

1 TERRY GODDARD
Attorney General
2 Firm Bar No. 14000
Mary O'Grady, No. 011434
3 Solicitor General
4 Steven A. LaMar, No. 004140
Senior Litigation Counsel
5 Carrie J. Brennan, No. 018250
Barbara A. Bailey, No. 018230
6 Assistant Attorneys General
7 1275 West Washington Street
Phoenix, Arizona 85007-2926
8 Tel: (602) 542-3333
9 Fax: (602) 542-8308
Attorneys for State of Arizona and
10 Arizona Secretary of State Janice Brewer

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 TO STRIKE
GONZALEZ PLAINTIFFS'
FACTUAL SUBMISSION IN
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT BY
DEFENDANTS STATE OF
ARIZONA AND ARIZONA
SECRETARY OF STATE**

(Assigned to the Honorable
Roslyn O. Silver)

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1 **MOTION**

2 Pursuant to Fed. R. Civ. P. 56(e) and Fed. Rs. Evid. 402, 602, 801(c), 802, and
3 901, Defendants State of Arizona and Arizona Secretary of State Janice Brewer move to
4 strike the exhibits filed by Gonzalez plaintiffs on June 16, 2008, in opposition to State
5 Defendants’ motion for summary judgment. As explained below, the vast majority of
6 those exhibits are inadmissible under the Federal Rules of Evidence because they have
7 not been authenticated. Accordingly, nearly all of plaintiffs’ exhibits should be excluded
8 from the record on summary judgment. In addition, apart from the lack of authentication
9 of such exhibits, many of those exhibits are hearsay and thus are inadmissible on that
10 independent basis.

11 Although plaintiffs submitted declarations from individuals that may not need
12 authentication, many of those declarations lack foundation for personal knowledge, are
13 based on hearsay, or are from individuals either not previously disclosed to Defendants
14 or disclosed long after the close of discovery in this case.

15 Moreover, because plaintiffs improperly rely on those inadmissible exhibits to
16 support plaintiffs’ factual representations in opposition to Defendant’s statement of
17 facts, the Court should strike plaintiffs’ paragraphs in opposition to those facts.

18 **MEMORANDUM**

19 **A. The Court Should Strike Most of Plaintiffs’ Submitted Exhibits**
20 **Because They Lack Authentication.**

21 On Saturday, June 14, 2008, plaintiffs filed both their response to Defendants’
22 summary judgment motion and a 246-page document that asserts 1,650 “additional
23 facts” in opposition to summary judgment. [See dkt. 813, 815] Late on the afternoon of
24 Friday, June 13, 2008, the day those response papers were due, plaintiffs asked for and
25 the Court granted permission to file their exhibits manually and to hand-deliver a copy
26 on CD’s to opposing counsel on Monday, June 16, 2008. State Defendants received
27 those two CD’s on Monday afternoon. One of the CD’s is labeled, “Exhibit 3 Voter
28 Roll.” The other CD contains more than 500 exhibits in Adobe formatted files
purporting to be exhibits 1-578. That CD contains gaps in exhibit numbers.

1 The files on the multiple-exhibit CD appear to be emails, memoranda, articles,
2 reports, and statements of approximately fifteen individuals, whose names match those
3 of witnesses disclosed for the first time by plaintiffs four months after the close of
4 discovery. Plaintiffs' CD of exhibits contained no index and, more importantly, no
5 declaration(s) authenticating those documents. When defense counsel contacted
6 plaintiffs' counsel to inquire whether any declaration of counsel had been filed with the
7 exhibits, plaintiffs' counsel responded that the "exhibit list" was not filed with any
8 declaration "because the declaration itself would have exceeded 100 pages." [Email
9 dated 6/16/08 from Nina Perales to Barbara Bailey (attached at Tab A)]

10 The Ninth Circuit has "repeatedly held that unauthenticated documents cannot be
11 considered in a motion for summary judgment." *Orr v. Bank of America*, 285 F.3d 764,
12 773 (9th Cir. 2002) (holding that evidence submitted in summary judgment papers was
13 inadmissible because it lacked authentication) (citing cases); *see also* Fed. R. Evid.
14 901(a). "Authentication is a 'condition precedent to admissibility,' and this condition is
15 satisfied by 'evidence sufficient to support a finding that the matter in question is what
16 its proponent claims.'" *Orr*, 285 F.3d at 773. For purposes of summary judgment,
17 "documents authenticated through personal knowledge must be 'attached to an affidavit
18 that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person
19 through whom the exhibits could be admitted into evidence.'" *Id.* at 773-74 (alteration
20 in original).

21 In this case, plaintiffs filed bare, unauthenticated exhibits, and for which no
22 proper foundation has been laid. Those include exhibits 1-501 and 555-578.
23 Accordingly, those exhibits are inadmissible and should be stricken from the record on
24 summary judgment. *E.g.*, *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th
25 Cir. 1987) (affirming the district court's exclusion of fuel invoice exhibits, which were
26 not properly authenticated; "[w]e hold that such documents may not be relied upon to
27 defeat a motion for summary judgment."); *Hamilton v. Keystone Tankship Corp.*, 539
28 F.2d 684, 686 (9th Cir. 1976) (holding that documentary exhibits should have been
excluded on summary judgment where there was no proper foundation laid for them).

1 **B. The Court Should Strike Plaintiffs’ Exhibits For the Independent**
2 **Reason that Those Exhibits Are Hearsay.**

3 “A trial court can only consider admissible evidence when ruling on a motion for
4 summary judgment.” *Orr*, 285 F.3d at 773; *Anheuser-Busch, Inc. v. Natural Beverage*
5 *Distributors*, 69 F.3d 337, 345 n.4 (9th Cir. 1995); *Beyene v. Coleman Sec. Servs. Inc.*,
6 854 F.2d 1179, 1181 (9th Cir. 1988); *De La Torre v. Merck Enters., Inc.*, 540 F. Supp. 2d
7 1066, 1075 (D. Ariz. 2008). Hearsay is not admissible unless it falls under some
8 exception to inadmissibility as provided in the Rules of Evidence or other legal
9 authorities. *See* Fed. R. Evid. 802.

10 Hearsay is “a statement, other than one made by the declarant while testifying at
11 the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed.
12 R. Evid. 801(c). Thus, for purposes of deciding a summary judgment motion, the Court
13 should exclude hearsay evidence and any assertions of fact based on such evidence.
14 *E.g.*, *Orr*, 285 F.3d at 778-79 (affirming the district court’s exclusion of hearsay
15 testimony given in a deposition in granting summary judgment).

16 Although the federal rules governing summary judgment permit movants and
17 respondents to submit affidavits or declarations in supporting or opposing summary
18 judgment, parties may not submit out-of-court statements to prove the truth of the
19 matters asserted in those statements. *E.g.*, *Waddell v. Comm’r of Internal Revenue*, 841
20 F.2d 264, 267 (9th Cir. 1988) (excluding a report by an appraiser who had died shortly
21 before trial because the report was hearsay and no exception to its inadmissibility was
22 established); *Beyene*, 854 F.2d at 1182-83 (an exhibit that consisted of two exhibits
23 admitted in a separate trial and which were third party memoranda were hearsay and
24 thus inadmissible for purposes of summary judgment).

25 Nearly all of the exhibits submitted by plaintiffs are hearsay. The majority of
26 exhibits 1-501 appear to consist of a morass of memoranda, emails, slide presentations,
27 correspondence, notices, website printouts, tables, handwritten notes, phone messages,
28 records and information about the named plaintiffs. In addition, the last portion of the
exhibits (exs. 555-578) purports to be reports of plaintiffs’ experts in the case.

1 Because each of those exhibits presumably is included to prove the truth of the
2 matter asserted therein, and because plaintiffs have established no foundation for any
3 exception to the hearsay exclusion, those exhibits are inadmissible for purposes of
4 summary judgment. Accordingly, the Court should strike those exhibits (exs. 1-501,
5 555-578) from plaintiffs' factual submission and plaintiffs' facts which rely on those
6 respective exhibits.¹

7 **C. The Court Should Strike Each Exhibit Purporting to Be the**
8 **Declaration of Individual Registrants or Electors Because the**
9 **Respective Declarants Were Untimely Disclosed by Plaintiffs.**

10 Apart from plaintiffs' failure to lay foundation for and to authenticate their
11 exhibits, plaintiffs' factual submission is disorganized and incomplete. Plaintiffs'
12 submission of hundreds of exhibits without any index, in support of 1,650 "facts," was
13 made even more confusing by plaintiffs' failure to serve some of their cited exhibits,
14 failure to properly cite to those exhibits, inclusion of exhibits not referenced in plaintiffs'
15 "facts," and failure to include complete and executed copies of purported declarations.

16 In addition, plaintiffs served declarations of approximately fifteen individuals
17 who either were not disclosed or were disclosed for the first time months after the close
18 of fact discovery in the case. Fact discovery closed on January 18, 2008. Indeed,
19 Gonzalez plaintiffs' counsel acknowledged to the Court on March 21, 2008, that "[w]e
20 finished fact discovery on January 18." [Transcript of 3/21/08 hearing, dkt. 735, p. 24]
21 Of the sixteen late disclosed witnesses, half were disclosed for the first time on May 9,
22 2008, and the remaining half were disclosed on different dates up to and including June
23 4, 2008, or not disclosed at all.

24 Plaintiffs should not be permitted to sandbag Defendants by offering declarations
25 of sixteen witnesses who were disclosed months after the close of discovery—when
26 Defendants no longer had any opportunity to cross-examine those witnesses or take any

27 ¹ Because plaintiffs served 1,650 "facts" and later served hundreds of non-indexed
28 exhibits, just a few days before Defendants' reply papers were due, Defendants have not
had an opportunity to prepare a submission to the Court regarding which plaintiff "facts"
rely on which exhibits. If the Court would find that helpful, Defendants are most willing
to provide that information to the Court. In any event, the Court should strike plaintiffs'
responses to Defendants' 24 facts as set forth in Defendants' Statement of Facts.

1 additional discovery about them. Plaintiffs' disregard for the disclosure rules is
 2 especially troubling given that Defendants had carefully sought by interrogatory the
 3 disclosure of individuals who lacked proof of citizenship or voting identification. [See
 4 dkt. 801-2 (Tab 9, responses to nos. 3 and 4)] Plaintiffs failed to identify a single
 5 individual in response to those interrogatories. Instead, plaintiffs attempt to surprise
 6 Defendants on summary judgment by offering testimony of untimely disclosed
 7 individuals. Plaintiffs' failure places Defendants at an unfair disadvantage and should
 8 not be permitted.

9 The following chart sets forth the exhibits consisting of individual declarations.
 10 In addition to untimely disclosure, some of those declarations are inadmissible for other
 11 reasons, as indicated in the chart:

Ex.	Name	Date first disclosed	Objection
524	Archuleta	5/09/08	Untimely disclosed; lacks foundation, personal knowledge pursuant to Fed. Rs. Evid. 602, 701; purports to offer expert testimony but was not designated as expert and no expert disclosures were made with regard to Ms. Archuleta. (See section D below.)
525	Belle-Oudry	6/04/08	Untimely disclosed.
527	Cotto	None	Not disclosed.
528	Davis	5/09/08	Untimely disclosed.
529	Fitzpatrick	5/09/08	Untimely disclosed.
530	Fletchall	None	Not disclosed.
531	D. Fulton	5/19/08	Untimely disclosed.
533	Gutierrez	5/09/08	Untimely disclosed; lacks foundation, personal knowledge; purports to offer expert testimony but was not designated as expert and no expert disclosures were made with regard to Mr. Gutierrez. (See section D below.)

535	Hameed	5/19/08	Untimely disclosed.
540	Mannan	5/09/08	Untimely disclosed.
541	Martinez	5/09/08	Untimely disclosed.
543	Natale	5/19/08	Declaration is unsigned; hearsay; not authenticated; witness untimely disclosed.
547	Sandschafer	5/09/08	Untimely disclosed.
550	Smith	5/09/08	Untimely disclosed.
552	Terrazas	5/23/08	Untimely disclosed.

The following declarations are cited in plaintiffs' "additional facts" but are not included in plaintiffs' filed exhibits that were served on Defendants:

Allen (ex. 523)
 Steven Fulton (ex. 531A)
 Jesus Gonzalez (ex. 532A)
 Higuera (ex. 536)
 Morrison-Flores (ex. 542)
 Quintero (ex. 544)
 Pete Rios (ex. 545)
 Rogers (ex. 546)
 Luz Sarmina (ex. 548)
 Michael Slater (ex. 549)
 Sorge (ex. 551)
 Valencia (ex. 553)
 Walker (ex. 554)
 White (ex. 554A)
 Dethloff (ex. number unknown)
 Luna (ex. number unknown)

In addition, plaintiffs submit the 2006 declaration of former plaintiff Agnes Laughter. [Ex. 538] Ms. Laughter's declaration should be excluded because it is not relevant. Ms. Laughter was a plaintiff in the Navajo Nation action and has dismissed her claims against the Secretary of State. Moreover, Ms. Laughter's declaration pertains solely to her experiences as a Navajo Nation member. Plaintiffs assert no claims on behalf of Navajo or other Native American electors.

1 **D. Other Declarations Submitted by Plaintiff Are Inadmissible to the**
2 **Extent They Lack Foundation for Personal Knowledge, Are Based on**
3 **Hearsay, or Purport to Offer Expert Opinion.**

4 Defendants move to strike the declarations of Elizabeth Archuleta, Alfredo
5 Gutierrez, Sal Martinez, Monica Sandschafer, and Hector Yturralde because their
6 declarations lack foundation for personal knowledge or are based on hearsay. [See exs.
7 524, 533, 541, 547, 554B] In addition, the Archuleta and Gutierrez declarations purport
8 to offer expert opinions even though no foundation was laid for their qualifications and
9 even though those individuals were not disclosed as experts in the case in accordance
10 with Fed. R. Civ. P. 26(a)(2).

11 “A witness may not testify to a matter unless evidence is introduced sufficient to
12 support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid.
13 602. Thus, an affiant must have personal knowledge and the proponent of such
14 testimony must offer evidence to support a finding of such personal knowledge. *E.g.*,
15 *U.S. for Use and Benefit of Conveyor Rental & Sales Co. v. Aetna Cas. & Surety Co.*,
16 981 F.2d 448, 454 (9th Cir. 1992) (holding that an affiant’s statement was inadmissible to
17 prove the truth of the matter asserted therein where the statement lacked any indication
18 of personal knowledge on the part of the affiant); *Opuku-Boateng v. California*, 95 F3d
19 1461, 1471 (9th Cir. 1996) (the district court erred by admitting the results of an informal
20 poll taken in the work place; such statements were inadmissible hearsay); *Harkins*
21 *Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477, 489-90 (9th Cir. 1988)
22 (deposition testimony about what the deponent had been told was hearsay and not
23 admissible for purposes of summary judgment); *Jacobsen v. Filler*, 790 F.2d 1362, 1367
24 (9th Cir. 1986) (deposition testimony about what the deponent was told or had read was
25 inadmissible hearsay and could not defeat summary judgment).

26 Mr. Martinez states that his organization, Chicanos Por La Causa, has “found that
27 Latinos often feel dejected and apathetic because they truly want to register but do not
28 possess the proper documents[] required by Proposition 200.” [Ex. 541 ¶ 8] Mr.
29 Martinez does not have personal knowledge of that statement and his assertion could
30 only be based on hearsay. Accordingly, that statement is inadmissible.

1 Ms. Sandschafer states that her organization, Association of Community
2 Organizations for Reform Now, “cannot successfully register new voters . . . because
3 individuals do not possess the proper documentation to complete a voter registration
4 application.” [Ex. 547 ¶ 7] She further states that applications “could not be completed
5 because the individual lacked proof of citizenship documentation.” [*Id.*] Ms.
6 Sandschafer’s statement is not based on personal knowledge. There is no foundation for
7 a finding that Ms. Sandschafer has personal knowledge about whether a person did or
8 did not possess proof of citizenship. To the extent she bases her statements on what
9 individuals told her, those statements are based on inadmissible hearsay.

10 Mr. Yturralde states that “[i]t was frustrating because we witnessed
11 disillusionment and disappointment by individuals who truly wanted to register but did
12 not have the proper documents.” [Ex. 554B ¶ 7] Mr. Yturralde’s statement is
13 inadmissible for the same reasons explained with regard to the statements of Ms.
14 Sandschafer and Mr. Martinez.

15 Ms. Archuleta states that she is a member of the Coconino County Board of
16 Supervisors. [Ex. 524 ¶ 1] In paragraphs 7 through 12 of her declaration she makes
17 assertions regarding historical discrimination against Latinos and Navajo, socio-
18 economic factors among ethnic groups in Coconino County, social “stigma,” racially
19 polarized voting, racial appeals, poll worker assistance, and voting experiences of
20 Navajo and Latinos. [*Id.* ¶¶ 7-12]

21 Ms. Archuleta’s declaration establishes no foundation for her qualification to
22 testify about historical discrimination, racially polarized voting, racial appeals, socio-
23 economic factors of various ethnic groups, or social “stigma.” She is not designated as a
24 testifying expert in this case; nor were the requisite Rule 26(a)(2) disclosures made with
25 regard to Ms. Archuleta. Neither are her statements based on personal knowledge. Her
26 statements regarding poll worker assistance lacks foundation for any personal
27 knowledge by Ms. Archuleta. Finally, her statements regarding the experiences of
28 Navajo and Latino voters are not based on personal knowledge. If anything, those
statements are based on hearsay and are thus inadmissible.

1 Similarly, Alfredo Gutierrez’ declaration purports to provide expert testimony on
2 discrimination, racially polarized voting, candidate slating, racial appeals, and
3 government response to needs of the Latinos. [Ex. 533 ¶¶ 6-16] Mr. Gutierrez’
4 declaration lacks foundation that he is qualified to provide such testimony. Neither have
5 any expert disclosures been made with regard to Mr. Gutierrez. Moreover, some of Mr.
6 Gutierrez’ statements lack a foundation to establish his personal knowledge of those
7 statements and presumably they are based on hearsay. For example, Mr. Gutierrez states
8 that there are “instances in which the poll workers refuse to assist Spanish speaking
9 voters.” [*Id.* ¶ 8] He states that “[t]oday, there is an expectation that legislators will stay
10 in their place and that is evident throughout Arizona.” [*Id.* ¶ 10] He further states,
11 “[d]uring my campaign for Governor, I was perceived as the Mexican candidate.” [*Id.*
12 ¶ 11] These and other statements in Mr. Gutierrez’ declaration lack any foundation for
personal knowledge. Accordingly, those statements are inadmissible.

13 The Court should exclude portions of the following declarations, as indicated in
14 parentheses:

15 Sal Martinez, Ex. 541 (¶8)

16 Monica Sandschafer, Ex. 547 (¶ 7)

17 Hector Yturralde, Ex. 554B (¶ 7)

18 Elizabeth Archuleta, Ex. 524 (¶¶ 7-12)

19 Alfredo Gutierrez, Ex. 533 (¶¶ 6-16)

20 **E. The Court Should Strike Plaintiffs’ “Additional Facts” That Are
21 Not Cited in Plaintiffs’ Response Brief.**

22 Plaintiffs submitted more than 1,600 numbered paragraphs in their response to
23 Defendants’ Statement of Facts. Those “additional facts” purport to support plaintiffs’
24 opposition to the summary judgment motions filed by State Defendants and County
25 Defendants. Approximately 800 of those paragraphs are not cited in plaintiffs’ response
26 brief, however. The following facts are not cited in plaintiffs’ response brief:

27 2-4, 6, 9-10, 13-34, 36-52, 54-56, 58-131, 134-136, 139, 142-160, 162-197, 199-
28 251, 253-284, 286-304, 306-318, 320-328, 330-366, 368-370, 372-422, 424-502, 504-
505, 508-522, 524-531, 534-538, 547-554, 557-561, 568-575, 578-580, 583-589, 592-

1 719, 721-728, 730-740, 742-753, 755-768, 770-773, 776-777, 780, 782, 785-802, 1069-
2 1084, 1153-1174, 1361-1362, 1436-1438, 1443-1459.

3 Plaintiffs have not explained how those facts are material to the Court's summary
4 judgment analysis. Accordingly, the Court should strike those facts from plaintiffs'
5 statement of "additional facts." *Cf. Chubb Group of Ins. Cos. v. H.A. Transp. Sys., Inc.*,
6 243 F. Supp. 2d 1064, 1070, n.6 (C.D. Cal. 2002) (disregarding for purposes of summary
7 judgment evidence that was irrelevant to the court's analysis).

8 **Relief Requested**

9 For the foregoing reasons, the Court should strike all plaintiff exhibits except exs.
10 522, 526, 532, 537, 539, 524, 533, 541, 547, and 554B. With regard to exs. 524, 533,
11 541, 547, and 554B, the Court should strike the inadmissible portions as stated in section
12 D above. In addition, the Court should strike plaintiffs' responses to Defendants'
13 statements of fact because those facts are not supported by admissible evidence, and also
14 should strike each of plaintiffs' "additional facts" that rely on such exhibits. Finally, the
15 Court should strike as irrelevant those paragraphs from plaintiffs' statement of facts that
16 are not cited in plaintiffs' response brief.

17 RESPECTFULLY SUBMITTED this 20th day of June, 2008.

18 TERRY GODDARD
19 Arizona Attorney General

20 s/ Barbara A. Bailey
21 Mary O'Grady
22 Solicitor General
23 Steven A. LaMar
24 Senior Litigation Counsel
25 Carrie J. Brennan
26 Barbara A. Bailey
27 Assistant Attorneys General
28 Attorneys for State of Arizona and
Arizona Secretary of State Janice Brewer

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 20th 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:
5

6 David J. Bodney
7 Karen J. Hartman-Tellez
8 Steptoe & Johnson LLP
9 201 East Washington St., Ste. 1600
10 Phoenix, Arizona 85004-2382
11 dbodney@steptoe.com
12 khartman@steptoe.com

13 David B. Rosenbaum
14 Thomas L. Hudson
15 Sara S. Greene
16 Osborn Maledon, P.A.
17 2929 N. Central, 21st Floor
18 Phoenix, Arizona 85012-2793
19 drosenbaum@omlaw.com
20 thudson@omlaw.com
21 sgreene@omlaw.com

22 Jon Greenbaum
23 Benjamin Blustein
24 Lawyers' Committee For
25 Civil Rights Under Law
26 1401 New York Avenue, Ste. 400
27 Washington, D.C. 20005
28 jgreenbaum@lawyerscommittee.org

29 Neil Bradley
30 ACLU Southern Regional Office
31 2600 Marquis One Tower
32 245 Peachtree Center Avenue
33 Atlanta, Georgia 30303
34 nbradley@aclu.org

1 Elliot M. Mincberg
2 People for the American
3 Way Foundation
4 2600 M Street, NW, Ste. 400
5 Washington, DC 20036
6 eminberg@pfaw.org

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

12 Joe P. Sparks
13 Susan B. Montgomery
14 Sparks, Tehan & Ryley PC
15 The Inter Tribal Council of Arizona, Inc.
16 7503 First Street
17 Scottsdale, Arizona 85251
18 joe-sparks@qwest.net

19 David J. Becker
20 People for the American Way Foundation
21 2000 M Street, NW, Suite 400
22 Washington, D.C. 20036
23 dbecker@pfaw.org

24 Daniel R. Ortega, Jr.
25 Roush McCracken Guerrero
26 Miller & Ortega
27 650 N. 3rd Avenue
28 Phoenix, Arizona 85003
danny@rmgmoinjurylaw.com

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

1 M. Colleen Connor
2 MCAO Division of County Counsel
3 222 N. Central Avenue, Ste. 1100
4 Phoenix, Arizona 85003
connorc@mcao.maricopa.gov

5 Dennis I. Wilenchik
6 Kathleen Rapp
7 Wilenchik and Bartness, P.C.
8 2810 N. Third Street
9 Phoenix, Arizona 85004
diw@wb-law.com
kathleenr@wb-law.com

10 Judith M. Dworkin
11 Marvin S. Cohen
12 Patricia Ferguson-Bohnee
13 SACKS TIERNEY P.A.
14 4250 N. Drinkwater Blvd. 4th
15 Scottsdale, Arizona 85251-3693
Judith.Dworkin@sackstierney.com

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

21 Melvin R. Bowers, Jr.
22 Lance B. Payette
23 Navajo County Attorneys Office
24 PO Box 668
25 Holbrook, Arizona 86025
lance.payette@co.navajo.az.us

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

1 Jean E. Wilcox
2 Coconino County Attorney's Office
3 110 East Cherry Ave.
4 Flagstaff, Arizona 86001
5 jwilcox@coconino.az.gov

6 **COPY** served the 20th day of June, 2008, via hand-delivery, with Notice of Electronic
7 Filing, on:

8 The Honorable Roslyn O. Silver
9 United States District Court
10 Sandra Day O'Connor U.S. Courthouse, Suite 624
11 401 West Washington Street, SPC 59
12 Phoenix, AZ 85003-2158

13 /s Elizabeth Stark

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