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La Paz, Mohave, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties

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

12  
13 MARIA M. GONZALES; JESUS M.  
GONZALES; BERNIE ABEYTIA;  
14 LUCIANO VALENCIA; DEBBIE LOPEZ,  
SOUTHWEST VOTER REGISTRATION  
15 EDUCATION PROJECT; VALLE DEL  
SOL; FRIENDLY HOUSE; CHICANOS  
16 POR LA CAUSA, INC.; and ARIZONA  
HISPANIC FORUM,

17 Plaintiffs,

18 v.

19 STATE OF ARIZONA, JAN BREWER, in  
20 her official capacity as the Secretary of  
State of the State of Arizona, et al.,

21 Defendants.  
22

No. CV06-1268-PHX ROS (Lead)  
No. CV06-1362-PHX-ROS  
No. CV06-1575-PHX-ROS

**RESPONSE IN OPPOSITION TO  
EMERGENCY MOTION TO  
PERMIT OBSERVERS AT  
POLLING PLACES ON  
ELECTION DAY**

(Assigned to the Honorable  
Roslyn O. Silver)

1 Defendants Maricopa County Recorder Helen Purcell and Maricopa  
2 County Elections Director Karen Osborne; Apache County Recorder LeNora  
3 Johnson and Apache County Elections Director Penny L. Pew; Cochise County  
4 Recorder Christine Rhodes and Cochise County Elections Director Thomas  
5 Schelling; Gila County Recorder Linda Haught Ortega and Gila County Elections  
6 Director Dixie Mundy; Graham County Recorder Wendy John and Graham  
7 County Elections Director Judy Dickerson; Greenlee County Recorder Berta  
8 Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz  
9 County Recorder Shelly Baker and La Paz County Elections Director Donna  
10 Hale; Mohave County Recorder Joan McCall and Mohave County Elections  
11 Director Allen Tempert; Pima County Recorder F. Ann Rodriguez and Pima  
12 County Elections Director Brad R. Nelson; Pinal County Recorder Laura Dean-  
13 Lytle and Pinal County Elections Director Gilberto Hoyos; Santa Cruz County  
14 Recorder Suzie Sainz and Santa Cruz County Elections Director Melinda MEEK;  
15 Yavapai County Recorder Ana Wayman-Trujillo and Yavapai County Elections  
16 Director Lynn A. Constabile; and Yuma County Recorder Susan Hightower  
17 Marler and Yuma County Elections Director Patti Madrill (collectively “Thirteen  
18 Counties”), by and through undersigned counsel, hereby respond to Plaintiffs’  
19 Motion Pursuant to FRCP 34 to Permit Observers at Polling Places on Election  
20 Day. This Response is supported by the following Memorandum of Points and  
21 Authorities.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

The Thirteen Counties request the Court deny the Motion to Permit Observers in Polling Places on Election Day because: (1) State law restricts access to polling places to ensure voters have an opportunity to cast their ballot free of intimidation and interference of the Plaintiffs' observers; (2) federal observers and examiners from the United States Department of Justice will be present to observe the implementation of the identification requirements on November 7, 2006; and (3) the Counties are not named parties in this lawsuit, *The Intertribal Council of Arizona et al. v. Jan Brewer.*, and not subject to this discovery request.

**I. State law restricts access to polling places to ensure voters have an opportunity to cast their ballot free of intimidation and interference of the Plaintiffs' observers.**

State law requires elections officials to establish and maintain a protected zone of seventy-five feet from the entrance of a polling place for a limited period of time in order to ensure the integrity of the election process and to protect the exercise of the right to vote. Pursuant to A.R.S. § 16-515(A),

. . . a person shall not be allowed to remain inside the seventy-five foot limit while the polls are open, except for the purpose of voting, and except the election officials, one representative at any one time of each political party represented on the ballot who has been appointed by the county chairman of that political party and the challengers allowed by law, and no political or electioneering materials may be displayed within the seventy-five foot limit.

The statute is aimed at preventing 1) congestion and interference with election officials at and around the polling place, and 2) delay and intimidation of voters

1 as they seek to exercise their constitutional right to vote. *City of Phoenix v.*  
2 *Superior Court In and For Maricopa County*, 101 Ariz. 265, 266, 419 P.2d 49,  
3 50 (1966)(“The statute is, of course, designed ‘to prevent interference with the  
4 efficient handling of the voters by the election board and to prevent delay or  
5 intimidation of voters. . .’)(quoting *State v. Robles*, 88 Ariz. 253, 256, 355 P.2d  
6 895, 897 (1960)).

7  
8 Moreover, preserving the integrity of the election process by ensuring  
9 there is a protected zone around polling places advances state interests of the  
10 highest order, namely integrity of the election process and protection of the right  
11 to vote. *Burson v. Freeman*, 504 U.S. 191 (1992)(campaign-free zone within  
12 100 feet of entrance to polling place was narrowly tailored to serve compelling  
13 state interest in preventing voter intimidation and election fraud); see *First*  
14 *National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (“preserving of  
15 the electoral process ... [is an interest] of the highest importance”); see also *Eu*  
16 *v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 231  
17 (1989) (“[a] State indisputably has a compelling interest in preserving the  
18 integrity of its election process”).

19 Likewise, protection of an individual's right to vote as he or she enters the  
20 polling place implicates one of the most basic rights in a democracy. *Reynolds*  
21 *v. Sims*, 377 U.S. 533, 555 (1964) (“[t]he right to vote freely for the candidate of  
22 one's choice is of the essence of a democratic society, and any restrictions on

1 that right strike at the heart of representative government”). Elections officials  
2 have the duty to protect the integrity of the election process and to protect the  
3 voters from intimidation, which would be compromised if the ITCA Plaintiffs are  
4 permitted to have observers in polling places.<sup>1</sup>

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6 **II. The United States Department of Justice will have federal**  
7 **examiners and observers at polling places to observe the**  
8 **implementation of the identification requirements on November 7,**  
9 **2006.**

10 The Department of Justice will have federal examiners and federal  
11 observers at polling places in five Counties, Apache, Cochise, Maricopa, Navajo  
12 and Yuma, where sixty-seven percent of all registered voters reside. The  
13 Plaintiffs’ Motion seeks to interfere with the federal examiners and observers  
14 who will already have a presence in Arizona to ensure that election officials are  
15 in compliance with federal law by and are properly administering the law.

16 The Voting Rights Act provides for the appointment of federal examiners  
17 by order of a federal court pursuant to Section 3(a), 42 U.S.C §1973a, or, with  
18 regard to political subdivisions covered under Section 4, 42 U.S.C. §1973b, of  
19 the Voting Rights Act, upon the certification by the Attorney General, pursuant to

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20 <sup>1</sup> Plaintiffs may obtain the information sought outside the seventy-five foot limit. With the  
21 exception of polling places used in an emergency, any facility that is used as a polling  
22 place on election day must allow persons to electioneer and engage in other political  
activity outside of the seventy-five foot limit. A.R.S. § 16-411(H).

1 Section 6, 42 U.S.C. §1973d. In Arizona, Apache, Navajo and Yuma Counties  
2 have been certified by the Attorney General pursuant to Section 6.<sup>2</sup>

3 Section 3 of the Voting Rights Act provides that a federal court may  
4 authorize the appointment of federal examiners by the Director of the Office of  
5 Personnel Management in accordance with Section 6 to serve for such period of  
6 time as the court deems appropriate to enforce the voting guarantees of the  
7 fourteenth or fifteenth amendment. On October 12, 2006, Cochise County  
8 became eligible for federal examiners as a result of a consent decree and court  
9 order under Section 3(a) of the Voting Rights Act.<sup>3</sup>

10  
11 In Maricopa County, federal examiners will be present at polling places  
12 pursuant to a Memorandum of Agreement entered into by the United States and  
13 Maricopa County that went into effect on June 29, 2006. Paragraph 27 of the  
14 agreement provides that examiners from the Department of Justice will be  
15 permitted to monitor voting procedures inside polling places and to observe  
16 training of election officials prior to the election. Exhibit #1, Memorandum of  
17 Agreement.

18 **III. The County Recorders and Elections Directors are not named**  
19 **parties in this lawsuit and not subject to Fed. R. Civ. P. 34.**

20 \_\_\_\_\_  
21 <sup>2</sup> [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm).

22 <sup>3</sup> *United States v. Cochise County, Arizona*, CV06-304-TUC (D. Ariz 2006).

1           Jan Brewer, in her official capacity as the Arizona Secretary of State is the  
2 only named defendant in this lawsuit, *The Intertribal Council of Arizona et al. v. Jan*  
3 *Brewer*. Because the county elections officials are not named parties, Fed. R. Civ.  
4 P. 34 governing production of documents and things for inspection, copying or  
5 photographing may not be used to discover matters from the county elections  
6 officials. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9<sup>th</sup> Cir. 1985) ("Rule 34  
7 may not be used to discover matters from a non-party."), *cert. denied*, 474 U.S.  
8 1021 (1985); *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1341 (8th  
9 Cir.1975) (Rule 34 applies only to parties); *Wimes v. Eaton Corp.*, 573 F.Supp.  
10 331, 333 (E.D.Wis.1983) (noting that the drafters of Rule 34 "deliberate[ly] ...  
11 limited the applicability of the rule to parties only"). Therefore, Plaintiffs' request  
12 to permit inspectors should be quashed because Rule 34 simply cannot be  
13 made and enforced against non-parties.

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### **Conclusion**

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For the reasons stated above, the Thirteen Counties respectfully request that the Court deny the Plaintiffs Emergency Motion Pursuant to FRCP 34 to Permit Observers at Polling Places on Election Day. The requested relief should be denied because the ITCA observers would be intrusive and intimidating to the voters, cause congestion in polling places, and interfere with federal observers and examiners. In addition, because the county elections officials are not parties to this lawsuit, they are not subject to Fed. R. Civ. P. 34.

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DATED this 30<sup>th</sup> day of October, 2006.

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1 Copy of the forgoing electronically  
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2 Electronic Case Filing System  
this 30<sup>th</sup> day of October 2006 and to:

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