Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Clint Bolick (Ariz. Bar No. 021684)
Diane S. Cohen (Ariz. Bar No. 027791)
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000
CBolick@GoldwaterInstitute.org
DCohen@GoldwaterInstitute.org
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mark Reed, Plaintiff, v. Helen Purcell in her individual capacity and in her official capacity as Maricopa County Recorder; Karen Osborne in her individual capacity and in her official capacity as Maricopa County Director of Elections; and Maricopa County, Defendants.	**Civil Action No.** **PLAINTIFF'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER**

Now comes Plaintiff Mark Reed, by and through his attorneys, and moves ex parte, pursuant to Federal Rules of Civil Procedure 6(c)(1)(C) and 65, for a temporary restraining order. This Motion is supported by the Memorandum of Points and Authorities below.

INTRODUCTION

Plaintiff moves this Court for a temporary restraining order barring Defendants and Defendants' agents and employees from enforcing a ban on so-called "tea party t-

shirts" at the polling stations within Maricopa County during the November 2, 2010 election. Such a ban is vague, overly broad, standardless and regulates speech that the County has no legitimate interest in regulating. In addition to this per se ban on such shirts, the County has issued an express policy that while anyone wearing such a shirt will not be prevented from voting, the County will take names and identifying information and then launch investigations into such voters, which under state law could lead to criminal penalties, including fine and imprisonment. A.R.S. §16-1018.

Plaintiff further requests that upon the issuance of a Court order prohibiting such enforcement, Defendants shall disseminate the order to all Maricopa County poll workers and any other employees who will be working at polling sites. Finally, Plaintiff requests that any temporary restraining order bond be waived or reduced to a nominal amount.

Movant's Attorney's Rule 65(1)(B) Certification

Pursuant to Rule 65 (1)(B), the undersigned counsel for Plaintiff, Diane Cohen, certifies that notice of Defendants' per se ban on all tea party t-shirts was not announced publically until October 21, 2010, after Judge James A. Teilborg entered an order enjoining Coconino County from enforcing a similar ban. (*See Wickberg v. Owens, et al.*, 10 C 8177, Dkt. 30, Exhibit 7). These announcements were made by Elections Director Karen Osborn in an interview with KFYI radio and have since been further reported in the press throughout the County.

On October 25, 2010, counsel for plaintiff sent correspondence to Director Osborn and County Recorder Helen Purcell regarding their announced ban on tea party

shirts and urged them to reverse their position. (The letter is attached as Ex.1.) On October 26, counsel for the County responded on their behalf and confirmed and defended the ban. (The County's letter is attached as Exhibit 2.) On October 27, Plaintiff's counsel sent another letter to the County's counsel and called as well, in order to gain further information on the County's policies regarding enforcing the electioneering laws on Election Day, to further urge the reversal of the tea party t-shirt ban and asked for additional information, including what is the County's definition of the term "campaign material" as used in the County's definition of electioneering. (Plaintiff's letter is attached as Exhibit 3.) Finally, the letter inquired as to whether other groups were singled out for a blanket ban as are "tea parties."

During this period of time, counsel for Plaintiff was also receiving reports from Maricopa County poll workers going through training for the November 2 election that they were being instructed that "tea party" t-shirts would be prohibited in the polling site, as would a pin or other emblem depicting the "Don't Tread On Me" flag, because it has been "co-opted" by the tea party. (Declaration of Brenda Schlomach, ¶16)

Later in the day Plaintiff's counsel learned that the County issued yet another apparently new policy declaring that those who wear tea party t-shirts to polling sites will not be prevented from voting; but if they refuse to either remove or cover the shirts, County employees will be instructed to take their names and voter identification numbers and complete something called an "event report." Elections Director-Defendant Osborn will then use that information to launch an investigation into that voter at a later date, and, obviously, outside the polls. After learning of the County's

new policy, Plaintiff's counsel contacted counsel for the County to discuss the matter as well as to advise her of Plaintiff's intention to file a motion for temporary restraining order to seek protection for Plaintiff prior to November 2, Election Day. As of the time of this filing, the County attorney has not responded to Plaintiff's call or latest correspondence.

Immediate and Irreparable Harm Will Result Before Defendants Can Be Heard

There are only two business days between the filing of this Motion and the November 2 election. Given the need to obtain immediate relief, and so that any such order can be disseminated to poll employees throughout Maricopa County prior to the election, Plaintiff believes in good faith that the application of a temporary restraining order is justified.

On November 2, Plaintiff and other voters in Maricopa County who wish to wear "tea party" shirts to the polls will have to decide whether they will forgo their constitutional rights to wear their shirt or face possible harassment or even arrest, imprisonment and fine, should they choose to stand up for their rights. (*See* generally, Declaration of Plaintiff Mark Reed, attached as Ex. 1.) Under our Constitution, this is a choice a citizen should not have to face or make. Given the law and facts, as set forth below, Plaintiff is likely to succeed on the merits. Further, the equities and public interest favor the requested relief. Accordingly, Plaintiff respectfully requests that the Court grant this Motion and enter the attached proposed order.

MEMORANDUM OF POINTS AND AUTHORITIES

On October 28, 2010, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. §1983 against Maricopa County and Defendants Purcell and Owens, in their individual and official capacities, as County Recorder and Elections Director, respectively. (Docket 1.) In the Complaint, Plaintiff alleges that Defendants are violating his constitutional rights to free speech and association, equal protection, and due process by issuing a blanket ban on all "tea party" t-shirts at the polling sites and threatening to take names and investigate those who wear such shirts but refuse to remove or cover them at the polling sites.

I. STATEMENT OF FACTS

The facts are fully set forth in the attached Declarations and attachments thereto (Exs. 4 and 5) and are incorporated herein by reference.

II. STANDARD OF REVIEW

"The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Cochran v. Rollins*, 2008 U.S. Dist. LEXIS 66534, 1-2, 2008 WL 3891578, 1 (D. Ariz. August 20, 2008). The standard for a preliminary injunction is satisfied when the movant shows: 1) a likelihood of success on the merits; 2) a likelihood of irreparable harm; 3) the existence of serious questions going to the merits and the balance tips in the movant's favor; and 4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, __ U.S. __, 129 S.Ct 365, 376 (2008); *Alliance for the Wild Rockies et al. v. Cottrell et al.*, 2010 U.S. APP. LEXIS

13022, 2010 WL 264087 (9th Cir. June 24, 2010) (clarifying an aspect of the post-*Winter* standard for preliminary injunction, holding that the "serious questions going to the merits" test survives *Winter*).

III. ARGUMENT

A. Defendants' Express Policies Violate Plaintiff's Constitutional Rights

1) Plaintiff's First Amendment Rights

The First Amendment issue in this case is whether a government official and body can excise, as "electioneering," one particular civic group's shirt from the public discourse, either on the theory that the shirt at issue tacitly asserts undue influence over voters or upon a more general assertion that a government official may properly silence groups as a matter of personal predilection that the shirt may "intimidate" voters.

Arizona Election Law

Arizona Revised Statues (A.R.S.) § 16-515 provides in relevant part:

> a person shall not be allowed to remain inside the seventy-five foot limit while polls are open, except for the purpose of voting . . . and *no political or electioneering materials may be displayed within the seventy-five foot limit.*

(emphasis added).

A.R.S. § 16-1018 provides in relevant part: "A person who commits any of the following acts is guilty of a class 2 misdemeanor: 1. Knowingly electioneers on election day within a polling place . . . ." The SOS's Election Procedures Manual prohibits "campaign related materials including but not limited to campaign signs, buttons, literature, shirts, bumper stickers, advertisements, endorsements or written materials" within the 75 foot limit. ARIZ. SEC'Y OF STATE, ELECTIONS PROCEDURES MANUAL 150

(May 2010), *available at* http://www.azsos.gov/election/Electronic_Voting_System/2010/Manual.pdf (last visited Oct. 12, 2010).

The Arizona Court of Appeals has noted that Arizona law does not define "electioneering." *Fish v. H.S. Redeker,* 2 Ariz. App. 602, 411 P.2d 40 (1966). However, in its decision, the *Fish* Court undertook a historical analysis of Arizona election law and found that its purpose is to "prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters entering the polling place by political workers seeking a 'last chance' effort to change their vote.'" *Id.* at 602, 411 P.2d at 42. *Fish* thus supports the principle that "electioneering" cannot mean anything other than express advocacy.

In *Burson v. Freeman*, 504 U.S. 191 (1992), the Supreme Court held that Tennessee could forbid a professional campaign worker from actively engaging voters outside of a polling place. In *Burson*, the Court weighed "the accommodation of the right to engage in political discourse with the right to vote," 504 U.S. at 198, and held that States may prohibit electioneering around polling places because "States' [have] compelling interests in preventing voter intimidation and election fraud." *Id.* at 206. However, unlike the *Burson* petitioner, who was a professional campaign worker seeking to loiter outside of a polling place in order to actively engage voters, voters wearing t-shirts that happen to indicate their affiliation with one of the many tea party t-shirts, which do not make any affirmative attempts to actively engage and exert undue influence

over other voters, or advocate for any candidate, party or measure on the ballot, cannot be regulated by the County.

Based on the foregoing, we know "electioneering" and "political" cannot mean anything other than *speech that advocates for or against a candidate, party or measure on the ballot* because any other definition sets us on a slippery slope wherein government officials would be free to use their own subjective beliefs to decide what these terms mean, which is exactly what is going on in Maricopa County. Under the standardless discretion currently applied by Defendants there is no principled distinction between banning tea party shirts and banning such things as a Star of David or crucifix based on the fact that some Jewish and Christian groups endorse candidates. Moreover, during an election year wherein AFSME labor union, which is active in Arizona, poured more than $87.5 million into Democratic campaigns, where is Maricopa's policy excluding AFSME t-shirts, pins and other logos from the polling sites? (See Ex. 5, attached hereto, Brody Mullins and John D. McKinnon, *Campaign's Big Spender*, Wall Street Journal, Oct. 22, 2010, available at http://online.wsj.com/article_email/SB10001424052702303339504575566481761790288-lMyQjAxMTAwMDIwMjEyNDIyWj.html .) Plaintiff is not suggesting there should be such a ban, but uses this information by way of example to show the discriminatory nature of the per se "tea party" t-shirt ban.

Aside from the absence of any legitimate interest to justify Defendants' actions, a per se ban on tea party shirts also runs afoul of the Constitution because it is clearly

motivated by a desire to suppress the points of view of those who are members of the numerous tea party organizations in the county points of view.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (citations omitted). Moreover, there is ample evidence that this blanket ban is willful and deliberate. Among the facts Defendants know and recklessly disregarded, or most certainly should know are:

- There were no "tea party" candidates on the August 24, 2010 ballot. *See* Ariz. Sec'y of State's list of 2010 Primary Election Candidates, http://www.azsos.gov/election/2010/Primary/FullListing.htm (last visited Oct. 9, 2010); and

- There are no "tea party" candidates on the upcoming November 2, 2010 ballot. *See* Ariz. Sec'y of State's list of 2010 General Election Partisan Candidates, http://www.azsos.gov/election/2010/general/PartisanCandidates.htm (last visited Oct. 9, 2010).

"The [viewpoint discrimination] test is whether the government has excluded perspectives on a subject matter otherwise permitted by the forum." *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 912 (9th Cir. 2007); *cf. Flint v. Dennison*, 488 F.3d 816, 833 (9th Cir. 2007) ("Viewpoint neutrality is the requirement that government not favor one speaker's message over another's regarding the same topic").

2) Plaintiff Is Entitled to Equal Protection under the Law

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). As set forth above, the evidence establishes, based on the blanket categorization and ensuing ban on "tea party" shirts, that Defendants are treating and will continue to treat voters who are wearing "tea party" paraphernalia differently from members of similarly situated groups, based on their perception of (or in other words "bias against") "tea parties."

In order to successfully defend against Plaintiff's equal protection claim, Defendants must show that their decisions are a narrowly tailored means of achieving a substantial and legitimate objective. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972). Defendants will be unable to meet this burden based on the law. First, as established above, the County has no legitimate interest in regulating voter attire that does not expressly advocate for or against a candidate, party or measure on the ballot. Second, even if the County had a legitimate interest here, it cannot further that interest by discriminating on the basis of the expressive conduct's content. This is unquestionably an equal protection violation. *Id.* at 96 ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

3) Due Process Must Guide the Enforcement of Arizona Election Laws

The Constitution abhors the misuse of discretion as a license for arbitrary procedure. *E.g.*, *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) ("The requirement that the [NLRB] exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case"); *Shuttlesworth v. Burmingham*, 394 U.S. 147, 150 (1969) ("There can be no doubt that the [law], as it is written, conferred upon the City Commission virtually unbridled and absolute power to prohibit [free speech] . . . For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'").

As evinced by their recently announced after-the-fact investigation procedure, Defendants have admitted they have no discernable standards at all in applying electioneering law:

> It is settled by a long line of . . . [Supreme Court decisions] that a [law], which . . . makes the peaceful enjoyment of freedom which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Shuttlesworth, 394 U.S. at 151.

The standardless discretion at issue in this case involves more than First Amendment censorship. Defendants have the duty to "supplant[] the original discretionary chaos with some degree of order" by "regularizing the system of deciding in each case [through] classifications, rules, principles, and precedents" *NLRB*, 499 U.S. at 612 (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT, § 6.04, p. 145 (3d ed. 1972)) (emphasis added). As the Supreme Court notes, "Sensible men could not refuse to use

such instruments and a sensible [government] would not expect them to." *Id.* Defendants nevertheless refuse to promulgate such instruments, even after admitting to the inadequacy of their current policy that is so standardless it is impossible to implement at the polls themselves but only, purportedly, after an after-the-fact investigation.

B. A Temporary Restraining Order Should be Granted

1) Plaintiff Will Suffer Irreparable Injury Absent Injunctive Relief

The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Under Ninth Circuit law, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). As set forth above and in the supporting affidavits, Defendants have an express policy of enforcing a per se ban on tea party apparel at the polls and will continue with this ban. With just two business days until the November 2 election, Plaintiff will suffer real and significant irreparable harm, harm that cannot be remedied except through injunctive relief. *See Designer Skin, LLC*, 2008 U.S. Dist. LEXIS 68467, 2008 WL 4174882, at *5.

2) Plaintiff Is Likely to Succeed on the Merits

As discussed above, the evidence strongly supports Plaintiff's Complaint. Given Defendants' willful ignorance of the law, and their own admissions regarding their

discriminatory treatment of Plaintiff solely due to the group to which she belongs, Plaintiff is likely to succeed on the merits.

3) The Balance of Hardship Tips in Favor of Issuing the Restraining Order

The balance of the hardships alone tips in favor of issuing the injunction. There would be absolutely no harm to Defendants by allowing Plaintiff to wear his shirt to the polls on November 2nd. An injunction against Defendants' conduct will in no way compromise the County's ability to protect against voter intimidation or efforts within 75' of the polls to influence voter conduct. In fact, Defendants seem to have conceded it, albeit in a tortuous way, by creating this "vote now, investigate later" policy, which does not serve the only relevant government interest: protecting voters at the polls from coercion. Indeed, it will actually protect voters against intimidation by the County who will be taking names, making lists and launching investigations into voters. Accordingly, banning such behavior will bring no hardship on Election Day.

4) The Public Interest Clearly Favor Issuing a Restraining Order

The public has an interest in laws being enforced constitutionally. *Cf. American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 2551 n.11 (3rd Cir. 2003) ("Neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law"). Moreover, the public interest ordinarily favors preliminarily enjoining the unconstitutional enforcement of a law. *See Sammartano*, 303 F.3d at 974 (collecting cases).

The Ninth Circuit has recognized only limited exceptions to this general rule, such as where nuclear safety is involved, provided that the government adduces evidence showing specifically how other legitimate interests would be harmed by enjoining the unconstitutional application of a law. *See Sammartano*, 303 F.3d at 974 (citing *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986)). Accordingly, in this case, Defendants must show harm to legitimate public interests—apart from the *illegitimate* interests in protecting the public from undifferentiated threats or censoring groups based on their viewpoint—to overcome the strong public interest in favor of preliminarily enjoining laws that violate the First Amendment. *Id.*

C. Upon Issuing a TRO, the Court Should Waive Bond Because Plaintiff Advances a Constitutional Claim and Defendants are Unlikely to Suffer Pecuniary Harm from an Injunction

Rule 65(c) invests the district court with discretion as to the amount of security required, if any. In particular, "[t]he district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (internal citations omitted). As set forth above, there is no realistic likelihood of harm to Defendants from being wrongfully enjoined. Furthermore, persuasive authority recommends that courts exercise their discretion and waive bond for plaintiffs in cases involving constitutional rights. *See, e.g.*, *Olshock v. Village of Skokie*, 401 F. Supp. 1219 (N.D. Ill. 1975). Accordingly, Plaintiff respectfully requests that this Court use its discretion to either waive bond or set it at a nominal amount.

IV. CONCLUSION

WHERFORE, in light of the foregoing, Plaintiff respectfully requests that this Court grant her motion for temporary restraining order, as forth in the proposed order.

OCTOBER 28, 2010

RESPECTFULLY SUBMITTED,

s/ Diane S. Cohen
Clint Bolick (Ariz. Bar No. 021684)
Diane S. Cohen (Ariz. Bar No. 027791)
GOLDWATER INSTITUTE
500 E. Coronado Rd., Phoenix, AZ 85004
P: (602) 462-5000
CBolick@GoldwaterInstitute.org
DCohen@GoldwaterInstitute.org
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Diane Cohen, an attorney, hereby certify that on October 28, 2010 I served the attached document via hand delivery and by prepaid USPS First Class Certified Mail on the following:

Colleen Connor
Assistant General Counsel
Maricopa County Office of General Litigation Services
301 West Jefferson Street, Suite 3200
Phoenix, AZ 85003
Attorney for Maricopa County

Fran McCarroll
Maricopa County Clerk of the Board
301 West Jefferson Street, 10th Floor
Phoenix, AZ 85003

Helen Purcell
Maricopa County Recorder
111 South 3rd Avenue, #103
Phoenix, AZ 85003

Karen Osborne
Maricopa County Director of Elections
111 South 3rd Avenue, #102
Phoenix, AZ 85003

Diane S. Cohen
Attorney for Plaintiff

s/ Diane Cohen