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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF ARIZONA

18 Maria M. Gonzalez, et al.,) No. CV-06-1268-PHX-ROS(Lead)
19) No. CV-06-1362-PCT-ROS
Plaintiffs,) No. CV-06-1575-PCT-ROS
20)
21 vs.) **GONZALEZ PLAINTIFFS'**
) **CONSOLIDATED RESPONSE TO**
22 State of Arizona, et al,) **THE PIMA COUNTY**
) **TREASURER'S MOTION TO**
23 Defendants.) **QUASH SUBPOENA AND THE**
) **OBJECTIONS TO SUBPOENA**
24) **BY THE PINAL COUNTY**
25) **TREASURER AND THE**
26) **MARICOPA COUNTY**
) **TREASURER.**
27)
28

INTRODUCTION

In October 2007, almost four months before the close of discovery in this case, Gonzalez Plaintiffs requested from the fifteen County Defendants the production of all uncounted provisional ballots from each election since January 2005. *See* Dkt. Nos. 385-400. County Defendants, including the County Recorders of Pima, Maricopa and Pinal Counties, failed to produce these documents within the time allowed by the Federal Rules of Civil Procedure and did not move for a protective order from the Court.

Before the close of discovery, Gonzalez Plaintiffs and County Defendants notified the Court of this discovery dispute in order to obtain a ruling on Plaintiffs' request to obtain the copies of the outside of ballot envelopes. *See* Dkt. Entry No. 549. In their position statement to the Court, the County Defendants asserted for the first time that the County Recorders could not produce the ballot envelopes in part because the envelopes were no longer in the possession of the County Recorders or Elections Directors, but instead in the possession of the County Treasurers. *See id.*

Four days after the close of discovery, on January 22, 2008, this Court issued its Order on the discovery dispute, rejecting the County Defendants' assertions that copies of the outside of ballot envelopes could not be produced under Arizona law and ruling that Plaintiffs were entitled to these documents. *See* Dkt. Entry No. 554. As to the

1 County Defendants' assertions that the ballot envelopes were not in the possession of the
2 County Recorders, the Court directed that the "Gonzalez Plaintiffs may subpoena, as
3 allowed by the rules, the appropriate entity." *Id.*
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5 After the Court's ruling, Gonzalez Plaintiffs followed the Court's direction and
6 began the process of issuing third-party subpoenas to the County Treasurers. Instead of
7 producing the copies requested by Gonzalez Plaintiffs, which they know are already the
8 subject of an order from this Court, three County Treasurers, Dolores J. Doolittle of
9 Pinal County (hereinafter referred to as the "Pinal County Treasurer"), Beth Ford of
10 Pima County (the "Pima County Treasurer"), and Charles Hoskins of Maricopa County
11 (the "Maricopa County Treasurer"), now object to the subpoenas. *See* Dkt. Entry Nos.
12 619, 614, 620.
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14

15 These County Treasurers rely largely on a privacy argument already considered
16 and rejected by this Court in its Order of January 22, 2008. For the reasons stated
17 below, Gonzalez Plaintiffs respectfully request that the Court overrule the objections to
18 the subpoenas and deny the Treasurers' objections and motion to quash.
19

20 ARGUMENT

21 **I. The Pinal County Treasurer's Objection Provides no Valid Basis Upon** 22 **Which to Void the Subpoena Served Upon Her.**

23 The Pinal County Treasurer filed an objection informing the Court that she is
24 prepared to produce the copies of the outside of ballot envelopes if ordered to do so and
25 seeking clarification from the Court regarding her obligation under the subpoena. She
26 also offers objections to the federal subpoena served upon her because: 1) the subpoena
27 requests confidential information; and 2) it would be imprudent for the Pinal County
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1 Treasurer to comply with the subpoena because other legal challenges have been made
2 to the authority of a County Treasurer to comply with a federal subpoena. *See* Dkt.
3 Entry No. 619 at 2.
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5 Gonzalez Plaintiffs disagree that a County Treasurer can avoid the commands of
6 a federal subpoena based on the assertion that the documents sought are "confidential"
7 under state statute, particularly in this case where the Court has already ordered that the
8 requested documents must be produced. In essence, the Treasurer argues that if Arizona
9 election law does not specifically permit her to copy ballot envelopes in order to comply
10 with federal court orders, she cannot do so. This reflects a fundamental
11 misunderstanding of the power of federal courts. Arizona election law making certain
12 voter-related information private need not specifically provide that officials must
13 comply with federal court orders. The Pinal County Treasurer cannot, and does not,
14 present any legal authority for the proposition that state election law must mandate that
15 she comply with federal subpoenas before she can do so.
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18 Similarly, Gonzalez Plaintiffs cannot find any legal authority for the assertion
19 that a federal subpoena can be ignored because unrelated third parties have objected to
20 it. Therefore, although Gonzalez Plaintiffs do not take issue with the Pinal County
21 Treasurer's request that the Court rule quickly on all pending objections, the Gonzalez
22 Plaintiffs request this Court overrule the objection raised by the County Treasurer and
23 order that she comply with the subpoena.
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26 **II. The Pima County Treasurer's Motion to Quash the Federal Subpoena**
27 **Served Upon her Should be Denied.**
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1 **A. The County Treasurer Has the Authority and the Obligation to**
2 **Comply with the Subpoena and her Failure to do so May be Deemed**
3 **Contempt of Court.**

4 In her Motion to Quash, the Pima County Treasurer asserts that she cannot
5 comply with the federal subpoena directing her to provide Gonzalez Plaintiffs with
6 copies of the outside of the envelopes containing uncounted provisional ballots because
7 she does not have the authority under state law to do so. The County Treasurer,
8 however, has been served with a subpoena issued under Rule 45 of the Federal Rules of
9 Civil Procedure commanding that she provide the copies of these envelopes to Gonzalez
10 Plaintiffs within a reasonable time period. Even if state statutes do not expressly
11 authorize the County Treasurer to copy the outside of these envelopes, the federal
12 subpoena is a "lawfully issued mandate of the court," *see Fisher v. Marubeni Cotton*
13 *Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975), and her failure to obey the subpoena served
14 upon her may be deemed contempt of Court. *See Fed. R. Civ. P. 45(e); see also Young*
15 *v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987) (Scalia, J.,
16 concurring in judgment) (courts empowered to prosecute for contempt "those who . . .
17 disobey orders necessary to the conduct of [their] business (such as subpoenas)");
18 *United States v. Bryan*, 339 U.S. 323, 331 (1950) (subpoena "not invitation to a game of
19 hare and hounds, in which the witness must testify only if cornered at the end of the
20 chase"). The Treasurer, therefore, does have the authority, provided by this Court, to
21 produce the material that the Gonzalez Plaintiffs seek.¹

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28 ¹ The fact that she is not a party to this case does not excuse the County Treasurer
 from complying with the subpoena, as non-party is subject to the same scope of

1 **B. The State Statutes Cited by the Treasurer are not Relevant in This**
2 **Case.**

3 The Pima County Treasurer also asserts that if she complies with the federal
4 subpoena she will violate Arizona law. This Court, however, has already ruled on the
5 privacy issue when it was raised by the County Defendants and found that the Gonzalez
6 Plaintiffs are entitled to copies of the outside of the ballot envelopes. *See* Dkt. Entry
7 No. 554. As noted by the Court, Gonzalez Plaintiffs do not request any ballots or
8 voting records that would jeopardize a voter's right to secrecy (the primary concern in
9 all of the statutes cited by the Treasurer), but instead only request copies of the outside
10 of the envelopes, which will not reveal any protected information. *See id.* In fact, the
11 information on the outside of the ballot envelope, *i.e.* voter's name, address, precinct
12 and poll worker, is information publicly available from any County Recorder's office.

13 Nevertheless, the Treasurer asserts that if she were to comply with the subpoena,
14 she would violate a number of state statutes and be subject to criminal prosecution. *See*
15 Dkt. Entry No. 614 at 3. The Treasurer's apprehensions are misplaced. The state
16 statutes cited by the Treasurer provide that a person who "[k]nowingly detains, alters,
17 mutilates or destroys ballots or election returns" or who "[i]ntentionally disables or
18 removes from the polling place, on-site early voting location or custody of an election
19 official a voting machine or a voting record" violates state law. A.R.S. § 16-1018
20 (A)(2); A.R.S. § 16-1016(A)(9). As the Court noted in its previous order, Gonzalez
21 Plaintiffs seek only copies of the outside of the envelopes that contain uncounted
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23 discovery under Rule 45 as a party is under Rule 34. *See* Fed. R. Civ. P. 45, Advisory
24 Committee Note of 1991, subdivision (a).
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26

1 provisional ballots. Compliance with the subpoena issued by Gonzalez Plaintiffs
2 would in no way require any County Treasurer to "alter," "mutilate," or "destroy" a
3 ballot, or require anyone to "disable" or "remove" from a polling place a voting machine
4 or voting record. Even if the outside of the envelopes could be considered a "voting
5 record," the County Treasurer could copy the outside of the envelopes without removing
6 them from where they are located, thus avoiding any potential liability under state law.
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9 Federal courts have long rejected claims from state officials that they cannot
10 comply with a federal subpoena because to do so would force them to violate state laws.
11 *See Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S.
12 658, 695 (1979) (state statute that thwarts federal court "cannot survive the command of
13 the Supremacy Clause of the United States Constitution"); *Spain v. Mountanos*, 690
14 F.2d 742, 746 (9th Cir. 1982) ("Under the Supremacy Clause of the United States
15 Constitution, a court, in enforcing federal law, may order state officials to take actions
16 despite contravening state laws."); *In re Dillon*, 824 F. Supp. 330, 334 (W.D.N.Y.
17 1992).
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20 **B. The Pima County Treasurer Does Not Provide Any Basis for the**
21 **Court to Find that Compliance with the Subpoena Would Constitute**
22 **an Undue Burden.**

23 A federal court may quash a subpoena that "subjects a person to undue burden."
24 Fed. R. Civ. P. 45(c)(3)(A)(iv). The Pima County Treasurer asserts that complying
25 with Gonzalez Plaintiffs' subpoena constitutes an undue burden on her and her office.
26 *See* Dkt. Entry No. 614 at 3-5. Specifically, she claims not to know what "specific
27 election documents" are in her custody and claims not to have the "sufficient election
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1 knowledge” to identify them. *Id.* at 3. Despite her complaint, it is incumbent upon the
2 Treasurer to determine which documents would be responsive to the subpoena. The
3 Treasurer could utilize the assistance of county election officials if it is true that she
4 lacks sufficient knowledge to recognize the envelopes that contain uncounted ballots.
5 In any event, the Treasurer cannot show that the subpoena imposes an undue burden
6 upon her.
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8 A Rule 45 subpoena is considered unduly burdensome when a court finds that it
9 is "unreasonable or oppressive." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d
10 395, 403 (D.C. Cir. 1984)). The party moving to quash has the heavy burden of
11 demonstrating the unreasonableness or oppressiveness of the subpoena. *See id.* Here,
12 the Treasurer has not provided any facts that would allow this Court to find that
13 Gonzalez Plaintiffs' request is "unreasonable," or "oppressive," other than to cite to her
14 general lack of knowledge regarding the subject matter of the request.
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17 To the extent the Treasurer argues that it would be unduly burdensome to
18 provide the copies of these documents to the location in Phoenix, Arizona noted on the
19 subpoena, the Gonzalez Plaintiffs have explained to the Treasurer that they are willing
20 to work in good faith with the Treasurer to obtain the requested material in the most
21 efficient and least burdensome manner. *See Ex. 1* (1/28/08 letter from counsel for
22 Gonzalez Plaintiffs to Pima County Treasurer and counsel for Pima County indicating
23 that Gonzalez Plaintiffs are willing to discuss the delivery of the documents in the
24 manner most efficient to the Treasurer). Therefore, because the Treasurer has not met
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1 the heavy burden of showing that the subpoena is unreasonable or oppressive, she does
2 not provide any basis to quash the federal subpoena that was served upon her.

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4 **III. The Maricopa County Treasurer Does not Raise a Valid Objection to the
Federal Subpoena Served Upon him.**

5 The Maricopa County Treasurer objects to the subpoena that was served upon
6 him and argues that compliance with the subpoena would violate state and federal law
7 and subject his office to undue burden. For the reasons stated below, the Treasurer's
8 objection should be overruled.

9
10 **A. The Maricopa County Treasurer Misreads the Subpoena, Which
11 Does Not Request the Production of Ballots.**

12 The primary concern raised by the Treasurer in his objection is that the subpoena
13 at issue would force him to open and remove the ballots stored by his office, which, in
14 his view, would violate state law. The Treasurer's argument is misplaced because
15 Gonzalez Plaintiffs do not seek any ballots and do not request that any ballots be
16 removed from Maricopa County's secure facility. Instead, Gonzalez Plaintiffs request
17 copies of the outside of the envelopes that contain uncounted provisional and
18 conditional provisional ballots -- material that the Gonzalez Plaintiffs have been
19 consistently requesting, to no avail, for over four months now. That much was made
20 clear not only in the actual subpoena issued to the Treasurer, but also by this Court's
21 Order of January 22, 2008.

22 The Court's order states that "Gonzalez Plaintiffs only request '*copies of the*
23 *outside of envelopes* containing conditional provisional ballots that were never
24 counted.'" See Dkt. Entry No. 554. Moreover, the Maricopa County Treasurer is
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1 represented by the Maricopa County Attorney's Office, the same counsel that
2 represented the Maricopa County Recorder and Elections Director in the discovery
3 dispute over the envelopes. Thus, it can hardly be argued that the Treasurer is unaware
4 of the nature of the information sought by Gonzalez Plaintiffs. At this point, and in
5 light of the previous filings made by his counsel and the order of this Court, the
6 Treasurer's claim that Gonzalez Plaintiffs seek "ballots" is without merit and borders on
7 the sanctionable.
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10 **B. The Treasurer's Objection Does not Demonstrate an Undue Burden**
11 **to Comply With the Subpoena.**

12 The Maricopa County Treasurer also argues that compliance with the federal
13 subpoena would subject him to an undue burden. As noted above, even as a non-party,
14 the Treasurer bears the heavy burden of demonstrating that the subpoena imposes a
15 burden that is unreasonable or oppressive. *See Northrop Corp.*, 751 F.2d at 403. In
16 determining whether such an undue burden exists, federal courts often consider the
17 relevance of the information requested, the need for the production, the breadth,
18 particularity and time period of the request. *See generally* 9 JAMES WM. MOORE ET AL.,
19 MOORE'S FEDERAL PRACTICE § 45.32 (3d ed. 2006). Here, taking into consideration the
20 fact that the Court has already determined that Gonzalez Plaintiffs are entitled to review
21 the information contained on the outside of these envelopes, the Treasurer cannot show
22 that he will be subject to an undue burden that would excuse him from complying with
23 the subpoena.
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26 In fact, the Treasurer does not even question the relevance of the information
27 sought in the subpoena, the need for the production of the copies of the envelopes, or
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1 object to the time that he has been allotted to produce them. Instead, he only claims that
2 complying with the subpoena would require representatives of his office to locate the
3 documents in the records he maintains. The Treasurer further complains that “ballots”
4 would have to be transported to the offices of the requesting party's attorney, which
5 would require that substantial and costly security measures be undertaken in order to
6 comply with Arizona and federal law. *See id.* at 3-4.
7

8 The Treasurer's argument on this point fails for two reasons. First, although
9 complying with the subpoena will, of course, necessitate that the envelopes containing
10 the uncounted provisional ballots be located, it is a specious argument to claim that
11 these envelopes are not maintained in a manner that would allow for them to be
12 identified without having to search through "thousands of boxes." It is simply
13 inconceivable that neither the County Treasurer nor County elections officials who are
14 available to assist him know where provisional ballot envelopes are maintained.
15 Although the provisional ballots may be in a vault containing "thousands of boxes" and
16 "pallets of boxes," there can be no doubt that the Treasurer, who is legally required to
17 maintain and keep safe these records, has a record keeping system and knows where to
18 locate them. *See Maricopa County Objection* at 3. Moreover, whatever burden may be
19 placed on the Treasurer to locate these envelopes does not outweigh Gonzalez Plaintiffs'
20 need for the production of the copies of these envelopes.
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25 Second, the claim that ballots have to be transported in a manner that would
26 require costly security measures is not credible. As discussed above, the Treasurer is
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1 not being required to open or remove a single ballot. Instead, the Treasurer has only
2 been commanded to provide copies of the outside of the envelopes to Plaintiffs.

3
4 **CONCLUSION**

5 For the foregoing reasons, Gonzalez Plaintiffs respectfully urge this Court to
6 overrule the objections made by the Pinal County Treasurer and the Maricopa County
7 Treasurer and deny the Pima County Treasurer's motion to quash.

8
9 DATED this 8th day of February, 2008.

Respectfully submitted,

10
11 By: s/Nina Perales
12 Nina Perales

13 Counsel for Plaintiffs
14 Gonzalez, et al.

15
16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on the 8th day of February, 2008, I caused the foregoing
18 document to be electronically transmitted to the Clerk's Office using the CM/ECF
19 System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

20 COPY of the foregoing mailed with Notice
21 of Electronic Filing this 8th day of January, 2008 to:

22 The Honorable Roslyn O. Silver
23 United States District Court
24 Sandra Day O'Connor U.S. Courthouse, Suite 624
25 401 West Washington Street, SPC 59
Phoenix, AZ 85003-2158

26 s/David Urias
27 David Urias