq.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004

BY: s/ Dennis I. Wilenchik for
Mary O’Grady
Solicitor General
Steven A. LaMar
Senior Litigation Counsel
Carrie J. Brennan
Barbara A. Bailey
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2926
*Attorneys for the State of Arizona
and the Arizona Secretary of State*

COLLEEN CONNOR
Deputy County Attorney
222 North Central Avenue, Suite 1100
Phoenix, Arizona 85004-2206
Attorneys for County Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 2008, I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

David J. Bodney
Karen J. Hartman-Tellez
Steptoe & Johnson LLP
201 E. Washington St., Ste. 1600
Phoenix, Arizona 85004-2382
dbodney@steptoe.com
khartman@steptoe.com

David B. Rosenbaum
Thomas L. Hudson
Sara S. Greene
Osborn Maledon, P.A.
2929 N. Central Ave., 21st Floor
Phoenix, Arizona 85012-2793
drosenbaum@omlaw.com
thudson@omlaw.com
sgreene@omlaw.com

1 Jon Greenbaum
Benjamin Blustein
2 Lawyers' Committee For
Civil Rights Under Law
3 1401 New York Avenue, Ste. 400
Washington, D.C. 20005
4 jgreenbaum@lawyerscommittee.org

Neil Bradley
ACLU Southern Regional Office
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, Georgia 30303
nbradley@aclu.org

5 Elliot M. Minberg
6 People for the American
Way Foundation
7 2600 M Street, NW, Ste. 400
Washington, DC 20036
8 eminberg@pfaw.org

Luis Roberto Vera, Jr.
League of United Latin
American Citizens
111 Soledad, Ste. 1325
San Antonio, Texas 78205-2260
Irvlaw@sbcglobal.net

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

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

14 David J. Becker
People for the American Way Foundation
15 2000 M Street, NW, Suite 400
Washington, D.C. 20036
16 dbecker@pfaw.org

Daniel R. Ortega, Jr.
Roush McCracken Guerrero
Miller & Ortega
650 North 3rd Avenue
Phoenix, Arizona 85003
danny@rmgmoinjurylaw.com

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

Mary O'Grady
Solicitor General
Carrie J. Brennan
Barbara A. Bailey
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Mary.OGrady@azag.gov

1 Judith M. Dworkin
Marvin S. Cohen
2 Patricia Ferguson-Bohnee
SACKS TIERNEY P.A.
3 4250 N. Drinkwater Blvd. 4th
Scottsdale, Arizona 85251-3693
4 Judith.Dworkin@sackstierney.com

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

5 Melvin R. Bowers, Jr.
Lance B. Payette
6 Navajo County Attorneys Office
PO Box 668
7 Holbrook, Arizona 86025
lance.payette@co.navajo.az.us

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

8 Jean E. Wilcox
9 Coconino County Attorney's Office
110 East Cherry Avenue
10 Flagstaff, Arizona 86001
jwilcox@coconino.az.gov

11
12
13 COPY of the foregoing filed electronically
this 16th day of June, 2008.

14
15 COPY of the foregoing emailed via the Court's
Electronic Court Filing ("ECF") this 16th day of June, 2008 to:

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

19
20 /s/ H. Myers

21

22