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25 Attorneys for Gonzalez Plaintiffs

26 IN THE UNITED STATES DISTRICT COURT  
27 FOR THE DISTRICT OF ARIZONA

28	Maria M. Gonzalez, et al.,	)	No. CV-06-1268-PHX-ROS(Lead)
		)	No. CV-06-1362-PCT-ROS
	Plaintiffs,	)	No. CV-06-1575-PCT-ROS
		)	
	vs.	)	<b><u>GONZALEZ PLAINTIFFS'</u></b>
		)	<b><u>CONSOLIDATED RESPONSE TO</u></b>
	State of Arizona, et al,	)	<b><u>THE GREENLEE AND SANTA</u></b>
		)	<b><u>CRUZ COUNTY TREASURERS'</u></b>
	Defendants.	)	<b><u>MOTIONS TO QUASH</u></b>
		)	<b><u>SUBPOENA AND THE</u></b>
		)	<b><u>OBJECTIONS TO SUBPOENA</u></b>
		)	<b><u>BY THE YAVAPAI, GRAHAM</u></b>
		)	<b><u>AND LA PAZ COUNTY</u></b>
		)	<b><u>TREASURERS.</u></b>
		)	

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**INTRODUCTION**

Gonzalez Plaintiffs have served subpoenas upon the County Treasurers of Greenlee, Santa Cruz , Yavapai, Graham and La Paz Counties (“County Treasurers” or “Treasurers”) requesting that they permit inspection and copying of all uncounted provisional and conditional provisional ballot envelopes from each election held in their respective counties since 2005. The County Treasurers now seek to avoid compliance with the federal subpoenas despite this Court’s January 22, 2008 order which finds that the documents are discoverable and directing Gonzalez Plaintiffs to issue subpoenas to the appropriate custodians of the documents.<sup>1</sup> *See* Dkt. Entry Nos. 554, 631, 634, 637, 644, 646.

The County Treasurers’ arguments in large part mirror those made by the Pima, Maricopa and Pinal County Treasurers in motions still pending before this Court. *See* Dkt. Entry Nos. 614, 619, 620, 624.<sup>2</sup> For the reasons stated below, Gonzalez Plaintiffs

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<sup>1</sup> Gonzalez Plaintiffs included copies of this Court’s January 22, 2008 order with the subpoenas sent to the County Treasurers.

<sup>2</sup> For a full discussion of the procedural background of this issue Gonzalez Plaintiffs respectfully refer the Court to their Consolidated Response to the Pima County Treasurer’s Motion to Quash Subpeona and the Objections to Subpoena by the Pinal County Treasurer and the Maricopa County Treasurer, fully incorporated herein. *See* Dkt. Entry No. 624 at 2-3.

1 respectfully request that the Court overrule and deny the County Treasurers' objections  
2 and motions to quash.

3  
4 **ARGUMENT**

5 **I. Federal Law Preempts State Law in This Circumstance.**

6 **A. County Officials Must Comply With Federal Subpoenas and Federal**  
7 **Court Orders.**

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9 The County Treasurers claim that they have no authority to comply with the  
10 federal subpoena served upon them by Gonzalez Plaintiffs. The Treasurers argue that if  
11 Arizona election law does not explicitly direct them to comply with a federal subpoena  
12 or court order, they cannot do so. *See* Dkt. Entry Nos. 631 at 3; 634 at 1-2; 637 at 1; 644  
13 at 1; 646 at 2. The County Treasurers are wrong. The fact that Arizona election law  
14 making certain voter-related information private is silent on what a Treasurer must do  
15 when served with a federal court order or subpoena does not mean that the Treasurers  
16 are prohibited from complying with "lawfully issued mandate[s] of the court." *Fisher v.*  
17 *Marubeni Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975).  
18

19  
20 Such an argument relies on the insupportable proposition that a state election law  
21 which is silent regarding compliance with federal subpoenas invariably nullifies federal  
22 court authority to manage discovery. In fact, the Treasurers' failure to obey subpoenas  
23 served upon them may be deemed contempt of court. *See* FED. R. CIV. P. 45(e); *see*  
24 *also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987)  
25 (Scalia, J., concurring in judgment) (courts empowered to prosecute for contempt "those  
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1 who . . . disobey orders necessary to the conduct of [their] business (such as  
2 subpoenas)").

3 **B. The County Treasurers Cannot Avoid Compliance With the**  
4 **Subpoena by Claiming the Information Sought is Confidential.**

5 A number of the County Treasurers also claim that the subpoenas served upon  
6 them should be invalidated because they request confidential or protected information.  
7 *See, e.g.*, Dkt. Entry Nos. 637 at 2; 634 at n.1. The Yavapai County Treasurer, for  
8 example, goes so far as to assert that the subpoenas require him to “sort[] through and  
9 remov[e] the rejected conditional provisional and provisional ballots” from their  
10 envelopes. *See* Dkt. Entry No. 634 at 2. This statement, and others like it made by the  
11 County Treasurers, are patently false.  
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14 Gonzalez Plaintiffs have repeatedly made clear to Defendants and the County  
15 Treasurers that they seek copies of the outside of ballot envelopes, not the ballot  
16 themselves. The letters that accompanied the subpoenas mailed by agreement to the  
17 County Treasurers in Apache, Cochise, Coconino, Greenlee, Mojave, Navajo, Pima,  
18 Pinal, Santa Cruz, Yavapai and Yuma counties clearly stated that Gonzalez Plaintiffs  
19 seek “copies of all uncounted provisional and conditional ballot envelopes” and also  
20 enclosed a copy of this Court’s January 22 Order stating that “Gonzalez Plaintiffs only  
21 request ‘copies of the outside of envelopes containing conditional provisional ballots  
22 that were never counted.’” *See* Exh. A. In addition, the Joint Discovery Dispute  
23 Statement, signed and filed with this Court by counsel for the thirteen County  
24 Defendants on February 5, 2008, again makes clear that Gonzalez Plaintiffs seek copies  
25 of the outside of ballot envelopes. *See* Dkt. Entry No. 600. Subsequent briefs filed by  
26  
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1 Gonzalez Plaintiffs in this discovery dispute similarly reiterate that Gonzalez Plaintiffs  
2 seek copies of the outside of ballot envelopes. *See* Dkt. Entry Nos. 615 and 624.

3  
4 As Plaintiffs have previously noted, this Court has already considered the issue  
5 of confidentiality of election materials and found that the Gonzalez Plaintiffs are  
6 entitled to copies of the outside of the ballot envelopes. *See* Dkt. Entry No. 554. The  
7 Court's order was based on the fact that Gonzalez Plaintiffs do not seek actual ballots or  
8 voting records that would jeopardize a voter's right to secrecy. *See id.* The County  
9 Treasurers, however, continue to object on the basis that Plaintiffs are seeking  
10 confidential information. That argument is wholly without merit because the  
11 information found on the outside of a ballot envelope, *i.e.*, a voter's name, address,  
12 precinct and poll worker, is information publicly available from any County Recorder's  
13 office.  
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16 Finally, the Treasurers' argument relies on too narrow a reading of Arizona  
17 election law regarding the handling of ballots following an election. The provision on  
18 which the Treasurers base their objection, A.R.S § 16-624, specifically states that a  
19 County Treasurer may handle and even open ballot envelopes pursuant to a court order.  
20 *See* A.R.S § 16-624 (B) and (D). In fact, the provision guiding handling of "irregular  
21 ballots" in A.R.S § 16-624 (B) arguably applies to conditional provisional ballots,  
22 which are not regular and cannot be counted in an election unless the voter returns with  
23 satisfactory identification under Proposition 200. Thus, even if a state law like A.R.S §  
24 16-624 could conceivably trump a federal court order, and even if Gonzalez Plaintiffs'  
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1 request required handling of ballots, A.R.S § 16-624 would not relieve the County  
2 Treasurers from their obligation to comply with the subpoenas.

3  
4 **C. Complying With the Subpoenas Served by Gonzalez Plaintiffs Would  
not Subject the County Treasurers to Criminal or Civil Liability.**

5 Despite the County Treasurers' mischaracterizations of Plaintiffs' requests, the  
6 subpoena issued upon them does not require that they perform any illegal acts. The  
7 subpoenas do not require that the County Treasurers "[k]nowingly detain[], alter[],  
8 mutilate[] or destroy[] ballots or election returns." A.R.S. § 16-1018(A)(2). The  
9 subpoenas also do not ask that County Treasurers "intentionally disable[] or remove[]  
10 from the polling place, on-site early voting location, or custody of an election official a  
11 voting machine or voting record." A.R.S. § 16-1016(A)(9). The County Treasurers  
12 nevertheless insist that criminal prosecution is a real threat because Gonzalez Plaintiffs  
13 request that they touch the outside of ballot envelopes. *See* Dkt. Entry Nos. 631 at 3;  
14 634 at 2; 637 at 1; 644 at 1. The credibility of this argument is suspect, especially in  
15 light of the fact that the County Treasurers are represented by their respective County  
16 Attorneys, who have long been aware that Gonzalez Plaintiffs do not seek actual ballots  
17 but instead only request that copies of envelopes be made.

18  
19 Moreover, it is absurd to suggest that the County Treasurers fear that their own  
20 County Attorneys, who represent them in this matter, would prosecute them for  
21 complying with a federal subpoena- even if it was true that compliance would  
22 contravene state law. *See Washington v. Washington State Comm'l Passenger Fishing*  
23 *Vessel Ass'n*, 443 U.S. 658, 695 (1979) (state statute that thwarts federal court "cannot  
24 survive the command of the Supremacy Clause of the United States Constitution");  
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1 *Spain v. Mountanos*, 690 F.2d 742, 746 (9<sup>th</sup> Cir. 1982) ("Under the Supremacy Clause  
2 of the United States Constitution, a court, in enforcing federal law, may order state  
3 officials to take actions despite contravening state laws.").

4  
5 **II. Complying with Gonzalez Plaintiffs' Subpoenas Would not Subject the  
6 County Treasurers to an Undue Burden.**

7 The County Treasurers assert that complying with Gonzalez Plaintiffs' subpoena  
8 constitutes an undue burden on them and their offices. *See* Dkt. Entry Nos. 631 at 3;  
9 634 at 2-3; 644 at 1-2; 646 at 2-3. A Rule 45 subpoena is considered unduly  
10 burdensome when a court finds that it is "unreasonable or oppressive." *Northrop Corp.*  
11 *v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984)). The party moving  
12 to quash has the heavy burden of demonstrating the unreasonableness or oppressiveness  
13 of the subpoena. *See id.* The County Treasurers have not met this burden.

14  
15 Here, none of the County Treasurers can show that the subpoenas served upon  
16 them are unreasonable or oppressive. Instead, they rely primarily on two assertions,  
17 neither of which rise to the level that would necessitate that the subpoenas be quashed.  
18 First, the County Treasurers claim that they cannot comply with the subpoenas because  
19 they lack sufficient election knowledge to identify the requested election documents.  
20 *See* Dkt. Entry Nos. 631 at 3; 634 at 3; 637 at 1; 644 at 1; 646 at 3. Second, some of the  
21 County Treasurers assert that compliance with the subpoena would require staff and  
22 resources to sort among boxes to identify the boxes of documents responsive to the  
23 subpoenas. *See* Dkt. Entry Nos. 634 at 3; 637 at 1; 644 at 2; 646 at 2-3. Plaintiffs  
24 disagree that either of these two complaints provide a sufficient basis to quash the  
25 subpoenas served upon the County Treasurers.  
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1           The assertion that the County Treasurers are unable to identify envelopes  
2 containing uncounted provisional ballots is disingenuous and ignores the fact that they  
3 are charged under state law with the duty to receive and maintain these election  
4 materials. As the legal custodians of the conditional provisional ballot envelopes, the  
5 Treasurers cannot avoid the subpoenas by claiming not to know what the envelopes  
6 look like. The Treasurers are also required, in large part, to retrieve and produce  
7 election materials in accordance with the duties assigned to them in A.S.R. § 16-624  
8 when under a court order. In this respect, the County Treasurers cannot show that the  
9 federal subpoena somehow imposes an undue burden upon them that a court order  
10 issued under A.S.R. § 16-624 does not.  
11

12  
13           Furthermore, the County Treasurers' complaint that the federal subpoenas are  
14 unduly burdensome because they and their offices must expend time and effort to  
15 comply similarly does not absolve them of their responsibility to do so. Although  
16 complying with the subpoena requires that the envelopes containing the uncounted  
17 provisional ballots are, in fact, identified, it seems far-fetched to claim that these  
18 materials are maintained in such a manner that the only way to ascertain which  
19 documents are responsive to Gonzalez Plaintiffs' request is for the County Treasurers  
20 and their staff to blindly troll through all of their stored materials. As mentioned above,  
21 this is a particularly unlikely scenario considering that the Treasurers are the individuals  
22 legally required to maintain and keep safe these records and surely have record keeping  
23 systems to locate them. *See id.*  
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1 overrule the Objections to Subpoenas by the Yavapai, Graham and La Paz County  
2 Treasurers.

3  
4 DATED this 19<sup>th</sup> day of February, 2008.

Respectfully submitted,

5  
6 By: s/Nina Perales  
Nina Perales

7  
8 Counsel for Plaintiffs  
9 Gonzalez, et al.

10  
11 CERTIFICATE OF SERVICE

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

15 COPY of the foregoing mailed with Notice  
16 of Electronic Filing this 19<sup>th</sup> day of February, 2008 to:

17 The Honorable Roslyn O. Silver  
18 United States District Court  
19 Sandra Day O'Connor U.S. Courthouse, Suite 624  
20 401 West Washington Street, SPC 59  
Phoenix, AZ 85003-2158

21 s/David Urias  
22 David Urias