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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al.,)	No. CV-06-1268-PHX-ROS(Lead)
)	No. CV-06-1362-PCT-JAT(Cons.)
Plaintiffs,)	No. CV-06-1575-PHX-EHC(Cons.)
)	
vs.)	GONZALEZ PLAINTIFFS' MOTION
)	FOR ADVERSE INFERENCE
State of Arizona, et al,)	FOLLOWING SPOILIATION OF
)	EVIDENCE AND MEMORANDUM
Defendants.)	IN SUPPORT
)	

(Assigned to the
Honorable Roslyn O. Silver)

COME NOW Gonzalez Plaintiffs and request that this Court grant an adverse inference in the wake of destruction of voter registration forms by Yuma County Defendants. Gonzalez Plaintiffs have been unable to negotiate a stipulation with Defendants regarding the factual inferences to be drawn in the wake of the destruction of evidence and turn to the Court for relief.

I. INTRODUCTION

In July 2007, and following discovery requests by Plaintiffs for information related to rejected voter registration forms, Yuma County Defendants shredded and permanently destroyed their rejected voter registration forms.

As a result of the destruction of documents sought by Plaintiffs in discovery, Yuma County produced only 258 rejected forms to Plaintiffs. These forms do not cover any period of time between January 1, 2005 and December 2006; only sporadic forms are provided for the period January 2007 to November 2007. For this reason, Gonzalez Plaintiffs respectfully request that this Court grant an adverse inference and find, as a matter of fact, that the voter registration forms that were destroyed and not produced by Yuma County showed a negative and disparate effect of Prop 200 on Latino voter registration.

II. FACTS SURROUNDING YUMA COUNTY'S DESTRUCTION OF EVIDENCE

This case was filed in May, 2006 by, among others, Maria and Jesus Gonzalez and Georgia Morrison Flores. Mr. and Mrs. Gonzalez and Ms. Morrison

Flores are Yuma County residents who challenged Proposition 200 on legal and constitutional grounds.

On June 30, 2006, ITCA Plaintiffs served their first set of interrogatories on Yuma County Defendants which included a request (No. 3) for the number of persons rejected for voter registration because of Prop 200. Ex. 1 (ITCA's First Set of Interrogatories to Yuma County).

On July 24, 2006, Yuma County responded to ITCA Plaintiffs' interrogatory (No. 3) by stating that "Yuma County *does not track or maintain* the information requested in this interrogatory." Ex. 2 (Yuma response to ITCA 1st Set of Interrogatories) (emphasis added). At this time, Yuma County *did* maintain rejected voter registration forms and provided its counsel, Colleen Connor, copies of the rejected voter registration forms of Maria and Jesus Gonzalez. *See* Ex. 3 (3/20/08 email from Colleen Connor, counsel for Yuma County in *Gonzalez v. Arizona*).

Also in July, 2006, Yuma County (and thirteen other County Defendants) entered into negotiations with Gonzalez Plaintiffs in order to reach an agreement governing the production of unredacted voter registration forms by County Defendants.¹ These negotiations, and the stipulation filed by counsel for Yuma County (and thirteen other county defendants), specifically discussed production

¹ These negotiations followed Maricopa County's production of redacted rejected voter registration forms in response to Gonzalez Plaintiffs' first Request for Production. *See* Ex. 4. (July 28, 2006 Maricopa County response and Gonzalez Plaintiffs' 1st RFP).

of unredacted voter registration forms by all County Defendants and counsel for Yuma County signed the stipulation. *See* Dkt. 134 and Dkt. 140. and Ex. 5.

On June 7, 2007, Yuma County received a second set of interrogatories from ITCA plaintiffs which included an interrogatory (No. 1) requesting the number of voter applicants who were not added to the rolls for failure to produce proof of citizenship pursuant to Prop 200. Ex. 6 (ITCA Plaintiffs' Second Set of Non-Uniform Interrogatories to County Defendants). ITCA's Request for Production, served that same day, asked Yuma County to produce voter registration forms rejected pursuant to Prop 200. Ex. 7 (ITCA Plaintiffs' Second Set of Requests for Production of Documents to County Defendants).

On July 9, 2007, Yuma County responded to ITCA's 2nd set of Interrogatories and RFPs by stating that it is "*unable to track*" the number of voter applicants who were not added to the rolls for failure to produce proof of citizenship pursuant to Prop 200. (emphasis added) Yuma County further stated that it is "*unable to track*" in response to the request for production of rejected voter registration forms. (emphasis added) Ex. 8 (Yuma County 7/9/07 responses to interrogatories and requests for production).

On August 10, 2007, Gonzalez Plaintiffs filed a motion seeking a ruling from the Court regarding the production of unredacted voter registration forms by all County Defendants. *See* Dkt. 315. On August 15, 2007, counsel for Yuma County and twelve other county defendants filed a Discovery Dispute Position Statement requesting that the Court deny Plaintiffs access to unredacted rejected

voter registration forms from all counties. *See* Dkt. 319. The Court ordered all county defendants to produce unredacted rejected voter registration forms in the hearing held 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).

Yuma County produced 258 voter registration forms to Gonzalez Plaintiffs on November 21, 2007. *See* Ex. 9. Of the 258 voter registration forms, none were from the period of time between January 1, 2005 and December 2006; the forms were dated from the period January 2007 to November 2007. The number of forms produced by Yuma County, by month, is as follows: Dec. 2006 (2); Jan. 2007 (3); Feb. 2007 (5); Mar. 2007 (2); Apr. 2007 (169); May 2007 (13); Jun. 2007 (8); Aug 2007 (8); Sep. 2007 (11); Oct. 2007 (26); Nov. 2007 (4).

One week later, on November 28, 2007, Yuma County objected to Gonzalez Plaintiffs' Requests for Production (No. 14 and 15) which asked the county to produce the rejected voter registration forms of Plaintiffs Maria and Jesus Gonzalez. Yuma County wrote that the request was "overbroad, unduly burdensome, irrelevant, vague, and ambiguous" and refused to produce the two forms. *See* Ex. 10 (Yuma 11/28/07 response to Request for Production) and Ex. 11 (Gonzalez 10/16/07 Request for Production to Yuma). Yuma County did not produce the rejected voter registration forms of Mr. and Mrs. Gonzalez until December 14, 2007 after further informal requests by Gonzalez Plaintiffs. *See* Ex. 12 (12/14/07 email from Colleen Connor).

Gonzalez Plaintiffs continued to seek production of rejected voter registration forms from Yuma County throughout the winter of 2007-2008. *See* Ex. 13 (12/19/07 Gonzalez Pls'. Interrogatories to Yuma County Defendants including a request (No. 4) for information related to voter applicants who were required to show proof of citizenship pursuant to Prop 200); Ex. 14 (12/19/07 Gonzalez Pls. 2nd set of RFPs to Yuma County Defendants including a request (No. 1) for voter registration forms rejected pursuant to Prop 200).

In response, Yuma County Defendants objected to Gonzalez Plaintiffs' Interrogatory as "vague and ambiguous and imposes an excessive and unreasonable burden" and produced less than 50 additional rejected voter registration forms. *See* Ex. 15 (1/18/08 Yuma County Response to Gonzalez Pls. Interrogatories) and Ex. 16 (1/18/08 Yuma County response to Gonzalez RFP).

Gonzalez Plaintiffs made further efforts to obtain the as-yet unproduced voter registration forms from Yuma County in emails to counsel for Yuma County in emails exchanged March 20 and 21, 2008. *See* Ex. 17 (emails between counsel dated 3/20/08 and 3/21/08). In these exchanges, Yuma County continued to deny that there were any additional voter registrations that had not been produced.

Counsel for Yuma County waited until March 28, 2008, the deadline for Gonzalez Plaintiff's experts' analysis of rejected voter registration forms, to inform counsel for Gonzalez Plaintiffs in a telephone call that Yuma County elections staff had shredded the contents of a filing cabinet containing rejected

voter registrations forms in the summer of 2007. *See* Ex. 18 (email from Collen Connor to Nina Perales).

Gonzalez Plaintiffs have since been unable to reach an agreement with Defendants regarding the factual inferences to be drawn in the wake of Yuma County's destruction of its rejected voter registration forms.

III. ARGUMENT

This Court has the inherent authority to make appropriate evidentiary rulings in the wake of Yuma County's destruction of evidence in the case. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). This power includes making a finding that the destroyed documents contained evidence that was unfavorable to Yuma County. *See Akiona v. United States*, 938 F.2d 158, 161(9th Cir.1991).

An adverse inference against Yuma County Defendants is warranted in this case because Yuma County: 1) maintained the records sought by Plaintiffs; 2) served repeated discovery responses signed by counsel that claimed the information was not available; and 3) then destroyed the evidence after learning that Gonzalez Plaintiffs sought a stipulation and court order governing production of the documents. *See id.* ("Generally, a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case.") (citation omitted); *see also Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 743 (8th Cir. 2004) (affirming sanction of adverse inference instruction where defendant had followed

its usual policy of destroying voice tapes following train accident in which motorist was killed).

The Court need not find bad faith in order to grant an adverse inference following the spoliation by Yuma County. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.1993) (“[A] finding of ‘bad faith’ is not a prerequisite to this corrective procedure.... Surely a finding of bad faith will suffice, but so will simple notice of ‘potential relevance to the litigation.’”).

Yuma County Defendants cannot claim in this case that they were unaware of the need to retain the rejected voter registration forms. This case was initiated by Plaintiffs more than a year before the records were destroyed and Plaintiffs had requested that Yuma County provide both the rejected voter registration forms and information related to the rejected voter registration forms before Yuma County destroyed the forms in the summer of 2007. *See U.S. v. Kitsap Physicians Service*, 314 F.3d 995 (9th Cir. 2002) (finding no spoliation when defendants destroyed evidence years before suit was initiated by plaintiff).

Neither can Yuma County claim that the evidence was lost, since it has admitted that it shredded the evidence. *See Medical Laboratory Management Consultants v. American Broadcasting Companies* 306 F.3d 806 (9th Cir. 2002) (finding no spoliation when defendants’ loss of the evidence was unintentional).

Yuma County officials collected and maintained rejected voter registration forms throughout the period in which Plaintiffs served multiple discovery requests for information related to the forms and for production of the forms themselves.

During this period, Yuma County did not produce the forms, but instead served responses which were signed by their attorneys claiming they did not “track” the requested information.

As Plaintiffs sought a court order approving a procedure under which all counties would produce rejected voter registration forms, Yuma County elections staff removed the forms from the filing cabinet in which they were kept and fed them into their newly-acquired document shredder. Yuma County then subsequently produced in discovery only a few, randomly retained forms and then withheld the fact that it had destroyed the bulk of the forms for over six months until the expert report deadline passed for analysis of the rejected voter registration forms.

Voter registration information from the Arizona statewide voter roll shows that Latino voter registration dropped as a percentage of all registration in Yuma County following implementation of Prop 200. *See* January 4, 2008 expert report of Dr. Rodolfo Espino (corrected version filed 1/7/08), Gonzalez SJ Exhibit 561. Under these circumstances, it is appropriate for the Court to make an adverse inference that the voter registration forms that were destroyed and not produced by Yuma County showed a negative and disparate effect of Prop 200 on Latino voter registration.

IV. CONCLUSION

For the foregoing reasons, Gonzalez Plaintiffs respectfully request that this Court grant an adverse inference and find, as a matter of fact, that the voter

registration forms that were destroyed and not produced by Yuma County showed a negative and disparate effect of Prop 200 on Latino voter registration.

DATED this 30 day of June, 2008.

Respectfully submitted,

By: s/Nina Perales
Nina Perales

Counsel for Plaintiffs
Gonzalez, et al.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th 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 CM/ECF registrants.

COPY of the foregoing filed electronically
this 30th day of June, 2008.

COPY of the foregoing mailed with Notice
of Electronic Filing this 30th day of June, 2008 to:

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

s/Nina Perales
Nina Perales