

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

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

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

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

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

23 UNITED STATES DISTRICT COURT
24 DISTRICT OF ARIZONA

25 Maria M. Gonzalez, et al.,
26
27 Plaintiffs,

28 vs.

State of Arizona, et al.,
Defendants.

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

)
) **REPLY IN SUPPORT OF ITCA**
) **PLAINTIFFS' EMERGENCY**
) **MOTION PURSUANT TO**
) **FRCP 34 TO PERMIT**
) **OBSERVERS AT POLLING**
) **PLACES ON ELECTION DAY**

1 Pursuant to Fed. R. Civ. P. 34, the Inter Tribal Council of Arizona, Inc., *et*
2 *al.* (“ITCA Plaintiffs”) filed a brief Motion to Permit Observers at Polling Places on
3 Election Day (the “Motion”) to ensure that they would be able to gather evidence as the
4 Supreme Court directed – namely, evidence of “the scope of the disenfranchisement that
5 the novel identification requirements will produce.” *Purcell v. Gonzalez*, 549 U.S. ____
6 (2006) (Stevens, J., concurring). Defendants the State of Arizona and Secretary of State
7 Jan Brewer (collectively, the “State”) and 13 of Arizona’s 15 counties (the “County
8 Defendants”) offer baseless speculation that the ITCA Plaintiffs’ observers will
9 “intimidate” voters and disrupt the election. In view of the narrowly-drawn proposed
10 Order the ITCA Plaintiffs submitted with their Motion, such conjecture is utterly
11 groundless.

12 For the following reasons, the ITCA Plaintiffs’ Motion is proper and
13 should be granted.

14 **1. The ITCA Plaintiffs’ observers will not disrupt the conduct of**
15 **the election.** Defendants’ concerns that the ITCA Plaintiffs’ observers (the
16 “Observers”) will disrupt the election by causing delay or intimidation are wholly
17 unfounded. To the contrary, the proposed Order requires that observers “not take part in
18 any **electioneering** of any sort” and “**not interfere** with the boardworkers in the
19 performance of their duties.” [Proposed Order, at 2] Indeed, at the suggestion of one
20 defendant, the ITCA Plaintiffs removed from the proposed Order a provision permitting
21 Observers to “call any perceived infractions of law to the attention of the
22 boardworkers.” [See State Resp. at 2, n.1]

23 Defendants offer no reason that the presence of one ITCA Observer in a
24 polling place would intimidate voters when the presence of several boardworkers, two
25 or three political party observers and federal observers would not. Indeed, party
26 observers would be more likely to disrupt the conduct of the election because they will
27 be communicating with boardworkers concerning perceived infractions of the law. The
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1 ITCA Observers, on the other hand, will simply document what they see and hear
2 without interfering with the boardworkers in the conduct of the election.

3 The State also expresses concern that if the Court grants the Motion,
4 proponents of Proposition 200 will seek to gain access to polling places. [*Id.* at 2] But
5 the proponents of Proposition 200 are not parties to this case, and have not been charged
6 by the Supreme Court with gathering evidence of voter disenfranchisement. As such,
7 Rule 34 does not permit them to gain access to polling places.

8 **2. The ITCA Plaintiffs cannot rely on defendants to provide**
9 **accurate evidence of violations of the law.** Observation of implementation of the
10 polling place identification procedures is important to the ITCA Plaintiffs' ability to
11 gather evidence in this case. While some of the County Defendants will likely compile
12 and make available to the ITCA Plaintiffs data relating to the number of provisional and
13 conditional provisional ballots cast and counted, they will certainly not keep accurate
14 records of voters who are turned away without casting any ballot. Indeed, it is highly
15 unlikely that boardworkers will accurately report when they are *not* following the
16 polling place procedures.

17 If Observers are required to remain outside the 75-foot limit, they will be
18 unable to observe and document the interaction of the boardworkers with voters.
19 Indeed, while some voters who are denied a ballot may seek out an Observer outside a
20 polling place, many others may not. During the September 12, 2006 Primary Election,
21 the ITCA Plaintiffs' encountered voters who were denied ballots, but unwilling to relate
22 their experience inside the polling place to those outside the 75-foot limit. In short,
23 without access to polling places, the ITCA Plaintiffs will be greatly hindered in
24 gathering relevant evidence that would otherwise remain undocumented.

25 **3. Federal observers will not be in polling places to gather**
26 **evidence about implementation of polling place identification procedures.** Some of
27 the County Defendants are parties to a Memorandum of Agreement (the "MOA") that
28 will permit federal observers in polling places to monitor the counties' compliance with

1 Section 203 of the Voting Rights Act – *not* Arizona’s polling place identification
2 requirements.¹ [*See* Counties’ Resp., Ex. 1] As such, the County Defendants’ claim
3 that federal observers will be present to “observe the implementation of the
4 identification requirements” is disingenuous, at best. [*Id.* at 5] Moreover, even if
5 federal observers were to observe and document defendants’ implementation of the
6 polling place identification requirements, the United States is not a party to this action,
7 and the ITCA Plaintiffs would not be entitled to obtain evidence from the federal
8 observers to present to the Court in this case.²

9 **4. The County Election Officials are named parties in this**
10 **consolidated lawsuit.** For the first time in this consolidated case, the County
11 Defendants argue that they are not parties to the ITCA Plaintiffs’ lawsuit, and therefore
12 Rule 34 does not authorize the relief the Motion seeks. [Counties’ Resp. at 6-7] Yet the
13 County Defendants participated in depositions and responded to written discovery
14 propounded by the ITCA Plaintiffs before the Preliminary Injunction hearing. Indeed,
15 when it has suited them, the County Defendants considered themselves parties to the
16 ITCA lawsuit, opposing the ITCA Plaintiffs’ Emergency Motion to the Ninth Circuit
17 and filing an Application for Stay of the Ninth Circuit’s injunction in the Supreme
18 Court.

19 At bottom, Rule 34 permits “any party” to request to enter premises
20 controlled by “any other party.” Fed. R. Civ. P. 34(a). This Court consolidated the
21 ITCA Plaintiffs’ lawsuit with the Gonzalez Plaintiffs’ lawsuit against the County
22 Defendants, and as such the County Defendants are an “other party.” *Id.*; *cf. Huene v.*
23 *United States*, 743 F.2d 703, 704 (9th Cir. 1984) (rejecting the notion “that the

24
25 ¹ The MOA illustrates that, even in view of A.R.S. § 16-515’s limitation on who may
26 remain inside polling places, a court order expanding the authorized persons is
appropriate.

27 ² Defendants cannot point to a single instance outside of litigation to which the United
28 States was a party where the federal government has released evidence discovered
during federal election monitoring or observation.

1 consolidated actions do not lose their separate identity” as an “overly mechanical
2 approach”).

3 Conclusion

4 For the foregoing reasons, the Court should grant the ITCA Plaintiffs’
5 Motion and enter the proposed Order submitted therewith.

6 RESPECTFULLY SUBMITTED this 31st day of October 2006.

7 STEPTOE & JOHNSON LLP

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

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12

13

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

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

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1 LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

2 Jon Greenbaum
3 Benjamin Blustein
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 PEOPLE FOR THE AMERICAN WAY
FOUNDATION

22 Elliot M. Mincberg
23 *Admitted Pro Hac Vice*
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: emincberg@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: lrvlaw@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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3
4
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11
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15
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19
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21
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24
25
26
27
28

Mary R. O’Grady (mary.ogrady@azag.gov)
Peter Alex Silverman (peter.silverman@azag.gov)
William Richards (bill.richards@azag.gov)
Office of the Attorney General
1275 W. Washington Street
Phoenix, Arizona 85007-2926

Attorney for Defendants State of Arizona, and Jan Brewer in
her official capacity as the Secretary of State of the state of
Arizona

M. Colleen Connor (connorc@mcao.maricopa.gov)
MCAO 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 Attorneys’ Office
P.O. Box 668
Holbrook, Arizona 86025

Attorneys for Navajo County Defendants

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