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Santa Cruz, Yavapai and Yuma County Defendants

11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE DISTRICT OF ARIZONA

13 Maria M. Gonzalez, et al.,  
14 Plaintiffs, and  
15 Inter Tribal Council of Arizona, et al.,  
16 Plaintiffs,  
17 v.  
18 State of Arizona, et al.,  
19 Defendants.  
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No. CV-06-1268-PHX-ROS(Lead)  
No. CV-06-1362-PCT-JAT(Cons.)

**RESPONSE OF 13 COUNTIES TO  
GONZALEZ PLAINTIFFS' AMENDED  
APPLICATIONS FOR ATTORNEYS'  
FEES AND EXPENSES**

21 Apache, Cochise, Gila, Graham, Greenlee, LaPaz, Maricopa, Mohave, Pima, Pinal  
22 Santa Cruz, Yavapai and Yuma County Defendants ("County Defendants") hereby  
23 respond in opposition to the Gonzalez Plaintiffs' Amended Motion for Attorneys' Fees  
24 and Expenses.  
25

26 On May 9, 2006, Gonzalez Plaintiffs filed suit against Arizona to enjoin the  
27 implementation of Proposition 200, which was a voter-approved initiative that amended  
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1 A.R.S. § 16-579 to require voters show identification at the polls, and amended A.R.S. §  
2 16-166(F) to require county election officials reject any voter registration not  
3 accompanied by satisfactory evidence of United States citizenship. On September 11,  
4 2013, this Court granted the Plaintiffs relief on only one of their 11 claims. Specifically,  
5 this Court enjoined the Defendants from implementing Arizona’s proof of citizenship  
6 requirement for voter registration, A.R.S. § 16-166 (F), with respect to individuals  
7 applying to register to vote in elections for Federal office using the Federal Form. (Dckt.  
8 1123). Because the County Defendants had no authority to ignore state law or the  
9 Arizona Secretary of State, the County Defendants request this Court not award any  
10 attorneys’ fees and expenses against the County Defendants.  
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13 **I. Gonzalez Plaintiffs Challenged State law, Not Any Discretionary Act of the**  
14 **County Defendants.**

15 In enacting the National Voter Registration Act of 1993 (“NVRA”), Congress  
16 imposed the obligations and responsibilities for implementing the NVRA on the States.  
17 One of those responsibilities was the processing of the federal voter registration form.  
18 “Notwithstanding any other Federal or State law, in addition to any other method of voter  
19 registration provided for under State law, each State shall establish procedures to register  
20 to vote in elections for Federal office . . . by mail application pursuant to section 1973gg-  
21 4 of this title.” 42 U.S.C. §1973gg-2(a). In addition, “[e]ach State shall accept and use the  
22 mail voter registration application form . . . for the registration of voters in elections for  
23 Federal office.” 42 U.S.C. §1973gg-4(a)(1).  
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26 Because the State is responsible for implementing the requirements of the NVRA,  
27 the State has the responsibility to ensure its lawful administration. *See Harkless v.*  
28

1 *Brunner*, 545 F.3d 445(6<sup>th</sup> Cir. 2008)(Ohio’s Secretary of State, as the chief election  
2 official, is responsible for the implementation and enforcement of the NVRA).

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4 The NVRA also mandates that “[e]ach State shall designate a State officer or  
5 employee as the chief State election official to be responsible for coordination of State  
6 responsibilities under [the NVRA].” 42 U.S.C. §1973gg-8. In Arizona, the secretary of  
7 state is “[t]he chief state election officer who is responsible for coordination of state  
8 responsibilities under the national voter registration act of 1993 . . . .” A.R.S. § 16-  
9 142(A)(1).

10  
11 To ensure uniformity of election procedures, the Secretary of State publishes the  
12 State’s Procedures Manual prior to each election pursuant to A.R.S. § 16-452. County  
13 election officials are required to follow the rules set forth in the Manual. From 2006 to  
14 2012, the Procedures Manual included the Proposition 200 language and required  
15 election officials to reject any voter registration application if it lacked satisfactory  
16 evidence of citizenship in accordance with A.R.S. § 16-166 (F). The Procedures Manual  
17 was modified in late 2012 to direct the County Recorders not reject a voter registration  
18 application made via the Federal Form solely because it is not accompanied with  
19 satisfactory evidence of United States citizenship.

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22 [http://www.azsos.gov/election/Electronic\\_Voting\\_System/manual.pdf](http://www.azsos.gov/election/Electronic_Voting_System/manual.pdf) at 11.

23  
24 Given the fact that a state statute was found to be in conflict with the NVRA and  
25 the County Defendants had no authority to disregard state law, the County Defendants  
26 should not be assessed any of the attorneys’ fees or costs sought by the Gonzalez  
27 Plaintiffs.  
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1 **II. The Court Has the Authority to Apportion Fees Between Defendants.**

2 This Court has discretion to apportion fees between defendants based upon the  
3 relative culpability of each defendant. *Jones v. Espy*, 10 F. 3d 690, 691-92 (9<sup>th</sup> Cir.  
4 1995). In *Southeast Legal Defense Group v. Adams*, 657 F. 2d 1118, 1125-26 (9<sup>th</sup> Cir.  
5 1981), the plaintiffs had sued both state and federal defendants to enjoined construction  
6 of a freeway built by the state, but funded with federal dollars. The plaintiffs prevailed  
7 on one of their 12 claims, and subsequently moved for an award of attorneys' fees under  
8 42 U.S.C. § 1988. The district court apportioned 75% of the attorney's fees incurred by  
9 plaintiffs' counsel to the state defendants who were the primary focus of the plaintiff's  
10 action. In upholding the district court's allocation of 75% of the attorney's fees incurred  
11 to the state defendants, the court of appeals noted that "probably 75% of plaintiffs'  
12 counsels' preparation dealt with the state defendants, as opposed to the federal  
13 defendants."

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17 In *Sable Communications of California v. Pacific Telephone and Telegraphic Co.*,  
18 890 F. 2d 184, 194 (9<sup>th</sup> Cir. 1989), a "phone sex" company, brought suit against Pacific  
19 Bell to enjoin it from interfering with Sable's operations. General Telephone intervened  
20 as a party defendant. Sable succeeded on its claim and obtained an award of \$150,000 in  
21 attorneys' fees for which Pacific Telephone and General Telephone were jointly and  
22 severally liable. On appeal, the Ninth Circuit held that the district court had abused its  
23 discretion when it failed to apportion attorneys' fees between the defendants. The court  
24 stated: "If, as appears likely, the conduct of Pacific Bell was the focus of the litigation  
25 and required a larger portion of the time of plaintiffs' counsel, it is appropriate to allocate  
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1 the burden of the fees accordingly. *Sable*, 890 F. 2d at 194.

2 In each of these cases, the court focused on the relevant time expended by the  
3 plaintiff against the individual defendants when deciding whether apportionment was  
4 proper. *Sable*, 890 F. 2d at 194; *Adams*, 657 F. 2d at 1125-26. In this case, the efforts of  
5 the Gonzalez Plaintiffs were primarily directed to the State Defendants, and not the  
6 County Recorders and County Elections Directors.

### 8 **III. The Gonzalez Plaintiffs Did Not Prevail on Any Claim Challenging** 9 **Identification at the Polls**

10 The Gonzalez Plaintiffs challenged two separate and distinct aspects of  
11 Proposition 200: the statute requiring voters show identification at the polls and the  
12 statute requiring proof of citizenship in order to register to vote. The Plaintiffs did not  
13 prevail on any of the claims challenging Arizona's voter identification polling place  
14 statute, A.R.S. § 16-579.

15 To the extent that a party is successful on some claims, but not on other claims, the  
16 court must determine whether the claims upon which plaintiff failed to prevail were  
17 related to the plaintiff's successful claims. *Webb v. Sloan*, 330 F. 3d 1158, 1168-69 (9<sup>th</sup>  
18 Cir. 2003). Claims are related if they involve a "common core of facts" or are based on  
19 common legal theories. Unrelated claims are "'distinctly different' and based on  
20 different facts and legal theories." *Id.* The focus is on "whether the unsuccessful and  
21 successful claims arose out of the same 'course of conduct.'" *Id.*

22 Here, the Plaintiffs cannot reasonably claim that the challenges to the polling place  
23 identification statute were based on a "common core of facts." The conduct addressed in  
24 A.R.S. § 16-579 (polling place identification) is factually distinct from the conduct  
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1 addressed by A.R.S. § 16-166 (proof of citizenship for voter registration). Plaintiffs  
2 cannot claim that the attacks on these two statutes are based upon common legal theories.  
3 Moreover, the Plaintiffs' Application and supporting billing timesheets do not distinguish  
4 between the time they devoted to challenging the registration statute, from the time  
5 devoted to challenging the separate and distinct polling place identification statute.  
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7 **IV. Conclusion**

8 For the foregoing reasons, the County Defendants respectfully request this Court  
9 not assess any award for attorneys' fees or expenses against the County Defendants.  
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11 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of March, 2014.

12 WILLIAM G. MONTGOMERY  
13 MARICOPA COUNTY ATTORNEY

14 By /s/ M. Colleen Connor  
15 M. COLLEEN CONNOR  
16 Deputy County Attorney  
17 Attorneys for Defendants County Recorders  
18 and County Elections Directors  
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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, 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 CM/ECF registrants of record.

/s/ Jennifer Christiansen

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