

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](mailto: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](mailto:DIW@wb-law.com); [KathleenR@wb-law.com](mailto:KathleenR@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  
LOPEZ, SOUTHWEST VOTER  
15 REGISTRATION EDUCATION  
PROJECT; VALLE DEL SOL;  
16 FRIENDLY HOUSE; CHICANOS POR  
LA CAUSA, INC.; and ARIZONA  
17 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' OBJECTION TO  
GONZALEZ PLAINTIFFS'  
QUESTIONED LAY WITNESSES**

**(Assigned to the  
Honorable Roslyn O. Silver)**

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**MOTION**

Defendants State of Arizona; Secretary of State Jan Brewer; Maricopa County Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne; Apache County Recorder LeNora Johnson and Apache County Elections Director Penny L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila County Elections Director Dixie Mundy; Graham County Recorder Wendy John and Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave County Recorder Joan McCall and Mohave County Elections Director Allen Tempert; Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R. Nelson; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections Director Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan Hightower Marler and Yuma County Elections Director Patti Madrill (collectively "Defendants"), by and through undersigned counsel, respectfully object to Gonzalez Plaintiffs' inclusion of untimely disclosed lay witnesses and whose testimony would result in extreme prejudice to the Defendants.

**RESPECTFULLY SUBMITTED** this 15th day of July, 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

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

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

4  
5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **Relevant Procedural Background**

7 Pursuant to the Court's Scheduling Order, dated March 27, 2008, all factual  
8 discovery closed on January 18, 2008. That Order stated that final *supplementation* of  
9 disclosures was to be completed by June 4, 2008. [Dkt. 740 ¶ F]. In addition, counsel  
10 for Gonzalez Plaintiffs recognized that, "[W]e finished fact discovery on January 18."  
11 03-21-08 Hearing Transcript at pg. 24. Prior to January 18, 2008 the Gonzalez  
12 Plaintiffs had served only one Disclosure Statement and that Disclosure Statement did  
13 not list a single lay witness. Defendants took the depositions of Plaintiffs and engaged  
14 in extensive discovery. It was only after discovery had closed and Defendants were  
15 precluded from deposing the "newly discovered" lay witnesses that Gonzalez Plaintiffs  
16 began to disclose the existence of these individuals. This is illustrated by the witnesses  
17 that the Court has already excluded. Plaintiffs made a strategic decision not to contact  
18 these potential witnesses until after the discovery cutoff, allowing Defendants no  
19 opportunity to conduct discovery with regard to these witnesses. As a result, Defendants  
20 will suffer extreme prejudice if the late witnesses are permitted to testify.

21 **A. Defendants will suffer extreme prejudice if late witnesses testify**

22 Like the many witnesses already stricken from Plaintiffs' witness list, Plaintiffs  
failed to disclose Herta Weber, Marta Higuera, Brenda Rogers, Steve Fulton, Donna  
Fulton, Karen Lewsader, and Barbara Corke until well after the January discovery  
cutoff. See Plaintiffs' July 10, 2008 Chart, attached hereto as Exhibit 1 and incorporated  
herein by reference. Defendants had no opportunity to contact these witnesses or to take  
their depositions. In fact, it is notable that Defendants still do not have contact  
information for at least two of these witnesses. It is beyond question that Defendants

1 would have taken the deposition of these potential witnesses, or at least sought written  
2 discovery about them. This is evidenced by the careful depositions and written  
discovery taken by Defendants about the other witnesses in this case.

3 As it stands, no opportunity existed for anyone to depose these individuals. The  
4 Court's July 9, 2008 Order indicates that declaration testimony from these late witnesses  
5 will not be permitted, but that deposition testimony may be allowed. Dkt. # 940. The  
6 fact of the matter is that no depositions of these individuals have ever occurred.  
7 Plaintiffs have wholly stripped Defendants of their right to seek discovery and cross-  
8 examine these individuals. As explained more fully below, Plaintiffs had ample  
9 opportunity to produce these potential witnesses prior to the discovery cutoff. However,  
10 assuming *arguendo*, that Plaintiffs are somehow correct in their assertion that it was not  
11 possible to produce these individuals until March, May, and June of 2008, the  
12 appropriate course of action would have been to bring the allegedly extenuating  
13 circumstances to the Court and ask the Court to reopen discovery. Instead, Plaintiffs  
sprang these new witnesses on Defendants in the month and a half leading up to trial.<sup>1</sup>  
As such, Defendants were prevented from conducting any discovery with regard to these  
witnesses and will be severely prejudiced by the inclusion of these witnesses.

14 The fact that Gonzalez Plaintiffs have continued to attempt to recruit witnesses  
15 five months after discovery closed in this case makes the harm to Defendants even more  
16 egregious. Plaintiffs' counsel recognized in March that, "[W]e finished fact discovery  
17 on January 18." 03-21-08 Hearing Transcript at pg. 24. After that affirmation to the  
18 Court, Plaintiffs sent out at least two more batches of letters seeking to recruit new fact  
19 witnesses. Exhibit 1. Indeed, plaintiffs' counsel was still sending out letters as late as  
20 May 28, 2008, after the trial of this matter had already been scheduled for July 1, 2008.  
Furthermore, despite receiving responses from Herta Weber and Marta Higuera in  
March, Plaintiffs failed to disclose their existence until June 4, 2008 – over two months

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21 <sup>1</sup> Karen Lewsader and Barbara Corke were not even included in Plaintiffs June 4, 2008 Final  
22 Pre-trial Disclosure Statement. Gonzalez Plaintiffs' Final Pre-trial Disclosure Statement,  
attached hereto as Exhibit #2 and incorporated herein by reference. Plaintiffs admit to having  
notice of Karen Lewsader prior to serving that disclosure statement.

1 later. The combination of the continual seeking out of new witnesses combined with  
2 Plaintiffs' utter failure to timely notify Defendants of these witnesses, makes it clear that  
3 Plaintiffs have not engaged in good faith discovery procedures. The only remedy for  
4 these offenses is to limit the harm to Defendants by excluding all testimony from the  
untimely disclosed witnesses.

5 **B. Rejected applicant witnesses are untimely**

6 Plaintiffs have repeatedly argued that Defendants were obligated to provide  
7 unredacted copies of the rejected voter registration forms and that a delay in producing  
8 such records caused the delay in finding additional fact witnesses. This is simply not  
9 true. Gonzalez Plaintiffs first sought rejected voter registration forms, only from  
10 Maricopa County, during the summer of 2006. Any information derived from those  
11 forms is protected under A.R.S. §16-168 and certain information is not to be disclosed  
12 regardless of the proposed use. Maricopa County appropriately redacted the rejected  
13 voter registration forms, sought a stipulation of confidentiality on the remaining  
14 information, and produced thousands of rejected voter registration forms to Plaintiffs.  
Despite the fact that names and addresses were not redacted from these forms, Plaintiffs  
chose not to utilize the information provided to them and instead continued to demand  
unredacted forms.

15 Notwithstanding Plaintiffs' claims to the contrary, this Court has never ordered  
16 the Counties to produce unredacted copies of the rejected voter registration forms.  
17 Rather, the Court limited the redaction to be done by the Counties. 08/30/07 Hr'g Tr. at  
18 25:2-26:24. The reality is that Plaintiffs made a strategic decision not to seek these  
19 potential witnesses out until after discovery had closed. Despite the fact that Plaintiffs  
20 have been in possession of the names and addresses of rejected voter applicants from  
21 Maricopa County since 2006, Plaintiffs admit that they made no attempt to contact these  
22 individuals until March 2008. Plaintiffs' only stated reason for this enormous delay is  
that it saved them money. Both Herta Weber and Marta Higuera submitted voter  
registration applications that were rejected by Maricopa County. Thus, their names and  
addresses were readily available to Plaintiffs in 2006. Nonetheless, the chart submitted

1 to the Court by Plaintiffs on Thursday, July 10, 2008, admits that no contact with these  
2 witnesses was attempted until March 14, 2008 – nearly two months after discovery had  
closed.<sup>2</sup>

3 Defendants have not been provided enough information about Barbara Corke to  
4 determine where she lives or how long Plaintiffs have been in possession of her name  
5 and address. However, at the latest, Plaintiffs were provided her name and address in  
6 2007. Plaintiffs readily admit that they made no attempt to contact this potential witness  
7 until May 23, 2008 – five months after the close of discovery and nearly seven months  
after the last set of rejected voter registration forms were served on Plaintiffs.

8 Given Plaintiffs unnecessary delay in contacting and disclosing Herta Weber,  
9 Marta Higuera, and Barbara Corke, it is clear that permitting their testimony, in any  
10 form, would reward Plaintiffs for failing to comply with the spirit of good-faith  
11 discovery. Furthermore, since Defendants have been denied the opportunity to conduct  
12 any discovery or cross-examine these witnesses, the inclusion of their testimony would  
13 result in extreme prejudice to Defendants. As such, Defendants respectfully request that  
the Court strike Herta Weber, Marta Higuera, and Barbara Corke from Plaintiffs'  
witness list and exclude any declarations by these individuals.

14 **C. The Court did not grant leave to produce late witnesses related to**  
15 **Conditional-Provisional Ballots**

16 In the discussion following Plaintiffs' production of Exhibit 1 in court on  
17 Thursday, July 10, 2008 Plaintiffs seemed to represent to the Court that leave had been  
18 given to produce late witnesses related to the uncounted conditional provisional ballots.  
If that is indeed what was represented to the Court, it is decidedly false.

19 Plaintiffs seek to introduce four witnesses whose conditional-provisional ballots  
20 were allegedly not counted. Plaintiffs contend that they could not contact these potential

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21 <sup>2</sup> Defendants have asked Plaintiffs repeatedly for evidence to back up the dates listed on the  
22 chart provided to the Court. Despite numerous promises, Plaintiffs have failed to provide any  
evidence to support those dates. Defendants do not concede that the dates provided by Plaintiffs  
are accurate. However, for the purpose of this Objection Defendants will assume *arguendo* that  
the dates are correct.

1 witnesses in a timely manner because Defendants delayed producing the conditional-  
2 provisional ballot envelopes. Plaintiffs conveniently neglect to mention that the  
3 conditional-provisional ballot envelopes were not in the possession of *any* named  
4 Defendant when they were requested. Instead, those envelopes were already locked  
5 inside of the County Treasurers' vaults and could not be accessed by Defendants. In  
6 addition, Plaintiffs fail to point out that they did not subpoena the requested documents  
7 from the County Treasurer's until *after* the close of discovery. Finally, Plaintiffs forget  
8 that their expressed purpose for obtaining the conditional-provisional ballot envelopes  
9 was **not** to recruit new witnesses, as has happened, but to conduct a Hispanic surname  
10 analysis. Dkt. # 549.

11 Moreover, the Court's ruling regarding the use of these ballot envelopes for  
12 further discovery has been mischaracterized. At the hearing in March, the Court gave  
13 Plaintiffs leave only to supplement their expert reports based upon the data contained in  
14 the ballot envelopes. 03-21-08 Hearing Transcript at 39:2-16. The Court **specifically**  
15 asked Ms. Perales if the parties were "finished with fact discovery, other than experts"  
16 and Ms. Perales responded by confirming that the parties had finished fact discovery on  
17 January 18<sup>th</sup>. 03-21-08 Hearing Transcript at 21:17-20. Thus, no additional fact  
18 witnesses were anticipated by Defendants and Plaintiffs did not reveal the existence of  
19 Brenda Rogers, Steve Fulton, or Donna Fulton until five months after the close of  
20 discovery and two months after Ms. Perales confirmed that fact discovery was complete.  
21 Karen Lewsader was never disclosed to Defendants and Defendants were wholly  
22 surprised to learn of her existence after the Motion for Summary Judgment had already  
been filed.<sup>3</sup> Thus Defendants will be unfairly prejudiced if these witnesses are permitted  
to testify, either live or by declaration.

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3 The Court even warned against such late discovery, "So when you file dispositive motions, it's trial by paper and there should be no additional discovery whatsoever, no surprises." 03-21-08 Hearing Transcript at 45:5-7.

1 **CONCLUSION**

2 Despite affirmative statements from Gonzalez Plaintiffs' lead counsel and explicit  
3 warnings by the Court about the timely close of discovery, Plaintiffs have persisted in  
4 their attempts to call untimely disclosed witnesses. Defendants were deprived of any  
5 opportunity to take discovery of these witnesses, including cross-examining them at  
6 deposition. Admission of testimony from these witnesses will result in unfair prejudice  
7 to Defendants. As such, Defendants respectfully request that they Court strike Herta  
8 Weber, Marta Higuera, Brenda Rogers, Steve Fulton, Donna Fulton, Karen Lewsader,  
9 and Barbra Corke from Plaintiffs' witness list. Defendants further request that any  
10 declarations of these individuals not be admitted into evidence.

11 **RESPECTFULLY SUBMITTED** this 15th day of July, 2008.

12 **ANDREW P. THOMAS**  
**MARICOPA COUNTY ATTORNEY**

**TERRY GODDARD**  
**ARIZONA ATTORNEY GENERAL**

13 BY: s/ Dennis I. Wilenchik  
14 **WILENCHIK & BARTNESS, P.C.**  
15 Dennis I. Wilenchik, Esq.  
16 Kathleen E. Rapp, Esq.  
17 The Wilenchik & Bartness Building  
18 2810 North Third Street  
19 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*

17 **COLLEEN CONNOR**  
18 Deputy County Attorney  
19 222 North Central Avenue, Suite 1100  
20 Phoenix, Arizona 85004-2206  
21 *Attorneys for County Defendants*

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 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](mailto:dbodney@steptoe.com)  
[khartman@steptoe.com](mailto:khartman@steptoe.com)

David B. Rosenbaum  
Thomas L. Hudson  
Sara S. Greene  
Osborn Maledon, P.A.  
2929 N. Central Ave., 21<sup>st</sup> Floor  
Phoenix, Arizona 85012-2793  
[drosenbaum@omlaw.com](mailto:drosenbaum@omlaw.com)  
[thudson@omlaw.com](mailto:thudson@omlaw.com)  
[sgreene@omlaw.com](mailto:sgreene@omlaw.com)

Jon Greenbaum  
Benjamin Blustein  
Lawyers' Committee For  
Civil Rights Under Law  
1401 New York Avenue, Ste. 400  
Washington, D.C. 20005  
[jgreenbaum@lawyerscommittee.org](mailto:jgreenbaum@lawyerscommittee.org)

Neil Bradley  
ACLU Southern Regional Office  
2600 Marquis One Tower  
245 Peachtree Center Avenue  
Atlanta, Georgia 30303  
[nbradley@aclu.org](mailto:nbradley@aclu.org)

Elliot M. Minberg  
People for the American  
Way Foundation  
2600 M Street, NW, Ste. 400  
Washington, DC 20036  
[eminberg@pfaw.org](mailto: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](mailto:Irvlaw@sbcglobal.net)

Daniel B. Kohrman  
AARP Foundation Litigation  
601 E Street, N.W., Ste. A4-240  
Washington, DC 20049  
[dkohrman@aarp.org](mailto: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](mailto:joe-sparks@qwest.net)

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4  
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10  
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14  
15  
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19  
20  
21  
22

David J. Becker  
People for the American Way Foundation  
2000 M Street, NW, Suite 400  
Washington, D.C. 20036  
[dbecker@pfaw.org](mailto:dbecker@pfaw.org)

Nina Perales  
Mexican American Legal Defense  
and Education Fund  
110 Broadway, Ste. 300  
San Antonio, Texas 78205  
[nperales@maldef.org](mailto:nperales@maldef.org)

Judith M. Dworkin  
Marvin S. Cohen  
Patricia Ferguson-Bohnee  
SACKS TIERNEY P.A.  
4250 N. Drinkwater Blvd. 4<sup>th</sup>  
Scottsdale, Arizona 85251-3693  
[Judith.Dworkin@sackstierney.com](mailto:Judith.Dworkin@sackstierney.com)

Melvin R. Bowers, Jr.  
Lance B. Payette  
Navajo County Attorneys Office  
PO Box 668  
Holbrook, Arizona 86025  
[lance.payette@co.navajo.az.us](mailto:lance.payette@co.navajo.az.us)

Jean E. Wilcox  
Coconino County Attorney's Office  
110 East Cherry Avenue  
Flagstaff, Arizona 86001  
[jwtwilcox@coconino.az.gov](mailto:jwtwilcox@coconino.az.gov)

Daniel R. Ortega, Jr.  
Roush McCracken Guerrero  
Miller & Ortega  
650 North 3<sup>rd</sup> Avenue  
Phoenix, Arizona 85003  
[danny@rmgmoinjurylaw.com](mailto:danny@rmgmoinjurylaw.com)

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](mailto:Mary.OGrady@azag.gov)

Criss E. Candelaria  
Bradley Carlyon  
Apache County Attorneys Office  
PO Box 637  
St. Johns, Arizona 86025  
[bcarlyon@apachelaw.net](mailto:bcarlyon@apachelaw.net)

Brenna L. Clani  
Navajo County Department of Justice  
PO Box 2010  
Window Rock, Arizona 86515  
[brennalclani@navajo.org](mailto:brennalclani@navajo.org)

1 COPY of the foregoing filed electronically  
this 15th day of July, 2008.

2  
3 COPY of the foregoing mailed with Notice of  
Electronic Filing this 15th day of July, 2008 to:

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

7

8 /s/ Tonya Mills

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