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CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
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6 **IN THE UNITED STATES DISTRICT COURT**  
 7 **FOR THE DISTRICT OF ARIZONA**

8 Maria M. Gonzalez, *et al.*,  
 9 Plaintiffs,  
 10 vs.  
 11 State of Arizona, *et al.*,  
 12 Defendants.

No. 06-CV-1268-ROS (lead)  
 No. 06-CV-1362-JAT (cons)

**MEMORANDUM IN SUPPORT OF  
 MOTION TO INTERVENE AS  
 DEFENDANT-INTERVENORS**

13 The Inter Tribal Council of Arizona, Inc.,  
 14 et al.,  
 15 Plaintiffs,  
 16 vs.  
 17 Jan Brewer,  
 18 Defendant.

19 and  
 20 Yes on Proposition 200, a registered ballot  
 21 initiative political committee organized  
 22 under Arizona law; and  
 Randall Pullen, an individual,  
 23 Applicants for Intervention.

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**INTRODUCTION**

On July 7, 2003, Arizona ballot initiative petition I-03-2004 was filed with the Arizona Secretary of State and it appeared on the November 2, 2004, general election ballot as Proposition 200, the “Arizona Taxpayer and Citizen Protection Act” (hereafter referred to as “Proposition 200”). Proposition 200 was approved by the voters of the State of Arizona by a margin of 56 percent in favor to 44 percent opposed.

On April 9, 2006, Plaintiffs filed a Complaint for declaratory and injunctive relief regarding Proposition 2006. Plaintiffs alleged that Proposition 200 violated the Supremacy Clause of the U.S. Constitution, the First, Twenty-Fourth, and Fourteenth Amendments to the U.S. Constitution, and a number of federal statutes.

On November 29, 2004, a similar complaint was filed in the U.S. District Court for the District of Arizona challenging the legality of Proposition 200; *see Friendly House v. Napolitano*, No. 04cv649 (D. Ariz.). Specifically, Plaintiffs in that case alleged that Proposition 200 violated the Supremacy Clause of the U.S. Constitution, the Fourteenth, Sixth, and Twenty-Fourth Amendments to the U.S. Constitution, and various federal statutes. Applicants also moved for intervention in that case, and their motion was granted. That case was ultimately dismissed without prejudice by the U.S. Court of Appeals for the Ninth Circuit for lack of standing. *Friendly House v. Napolitano*, 419 F.3d 930(9th Cir. 2005).

**DESCRIPTION OF APPLICANTS**

Yes on Proposition 200 is a ballot initiative political committee, organized under Arizona Law and registered with the Arizona Secretary of State, the purpose of which was to support and defend Proposition 200. Declaration of Randy Pullen, ¶¶ 4,5<sup>1</sup>. Yes on 200 Proposition was the largest and most active organization in Arizona working to enact the

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<sup>1</sup> Mr. Pullen’s Declaration is attached hereto as Exhibit 1.

1 Arizona Taxpayer and Citizen Protection Act of 2004 and to promote the Act's stated  
2 policy goal of deterring illegal immigration into Arizona. Exh. 1, ¶ 6.

3 Mr. Randall Pullen is a United States citizen, a legal resident and registered voter  
4 in the State of Arizona. *Id.* ¶ 1. Mr. Pullen is Chairman of Yes on Proposition 200. *Id.* ¶  
5 2.

6 Plaintiffs in this case seek injunctive and declaratory relief concerning Proposition  
7 200. Their Complaint raises questions of law that are vital to Applicants. Notably,  
8 Applicants' interests, as sponsors of the Proposition, include protection of the Proposition  
9 itself and differ from the interests of Defendants in their levels of support and enthusiasm  
10 for the Proposition. The issues are also vital to the personal, economic, and social  
11 interests of Applicants.

## 12 ARGUMENT

### 13 **I. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER** 14 **OF RIGHT.**

15 Upon timely application, anyone shall be permitted to intervene in an action when:

16 (1) a statute of the United States confers an unconditional right to  
17 intervene; or when (2) the applicant claims an interest relating to the  
18 property or transaction that is the subject of the action and is so  
19 situated that the disposition of the action may, as a practical matter,  
impair or impede his ability to protect that interest, unless the  
applicant's interest is represented adequately by existing parties.

20 Fed. R. Civ. P. 24(a).

21 Intervention of right under Rule 24(a) involves application of a four-part test.  
22 First, to support intervention, the applicant's motion should be timely. Second, the  
23 applicant should assert an interest relating to the transaction or property that is the subject  
24 of the action. Third, the applicant should show that its interest may be impaired by the  
25 action. Fourth, the interests of the applicant should not be adequately represented by  
26 parties already involved in the action. *Sagebush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th  
27 Cir. 1983).

1 This intervention test is to be “broadly construed in favor of applicants for  
2 intervention.” *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d  
3 1391, 1394 (9th Cir. 1992). Denial of intervention must be done with circumspection. On  
4 the facts set out above, and for the reasons that follow, Applicants fully meet each prong  
5 of the test for intervention as a matter of right under Fed. R. Civ. P. 24 (a), and, therefore,  
6 Applicants’ Motion to Intervene should be granted.

7 **A. Applicants’ Motion To Intervene Is Timely.**

8 “In determining whether a motion for intervention is timely, we consider three  
9 factors: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the  
10 prejudice to other parties; and (3) the reason for and length of the delay.” *League of*  
11 *United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).  
12 Specifically, the proposed intervenor should, ideally, intervene as soon as he has doubts  
13 about the adequacy of representation. *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir.  
14 1991). A filing for intervention that occurs before the case is truly at issue is considered  
15 timely. *Kozak v. Wells*, 278 F.2d 104, 109 (8th Cir. 1960).

16 Applicants filed their Motion to Intervene approximately one month after the  
17 complaint had been filed, and one day after responses were due from Defendants. As  
18 such, no discovery has taken place and the case is not yet at issue. Because of the  
19 promptness of Applicants’ Motion for Intervention, the existing parties will not be  
20 prejudiced if the Court permits intervention, no additional discovery will be necessary,  
21 and the proceeding will not be delayed.

22 On the other hand, Applicants would be greatly prejudiced if their Motion for  
23 Intervention is denied because no party would be representing their interests as supporters  
24 of Proposition 200 and as voters concerned about the potential for fraudulent vote  
25 dilution. Here, Applicants currently have grave doubts about Defendants’ dedication and  
26 commitment to the defense and enforcement of Proposition 200. Applicants’ Motion for  
27 Intervention is, therefore, appropriate and timely and should be granted.  
28

1           **B. Applicants Have A Protectable Interest.**

2           Applicants meet the second prong of the test for intervention because they have a  
3 protectable interest in the subject matter of the litigation. The requisite interest for  
4 intervention, as a matter of right, must be direct, non-contingent, substantial, and legally  
5 protectable. *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002).  
6 “An applicant has a ‘significant protectable interest’ in an action if (1) it asserts an interest  
7 that is protected under some law, and (2) there is a ‘relationship’ between its legally  
8 protected interest and the plaintiff’s claims. The relationship requirement is met if the  
9 resolution of the plaintiff’s claims actually will affect the applicant. The interest test is not  
10 a clear-cut or bright-line rule, because no specific legal or equitable interest need be  
11 established. Instead, the interest test directs courts to make a practical, threshold inquiry,  
12 and is primarily a practical guide to disposing of lawsuits by involving as many apparently  
13 concerned persons as is compatible with efficiency and due process.” *Id.* (internal  
14 quotation marks and citation omitted).

15           The Ninth Circuit has concluded that the sponsors of a ballot initiative have a  
16 sufficient interest in the subject matter of the litigation to intervene. *Yniguez*, 939 F.2d  
17 727; *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630  
18 (9th Cir. 1982). In *Yniguez*, the Ninth Circuit held that those entities that proposed and  
19 vigorously campaigned for a ballot initiative have a strong interest in the survival of that  
20 provision. 939 F.2d at 733. Here, Applicants spent innumerable hours and considerable  
21 money to generate enough support for Proposition 200 to ensure its passage. Exh. 1,  
22 ¶¶ 6-9. A judicial determination in favor of Plaintiffs would directly affect Applicants.

23           Yes on Proposition 200 was the largest and most active organization in Arizona  
24 working to enact Proposition 200 and to support the Act’s stated policy goal of deterring  
25 illegal immigration into Arizona. Exh. 1, ¶ 6. In addition, Yes on Proposition 200 was  
26 recognized as a defendant, and real party in interest, in *No On 200 v. Brewer*, No. 04 CV  
27 020468 (Ariz. Sup. Court, Maricopa Cty., October 2004), and Yes on Proposition 200 was  
28

1 permitted to intervene in *Friendly House v. Napolitano*, No. 04cv649 (D.Ariz. granted  
2 Dec. 15, 2004), because it had a protectable interest.

3 Randall Pullen is the Chairman of Yes on Proposition 200. He spent countless  
4 hours attending meetings concerning Proposition 200, participating in debates pertaining  
5 to Proposition 200, collecting more than \$250,000 to fund a media campaign, making  
6 personal financial contributions, and personally obtaining more than 1,300 signatures for  
7 Proposition 200. Exh. 1, ¶¶ 7-9. Randy Pullen was also recognized as a defendant in *No*  
8 *On 200 v. Brewer, supra*. He, too, was permitted to intervene in *Friendly House v.*  
9 *Napolitano, supra*.

10 Further, registered voters concerned about redistricting and vote dilution have a  
11 protectable interest that warrants intervention. See *Johnson v. Mortham*, 915 F. Supp.  
12 1529 (N.D. Fla, 1995) (Registered voters could intervene in suit challenging the  
13 constitutionality of a redistricting plan as a remedy for vote dilution), *Meek v.*  
14 *Metropolitan Dade County, Fla.*, 985 F.2d 1471 (11th Cir. 1993), *League of United Latin*  
15 *American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993).

16 Here, Applicant Pullen, as a registered voter, is concerned that his vote would be  
17 fraudulently diluted in the absence of Proposition 200. Exh. 1, ¶ 10. Indeed, the absence  
18 of a common-sense photo-ID requirement for in-person voting that imposes a *de minimus*  
19 hardship on a small number of people is necessary to protect the fundamental voting rights  
20 of legally registered voters from voter fraud. These interests are discrete from the  
21 interests of Defendants. For the above reasons, Applicants have a protectable interest in  
22 this litigation that is sufficient to support their intervention as of right under Fed. R. Civ.  
23 P. 24(a).

24 **C. Applicants' Interests Would Be Impaired If Intervention**  
25 **Were Denied.**

26 The question of whether Applicants' interests would be impaired is substantially  
27 similar to the question of whether Applicants have a protectable interest. *Natural*  
28 *Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*, 578 F.2d 1341,

1 1345 (10th Cir. 1978) (“[a] question of impairment is not separate from the question of  
2 existence of an interest.”).

3 As discussed above, Applicants have a present, existing interest to ensure that  
4 Proposition 200, for which they expended their time, energy, and economic resources, is  
5 properly defended and enforced. Should judgment be rendered for Plaintiffs, this time,  
6 energy, and financial expenditure would be for naught. Additionally, as a registered voter  
7 in the State of Arizona, Applicant Pullen’s interest would be impaired should Proposition  
8 200 be held unconstitutional, thereby removing a safeguard against voter fraud.

9 **D. The Existing Defendants Will Not Adequately Represent**  
10 **Applicants’ Interests.**

11 The burden under this prong has been described as “minimal”; a party seeking to  
12 intervene need to show only that representation of its interest “may be inadequate.”  
13 *Natural Resources Defense Council*, 578 F.2d at 1345; *Trbovich v. UMW*, 404 U.S. 528,  
14 538 n.10 (1972). As the Sixth Circuit has held:

15 [T]he applicant [for intervention] should be treated as the best judge  
16 of whether the existing parties adequately represent his or her  
17 interests, and that any doubt regarding adequacy of representation  
18 should be resolved in favor of the proposed intervenors.

19 *Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir. 2000).

20 The burden of persuasion is on those opposing intervention to show that  
21 representation without the Applicants will be adequate. C. Wright & A. Miller, *Federal*  
22 *Practice and Procedure*, § 1909 (1986). Generally, a governmental body is presumed to  
23 adequately represent the interests of its citizens. 6 Moore’s Federal Practice §  
24 24.03[4][a][iv]. However, this presumption can be rebutted if the prospective intervenor  
25 can show divergent interests from those represented by the government. Moore’s Federal  
26 Rules Pamphlet 2006, at 372.

27 In this case, Applicants intend to zealously defend the constitutionality and legality  
28 of Proposition 200; such a spirited defense is not guaranteed from the current Defendants.  
In the past, both the Arizona Attorney General, Terry Goddard, and Governor Janet

1 Napolitano have been outspoken opponents of Proposition 200 in its entirety; both have  
2 been listed as opposed to Proposition 200 on the websites of two opposition organizations.  
3 See, e.g., “Defeat 200” website, <http://www.defeat200.org/allies.php> (last visited May 15,  
4 2006), and “Truth in Action” website, [http://www.tiaNews.com/tianews/breaking/  
5 10-02-04/opposed\\_prop\\_200.htm](http://www.tiaNews.com/tianews/breaking/10-02-04/opposed_prop_200.htm) (last visited May 15, 2006). In addition, despite her  
6 recent letters to the Election Assistance Commission (“EAC”) supporting Proposition 200,  
7 Defendant Jan Brewer, Arizona Secretary of State, had previously planned to allow  
8 Arizonans to continue to register to vote online, notwithstanding Proposition 200, which  
9 bars such registration. Shawn Macomber, *The Open Borders Lobby vs. the People of  
10 Arizona*, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=16101>, November  
11 29, 2004. The foregoing that those responsible for defending and enforcing Proposition  
12 200 have political reasons and motivation to shirk that responsibility.

13 Moreover, days after the election, Arizona’s Attorney General released an opinion  
14 substantially narrowing the scope of the “benefits” portion of Proposition 200 from that  
15 intended by the Applicants and voted on and approved by the people of Arizona. Arizona  
16 Attorney General Opinion I04-010, *State and Local Public Benefits Subject to Proposition  
17 200* (Nov. 12, 2004). The only conclusion that can be drawn from the Opinion is that,  
18 given his willingness to cede a major part of the legal battlefield, the Attorney General’s  
19 representation of Applicants’ interest will be inadequate.

20 Furthermore, during oral arguments regarding the motion by Plaintiffs for a  
21 temporary restraining order in a similar Proposition 200 case, *Friendly House v.  
22 Napolitano*, *supra*, State Defendants “candidly admitted” that there was no irreparable  
23 harm to be suffered by Arizona if a temporary restraining order were granted. Order at 2  
24 *Friendly House v. Napolitano*, No. 04CV649 (D.Ariz. Nov. 30, 2004). Applicants  
25 disagree vigorously and vehemently with State Defendants’ “candid[] admi[ssion]:”

26 Finally, the Ninth Circuit recognized that the government may be less than  
27 enthusiastic about enforcing a measure adopted by a ballot initiative. The people  
28 generally resort to a ballot initiative precisely because they do not believe that the

1 ordinary processes of representative government are sufficiently sensitive to the popular  
2 will with respect to a particular subject. *Yniguez*, 939 F.2d at 733. Although the people  
3 may not always be able to count on their elected representatives to support, fully and  
4 fairly, a provision enacted by ballot initiative, they are entitled to depend on those who  
5 proposed and vigorously campaigned for the initiative to do so. *Id.* at 727.

6 Applicants, as the major backers of Proposition 200, should not be consigned to the  
7 sidelines as non-participants in this case and “hope for the best” from Defendants.  
8 Defendants cannot represent Applicants because Defendants opposed enactment of  
9 Proposition 200. The political, social, financial, and cultural interests that Applicants  
10 bring to this case are personal and distinct to them and represent the views of at least a  
11 significant plurality of the November 2004 electorate. This is precisely the sort of  
12 situation in which a lack of identity of interests favors intervention as a matter of right.  
13 *See e.g.*, 3B *Moore’s Federal Practice*, § 24.07(4) at 24-78 (2d ed. 1992). As a result,  
14 Applicants’ interests are not adequately represented. The Court should not relegate  
15 defense of this important initiative to persons who are hostile to it. *See Yniguez*, 939 F.2d  
16 at 733.

## 17 **II. APPLICANTS ARE ENTITLED TO PERMISSIVE INTERVENTION**

18 Fed. R. Civ. P. 24(b) governs permissive intervention and provides:

19 Upon timely application, anyone may be permitted to intervene in an  
20 action (1) when a statute of the United States confers a conditional  
21 right to intervene; or (2) when an applicant’s claim or defense and the  
22 main action have a question of law or fact in common. When a party  
23 to an action relies for ground of claim or defense upon any statute or  
24 executive order administered by a federal or state governmental  
25 officer or agency or upon any regulation, order, requirement or  
26 agreement issued or made pursuant to the statute or executive order,  
27 the officer or agency upon timely application may be permitted to  
28 intervene in the action. In exercising its discretion, the court shall  
consider whether the intervention will unduly delay or prejudice the  
adjudication of the rights of the original parties.

26 Fed. R. Civ. P. 24(b).

27 The facts and legal issues raised in the proposed Answer in Intervention lodged by  
28 Applicants are the same as those that will be central to the lawsuit brought by Plaintiffs

1 against Defendants, albeit with the different perspectives described above. The Court will  
2 need to examine the same law and the same facts to adjudicate these claims.

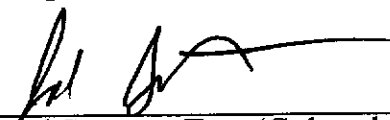
3 Rule 24(b) requires the Court to consider whether permissive intervention would  
4 cause undue delay or would prejudice adjudication of the rights of the original parties. In  
5 this instance, as described above, there will be neither prejudice nor undue delay. In the  
6 instant case, all of the responsive pleadings have not yet been filed and the addition of  
7 Applicants at this stage would not result in any undue delay. Nor is there is any other  
8 reason why granting Applicants intervenor status should be denied<sup>2</sup>. *See, e.g., Spangler v.*  
9 *Pasadena City Board of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Thus, at a minimum,  
10 Applicants should be granted permissive intervention.

### 11 CONCLUSION

12 For all of the foregoing reasons, Applicants respectfully request that this Court  
13 grant their Motion to Intervene.

14 DATED this 19th day of June 2006.

15 Respectfully Submitted By:

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28 <sup>2</sup> The criteria discussed in *Spangler* for permissive intervention were discussed in  
Section I of this brief.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of June 2006, I served a true and correct copy of **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT-INTERVENORS** on all counsel of record by sending said copy *via* United States mail, first class, postage prepaid, and addressed to all of the counsel listed below:

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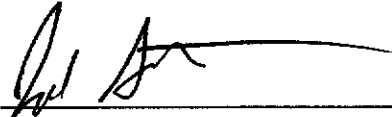
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