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

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

18 **Plaintiffs,**

19 **v.**

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

22 **Defendants.**

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

**STATE AND THIRTEEN
COUNTY DEFENDANTS'
MOTION FOR APPOINTMENT
OF INDEPENDENT EXPERT
AND APPROVAL OF FINAL
SCRIPT**

(Expedited Ruling Requested)

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COME NOW Defendants State of Arizona, Secretary of State Jan Brewer, 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; 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 “Defendants”), by and through undersigned counsel and submit this MOTION FOR APPOINTMENT OF INDEPENDENT EXPERT AND APPROVAL OF FINAL SCRIPT. This Motion is supported by the following Memorandum of Points and Authorities, exhibits, and the parties’ pleadings filed herein, together with any exhibits thereto, all of which are incorporated herein by this reference.

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RESPECTFULLY SUBMITTED this 11th day of September, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 Despite earnest and diligent efforts on the part of both plaintiff and defense
4 counsel, the parties have been unable to agree on important details regarding the
5 proposed contact of thousands of Arizona voters or prospective voters. As explained
6 more fully below, the State and County Defendants respectfully request that the Court
7 order the appointment of an independent and neutral expert pursuant to Fed. R. Evid.
8 706 based upon the parties' joint submission of possible nominations.¹ Alternatively,
9 Defendants request that the Court order that any contact of prospective interviewees, by
10 either Plaintiffs' counsel or their retained expert(s), be governed by and limited to the
11 applicable scripts attached to this motion as Exhibits A & B. At a minimum, any script
12 that is used by Plaintiffs' counsel or their expert(s) should be presented to the Court,
13 with an opportunity for objection by the Defendants.

14 **II. Need for Unbiased Collection of Data**

15 The State and Counties have a duty to protect individual's confidential, personal
16 information. A.R.S. § 41-4172; A.R.S. § 16-168; *Phoenix Newspapers, Inc., v. Purcell*,
17 187 Ariz. 74, 79, 927 P.2d 340, 345 (App. 1996) *cert. denied*, 188 Ariz. 257, 934 P.2d
18 1349 (1997)(registration information used for purposes, unrelated to campaigns and
19 elections, could lead to annoying situations for registered voters that might discourage
20 some citizens from registering to vote while public policy strongly advocates greater
21 voter registration and participation.) This is especially important in cases such as this
22 one when the personal information was revealed in an attempt to exercise the
fundamental right to vote. Whether or not an individual is ultimately qualified to vote
under federal and state law, the government has a responsibility to protect that person
from fraud and harassment.

1 The County Defendants do not include Coconino and Navajo County defendants.

1 The Court recognized these concerns during the August 30, 2007 discovery
2 dispute hearing and addressed them with two separate, yet equally important orders.
3 The first was specifically geared toward the possibility that volunteers with no training
4 could have access to the personal, identifying information found on the voter registration
5 forms and on the conditional provisional ballot receipts and ordered that **anyone** who
6 had access to that information, would file a signed statement indicating, under penalty
7 from the Court, that they understood the stipulation for confidentiality and would abide
8 by it. The second was geared at both the possibility that untrained volunteers might be
9 conducting this research, but also at the prevention of harassment or solicitation, and
10 required the parties to stipulate to a script to be used when contacting these individuals.
11 In fact, the Court indicated that were the information obtained through these telephone
12 calls to be used by an expert or an agent of Plaintiffs, it would have to be done with “a
13 court order and it will be kept under seal.” August 30, 2007 transcript 29:23-24.

14 Defendants agree that Plaintiffs’ experts should be allowed to use the data
15 collected in whatever means they see fit to address Plaintiffs’ burden of proof within the
16 confines of the Court’s order regarding the confidentiality of voter information.
17 However, that data should be **collected** in a neutral fashion, with the least possible
18 intrusion on the interviewees. Defendants’ proposal that the Court appoint a neutral
19 expert to conduct and oversee the proposed contact would ensure that information is
20 obtained fairly and that questions are asked even-handedly. Plaintiffs’ current proposal
21 seeks free reign for Plaintiffs and their paid experts to modify the script called for by the
22 Court and to contact thousands of Arizona citizens without any supervision as to what
they would be asking or telling such citizens.

 Plaintiffs’ contend that their retained expert should be permitted to conduct
unrestrained research because the State and Counties are free to hire their own expert
and conduct research as well. This makes sense in other types of litigation, where any

1 disputes between experts or potential biases merely become a question of credibility for
2 the jury to decide. However, Plaintiffs' solution overlooks the enormous intrusion into
3 the private lives of the individuals being contacted. The normal route of each party
4 conducting their own research means that many individuals could be contacted at least
5 twice regarding their voting history and this litigation. Furthermore, considering the
6 sheer number of parties in this case, the possibility exists that these individuals could be
7 contacted up to six times or more. Obviously, this is of great concern and should not be
8 permitted.

8 In attempting to reach the most reasonable solution to the issues regarding contact
9 with voters and potential voters, Defendants proposed that a neutral research company,
10 the cost of which would be shared by the parties, be the sole entity to place the telephone
11 calls to the interviewees. That would ensure that the agreed-upon script is followed
12 without any bias, harassment or pressure on the individuals being contacted. The neutral
13 firm could provide the raw data to both sides to be used and interpreted however the
14 parties and their experts saw fit. This solution protects the individuals being contacted
15 while still allowing the parties and their experts freedom to independently interpret the
16 data without intrusion of the other parties. As such, the Defendants request that the
17 Court order the parties to contract with a neutral research firm, that will use a finalized
18 script to be approved by the Court, to conduct the calling and distribute the raw data to
19 all parties for their experts to use as necessary

18 **III. Need for Uniform Script**

19 Alternatively, the Court should require that any contact by Plaintiffs' counsel or
20 their experts be strictly confined to the scripts attached as Exhibits A and B. The Court
21 indicated at the August 30, 2007 hearing that the parties should attempt to work together
22 and agree on such a script. Although counsel for all parties to this dispute have worked
substantially together since last week, they have been unable to agree on a script.

1 Accordingly, Defendants propose those scripts at Exhibits A and B, which were drafted
2 in substantial collaboration with Plaintiffs' counsel.

3 Placing unsolicited calls to Arizonans regarding on-going litigation may be
4 considered, by many, an unacceptable intrusion into their privacy. Defendants submit
5 that the proposed scripts reasonably address this concern while simultaneously affording
6 Plaintiffs the ability to obtain the information they need to put on their case. There is the
7 very real possibility, under any scenario, that Defendants may be faced with an
8 onslaught of angry Arizonans whose private information has been shared and who have
9 been contacted about their voting history – a topic that is considered taboo in polite
10 society. However, if Plaintiffs' experts are permitted to make significant changes to the
11 script without consultation with Defendants or approval from the Court, Defendants are
12 left without any answer for complainants. Moreover, Defendants are either effectively
13 left in the dark as to what communication was had, with whom, or are faced with the
14 possibility of contacting the same individuals regarding the same issues. At least with a
15 stipulated final script, and even more so with a neutral firm conducting the calls,
16 Defendants would have all the information necessary to address the potential concerns of
17 the individuals who will be contacted. At a minimum, any proposed communication
18 made by Plaintiffs' counsel or experts should be submitted to the Court for approval,
19 with an opportunity for objection by Defendants.

17 **IV. Conclusion**

18 Defendants respectfully request that the Court order the parties to contract with a
19 neutral research firm, that will use a finalized script to be approved by the Court, to
20 conduct the calling and distribute the raw data to all parties for their experts to use as
21 necessary. In the alternative, Defendants request that the Court approve the scripts
22 submitted by Defendants as Exhibits A and B. At a minimum, the Court should order
the parties to consult on a finalized script, after input from their individual experts, and

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have that script approved by and filed with the Court prior to any contact is made with the interviewees.

RESPECTFULLY SUBMITTED this 11th day of September, 2007.

ANDREW P. THOMAS
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 11th day of September, 2007, I caused the foregoing
3 document to be electronically transmitted to the Clerk's Office using the CM/ECF
4 System for filing and transmittal of a Notice of Electronic Filing to the following

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1 COPY of the foregoing filed electronically
this 11th day of September, 2007.

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3 COPY of the foregoing mailed with Notice of
Electronic Filing this 11th day of September, 2007 to:

4 The Honorable Roslyn O. Silver
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8 /s/ S. Bame

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