

1 OSBORN MALEDON, P.A.
2 2929 North Central Avenue
3 21st Floor
4 Phoenix, Arizona 85012-2793
5 Telephone: (602) 640-9000

6 David B. Rosenbaum (009819)
7 drosenbaum@omlaw.com
8 Thomas L. Hudson (014485)
9 thudson@omlaw.com
10 Sara S. Greene (022706)
11 sgreene@omlaw.com

12 STEPTOE & JOHNSON LLP
13 Collier Center
14 201 East Washington Street
15 Suite 1600
16 Phoenix, Arizona 85004-2382
17 Telephone: (602) 257-5200
18 Facsimile: (602) 257-5299

19 David J. Bodney (006065)
20 dbodney@steptoe.com
21 Karen J. Hartman-Tellez (021121)
22 khartman@steptoe.com

23 Attorneys for The Inter Tribal Council
24 of Arizona, Inc., et al.

25 UNITED STATES DISTRICT COURT

26 DISTRICT OF ARIZONA

27 Maria M. Gonzalez, et al.,
28 Plaintiffs,

vs.

State of Arizona, et al.,
Defendants.

)
) No. CV06-01268-PHX-ROS (Lead)
) CV06-01362-PHX-ROS (Cons)
) CV06-01575-PHX-ROS (Cons)

) **ITCA PLAINTIFFS' RESPONSE**
) **IN OPPOSITION TO**
) **DEFENDANTS' MOTION FOR**
) **APPOINTMENT OF**
) **INDEPENDENT EXPERT AND**
) **APPROVAL OF FINAL SCRIPT**
)

25 Pursuant to Local Rule 7.2(c), plaintiffs the Inter-Tribal Council of
26 Arizona, Inc., *et al.* (the "ITCA Plaintiffs") hereby respond in opposition to the State
27 and Thirteen County Defendants' Motion for Appointment of Independent Expert and
28 Approval of Final Script (the "Motion"). This Response is supported by the following

1 Memorandum of Points and Authorities and the attached Declaration of Bruce
2 Hernandez.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Preliminary Statement

5 The Court should deny Defendants’ Motion for three fundamental reasons.
6 First, the ITCA Plaintiffs and their consulting expert shall take the reasonable steps
7 already required by the Court to protect the privacy interests of all survey respondents.
8 Moreover, Defendants have not provided a single real example of the “problem” they
9 seek to avoid – “angry Arizonans” complaining to Defendants about perceived privacy
10 invasion. Second, Defendants seek to involve the Court in the fact-gathering aspect of
11 the discovery process in a manner not contemplated by the Rules of Civil Procedure.
12 Third, the expert or experts engaged to conduct any survey research should design the
13 survey instrument to make it effective, unbiased and non-intrusive.

14 Defendants’ Motion is rife with conjecture about “fraud,” “harassment,”
15 “solicitation,” “bias” and “intrusion into . . . private lives.” [Mot. at 4-6] Yet the
16 Defendants have presented no evidence to the Court that such harms have occurred or
17 will occur if the ITCA Plaintiffs’ expert survey research firm places telephone calls to
18 individual Arizonans. Indeed, this Court has already considered the privacy interests at
19 stake and fashioned reasonable measures to protect those interests, with which the ITCA
20 Plaintiffs and their consulting expert shall comply. The ITCA Plaintiffs should not be
21 barred from gathering facts to support their claims because the Defendants might receive
22 a telephone call from some hypothetical angry constituent.

23 Similarly, Defendants’ arguments about the “bias” of the ITCA Plaintiffs’
24 proposed survey are unsupported and misplaced. Defendants will have the opportunity
25 to uncover any bias in the ITCA Plaintiffs’ survey through the discovery process and
26 can present that information to the Court. In addition, the ITCA Plaintiffs’ consulting
27 expert has already identified potential bias in the scripts Defendants submitted for the
28 Court’s approval. [Declaration of Bruce Hernandez (“Hernandez Decl.”), ¶ 8] To

1 prevent any such bias, the trained and experienced experts, not counsel or the parties,
2 must design the survey instrument. In brief, Defendants’ illusory concerns are
3 insufficient to warrant appointment of a “neutral” expert or approval of their scripts, and
4 the Court should deny the Motion.

5 Argument

6 I. DEFENDANTS’ MOTION SHOULD BE DENIED BECAUSE IT SEEKS TO
7 SOLVE A PROBLEM THAT THE COURT HAS ALREADY ADDRESSED.

8 A. Defendants’ Concerns of “Harassment” Lack Any Support and Are
9 Without Merit.

10 Defendants characterize the ITCA Plaintiffs’ proposed survey of
11 statistically-significant samples of Arizonans whose (1) voter registration forms were
12 rejected for lack of “satisfactory evidence of citizenship” and (2) conditional provisional
13 ballots were not counted as an “enormous intrusion into the private lives of the
14 individuals being contacted.” [Mot. at 6] Moreover, defendants raise the specter of
15 “bias, harassment or pressure on the individuals being contacted.” [*Id.*] Defendants’
16 characterization of the ITCA Plaintiffs’ planned telephone survey is alarmist, overblown
17 and inconsistent with the ITCA Plaintiffs’ previous experience contacting voters whose
18 registration forms were rejected. Moreover, the existence of “bias” in the survey
19 instrument or “pressure” on survey respondents is properly the subject of cross-
20 examination. Defendants’ counsel will have the opportunity to examine the ITCA
21 Plaintiffs’ consultant regarding any opinions or methodologies disclosed.

22 Importantly, Defendants’ concerns about the ITCA Plaintiffs’ survey are
23 wholly speculative. Indeed, even though the ITCA Plaintiffs contacted nearly 500 failed
24 registrants between July 30 and August 15, the Defendants have cited *not one* example
25 of an individual contacting them to complain about those telephone calls. In view of
26 Plaintiffs’ willingness to comply with the reasonable steps the Court has taken to guard
27 confidential information and protect the privacy interests of the individuals they contact,
28 Defendants’ concerns are unfounded. [Hernandez Decl. at ¶¶ 4-5; *see generally* Motion
for Approval of Proposed Preliminary Script Outline]

1 Defendants assert that “[p]lacing unsolicited calls to Arizonans regarding
2 on-going litigation may be considered, by many, to be an unacceptable intrusion into
3 their privacy.” [Mot. at 7] The information Plaintiffs will use to contact rejected
4 registrants and conditional provisional voters, however, is not “private.” Names,
5 addresses and telephone numbers on voter registration forms are available to political
6 parties, candidates or any member of the public who seeks such information from a
7 county recorder. A.R.S. § 16-168(E) (“Nothing in this section shall preclude public
8 inspection of voter registration records at the office of the county recorder for the
9 purposes prescribed by this section”); *see also In re Primus*, 436 U.S. 412, 424
10 (1978); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (recognizing that litigation of this
11 type is “expressive and associational conduct at the core of the First Amendment’s
12 protective ambit.”). Indeed, the only “private” information at issue has little to do with
13 the ITCA Plaintiffs’ planned survey. The information exempted from disclosure under
14 A.R.S. § 16-168(F), but which the Court has ordered the Defendants to disclose –
15 birthdates, state or county of birth, father’s name or mother’s maiden name, Indian
16 census numbers or naturalization certificate numbers – will be used primarily to confirm
17 the accuracy of the database of rejected voter registration forms and perform statistical
18 analyses.

19 The ITCA Plaintiffs proposed survey will not constitute an invasion of
20 privacy because any Arizonan who does not wish to participate in the survey may
21 decline and simply hang up the phone.¹ Furthermore, Defendants’ concern that
22 Plaintiffs will inquire into “voting history – a subject that is considered taboo in polite

23 ¹ The Supreme Court has squarely rejected a privacy argument similar to
24 Defendants’. In *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150
25 (2002), the Court held that a permit requirement that applied to non-commercial door to
26 door solicitation violated the First Amendment. Defendant there argued that it sought to
27 protect the privacy of its residents. The Court disposed of that argument in one
28 paragraph, noting that the ability to post “no solicitation” signs and “the resident’s
unquestioned right to refuse to engage in conversation with unwelcome visitors[]
provides ample protection for the unwilling listener.” *Id.* at 168.

1 society” is misplaced. [Mot. at 7] Plaintiffs do not intend to inquire *how or for whom*
2 an individual has voted in the past, but *whether* they did so – a question regularly asked
3 by the U.S. Census Bureau. *See* U.S. Census Bureau, Voting and Registration in the
4 Election of November 2004, available at [http://www.census.gov/prod/2006pubs/p20-](http://www.census.gov/prod/2006pubs/p20-556.pdf)
5 556.pdf. As such, no “taboo” inquiries will be made.

6 Defendants’ true concern seems to be adverse public opinion, not the
7 privacy of individuals. They ask to be protected from a hypothesized “onslaught of
8 angry Arizonans whose private information has been shared.” [Mot. at 7]² But such
9 speculation is unwarranted. Plaintiffs have possessed redacted copies of nearly 20,000
10 rejected voter registration forms since last summer, yet Defendants have *not* presented a
11 single “angry Arizonan” to support their Motion. In fact, the ITCA Plaintiffs’
12 experience was that many rejected registrants had the opposite reaction – they were
13 pleased that someone contacted them about their rejected registration form.

14 B. Defendants’ Proposal Will Require the Court to Participate Extensively in
15 the Discovery Process.

16 Defendants’ Motion asks the Court to inject itself, unnecessarily, into the
17 basic fact-gathering aspect of discovery. Indeed, under Defendants’ proposal, the Court
18 likely would be called upon to decide technical details concerning (1) the number and
19 form of questions to be included in the survey instrument, (2) the proper sample size and
20 (3) the means of sample selection. Resolving such issues could consume a substantial
21 amount of the Court’s time. Moreover, if these issues are resolved by the Court, it
22 places the Plaintiffs in the dilemma of either occupying the Court’s time with deciding
23 the details of the survey or effectively waiving the ability to cross-examine the court-
24 appointed expert concerning his or her data collection techniques.

25
26 ² Even if Defendants had received complaints, or might receive them in the
27 future, this Court need not assume the role of Defendants’ shield. *See Maryland v.*
28 *Baltimore Radio Show*, 338 U.S. 912, 913 (1950) (Public officials “are supposed to be
made of sterner stuff.”) (Frankfurter, J., on denial of writ of certiorari).

1 Gathering factual and statistical information about rejected voter
2 registration applicants and conditional provisional voters does not require the Court to
3 appoint its own expert. Indeed, courts generally restrict their appointment of experts
4 under Fed. R. Evid. 706 to cases in which they require assistance deciphering complex
5 scientific questions. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 830 F. Supp.
6 686, 693 (E.D.N.Y. 1993) (stating that “use of Rule 706 should be reserved for
7 *exceptional cases* in which the ordinary adversary process does not suffice,” such as
8 those with complex “epidemiological and other scientific questions . . . riven with
9 uncertainties and interdependent variables”) (emphasis added). The fact-gathering that
10 Plaintiffs plan to conduct involves no such complex questions. Defendants have pointed
11 to no cases, let alone any similar to the instant case, in which the court has appointed its
12 own expert to gather facts. Indeed, the ITCA Plaintiffs are unaware of any such
13 appointment in a voting rights case like this one.

14 C. Appointment of a “Neutral” Expert Will *Not* Solve the Perceived
15 “Privacy” Problem.

16 Defendants argue that an individual “could be contacted up to six times or
17 more.” [Mot. at 6] The ITCA Plaintiffs’ expert, however, will not contact each of the
18 30,000-plus individuals whose voter registrations have been rejected since January
19 2005. Rather, the expert will contact only a statistically-significant sample of rejected
20 registrants and conditional provisional voters. [Hernandez Decl. ¶ 3] Importantly,
21 while it is extremely unlikely that any individual would be contacted more than once,
22 appointing a “neutral” expert would not prevent such an occurrence. Rule 706(d)
23 provides that “[n]othing in this rule limits the parties in calling expert witnesses of their
24 own selection.” As such, the Rule guarantees Plaintiffs’ expert the opportunity to
25 conduct the same type of research that the “neutral” expert would conduct.

26 In addition, the cost of a “neutral” expert is problematic. The majority of
27 Plaintiffs are individuals and not-for-profit organizations with limited resources. The
28 ITCA Plaintiffs have already retained a consulting expert and agreed to pay for services

1 their expert renders. The ITCA Plaintiffs do not have resources to commit to sharing the
2 cost of a neutral expert with Defendants.

3 II. EXPERTS – *NOT* LAWYERS, THE PARTIES OR THE COURT – SHOULD
4 DESIGN THE SURVEY INSTRUMENT.

5 The Court should not approve the scripts submitted by Defendants (the
6 “Scripts”) for use by Plaintiffs’ experts or a “neutral” court-appointed expert.
7 Importantly, Defendants have not identified any problems with the script outline
8 Plaintiffs submitted. The ITCA Plaintiffs’ consulting expert, on the other hand,
9 identified numerous problems with Defendants’ proposed Scripts. [See Hernandez Decl.
10 ¶¶ 6-10] For example, the introductions are too long and give respondents too many
11 opportunities to opt out. [Id. at ¶ 7] Consequently, to obtain a sufficient number of
12 responses, the survey firm would need to contact *more* Arizonans – precisely what
13 Defendants seek to *avoid*. In addition, mentioning that the project is related to a lawsuit
14 might introduce some unknown bias. [Id. at ¶ 8]

15 Defendants’ Scripts also include redundant questions that seem more
16 geared toward impeachment of the survey results than discovering new data. [See *id.* at
17 ¶ 9] For example, the Scripts would ask voter registration applicants who provided
18 additional citizenship information after an initial rejection to list the specific documents
19 that they provided or the date on which they provided it; this information, however,
20 already is in the counties’ possession. As such, its purpose appears to be fishing for
21 inconsistencies in the survey responses, not gathering new information. If the
22 Defendants desire to conduct this type of survey they are free to do so. However, the
23 Court has no obligation to lend its auspices to it, nor is there any reason to force the
24 Plaintiffs to participate in it. In short, the survey should be designed by the expert
25 research firm retained to conduct it, not by counsel who lack experience in creating such
26 surveys or by the Court.

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Conclusion

For the foregoing reasons, the Court should (1) deny the Motion for Appointment of Independent Expert and (2) not adopt Defendants' Scripts.

RESPECTFULLY SUBMITTED this 25th day of September, 2007.

STEPTOE & JOHNSON LLP

By s/ Karen J. Hartman-Tellez
David J. Bodney
Karen J. Hartman-Tellez
Collier Center
201 East Washington St., Ste. 1600
Phoenix, Arizona 85004-2382

OSBORN MALEDON, P.A.
David B. Rosenbaum
Thomas L. Hudson
Sara S. Greene
2929 North Central Ave., 21st Floor
Phoenix, Arizona 85012-2793

Attorneys for The Inter Tribal Council
of Arizona, Inc., et al.

1 LAWYERS' COMMITTEE FOR CIVIL
2 RIGHTS UNDER LAW
3 Jon Greenbaum
4 1401 New York Avenue, Suite 400
5 Washington, D.C. 20005
6 Telephone: 202-662-8315
7 Fax: (202) 628-2858
8 E-mail:
9 jgreenbaum@lawyerscommittee.org
10 *Admitted Pro Hac Vice*

11
12 ACLU Southern Regional Office
13 Neil Bradley
14 2600 Marquis One Tower
15 245 Peachtree Center Avenue
16 Atlanta, Georgia 30303
17 Telephone: 404-523-2721
18 Fax: 404-653-0331
19 E-mail: nbradley@aclu.org
20 *Admitted Pro Hac Vice*

21
22 PEOPLE FOR THE AMERICAN WAY
23 FOUNDATION
24 David Becker
25 *Pro Hac Vice Application Pending*
26 2000 M Street, NW, Suite 400
27 Washington, DC 20036
28 Telephone: 202-467-4999
Fax: 202-293-2672
E-mail: dbecker@pfaw.org

THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS
Luis Roberto Vera, Jr.
(TX SBN 20546740)
111 Soledad, Suite 1325
San Antonio, Texas 78205-2260
Telephone: 210-225-3300
Fax: 210-225-2060
E-mail: lrqlaw@sbcglobal.net
Pro Hac Vice Application to be Filed

AARP FOUNDATION LITIGATION
Daniel B. Kohrman (DC BN 394064)
601 E Street, N.W., Suite A4-240
Washington, DC 20049
Telephone: 202-434-2064
Fax: 202-434-6424
E-mail: dkohrman@aarp.org
Admitted Pro Hac Vice

THE INTER TRIBAL COUNCIL OF
ARIZONA, INC.
Joe P. Sparks (002383)
Susan B. Montgomery (020595)
Sparks, Tehan & Ryley PC
7503 First Street
Scottsdale Arizona 85251
Telephone: 480-949-1339
Fax: 480-949-7587

Attorneys for the Inter Tribal Council of
Arizona, Inc., et al.

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2
3
4
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8
9
10
11
12
13
14
15
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19
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21
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23
24
25
26
27
28

Mary R. O’Grady (mary.ograde@azag.gov)
Carrie J. Brennan (carrie.brennan@azag.gov)
Barbara A. Bailey (Barbara.bailey@azag.gov)
Office of the Attorney General
1275 W. Washington Street
Phoenix, Arizona 85007-2926

Attorney for State Defendants

M. Colleen Connor (connorc@mcao.maricopa.gov)
Maricopa County Attorney’s Office
Division of County Counsel
222 N. Central Avenue, Ste. 1100
Phoenix, Arizona 85003

Dennis I. Wilenchik (diw@wb-law.com)
Kathleen Rapp (kathleenr@wb-law.com)
Wilenchik and Bartness, P.C.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004

Attorneys for County Defendants

Jean Wilcox (jwilcox@coconino.az.gov)
Coconino County Attorney’s Office
110 East Cherry Avenue
Flagstaff, Arizona 86001

Attorneys for Coconino County Defendants

Lance Payette (lance.payette@co.navajo.az.us)
Navajo County Attorney’s Office
P.O. Box 668
Holbrook, Arizona 86025

Attorneys for Navajo County Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
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I further certify that I caused a copy of the attached document to be hand-
delivered on the 26th day of September, 2007 to:

Honorable Roslyn O. Silver
Sandra Day O'Connor U.S. Courthouse, Ste. 624
401 West Washington, SPC 59
Phoenix, Arizona 85003-2158

s/ Michele L. Galvez
Michele L. Galvez, Legal Secretary