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14 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

15 Maria M. Gonzalez, et al., ) No. CV-06-1268-PHX-ROS(Lead)  
16 ) No. CV-06-1362-PCT-JAT(Cons.)  
Plaintiffs, ) No. CV-06-1575-PHX-EHC(Cons.)  
17 )  
18 vs. ) GONZALEZ PLAINTIFFS' MOTION  
TO ADMIT DEPOSITIONS AND  
19 State of Arizona, et al, ) DECLARATION TESTIMONY AT  
TRIAL  
20 Defendants. )  
) (Assigned to the  
21 ) Honorable Roslyn O. Silver  
)

22  
23 Now come Gonzalez Plaintiffs and file this Motion to Admit Deposition and  
24 Declaration Testimony at Trial. Georgia Morrison-Flores, Gerri Ratliff, and Michael Quinn are  
25 unavailable to testify at trial and Gonzalez Plaintiffs therefore seek to use their sworn  
26 statements as testimony pursuant to Rule 32 of the Federal Rules of Civil Procedure and Rule

1 804 of the Federal Rules of Evidence. In support of their Motion, Gonzalez Plaintiffs show the  
2 following:

3 **I. FACTUAL BACKGROUND**

4 **A. The Parties Have Agreed that Plaintiffs can Introduce the Deposition of**  
5 **Georgia Morrison-Flores at Trial**

6 On July 7, 2008, Gonzalez Plaintiffs and Defendants agreed that Plaintiffs can introduce  
7 the January 17, 2008 deposition of Georgia Morrison-Flores as testimony at trial. *See*  
8 Deposition of Georgia Morrison-Flores, attached as Exhibit 2; Deposition Designations of  
9 Georgia Morrison-Flores, attached as Exhibit 3; 7/7/08 email from Barbara Bailey to Nina  
10 Perales, attached as Exhibit 13. Gonzalez Plaintiffs therefore respectfully request that the  
11 Court admit Ms. Morrison-Flores's deposition into evidence in lieu of her live testimony.

12 **B. The Declarations of Georgia Morrison-Flores and the Depositions of Gerri**  
13 **Ratliff and Michael Quinn are Admissible.**

14 Gonzalez Plaintiffs have recently discovered that three of the individuals named in their  
15 witness designations will be unavailable to testify at trial. Georgia Morrison-Flores, a Plaintiff  
16 in this lawsuit, currently resides in Yuma, Arizona and originally planned to travel to Phoenix  
17 to testify at trial. Ms. Morrison-Flores submitted a declaration as an exhibit to the Declaration  
18 of Nina Perales in Support of Gonzalez Plaintiffs' Response to State Defendants' Motion to  
19 Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) filed on December 19, 2007 ("December 2007  
20 Declaration"). *See* December Declaration, attached as Exhibit 4. She filed a second  
21 declaration as an exhibit to the Declaration of Diego Bernal in Support of Gonzalez Plaintiffs'  
22 Response to State Defendants' Motion to Supplement the Record in Support of State  
23 Defendants' Motion (Dkt. Entry No. 679-2) ("February 2008 Declaration"). *See* February  
24 Declaration, attached as Exh. 5.  
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1 In recent weeks Ms. Morrison has become seriously ill, and she was admitted the  
2 emergency room at Yuma Regional Medical Center during the week of June 12, 2008. *See*  
3 Letter of Dr. Tapash K. Das, attached as Exhibit 1-A. Ms. Morrison is physically weak and  
4 suffers from continuous severe pain in her abdomen, causing her to vomit. *See id.* She is  
5 taking multiple prescription medications to ease her physical symptoms, and is not able to  
6 travel or sit up for long periods of time. *See* Declaration of Marisol Perez, attached as Exhibit  
7 1. Ms. Morrison's physician, Dr. Tapash K. Das, has confirmed the seriousness of Ms.  
8 Morrison's illness and advised that she not travel to Phoenix. *See* Letter of Dr. Tapash K. Das,  
9 attached as Exhibit 1-A.

10 On April 22, 2008, Gonzalez Plaintiffs deposed third party witnesses Gerri Ratliff and  
11 Michael Quinn, both of whom are employees of U.S. Citizenship and Immigration Services  
12 (USCIS) and reside in the Washington D.C. area. *See* Depositions of Gerri Ratliff and Michael  
13 Quinn, attached as Exhibits 6 and 7, respectively; Deposition Designations of Gerri Ratliff and  
14 Michael Quinn, attached as Exhibits 8 and 9, respectively. The deposition testimony of Ms.  
15 Ratliff and Mr. Quinn concerns the policies and procedures of the USCIS and is not available  
16 from any other source. For example, their testimony provides specific information regarding  
17 USCIS records such as Alien Files and the purpose and use of the Alien Registration Number,  
18 the Certificate of Citizenship and the Certificate of Naturalization. *See generally* Ratliff and  
19 Quinn Depositions, Exhs. 6-7. Their testimony also describes how immigration-related  
20 information is maintained, updated and made available by USCIS to state and local agencies  
21 through the VIS database and SAVE programs. *See id.* On June 20, Gonzalez Plaintiffs  
22 requested that USCIS make Ms. Ratliff and Mr. Quinn available for testimony. *See* June 20,  
23 2008 Letter of Nina Perales, attached as Exhibit 10. Peter Gregory, Chief of the Commercial  
24 and Administrative Law Division of USCIS responded on July 2, stating that USCIS declined  
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1 to produce their employees for trial pursuant to 6 C.F.R. § 5.48(a). *See* July 2, 2008 Letter of  
2 Peter Gregory, attached as Exhibit 11. Ms. Ratliff and Mr. Quinn are in Washington DC and  
3 thus outside the subpoena range of the Court.

4 Given that Ms. Morrison, Ms. Ratliff, and Mr. Quinn are unavailable to testify at trial,  
5 Gonzalez Plaintiffs respectfully request that the Court permit the use of their depositions and  
6 declarations as testimony at trial.

## 7 II. LEGAL ARGUMENT

### 8 A. Legal Standards for Fed. R. Civ. P. 32 and Fed. R. Evid. 801

9 Fed. R. Civ. P. 32 governs the use of depositions in court proceedings. *See* FED. R. CIV.  
10 P. 32; *see also* *Schneider v. TRW, Inc.*, 938 F.2d 986, 1000-01 (9th Cir. 1991) (noting that [Fed.  
11 R. Evid.] 801. . . does not control the admissibility of depositions; rather, Rule 32 of the  
12 Federal Rules of Civil Procedure controls; *see also id.* at n.8; *Garcia-Martinez v. City &*  
13 *County of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004) (“Deposition testimony is ordinarily  
14 inadmissible hearsay, although Rule 32(a) creates an exception to the hearsay rules. . .”).  
15

16 Pursuant to Rule 32, “[a] party may use for any purpose the deposition of a witness,  
17 whether or not a party, if the court finds. . . that the witness is more than 100 miles from the  
18 place of hearing . . . [or] that the witness cannot attend or testify because of age, illness,  
19 infirmity, or imprisonment. . . .” FED. R. CIV. P. 32(a)(4)(b)-(c).

20 “Hearsay” is a statement, other than one made by the declarant while testifying at the  
21 trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID.  
22 801, 802. Hearsay is inadmissible unless it is defined as non-hearsay under Federal Rule of  
23 Evidence 801 or falls within a hearsay exception under Rules 803, 804 or 807. *See* FED. R.  
24 EVID. 802; 30B FEDERAL PRACTICE & PROCEDURE § 7031 at 279. Fed. R. Evid. 804 excepts  
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1 the statement of a witness who is “unavailable,” or “unable to be present or to testify because of  
2 death or then existing physical or mental illness or infirmity. . .” FED. R. EVID. 804(a)(4).

3 To be admissible under Rule 804(a), a declaration must: 1) have “circumstantial  
4 guarantees of trustworthiness” equivalent to the other four exceptions listed in Rule 804; 2) be  
5 offered as evidence of a material fact; 3) be more probative on the point for which it is offered  
6 than other evidence the proponent can obtain through reasonable efforts; 4) best serve the  
7 general purposes of the Rules and the interests of justice; and 5) be given with adequate notice  
8 to the adverse party. *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 713 (9th Cir. 1992).

9  
10 **B. Rule 32 of the Federal Rules of Civil Procedure Permits the Use of the  
11 Deposition Testimony of Ms. Ratliff and Mr. Quinn at Trial Because  
12 They are Unavailable.**

13 Ms. Ratliff and Mr. Quinn are unavailable to testify within the meaning of Fed. R. Civ.  
14 P. 32 because they live in Washington, D.C., over 100 miles from the place of trial. *See* FED.  
15 R. CIV. P. 32(a)(4)(b). According to Fed. R. Civ. P. 32(a), a party may use for any purpose the  
16 deposition of a witness, whether or not a party, if the court finds. . . that the witness is more  
17 than 100 miles from the place of hearing or trial or is outside the United States, unless it  
18 appears that the witness's absence was procured by the party offering the deposition.” *See id.*  
19 Gonzalez Plaintiffs have done nothing to procure the absence of Ms. Ratliff and Mr. Quinn, and  
20 in fact specifically requested that USCIS make them available to testify at trial. *See* Perales  
21 Letter, Exh. 10. Ms. Ratliff and Mr. Quinn have refused to testify, and Gonzalez Plaintiffs are  
22 unable to procure their attendance by subpoena. *See* Gregory Letter, Exh. 9. Because they are  
23 unavailable, the Court may use the depositions of these individuals as testimony under Rule 32.  
24 FED. R. CIV. P. 32(a)(4)(b).

25 The admission of the Ratliff and Quinn depositions is consistent with the hearsay  
26 exception that permits the testimony of deponents who are unavailable to testify at trial. Fed.

1 R. Evid. 804(b)(1) qualifies the deposition of an unavailable witness for admission into  
2 evidence “if the party against whom the testimony is now offered ... had an opportunity and  
3 similar motive to develop the testimony by direct, cross, or redirect examination.” Plaintiffs  
4 gave Defendants notice of the USCIS depositions and gave Defendants the opportunity to  
5 attend the deposition in person or by telephone; Defendants declined Plaintiffs’ offer to attend  
6 the depositions. *See Gonzalez Plaintiffs’ Consolidated Response to Motions in Limine*, Dkt.  
7 Entry No. 865 at 19-23. Ms. Ratliff and Mr. Quinn are unavailable as witnesses under Fed. R.  
8 Evid. 804(a). *See* FED. R. EVID. 804(b); *McIntyre v. Reynolds Metals Co.*, 468 F.2d 1092, 1093  
9 n.2 (5th Cir. 1972) (witness declared unavailable as “beyond the subpoena power of the District  
10 Court. . . and refused to appear voluntarily to testify”).

11  
12 **C. The Declarations of Ms. Morrison-Flores are Excepted From the  
Hearsay Rule Because she is Unavailable to Testify at Trial.**

13 Ms. Morrison-Flores is unavailable under the Federal Rules of Evidence because she is  
14 too ill to travel in order to testify at trial. FED. R. EVID. 804(a); *see Finizie v. Principi*, 69  
15 Fed.Appx. 571 (3d Cir. 2003) (finding that a doctor’s explanation of a declarant’s medical  
16 condition and why that condition renders an inability to testify is sufficient to show  
17 unavailability under Rule 804); *Mutuelles Unies v. Kroll Linstrom*, 957 F.2d 707, 713 (9th Cir.  
18 1992) (declaring plaintiff’s expert witness unavailable due to a scheduled surgery that would  
19 result in one to two weeks of recovery time on the second day of trial); *see United States v.*  
20 *McGuire*, 307 F. 3d 1192, 1205 (9th Cir. 2002) (finding that witness’s complications related to  
21 pregnancy made her “unavailable” under Fed. R. Evid. 804(a)(4)). As attested to by her  
22 attorney and her doctor, Ms. Morrison suffers from a medical condition that prevents her from  
23 traveling to Phoenix in order to testify at trial. *See Perez Decl., Exh. 1*. Even if Ms. Morrison-  
24 Flores was strong enough to testify from Yuma, Gonzalez Plaintiffs have learned that there are  
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26

1 no facilities in Yuma that would accommodated her testimony by teleconference. *See* Perez  
2 Decl., Exh. 1.

3 Ms. Morrison-Flores's December 2007 and February 2008 Declarations meet all of  
4 these criteria to be admissible under Rule 804(a) and the Court may therefore admit them into  
5 evidence as testimony.

6 The December and February Declarations were both sworn to under penalty of perjury  
7 and are not otherwise unreliable. *See Barker v. Morris*, 761 F.2d 1396, 1401-03 (9th Cir.  
8 1985). They therefore bear sufficient guarantees of trustworthiness. The declarations are also  
9 offered as evidence of material fact. Both declarations are essential to Ms. Morrison-Flores's  
10 claims in this case because they constitute her personal knowledge and describe her inability to  
11 vote at the polls on two separate occasions in two separate elections after the passage of Prop  
12 200. *See* December 2007 Decl., Exh. 4; February 2008 Decl., Exh. 5. No other witness has the  
13 personal knowledge to testify regarding the details of Ms. Morrison-Flores's experiences of  
14 being rejected for voting at the poll, or her feelings of frustration at not being able to cast a  
15 ballot. There is "no other equally good evidence from [an] equally good source" than her own  
16 words to describe the deprivation of her right to vote. *See United States v. Curro*, 847 F.2d  
17 325, 327-328 (6th Cir. 1988); *United States v. Sanchez-Lima*, 161 F. 3d 545, 547 (9th Cir.  
18 1998). Her declaration testimony is therefore more probative on the point for which it is  
19 offered than other evidence the proponent can obtain through reasonable efforts, and best  
20 serves the general purpose of the Federal Rules and justice.

21  
22 Finally, Defendants have sufficient notice of her declaration testimony. Gonzalez  
23 Plaintiffs notified Defendants of Ms. Morrison-Flores's illness and their intent to introduce her  
24 declarations on July 3, 2008, the same day that they confirmed her inability to travel to trial.  
25 *See* July 3, 2008 Email, attached as Exhibit 12. Moreover, Defendants were afforded the  
26

1 opportunity to object to Ms. Morrison-Flores's declarations and to cross examine Ms. Morrison  
2 at her deposition regarding her December Declaration. Following their receipt of her February  
3 2008 Declaration Defendants did not seek to redepose Ms. Morrison-Flores and Defendants did  
4 not object to any of the information in the declaration.

5  
6 **III. CONCLUSION**

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8 For the reasons set forth above, Gonzalez Plaintiffs respectfully request that the  
9 Court admit the deposition and declarations of Georgia Morrison-Flores, and the depositions of  
10 Gerri Ratliff and Michael Quinn, into evidence at trial.

11  
12  
13  
14 DATED this 8<sup>th</sup> day of July, 2008. Respectfully submitted,

15 By:       s/Nina Perales  
16 Nina Perales

17 **Counsel for Plaintiffs**  
18 **Gonzalez, et al.**

1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 8<sup>th</sup> day of July, 2008, I caused the foregoing document to be  
3 electronically transmitted to the Clerk's Office using the CM/ECF System for filing and  
4 transmittal of a Notice of Electronic Filing to CM/ECF registrants.

5 COPY of the foregoing filed electronically  
6 this 8<sup>th</sup> day of July, 2008.

7 COPY of the foregoing mailed with Notice  
8 of Electronic Filing this 8<sup>th</sup> day of July, 2008 to:

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

14 s/Nina Perales  
15 Nina Perales  
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