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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
DEPOSITION TESTIMONY OF
ARTURO ROSALES AND AGNES
LAUGHTER**

(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 deposition testimony of F. Arturo Rosales and Agnes Laughter.

19 The Gonzalez plaintiffs disclosed as “exhibits” the depositions of plaintiff expert
20 F. Arturo Rosales. The Court should exclude such deposition testimony because the use
21 of such testimony is not permitted under Fed. R. Civ. P. 32(a). In addition, the ITCA
22 plaintiffs have designated the deposition testimony of Agnes Laughter for admission at
23 trial. The Court should exclude that testimony because it is irrelevant under Fed. R.
24 Evid. 402. This Motion is accompanied by the following Memorandum of Points and
25 Authorities, incorporated herein by reference.

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

27 **ANDREW P. THOMAS**
28 **MARICOPA COUNTY ATTORNEY**

TERRY GODDARD
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MEMORANDUM OF POINTS AND AUTHORITIES

A. The Deposition of Arturo Rosales.

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12 State Defendants deposed Gonzalez plaintiff expert, Dr. Rosales, on February 27,
13 2008. At trial, deposition testimony may be used against a party only on the specified
14 conditions set forth in Fed. R. Civ. 32(a)(1). One of the conditions is that “the use is
15 allowed by Rule 32(a)(2) through (8).” Fed. R. Civ. 32(a)(1)(C). Plaintiffs’ use of the
16 deposition testimony of Dr. Rosales does not fall under any of the permissible uses set
17 out in sub-provisions (a)(2) through (8).

18 The only possible applicable sub-provision is (a)(4), which provides for use of
19 deposition testimony of witnesses who are unavailable. Unavailability under that sub-
20 provision requires the Court to find that the witness is dead, the witness is more than 100
21 miles from the trial, the witness cannot attend due to age, illness, infirmity, or
22 imprisonment, or the party offering the deposition could not procure the witness’s
23 attendance by subpoena. Alternatively, the offering party may move to permit the
24 deposition to be admitted by demonstrating that “exceptional circumstances make it
25 desirable—in the interest of justice and with due regard to the importance of live
26 testimony in open court.” Fed. R. Civ. P. 32(a)(4)(E).

27 There is no suggestion that Dr. Rosales is unavailable for purposes of Rule
28 32(a)(4). He lives and resides in the Phoenix area. He has appeared in Phoenix for
deposition to testify on plaintiffs’ behalf. Moreover, plaintiffs have not demonstrated

1 that any exceptional circumstances exist to use Dr. Rosales' deposition testimony. *E.g.*,
2 *Griman v. Makousky*, 76 F.3d 151, 153 (7th Cir. 1996) (plaintiff's inability to locate key
3 witness who had been recently released from defendants' custody was not an exceptional
4 circumstance under Rule 32; "[e]ven 'serious prejudice' from the exclusion of a
5 deposition has been held not to be an exceptional circumstance in and of itself").

6 Accordingly, the Court should not permit plaintiffs' use at trial Dr. Rosales'
7 deposition testimony. *E.g.*, *Young & Assocs. Public Relations, L.L.C. v. Delta Air Lines,*
8 *Inc.*, 216 F.R.D. 521, 522 (D. Utah 2003) ("The preference for live testimony at trial
9 rather than deposition testimony as a substitute is uniformly stressed in case law").

10 **B. The Deposition of Agnes Laughter.**

11 The ITCA plaintiffs designated the deposition testimony of Agnes Laughter for
12 admission in evidence. Ms. Laughter was a plaintiff in the Navajo Nation lawsuit,
13 which asserted a challenge to the voting identification requirement of Prop 200. Ms.
14 Laughter has dismissed her lawsuit against the Secretary of State and thus is no longer a
15 part of this litigation.

16 Under Fed. R. Evid. 402, evidence that is not relevant to any fact that is of
17 consequence to determination of the action is not admissible. See Fed. Rs. Civ. P. 401,
18 402. Ms. Laughter testified in her deposition about her personal experiences and
19 circumstances pertaining to voting and possession of identification. Ms. Laughter is
20 Navajo and lives on the Navajo reservation. She did not provide testimony regarding
21 other Native American tribes. The ITCA plaintiffs represent the Hopi Tribe and the
22 Inter Tribal Council of Arizona, of which the Navajo Nation is not a part. Accordingly,
23 Ms. Laughter's testimony is not relevant to any claims in the remaining litigation,
24 including the claims of the Native American plaintiffs, who are not even challenging the
25 voting identification requirement.

26 In addition, plaintiffs have not established that Ms. Laughter is unavailable to
27 testify at trial in accordance with Rule 32(a). For both of those reasons, the Court should
28 exclude the use of Ms. Laughter's deposition testimony at trial.

1 **Relief Requested**

2 For the foregoing reasons, the Court should exclude from trial the deposition
3 testimony of Dr. Rosales and Agnes Laughter.

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

5 **ANDREW P. THOMAS**
6 **MARICOPA COUNTY ATTORNEY**

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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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6 **COPY** also served this 16th day of June, 2008, by U.S. Mail with Notice of
7 Electronic Filing, on the following, who may not be a registered participant of the ECF
8 System:

9 The Honorable Roslyn O. Silver
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14 /s Hilary Meyers

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