

1 ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY  
2 By: Colleen Connor (# 015679)  
Deputy County Attorney  
MCAO Firm No. 00032000  
3 CIVIL DIVISION  
222 North Central Avenue, Suite 1100  
4 Phoenix, Arizona 85004-2206  
Telephone (602) 506-0128  
5 [connorc@mcao.maricopa.gov](mailto:connorc@mcao.maricopa.gov)

6 Dennis I. Wilenchik (# 05350)  
Kathleen Rapp (# 023982)  
WILENCHIK AND BARTNESS, P.C.  
7 The Wilenchik & Bartness Building  
2810 North Third Street  
8 Phoenix, Arizona 85004  
Telephone (602) 606-2810  
9 [DIW@wb-law.com](mailto:DIW@wb-law.com); [KatheenR@wb-law.com](mailto:KatheenR@wb-law.com)  
Attorneys for County Defendants

10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF ARIZONA**

12 **MARIA M. GONZALEZ; JESUS M.**  
13 **GONZALES; BERNIE ABEYTIA;**  
14 **LUCIANO VALENCIA; DEBBIE**  
15 **LOPEZ, SOUTHWEST VOTER**  
16 **REGISTRATION EDUCATION**  
17 **PROJECT; VALLE DEL SOL;**  
18 **FRIENDLY HOUSE; CHICANOS POR**  
19 **LA CAUSA, INC.; and ARIZONA**  
20 **HISPANIC FORUM,**  
  
21 **Plaintiffs,**  
  
22 **v.**  
  
23 **STATE OF ARIZONA, JAN BREWER,**  
24 **in her official capacity as the Secretary of**  
25 **State of the State of Arizona, et al.,**  
  
26 **Defendants.**

**No. CV06-1268-PHX ROS (Lead)**  
**No. CV06-1362-PCT-JAT**  
**No. CV06-1575-PHX-EHC**  
  
**YUMA COUNTY DEFENDANTS’**  
**RESPONSE TO GONZALEZ**  
**PLAINTIFFS’ MOTION FOR**  
**SANCTIONS**  
  
**(Assigned to the**  
**Honorable Roslyn O. Silver)**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

Defendants Yuma County Recorder Susan Hightower Marler and Yuma County Elections Director Patti Madrill (collectively “Yuma County Defendants”), by and through undersigned counsel, hereby Responds to Gonzalez Plaintiffs’ Motion for Sanctions. This Response is supported by the following Memorandum of Points and Authorities and the parties’ pleadings filed herein, together with any exhibits thereto, all of which are incorporated herein by this reference.

**RESPECTFULLY SUBMITTED** this 2nd day of July, 2008.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

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

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Introduction**

Gonzalez Plaintiffs move for sanctions and for an adverse inference using only half of an explanation that was given by Yuma County officials. In addition, Plaintiffs have used inflammatory rhetoric in a vain attempt to transform what was, at most, an honest mistake into a sanctionable offense. In reality the explanation that has been

1 provided to Plaintiffs' multiple times is that Yuma County did not track rejected voter  
2 registration forms prior to 2007, when it implanted new voter registration software  
3 known as Power Profile. See Plaintiffs exhibits 2, 3, 8, 10, 15-17; 07-02-08 Affidavit of  
4 K. Marin at ¶ 4, attached hereto as Exhibit 1 and incorporated herein by this reference.  
5 Any copies of rejected voter registration forms that may have been kept prior to 2007  
6 were kept sporadically and were not kept in accordance with Yuma County's normal  
7 practice. *Id.* at ¶¶ 4,7. While copies of Mr. and Mrs. Gonzalez's registration forms  
8 happened to still be in Yuma County's possession when this lawsuit was filed in 2006, it  
9 is entirely unknown how many other rejected voter registration forms may have been  
10 inadvertently retained for a time. *Id.* ¶¶ 8, 11. Yuma County officials have speculated  
11 that if any had been kept, they would have been with the backlog of files waiting for  
12 destruction in accordance with records retention policies. *Id.* at ¶ 12.

13 This backlog was destroyed sometime after Yuma County procured a high  
14 volume shredder that could accommodate the backlog of documents in August 2007. *Id.*  
15 Whether any rejected voter registration forms were in those files is utterly unknown. *Id.*  
16 However, that is the only place that any stray forms might have been located, such that  
17 they would not have been located in a search for discoverable documents. Thus, *if* any  
18 rejected voter registration forms were destroyed at all, it was done inadvertently and  
19 without malicious intent.

## 18 **II. Discovery**

### 19 *a. Yuma County responded accurately to all discovery requests*

20 Gonzalez Plaintiffs did not ask for document production from Yuma County until  
21 October 2007. Plaintiffs' Exhibit 14. While Plaintiffs attempt to characterize Yuma  
22 County as dodging several discovery requests for a span of nearly two years, this is

1 simply not accurate. The counties are not named Plaintiffs in the consolidated ITCA  
2 case and County Defendants were under no obligation to respond to any discovery  
3 requests issued only by the ITCA plaintiffs. However, in the spirit of cooperation and  
4 open disclosure, the County Defendants went above and beyond by responding to  
5 everything that was asked of them by all Plaintiffs. In June of 2006, when ITCA first  
6 asked for rejected voter registration forms, Yuma County responded truthfully by  
7 indicating that it did not track that information. While Gonzalez Plaintiffs claim the  
8 clock began ticking on discovery requests during the summer of 2006, they fail to  
9 mention that they only requested rejected voter registration forms from Maricopa  
10 County at that time. The Gonzalez Plaintiffs made no request to Yuma County until  
11 October 2007, over a year later.

12 When ITCA asked Yuma County for discovery again in June 2007, Yuma County  
13 again went above and beyond the call of duty by responding to requests. The County  
14 was asked about information regarding the total number of voter registration  
15 applications rejected for failure to provide proof of citizenship between January of 2005  
16 and June 2007. Yuma County answered that it could not track such information. Since  
17 Yuma County did not track rejected voter registration forms until it implemented Power  
18 Profile in 2007, Yuma County could not, and still cannot, produce answers regarding the  
19 total number of rejected voter registration forms since January 2005.<sup>1</sup>

20 The first time Gonzalez Plaintiffs *ever* asked Yuma County for production of  
21 documents was on October 16, 2007. Plaintiffs' Exhibit 14. Those requests were  
22

---

1 Admittedly, because of the relatively recent implementation of the new computer software and the vast capabilities of the new system, there may have been some confusion in June 2007 about whether or not the new system tracked rejected voter registrations forms and/or how to retrieve those from the system. However, any confusion was cleared up and the forms were produced to Plaintiffs with even less redaction than was ordered by the Court.

1 received by counsel on October 22, 2007 and the rejected voter registration forms were  
2 served on Plaintiffs' counsel via e-mail on November 21, 2007. County Defense  
3 Counsel's date stamped copy of RPFs, attached hereto as Exhibit 2 and incorporated  
4 herein by reference; Plaintiffs' Exhibit 9. For Gonzalez Plaintiffs to now claim that  
5 Yuma County Defendants should be sanctioned for not having more rejected voter  
6 registration forms in their possession is absurd. Defendants, including Yuma County  
7 Defendants, have bent over backward to accommodate discovery requests from all  
8 Plaintiffs, even though they were not technically required to do so. Thousands and  
9 thousands of pages of documents have been copied, redacted, and then reredacted, as  
10 explained more fully below, when Plaintiffs determined that the originally produced  
documents did not provide enough personal information.

11 Yuma County itself has produced all of the rejected voter registration forms that  
12 it has in its possession. It is notable that Plaintiffs contradict themselves in their  
13 discussion regarding what Yuma County has produced. Plaintiffs specifically quarrel  
14 with the fact that Yuma produced no rejected voter registration forms "from the period  
15 of time between January 1, 2005 and December 2006." Plaintiffs' Motion at 5. Just two  
16 lines later, Plaintiffs admit that Yuma produced two rejected voter registration forms  
17 from December 2006. Plaintiffs' objections ignores the timeline of this case and  
18 disregards the fact that Yuma is a smaller county. They are not likely to have large  
19 amounts of rejected voter registration forms like, for instance, Maricopa County would  
20 have.<sup>2</sup> Thus, to allege now that Yuma County should be sanctioned and that a broad  
adverse inference should be shackled to this case is disingenuous, at best.

---

21  
22 <sup>2</sup> This is illustrated by the small number of voter registrations rejected in other months as well.  
*See* Plaintiffs' Motion at 5.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

*b. Protection of Voter Registration Forms*

Gonzalez Plaintiffs also make their now-typical red herring argument that County Defendants unduly delayed production of unredacted documents. As has been stated many times, this is simply not true and it is not persuasive. Gonzalez Plaintiffs assert (1) that the stipulation of confidentiality specifically addressed and contemplated unredacted copies of rejected voter registration forms; and (2) that the Court ultimately ordered the Counties to produce unredacted copies of the voter registration forms. Neither of these assertions is true.

A.R.S. § 16-168 requires that all information obtained from the voter roles be treated with the utmost confidence. Furthermore A.R.S. § 16-168 (E) delineates a few narrow categories for which someone may have access to voter registration at all, in which Plaintiffs’ purposes are not included. In accordance with these statutes and in a good faith effort to resolve discovery disputes, Defendants produced the rejected voter registration forms, but redacted them in accordance with the statute. The stipulation for confidentiality was designed to protect the applicant information that was not redacted and to ensure that the voter registration forms were not mishandled. The production of unredacted copies of voter registration forms was plainly not discussed anywhere in the stipulations.

When the Court analyzed Plaintiffs’ request for unredacted copies of the voter registration forms, it determined that Plaintiffs could have access to limited additional information. Despite Plaintiffs’ claims to the contrary, the Court *did not* order the counties to produce unredacted copies of the voter registration forms. The Court ordered that “birth date, month, day, year, state or county of birth, father’s name and mother’s

1 maiden name de disclosed and nothing else...”<sup>3</sup> August 30, 2007 transcript at 25: 20-22.  
2 Signatures, Social Security numbers, and other identifying numbers still had to be  
3 redacted from the forms.

4 This argument, however flawed, has absolutely nothing to do with Gonzalez  
5 Plaintiffs’ contention that Yuma County should be sanctioned for, in their opinion, not  
6 retaining enough rejected voter registration forms. It is an inaccurate attempt to draw  
7 attention away from the flaws in the underlying argument and generally cast Defendants  
8 in a negative light in hopes that inappropriate sanctions will be granted. The inclusion of  
9 this misinformation should be seen for what it is and given no weight at all in deciding  
10 the primary motion.

### 11 **III. Yuma County did not wrongfully destroy documents**

12 Yuma County has done nothing wrong in this case. While the Court has the  
13 authority to draw an adverse inference from the destruction of evidence relevant to the  
14 case, it is inappropriate to do so here. *Akiona v. U.S.*, 938 F.2d 158, 161 (9<sup>th</sup> Cir., 1991).  
15 First, there is no evidence that anything related to the case was destroyed. At most,  
16 Yuma County Defendants believe that *if* there were any rejected voter registration forms  
17 that were copied and still retained, they may have been located in with documents  
18 scheduled to be shredded.

19 The reason for an adverse inference is two-prong: (1) a “common sense  
20 observation that a party who has notice that a document is relevant...and who proceeds  
21 to destroy it is more likely to have been threatened by the document...”; and (2) a  
22 deterrent for would-be tamperers. *Id.* Neither of these rationales applies in this case.  
As stated above, there is no evidence that anything was destroyed at all – much less that

---

<sup>3</sup> The Court later added that tribal identification numbers and naturalization certificate numbers should be provided when applicable. August 30, 2007 transcript at 32:1-33:18.

1 it was something negative to Defendants. Furthermore, the deterrence rationale only  
2 applies if it was wrong to destroy the documents. “A party should only be penalized for  
3 destroying documents if it was wrong to do so, and that requires, at a minimum, some  
4 notice that the documents are potentially relevant.” *Id.*; *Nation-Wide Check Corp. v.*  
5 *Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir.1982) (“The inference depends,  
6 of course, on a showing that the party had notice that the documents were relevant ...”);  
7 *id.* at 219 (indicating that this “minimum link of relevance” is required before  
8 deterrence rationale would justify shifting burden of proof); *see also Vick v. Texas*  
9 *Employment Comm'n*, 514 F.2d 734, 737 (5th Cir.1975) (requiring showing of bad  
10 faith). Here there is no evidence that *anything* related to the case was destroyed. As  
11 such Plaintiffs have certainly not met their burden to show that Yuma County has  
12 destroyed relevant documents after having received notice that the documents were  
13 relevant. There has been no showing that Yuma County acted with bad faith or  
14 intentionally destroyed anything related to the case. Therefore, Gonzalez Plaintiffs’  
15 Motion for Sanctions should be denied.

14 **IV. Plaintiffs are not entitled to a broad adverse inference**

15 Even if there was evidence that Yuma County had inadvertently destroyed  
16 relevant documents, the broad adverse inference proposed by Plaintiffs’ is not the  
17 appropriate remedy. In cases where the party has committed no wrongdoing, it is  
18 appropriate to assign no evidentiary consequence at all. *Welsh v. U.S.*, 844 F.2d 1239,  
19 1246 (6<sup>th</sup> Cir., 1988) (citing *INA Aviation Corp. v. United States*, 468 F.Supp. 695, 700  
20 (E.D.N.Y.), *aff’d mem.*, 610 F.2d 806 (2d Cir.1979)); *Akiona v. U.S.*, 938 F.2d at 161.  
21 Here, there is no evidence of wrongdoing and Plaintiffs have not been harmed by any  
22 potential destruction of a few randomly copied rejected voter registration forms. *See*

1 *Struthers Patent Corp. v. Nestle Co., Inc.*, 558 F.Supp. 747, 766 (D.C.N.J.1981). Thus,  
2 no relief should be awarded to Plaintiffs and their Motion for Sanctions should be  
3 denied.

4 Plaintiffs seek to gain by adverse inference what they have not been able to prove  
5 through any discovery in this case – that Proposition 200 has “a negative and disparate  
6 effect... on Latino voter registration.” Plaintiffs’ Motion at 10. Defendants have  
7 produced tens of thousands of rejected voter registration forms and other discovery and  
8 still even the numbers disclosed by Plaintiffs’ own expert show that Latino voter  
9 registration has risen in Arizona since the implementation of Prop 200. Dkt. 802 (Decl.  
10 of Dr. Jeffrey Zax) ¶¶ 7-9, 13-14,17-19. Now Plaintiffs request a wildly overreaching  
11 adverse inference to the contrary because Plaintiffs think Yuma County should have  
12 been able to provide more documents. This is inappropriate and Yuma County  
13 Defendants respectfully request that the Court deny Gonzalez Plaintiffs’ Motion for  
14 Sanctions.

15 **V. Conclusion**

16 For all of the reasons stated, Gonzalez Plaintiffs are not entitled to sanctions in  
17 any form and are certainly not entitled to the broad adverse inference they propose.  
18 Yuma County Defendants respectfully request that the Court deny Gonzalez Plaintiffs’  
19 Motion for Sanctions.  
20  
21  
22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

**RESPECTFULLY SUBMITTED** this 2nd day of July, 2008.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

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

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

1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 2nd day of July, 2008, I caused the foregoing document  
3 to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing  
4 and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

5 David J. Bodney  
6 Karen J. Hartman-Tellez  
7 Steptoe & Johnson LLP  
8 201 E. Washington St., Ste. 1600  
9 Phoenix, Arizona 85004-2382  
10 [dbodney@steptoe.com](mailto:dbodney@steptoe.com)  
11 [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)

10 Jon Greenbaum  
11 Benjamin Blustein  
12 Lawyers' Committee For  
13 Civil Rights Under Law  
14 1401 New York Avenue, Ste. 400  
15 Washington, D.C. 20005  
16 [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)

14 Elliot M. Minberg  
15 People for the American  
16 Way Foundation  
17 2600 M Street, NW, Ste. 400  
18 Washington, DC 20036  
19 [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)

18 Daniel B. Kohrman  
19 AARP Foundation Litigation  
20 601 E Street, N.W., Ste. A4-240  
21 Washington, DC 20049  
22 [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)

1 David J. Becker  
People for the American Way Foundation  
2 2000 M Street, NW, Suite 400  
Washington, D.C. 20036  
3 [dbecker@pfaw.org](mailto:dbecker@pfaw.org)

4 Nina Perales  
5 Mexican American Legal Defense  
and Education Fund  
6 110 Broadway, Ste. 300  
San Antonio, Texas 78205  
7 [nperales@maldef.org](mailto:nperales@maldef.org)

8  
9 Judith M. Dworkin  
Marvin S. Cohen  
10 Patricia Ferguson-Bohnee  
SACKS TIERNEY P.A.  
11 4250 N. Drinkwater Blvd. 4<sup>th</sup>  
Scottsdale, Arizona 85251-3693  
12 [Judith.Dworkin@sackstierney.com](mailto:Judith.Dworkin@sackstierney.com)

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

16 Jean E. Wilcox  
17 Coconino County Attorney's Office  
110 East Cherry Avenue  
18 Flagstaff, Arizona 86001  
[jwilcox@coconino.az.gov](mailto:jwilcox@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 2nd day of July, 2008.

2  
3 COPY of the foregoing mailed with Notice of  
Electronic Filing this 2nd 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

9

10

11

12

13

14

15

16

17

18

19

20

21

22