

CA No. 08-17094, 08-17115
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARIA M. GONZALEZ, *et al.*,
Plaintiffs/Appellants,

v.

STATE OF ARIZONA, *et al.*,
Defendants/Appellees,

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
Plaintiffs/Appellants,

v.

STATE OF ARIZONA, *et al.*,
Defendants/Appellees.

**On Appeal from the United States District Court
for the District of Arizona
Nos. 06-cv-01268-PHX-ROS; 06-cv-01362-PHX-ROS
(Honorable Roslyn O. Silver)**

**BRIEF OF PROTECT ARIZONA NOW,
WASHINGTON LEGAL FOUNDATION,
AND ALLIED EDUCATIONAL FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES
STATE OF ARIZONA AND SECRETARY OF STATE'S
PETITION FOR REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation and the Allied Educational Foundation state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. They have no parent corporation and no stock owned by a publicly owned company.

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INTERESTS OF *AMICI CURIAE*

Protect Arizona NOW (“PAN”) is a non-partisan association of Arizonans from all walks of life, organized to promote adoption of Proposition 200 on the November 2004 ballot.¹ PAN was the sponsoring organization for Prop 200 and intervened as a defendant in prior challenges to Prop 200. PAN has been concerned by the threat to the integrity of Arizona elections posed by the increased number of illegal aliens coming into the State in violation of federal law, and the threat that those aliens will seek to vote.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States, including many in Arizona. WLF has appeared in courts across the country to ensure that governments possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. WLF represented PAN in its prior defense of the welfare-related provisions of Prop 200. WLF also filed briefs on both occasions on which this case was before panels of this Court.

The Allied Educational Foundation is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to

¹ All parties have consented to the filing of this brief. In light of that consent, Circuit Rule 29-2(a) provides that *amici* may file this brief without first seeking leave of court.

promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Arizona electorate approved Prop 200 by a wide margin in November 2004. Nonetheless, opponents of Prop 200 have made it clear that they are determined to ignore the election results and have launched multiple judicial assaults on the law. *Amici* are filing this brief to ensure that the voices of the majority of Arizonans who support Prop 200 are heard.

STATEMENT OF THE CASE

This case challenges the voting-related provisions of Prop 200, a public initiative adopted by Arizona voters by a large margin in November 2004. Prop 200 amended Arizona law to add the “Arizona Taxpayer and Citizen Protection Act,” a law designed to prevent voting and access to certain public benefits by ineligible individuals, and to increase reporting by state and local government officials to federal immigration authorities when they become aware of violations of federal immigration law by those who have applied for public benefits from the state.

Challenges to Prop 200 were filed in federal court in 2006. In each of the suits, the plaintiffs filed preliminary injunction motions, seeking to enjoin Arizona officials from implementing: (1) Prop 200’s requirement that individuals

registering to vote provide evidence to support claims of citizenship; and (2) Prop 200's requirement that voters provide proof of identity before casting ballots.²

The district court denied the preliminary injunction motions in October 2006. The plaintiffs appealed the denial with respect to the voter registration requirements, and this Court affirmed the following year in *Gonzalez I*. The Court held that the plaintiffs had “demonstrated little likelihood of success” on their claims that Prop 200: (1) was an unconstitutional poll tax; (2) imposed an undue burden on voting rights; and (3) imposed a disproportionate burden on naturalized citizens. It also held that Arizona did not violate the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg *et seq.*, by requiring mail-in voter registration applicants to present evidence of citizenship. *Gonzalez v. State of Arizona* [“*Gonzalez I*”], 485 F.3d 1041, 1048-51 (9th Cir. 2007).

Based in part on the legal conclusions drawn by this Court in *Gonzalez I*, the district court in August 2007 entered summary judgment against the plaintiffs on their NVRA and poll tax claims. Following trial, the district court in August 2008 entered judgment against the plaintiffs on all remaining issues.

As implemented by Arizona election officials, Prop 200 provides numerous

² These complaints did not challenge the welfare-related provisions of Prop 200. A previous challenge to those provisions was rejected by the federal courts. *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005).

methods by which voter registration applicants can provide satisfactory evidence of citizenship. The evidence at trial indicated that no individual Appellant was being prevented from registering to vote by Prop 200. Appellant Jesus Gonzalez apparently remained unregistered, but the evidence indicated that he could register at any time (both by mail or in person) if he would provide one of several acceptable types of information he possessed that would establish citizenship, including either the “A-number” from his Certificate of Naturalization or his valid U.S. passport.

In a decision issued on October 26, 2010, a three-judge panel of this Court affirmed in part and reversed in part. The panel upheld Prop 200’s polling place identification requirement, finding that the requirement violated neither § 2 of the Voting Rights Act, 42 U.S.C. § 1973, nor the anti-poll tax provisions of the Fourteenth and Twenty-Fourth Amendments. Slip Op. at 17671-17683. The panel held that Prop 200’s proof-of-citizenship requirement violated the NVRA insofar as it required an individual seeking to register to vote in federal elections to provide evidence of citizenship in addition to a sworn statement attesting to one’s citizenship. *Id.* at 17635-17671. Although the panel acknowledged that its interpretation of the NVRA directly conflicted with *Gonzalez I*, it concluded that neither the law of the case doctrine nor the law of the circuit doctrine required it to

abide by *Gonzalez I*'s holding. *Id.* at 17660-17670. The panel did not address Appellants' other challenges to Prop 200's proof-of-citizenship requirement.³

SUMMARY OF ARGUMENT

A grant of rehearing *en banc* in this case is virtually mandated. There now exist two panel decisions of this Court that espouse diametrically opposite interpretations of the NVRA. Confusion will reign in this area of the law until the Court grants rehearing *en banc* to resolve the conflict. Other States within the Ninth Circuit impose proof-of-citizenship requirements on voter registration applicants that exceed the minimal requirements imposed by the NVRA, and those requirements are likely to be challenged in light of the *Gonzalez II* panel decision. In the absence of an *en banc* decision from this Court, courts hearing such a challenge will be faced with an intractable dilemma: should they follow *Gonzalez I* or *Gonzalez II*? Indeed, Ninth Circuit precedent suggests that the appellate panel

³ Because the NVRA applies solely to registration for *federal* elections, Arizona remains free to enforce Prop 200's requirements on those seeking to register to vote in State and local elections. The panel nonetheless concluded that it need not address Appellants' other claims (that the proof-of-citizenship requirement imposes greater burdens on naturalized citizens than on non-naturalized citizens and burdens the fundamental right to vote in violation of the Fourteenth Amendment's Equal Protection Clause) because Arizona had "not indicated" that it intended to continue to enforce Prop 200 with respect to State and local elections in the event that it lost on the NVRA issue. Slip Op. at 17671 n. 20.

that hears that challenge should not attempt to choose but should instead issue a call for *en banc* review. Rather than waiting for that call and permitting several years of confusion to ensue, the Court should grant Arizona's petition and resolve the conflict as quickly as possible.

Review is also warranted because the *Gonzalez II* panel has done serious damage to the law of the circuit doctrine. The panel decision appears to be based on a holding that the law of the circuit doctrine does not apply when the prior panel decision was issued in an earlier phase of the same lawsuit. That holding contradicts binding Ninth Circuit precedent and appears to have been based on the panel's misunderstanding of the Court's *en banc* decision in *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997).

Finally, rehearing *en banc* is warranted because the panel read the NVRA more broadly than Congress ever intended. As a result, Arizona and other States will have a much more difficult time ensuring that those who register to vote are actually eligible to vote.

ARGUMENT

I. REHEARING *EN BANC* IS WARRANTED TO CLEAR UP THE MASSIVE CONFUSION CAUSED BY CONFLICTING PANEL DECISIONS REGARDING THE MEANING OF THE NVRA

Appellants cannot seriously contest that *Gonzalez I* and *Gonzalez II* directly

conflict with one another with respect to the meaning of the NVRA. *Gonzalez I* held that Prop 200's proof-of-citizenship requirement complied with the NVRA and concluded that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." 485 F.3d at 1050-51. *Gonzalez II* disagreed. It held that Prop 200's proof-of-citizenship requirement "conflicts with the NVRA's text, structure, and purpose." Slip Op. at 17652. It concluded that it was not bound to follow *Gonzalez I*'s interpretation of the NVRA because that interpretation was based on "a fundamental misreading of the statute" and was "clear error." *Id.* at 17665.

Gonzalez II did not, of course, purport to overrule *Gonzalez I*, nor did the panel possess the authority to do so. As a result, there now exist two Ninth Circuit panel decisions that directly conflict with one another and that both can lay claim to precedential authority.⁴ The only method by which the Court can eliminate the confusion created by these conflicting decisions is to grant the petition for rehearing *en banc*.

⁴ *Gonzalez II* did not contend that reconsideration was appropriate based on intervening controlling authority; its sole justification for reconsidering *Gonzalez I*'s NVRA holding was its belief that the holding was clearly erroneous. In other words, there is no reason, other than the say-so of the *Gonzalez II* majority, to prefer the holding of *Gonzalez II* to the holding of *Gonzalez I*.

The danger of confusion is not merely hypothetical. As Chief Judge Kozinski's dissent pointed out, numerous States require those seeking to register to vote to provide evidence of eligibility beyond the minimal requirements imposed by federal law.⁵ Slip. Op. at 17699. One of the listed States is Hawaii, which is located within the Ninth Circuit. Under *Gonzalez I*'s interpretation of the NVRA, those additional evidentiary requirements are undoubtedly permissible. 485 F.3d at 1050-51. Under *Gonzalez II*'s interpretation of the NVRA, the legality of such requirements is open to serious question. In light of *Gonzalez II*, legal challenges to those requirements can reasonably be anticipated.

A district court within the Ninth Circuit hearing such a challenge would be faced with an intractable dilemma. It would be faced with two conflicting and equally binding interpretations of the NVRA. *Amici* are unaware of a Ninth Circuit decision that would provide guidance in making the choice. The majority rule within the federal appellate courts is that the earlier of the two conflicting precedents should be followed. *See Wade v. Hewlett-Packard Development Co. Short Term Disability Plan*, 493 F.3d 533, 542 (5th Cir. 2007); *McMellon v.*

⁵ Federal law provides that the federal voter registration form must include a question regarding citizenship and must require all applicants to check one of two boxes explicitly indicating whether they are U.S. citizens or not U.S. citizens. 42 U.S.C. § 15483(b)(4).

United States, 387 F.3d 329, 333 (4th Cir. 2004); *Hiller v. Oklahoma ex rel. Used Motor Vehicle & Parts Comm’n*, 327 F.3d 1247, 1251 (10th Cir. 2003); *Morrison v. Amway Corp*, 323 F.3d 920, 929 (11th Cir. 2003); *Kovacevich v. Kent State Univ*, 224 F.3d 806, 822 (6th Cir. 2000); *Ryan v. Johnson*, 115 F.3d 193, 198 (3d Cir. 1997); *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

Thus, under the majority rule, district courts would be bound to ignore *Gonzalez II* and to follow *Gonzalez I*'s interpretation of the NVRA. But other federal appellate courts have adopted a rule that grants a court freedom “to choose which line of cases to follow,” based on which line the court finds more persuasive. *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000). The Ninth Circuit does not appear to have a clear rule governing this issue.⁶ Thus, when faced with the inevitable NVRA challenges of the sort at issue here, a district court within the Ninth Circuit would lack any guidance in making its choice.

Once such a case is appealed to this Court, the panel to which the case is assigned will face a similar dilemma. Indeed, an *en banc* decision of this Court indicates that the panel would not be permitted to engage in any sort of choosing

⁶ In *Greenhow v. Sec’y of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988), the Court noted several possible approaches to making the choice between conflicting panel decisions, it but said that none of those approaches had “an unimpaired claim to being the law of the circuit,” and it did not establish a single rule to be followed in future cases by federal district courts.

process but rather “must call for *en banc* review” prior to rendering a decision.

United States v. Hardesty, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*).

Hardesty relied on an earlier *en banc* circuit decision, which held:

We now hold that the appropriate mechanism for resolving an irreconcilable conflict is an *en banc* decision. A panel faced with such a conflict must call for *en banc* review, which the court will normally grant unless the prior decisions can be distinguished. Despite the “extraordinary” nature of *en banc* review, . . . and the general rule that *en banc* hearings are “not favored,” Fed.R.App.P. 35(a), *en banc* review is proper “when consideration by the full court is necessary to secure or maintain the uniformity of its decisions.” Fed.R.App.P. 35(a)(1).

Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1478-89 (9th Cir. 1987)

(citations omitted), *cert. denied*, 485 U.S. 989 (1988), *overruled on other grounds*, 490 U.S. 642 (1989).

Thus, it is highly likely that the Court eventually will be required to convene an *en banc* panel to resolve the conflict between *Gonzalez I* and *II*. It makes much more sense to convene such a panel now, rather than allowing confusion to build during the several years that are likely to elapse before the next NVRA case reaches the Court.

Moreover, confusion regarding voter registration procedures is particularly likely in Arizona itself if the petition is denied. The panel’s holding applies only to registration for federal elections; Arizona is free to continue to apply its proof-

of-citizenship requirements to those registering to vote in State and local elections. The panel observed that Arizona had “not indicated,” in the event of an unfavorable NVRA ruling, that it would establish separate voter registration systems for federal and State elections, and thus the panel deemed it unnecessary to rule on whether the Prop 200 proof-of-citizenship requirements violated Appellants’ constitutional rights. Slip Op. at 17671. But the panel’s observation overlooked the fact that Arizona law requires election officials to impose the proof-of-citizenship requirements. *See* A.R.S. § 16-166(F). Moreover, if election officials fail to enforce those requirements, Arizona law arguably provides individual citizens a right to seek a writ of mandamus compelling enforcement. Granting rehearing *en banc* will allow Arizona an opportunity to learn as early as possible whether *Gonzalez II* was correctly decided and thus whether a dual system of voter registration is really necessary.

II. EN BANC REVIEW IS WARRANTED BECAUSE THE PANEL HAS DONE SERIOUS DAMAGE TO THE LAW OF THE CIRCUIT DOCTRINE

En banc review is also warranted because the panel eviscerated the law of the circuit doctrine in a manner that it likely to lead to widespread confusion in future cases.

The law of the circuit doctrine provides that a panel of this Court lacks

authority to depart from the “precedential aspects” of a prior Ninth Circuit panel decision. *Old Person v. Brown*, 312 F.3d 1036, 1039 (2002). Moreover, *Old Person* makes clear that the law of the circuit doctrine requires adherence even when: (1) the prior panel decision was issued in the same case; and (2) the law of the case doctrine is inapplicable because one of the three exceptions to that doctrine is shown to exist. *Id.*⁷

The panel departed dramatically from that understanding of the law of the circuit doctrine. Under *Old Person*, only option (once it concluded that *Gonzalez I* was based on a fundamental misunderstanding of the NVRA) was to call for *en banc* review of the case. Instead, it concluded that the law of the circuit did not bar its course of action because: (1) *Gonzalez I*'s interpretation of the NVRA was “clearly erroneous,” and (2) no other panels had relied on *Gonzalez I*, and thus there was no danger that it would create a conflict with any decision besides *Gonzalez I*. Slip Op. at 17666-68.

The panel largely based its cramped understanding of the law of the circuit doctrine on the Court’s decision in *Jeffries v. Wood* [“*Jeffries V*”], 114 F.3d 1484

⁷ Applying the law of the circuit doctrine to cases in which an exception to the law of the case doctrine is found to exist does not render the latter doctrine superfluous. For example, the law of the circuit doctrine generally applies only to issues of law; thus, the doctrine would not require adherence to a finding of fact that a later panel deemed to be clearly erroneous.

(9th Cir. 1997) (*en banc*). Its reliance on *Jeffries V* was wholly misplaced and was based on a misunderstanding of the holding in that case. *Jeffries V* had virtually nothing to say about the law of the circuit doctrine. Rather, the Court addressed the law of the *case* doctrine, and it invoked the latter doctrine to *enforce* compliance with a prior panel decision (*Jeffries III*) and to castigate a later panel (*Jeffries IV*) for failing to comply with the doctrine. Nothing in *Jeffries V* can be interpreted as support for *any* interpretation of the law of the circuit doctrine, let alone a cramped interpretation.

Jeffries V involved a federal habeas challenge to a state criminal conviction. The appellants, Washington State corrections officials who sought to avoid *Jeffries III* and to affirm *Jeffries IV*, argued that *Jeffries III* was “clearly erroneous.” The appellee, a state prisoner seeking to overturn a murder conviction, argued that both the law of the case doctrine *and* the law of the circuit doctrine prevented the *Jeffries IV* panel from second-guessing *Jeffries III*. The *en banc* Court (*Jeffries V*) agreed that the later panel was bound under the law of the case doctrine to uphold *Jeffries III*, not only because *Jeffries III* was not “clearly erroneous” but also because it was “correct.” 114 F.3d at 1492. Having determined that the law of the case required reversal of *Jeffries IV*, the *en banc* panel had no occasion to consider whether the law of the circuit doctrine required

the same result. The *Gonzalez II* panel interpreted *Jeffries V*'s focus on the law of the case doctrine as an indication that that doctrine is the only relevant doctrine when considering two panel decisions arising in the same case. Slip Op. at 17666-17667. As the preceding discussion of *Jeffries V* makes clear, the panel's interpretation was wrong; *Jeffries V* did not discuss law of the circuit because it did not need to, not because it deemed the doctrine inapplicable.

Gonzalez II compounded its error by reading into *Jeffries V* an exception to the law of the circuit doctrine in cases in which the prior panel decision has not been relied on by other panels. Slip Op. at 17668. But *Jeffries V* cannot reasonably be understood to have created such an exception, given that (as noted above) the decision focused exclusively on the law of the case doctrine and had no reason to address the law of the circuit doctrine.

In a recent *en banc* decision, the Court reiterated its *Old Person* holding that, under the law of the circuit doctrine, a Ninth Circuit panel has "no discretion to depart from precedential aspects of our prior decision[s]." *United States v. State of Washington*, 588 F.3d 1270, 1278 n.9 (9th Cir. 2009). Indeed, in that case, the Court agreed to hear the case *en banc* without awaiting a three-judge panel hearing, because even if the panel could have revisited a prior panel decision "under one of the exceptions to the law of the case, *Jeffries [V]*, . . . it would still

have been bound by [the prior panel] opinion as the law of the circuit.” *Id.* *Gonzalez II* departs sharply from that understanding of the law of the circuit doctrine and calls into question how strictly the doctrine ought to be applied in future cases. The petition should be granted in order to resolve the conflict between the panel’s understanding of the law of the circuit doctrine and prior decisions of the Court.

III. EN BANC REVIEW IS WARRANTED BECAUSE THE PANEL INTERPRETED THE NVRA IN A MANNER THAT WILL MAKE IT DIFFICULT FOR ARIZONA AND OTHER STATES TO ENSURE THE INTEGRITY OF THE VOTER ROLLS

Rehearing *en banc* is warranted because the panel read the NVRA more broadly than Congress ever intended. As a result, Arizona and other States will have a much more difficult time ensuring that those who register are actually eligible to vote.

States historically have controlled voting eligibility requirements and the standards for determining eligibility, for both State and federal elections. State authority to oversee federal elections is set forth in Article I, § 4 of the Constitution, which provides: “The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof.”

The NVRA evidences a congressional intent to limit that State authority only to the extent explicitly set forth in the NVRA. The NVRA prescribes that States must permit voter registration for federal elections to be conducted by mail, and that States may not include in the mail-in form “any requirement for notarization or other formal authentication.” 42 U.S.C. § 1973gg-7(b)(3). But the NVRA does not prohibit other State registration requirements reasonably designed to ensure that applicants are eligible to vote. To the contrary, the NVRA explicitly contemplates that mail voter registration forms devised by the federal government and/or by state governments may appropriately seek applicant information not explicitly set forth in the statute: it provides that mail voter registration forms may require “such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration.” 42 U.S.C. § 1973gg-7(b)(1). Voter registration applicants are ineligible to register unless they are U.S. citizens; accordingly, it is difficult to dispute that State election officials need at least some evidence that the applicant is a U.S. citizen to be able to assess his eligibility.

The panel’s contention that the NVRA sought to deny State officials access to such evidence is untenable. The panel held that States are *required* to register mail-in applicants who provide all information mandated on the federal form and

whose applications include nothing affirmatively demonstrating ineligibility. Pet. App. at 16757. Under that interpretation of the NVRA, Arizona election officials will be required to register all such applicants even though they know, for example, that an applicant is a convicted felon or that he has listed an address at which they suspect he may not reside. To interpret the NVRA as prohibiting States from requiring applicants to provide evidence of citizenship in connection with their mail-in registration forms – even though, as Appellants concede, such evidence can be and is required in all other registration settings – would be inconsistent with the NVRA’s stated purpose of “protect[ing] the integrity of the electoral process.” 42 U.S.C. § 1973gg(b)(3).

Prop 200 addresses an issue of utmost importance in any democracy: maintaining the integrity of the electoral process. If our recent history of hotly contested presidential elections has taught us anything, it is that the common bonds that hold us together as a society cannot long endure unless the fairness of elections is not subject to question. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process.”).

The panel’s decision overturns a measure that the people of Arizona

determined was an important safeguard against fraudulent voting by noncitizens. It did so based on an interpretation of the NVRA that ascribes to Congress an intent to prevent States from taking the most basic steps designed to ensure that registration applicants really are U.S. citizens. *En banc* review is warranted to determine whether Congress really intended to impose such drastic restrictions on State oversight of election standards.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Protect Arizona NOW, *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rules 29-2(c)(2) and 32-1, I hereby certify that the foregoing brief of *amici curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 4,158, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, I electronically filed the brief of *amici curiae* Protect Arizona NOW, et al., with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed a copy of the foregoing document by first-class U.S. Mail, postage prepaid, to the following participants on the 24th day of November, 2010, to:

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