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

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

17 Plaintiffs,

18 v.

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

21 Defendants.
22

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

**RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION**

(Assigned to the Honorable
Roslyn O. Silver)

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Defendants Maricopa County Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne; Apache County Recorder LeNora Johnson and Apache County Elections Director Penny L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila County Elections Director Dixie Mundy; Graham County Recorder Wendy John and Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave County Recorder Joan McCall and Mohave County Elections Director Allen Tempert; Navajo County Recorder Laurette Justman and Navajo County Elections Director Kelly Dastrup; Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R. Nelson; Pinal County Recorder Laura Dean-Lytle and Pinal County Elections Director Gilberto Hoyos; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections Director Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan Hightower Marler and Yuma County Elections Director Patti Madrill (collectively "County Defendants"), by and through undersigned counsel, hereby respond to Plaintiffs' Motion for Preliminary Injunction and join the Defendant Secretary of State's Response. This Response is supported by the following Memorandum of

1 Points and Authorities and the parties' pleadings filed herein, together with any
2 exhibits thereto, all of which are incorporated herein by this reference.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 The County Defendants have received and reviewed the Response to
5 Plaintiffs' Motion for Preliminary Injunction to be filed by Defendant Secretary of State
6 ("State Defendant") in this matter. The Brief correctly sets forth the applicable law
7 governing this case and cogent legal arguments as to why Plaintiffs' instant
8 action is without merit. Accordingly, the County Defendants join in the well-stated
9 legal arguments presented in the Brief of the State Defendant and incorporate
10 them in their entirety herein.

11 In addition, the County Defendants would like to address two of the criterions
12 for the issuance of a preliminary injunction in the context of this litigation.
13 Specifically, the County Defendants believe that the issuance of a preliminary
14 injunction will result in greater harm to the citizens of Arizona and to the County
15 Defendants. Finally, the County Defendants address the supreme necessity of timely
16 filing in election cases.

17 **I. Standard of Review**

18 A preliminary injunction is appropriate where plaintiffs demonstrate
19 "either: (1) a likelihood of success on the merits and the possibility of irreparable
20 injury; or (2) that serious questions going to the merits were raised and the
21 balance of hardships tips sharply in [their] favor." *Clear Channel Outdoor Inc. v.*
22 *City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.2003) (quoting *Walczak v. EPL*

1 *Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir.1999)). The district court must also
2 consider whether the public interest favors issuance of the injunction. *Fund for*
3 *Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir.1992); see also *Chisom v.*
4 *Roemer*, 853 F.2d 1186, 1189 (5th Cir.1988).

5 The following alternative test for injunctive relief has also been
6 formulated: a plaintiff is required to establish “(1) a strong likelihood of success
7 on the merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary
8 relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4)
9 advancement of the public interest (in certain cases).” *Johnson v. Cal. State Bd.*
10 *of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995) (internal quotation marks
11 omitted). This analysis creates a continuum: the less certain the district court is
12 of the likelihood of success on the merits, the more plaintiffs must convince the
13 district court that the public interest and balance of hardships tip in their favor.
14 *Fund for Animals, Inc.*, 962 F.2d at 1400.

15 **II. Issuance of a Preliminary Injunction Will Cause Irreparable Harm to the** 16 **Citizens of Arizona, County Defendants And To The Public Interest**

17 Plaintiffs’ challenge to the proof of citizenship for voter registration and
18 identification at the polls requirements comes too late and would impermissibly
19 disturb the status quo. For the last nineteen months, the Counties have been
20 verifying a voter registrant’s proof of citizenship and rejecting voter registrations that
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1 lack evidence of citizenship.¹ Moreover, in County and City elections held in
2 November 2005, March 2006, and May 2006, election officials implemented the
3 identification at the polls requirement.²

4 Under this new law, the Counties revised their voter registration
5 procedures and developed new procedures to implement the requirement that
6 voters provide identification at the polls. Pursuant to Section 5 of the Voting
7 Rights Act of 1965, 42 U.S.C.A. § 1973c, the Counties' new forms and
8 procedures have required preclearance.³ Any alteration of voting qualifications
9 and procedures, changes that have a direct relation to voting and the election
10 process, must be precleared by the United States Attorney General before being
11 implemented. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

12 Consequently, previous voter registration and polling place procedures,
13 materials, letters, and forms have been replaced with new forms, letters, and

14
15 ¹ Exhibit 1 attached hereto, Affidavit of Karen Osborne, Maricopa County
16 Elections Director (Osborne Affidavit) at ¶ 4; Pinal, Pima, Apache, La Paz,
17 Yavapai, Mohave, Greenlee, Coconino, Yuma and Maricopa Counties
Responses to ITCA Plaintiffs' Interrogatories 3 and 8 (Exhibits 7, 8, 11, 13, 9, 6,
12, 5, 16, and 15, respectively, ITCA Plaintiffs' Motion for Preliminary Injunction,
incorporated by reference.)

18 ² Pinal, Pima, Apache, La Paz, Yavapai, Mohave, Greenlee, Coconino, Yuma
19 and Maricopa Counties Responses to ITCA Plaintiffs' Interrogatory 5 (Exhibits 7,
20 8, 11, 13, 9, 6, 12, 5, 16, and 15, respectively, ITCA Plaintiffs' Motion for
Preliminary Injunction, incorporated by reference.)

21 ³ The provisions requiring preclearance apply to the subtle, as well as obvious,
22 regulations. *Presley v. Etowah County Com'n*, 502 U.S. 491 (1992); *City of
Pleasant Grove v. U.S.*, 479 U.S. 462 (1987); *N.A.A.C.P. v. Hampton County
Election Com'n*, 470 U.S. 166 (1985).

1 instructive materials. Returning to the previous procedures or using old
2 documents would require another preclearance by the Justice Department.
3 There is simply not time to acquire this preclearance should the Court grant the
4 Preliminary Injunction.

5 Disruption of the law at this late date, within weeks of the next series of
6 elections, would be a disservice to the public interest because it would disturb the
7 status quo and would cause significant election official and voter confusion. The
8 relief that Plaintiffs request would contravene the chief function of a preliminary
9 injunction, which is to preserve the status quo. "Plaintiff's long delay before seeking
10 a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland*
11 *Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir.1985); *accord*
12 *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092 n. 27 (3rd Cir.1984) ("[T]he
13 district court may legitimately think it suspicious that the party who asks to
14 preserve the status quo through interim relief has allowed the status quo to
15 change through unexplained delay."). While Plaintiffs could have brought their
16 action sooner and avoided the harm that would now result, Plaintiffs chose to
17 wait.

18 **A. Significant Training of Election Officials For the Implementation**
19 **of Proposition 200 Has Already Occurred; Consequently, an**
20 **Injunction Would Cause Mass Confusion on Election Day**

21 The Secretary of State and County election officials have revised their
22 training classes to instruct staff on the proof of citizenship requirement for voter

1 registration⁴ and identification at the polls procedure.⁵ Election officials then use
2 this training to train the thousands of boardworkers who work at the polls on
3 election day.⁶

4 The training that has already been conducted includes: (1) the 2005
5 Arizona Secretary of State Election Officer Certification Course⁷ conducted from
6 July 11- 15, 2005, and August 1 - 5, 2005; (2) the Secretary of State's two-day
7 Recertification Classes in September and October 2005; (3) the Arizona County
8 Recorder Association meeting on February 2, 2005; (4) the Arizona Association
9 of Counties Annual Conference from 1:00 – 4:00 p.m. on November 16, 2005;
10 (5) the Election Officials of Arizona meeting on November 17 – 18, 2005; and (6)
11 the City Clerk meeting on October 12, 2005.⁸ In addition, the 2006 Secretary of
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14 ⁴ Osborne Affidavit at ¶ 4 - 8.

15 ⁵ Osborne Affidavit at ¶ 9 - 11.

16 ⁶ Osborne Affidavit at ¶ 18.

17 ⁷ The Secretary of State's Certification and Training Program is required
pursuant to A.R.S. § 16-407(A), which states:

18 Except as provided in subsection H, no person may perform the
19 duties or exercise the authority of an election officer or of the clerk of
20 the board of supervisors or the county recorder in performance of
21 election duties in or on behalf of any county unless the person is the
holder of an election officer's certificate issued by the secretary of
state before January 1 of each general election year.

22 ⁸ Osborne Affidavit at ¶ 12.

1 State's Procedures Manual,⁹ which County election officials are required to
2 follow,¹⁰ contains more than 25 pages outlining the voter registration and
3 identification at the polls procedures.¹¹

4 **1. Voter Registration**

5 The proof of citizenship requirement for voter registration went into effect
6 on January 24, 2005, the date the Department of Justice precleared Proposition
7 200.¹² In July 2005, the County elections' offices began distributing an amended
8 Arizona Voter Registration form that included instructions about the proof of
9 citizenship requirements and provided additional fields on the form for
10 registrants' drivers license number, non-operating identification number, and

11 ⁹ The Secretary of State's Procedures Manual is produced pursuant to A.R.S. §
12 16-452:

13 After consultation with each county board of supervisors or other
14 officer in charge of elections, the secretary of state shall prescribe
15 rules to achieve and maintain the maximum degree of correctness,
16 impartiality, uniformity and efficiency on the procedures for early
17 voting and voting, and of producing, distributing, collecting, counting,
18 tabulating and storing ballots. The secretary of state shall also adopt
19 rules regarding fax transmittal of unvoted ballots, ballot requests,
20 voted ballots and other election materials to and from absent
21 uniformed and overseas citizens and shall adopt rules regarding
22 internet receipt of requests for federal postcard applications
prescribed by section 16-543.

19 ¹⁰ "A person who violates any rule adopted pursuant to [Procedure Manual] is
guilty of a class 2 misdemeanor." A.R.S. § 16-452(C).

20 ¹¹ Exhibit 2 attached hereto, Secretary of State's Procedures Manual, at 41 - 56
21 (voter registration) and at 113 – 123 (proof of identification at the polls).

22 ¹² Osborne Affidavit at ¶ 3 and 4.

1 naturalization certificate number.¹³

2 The Counties have also developed their own procedures to notify voters
3 that evidence of citizenship is necessary to register to vote. In Maricopa County
4 for example, when the Department receives a registration that does not prove
5 citizenship, the potential registrant is sent a notification letter outlining the
6 deficiency along with a new registration form and postage-paid return
7 envelope.¹⁴ On December 21, 2005, Maricopa County's revised procedure for
8 giving instructive materials to new registrants, along with the new voter
9 registration form, was precleared by the Department of Justice.¹⁵

10 **2. Identification at the Polls**

11 In March 2006, Maricopa County Recorder Helen Purcell launched a public
12 outreach campaign to educate the public about the identification requirements for
13 voting.¹⁶ The outreach campaign included appearances on local television and
14 radio programs, a card mailed to each voter, and large signs posted outside each
15 polling place listing acceptable proof of identification at the polls. In preparation
16 for the September 12, 2006 Primary Election, the County Recorder will hold a
17 press conference on August 29, 2006 regarding the identification at the polls

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19 ¹³ Osborne Affidavit at ¶ 6.

20 ¹⁴ Osborne Affidavit at ¶ 5.

21 ¹⁵ *Id.*

22 ¹⁶ Osborne Affidavit at ¶ 14 and 16.

1 requirement and the opportunity for all voters to request and cast an early
2 ballot.¹⁷

3 With less than three months before the general election, the County
4 Defendants simply do not possess the ability and the time to revise election
5 materials and re-train boardworkers. Preparation for an election must begin far in
6 advance of the scheduled election date and, in fact, have already been underway
7 for quite some time. On August 1, 2006, the Maricopa County Elections
8 Department began training the more than 7,000 boardworkers who will be working
9 on election day.¹⁸ Moreover, many of these same boardworkers were trained on
10 the identification procedures prior to the March and May 2006 elections.
11 Therefore, boardworkers have already been trained in the Counties and
12 municipalities that have previously conducted elections, and many have even
13 undergone training for the September 12, 2005 primary election.

14 Additionally, the County election officials have already ordered and received
15 the election day supplies. Those supplies include the packet of forms for each
16 polling place and the large signs to be placed outside the polling place that lists the
17 types of acceptable identification for in-person voting.¹⁹ There is no time now for
18 new supplies to be ordered and received by County election officials prior to the

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20 ¹⁷ Osborne Affidavit at ¶ 15.

21 ¹⁸ Osborne Affidavit at ¶ 18.

22 ¹⁹ Osborne Affidavit at ¶ 9.

1 upcoming elections. Even if the counties could spare the time and money to re-
2 order all of the materials and re-train all of the boardworkers needed for election
3 day, there is no guarantee that those changes could be precleared by the Justice
4 Department in time for election day.

5 **B. A Last Minute Change to the Status Quo Would Be Harmful to the**
6 **Public Interest**

7 If the Court granted the preliminary injunction requested by Plaintiffs, mass
8 confusion would result for election officials, boardworkers, and, most importantly,
9 voters. New training of thousands of election officials could not occur in time for them
10 in turn to train boardworkers on the revised identification requirement for in-person
11 voting. There would be insufficient time to preclear, order, and send out new sample
12 ballot or post accurate posters at polling places for use in the upcoming elections.
13 The voters would be confused, a problem that would be exacerbated by the
14 unavailability of correct materials and boardworker training and the lack of time to
15 educate the public about the injunction. The confusion may be even greater in the
16 Counties that have already held two or three elections under the new law.

17 Furthermore, issuing an injunction would be contrary to the public interest by
18 virtue of the enormous resources already invested in the Proposition 200
19 requirements. In reversing the Ninth Circuit's decision to grant an injunction to
20 delay the 2003 California recall election, the Ninth Circuit sitting *en banc*
21 emphasized the point that the public interest would be significantly affected by
22 delaying an election because a significant amount of time and money had already

1 been expended. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d
2 914 (9th Cir. 2003) (en banc).

3 In this case, hardship falls not only upon the putative defendant, the
4 California Secretary of State, but on all the citizens of California,
5 because this case concerns a statewide election. The public interest
is significantly affected. For this reason our law recognizes that
election cases are different from ordinary injunction cases.

6 *Id.* 344 at 919 (citing *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). Similarly,
7 the Counties have dedicated significant time and resources to inform Arizona
8 citizens of the new law, train election officials and boardworkers, and develop
9 new election materials.

10 For all these reasons, it is possible that inconsistent application of the
11 identification requirement could occur in the Counties if a preliminary injunction is
12 issued at this late date, resulting in some municipalities applying the
13 identification at the polls requirement and some not.

14 **III. Plaintiff's Claim Barred by the Doctrine of Laches**

15 Laches will generally bar a claim when the delay is unreasonable and
16 results in prejudice to the opposing party. *Harris v. Purcell*, 193 Ariz. 409, 412,
17 973 P.2d 1166, 1169 (1998); *Mathieu v. Mahoney*, 174 Ariz. 456, 458-59, 851
18 P.2d 81, 83-84 (1993). In determining whether the delay was unreasonable, the
19 court must examine the justification for delay, including the extent of plaintiff's
20 advance knowledge of the basis for challenge. *Harris*, 193 Ariz. at 413. In this
21 case, the Plaintiffs have known that the proof of citizenship for voter registration
22 has been required since January 2005, and that the identification at the polls

1 procedure would be implemented in certain Counties as early as the November
2 2005 election and again in the March and May 2006 elections.

3 Plaintiffs did not file this lawsuit until May 9, 2006, more than fifteen
4 months after the law went into effect. In addition to delaying the filing of this
5 lawsuit, Plaintiffs delayed these proceedings by initially focusing on the one,
6 narrow claim seeking to enjoin the Secretary of State from rejecting the Federal
7 Mail Voter Registration form.²⁰ Even after this Court tried to expedite this
8 litigation by scheduling the evidentiary hearing for mid-July, Plaintiffs moved to
9 delay discovery²¹ and the evidentiary hearing until the end of August.²²
10 Plaintiffs' dilatory tactics belie their claim of irreparable harm. Instead, any
11 decision will most likely be made after the September 12, 2006 Primary Election,
12 which will be the fourth Arizona election implementing Proposition 200's

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14 ²⁰ May 17, 2006, Status Conference (Dkt. 26). Not until after this Court's June
15 19, 2006 Opinion and Order (Dkt. 68) establishing the briefing schedule and
16 setting the date for the Preliminary Injunction hearing did Plaintiffs begin to
17 proceed litigating the other claims.

18 ²¹ With just weeks left before the Primary Election, Plaintiffs required all 15
19 County Recorders and Elections Directors to answer Interrogatories and
20 respond to Requests for Production of Documents, totaling over 16,000 pages,
21 as well as deposing seven county election officials. (See Exhibits 5 – 20 and 23
22 - 31, ITCA Plaintiffs' Motion for Preliminary Injunction, incorporated by
reference.)

²² Commenting on Ralph Nader's delay of his ballot access lawsuit, Judge
Posner noted that the case could have proceeded more expeditiously: "By
waiting as long as he did to sue, and despite the strenuous efforts by the district
court and this court to expedite the litigation, Nader created a situation in which
any remedial order would throw the state's preparations for the election into
turmoil." *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004).

1 identification at the polls requirement.

2 In a lawsuit brought by Ralph Nader in Illinois in 2004 to allow him to file
3 petitions late getting him on the presidential ballot, Judge Posner emphasized
4 the doctrine of laches in weighing the public interest and public confidence in the
5 election process.

6 [I]t would be inequitable to order preliminary relief in a suit filed so
7 gratuitously late in the campaign season. It wasn't filed until June 27,
8 only a little more than four months before the election. If when he
9 declared his candidacy back in February Nader had thought as he
10 now does that the Illinois Election Code unconstitutionally impaired
11 his chances of getting a place on the ballot, he could easily have
12 filed suit at the same time that he declared his candidacy-especially
13 as he had filed a similar suit the last time he ran for President, in
14 2000, when he obtained a preliminary injunction that got him on the
15 Illinois ballot by allowing him to submit petitions collected after the
16 deadline, though no final judgment was ever entered.

17 *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (internal citation omitted).
18 Judge Posner recognized that the public interest in an election case militated in
19 favor of a laches holding:

20 We are mindful that the right to stand for office is to some extent
21 derivative from the right of the people to express their opinions by
22 voting . . . But nothing is more common than for the denial of an
injunction to harm innocent nonparties, such as people who would
like to vote for Nader but unlike the two voter plaintiffs are not
complicit in his decision on the timing of the suit. But there are
innocents on the other side as well-namely the people who will be
harmred if a last-minute injunction disrupts the Presidential election in
Illinois.

23 *Id.* Likewise, any last minute change to the election procedures after extensive
24 voter education efforts, training of boardworkers, and the law's implementation

1 in previous elections will be disruptive, costly and harmful to all Arizona citizens.

2 A laches defense, however, cannot stand on unreasonable conduct alone.
3 *Harris*, 193 Ariz. at 412, 973 P.2d at 1169. A showing of prejudice is also
4 required. *Id.*; *Mathieu*, 174 Ariz. at 459, 851 P.2d at 84. In election cases,
5 prejudice caused by a challenger's delay affects interests that reach beyond
6 those of the defendants. The real prejudice caused by delay in election cases is
7 to the quality of decision making in matters of great public importance. *Mathieu*,
8 174 Ariz. at 460, 851 P.2d at 85. The effects of such delay extend far beyond
9 the interests of the parties. In *Mathieu*, the Arizona Supreme Court explained
10 that waiting until the last minute to file an election challenge to a ballot measure
11 "places the court in a position of having to steamroll through the delicate legal
12 issues in order to meet the deadline for measures to be placed on the ballot." *Id.*
13 at 459, 851 P.2d at 84 (quoting *State ex rel. Fidanque v. Paulus*, 297 Or. 711,
14 688 P.2d 1303, 1308 (1984)).

15 Moreover, the Arizona Supreme Court cautioned that litigants and lawyers
16 in election cases "must be keenly aware of the need to bring such cases with all
17 deliberate speed or else the quality of judicial decision making is seriously
18 compromised." *Id.* at 460, 851 P.2d at 85. Late filings "deprive judges of the
19 ability to fairly and reasonably process and consider the issues ... and rush
20 appellate review, leaving little time for reflection and wise decision making." *Id.*
21 at 461, 851 P.2d at 86. Fundamental fairness is the *sine qua non* of the laches
22 doctrine. *Mathieu*, 174 Ariz. at 460, 851 P.2d at 85. The County Defendants

1 request this Court to consider the fairness of the relief sought, not only to those
2 challenging, but also to the thousands of Arizonans who will go the polls on
3 election day.

4 **IV. Conclusion**

5 For the reasons stated above, the County Defendants respectfully request
6 that the Court deny the Motion for Preliminary Injunction. The grant of an
7 injunction would result in even greater harm to the voters and would be highly
8 detrimental to the public interest.

9 DATED this 16th day of August 2006.

10 ANDREW P. THOMAS
11 MARICOPA COUNTY ATTORNEY

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12 Courtesy copy mailed this 16th day
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s/Colleen Connor

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