No. 08-17094, 08-17115

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESUS 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.

KEN BENNETT, in his official capacity as SECRETARY OF STATE OF ARIZONA.

Defendant-Appellee.

On appeal from the United States District Court for the District of Arizona

No. CV-06-01268-PHX-ROS
No. CV-06-01362-PHX-ROS

APPELLEES STATE OF ARIZONA AND SECRETARY OF STATE'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

The State of Arizona and Secretary of State Ken Bennett (Secretary) petition this Court under Federal Rule of Appellate Procedure 35(b) to rehear this appeal en banc because the panel's majority opinion in *Gonzalez v. Arizona*, -----F.3d---, 2010 WL 4192623 (9th Cir. (Ariz.) Oct. 26, 2010) (*Gonzalez II*), which held that Arizona's requirement that people registering to vote provide evidence of citizenship violates the National Voter Registration Act (NVRA), conflicts with a previous panel's opinion in *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) *(Gonzalez I)*.[1]

This proceeding also involves a question of exceptional importance; voting is a fundamental right and the public's "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

FACTUAL AND PROCEDURAL HISTORY

In 2004, Arizona voters passed Proposition 200, which amended Arizona Revised Statutes (A.R.S.) §§ 16-152 and 16-166 to require persons wishing to register to vote for the first time in Arizona to submit proof of citizenship, and to require all Arizona voters to present identification when voting in person at the polls on election day. *Gonzalez I*, 485 F.3d at 1047. Plaintiffs-Appellants filed a

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[1] Copies of both opinions are attached as Addenda 1 and 2.

complaint in May 2006 attacking the Proposition on the following grounds: (1) that it was an unconstitutional poll tax; (2) that it violated the Equal Protection Clause of the Fourteenth Amendment; (3) that it violated the Fourteenth Amendment's guarantee of the fundamental right to vote; (4) that it violated Section 2 of the Voting Rights Act; (5) that it violated two provisions in the Civil Rights Act; and (6) that it violated the NVRA. *Id.* at 1046. They also immediately filed a motion seeking a preliminary injunction preventing the implementation of both the registration and identification-at-the-polls requirements. *Id.* at 1047. After the district court denied their preliminary injunction motion, Plaintiffs-Appellants appealed, and a motions panel of this Court granted their emergency motion for injunction pending appeal. *Id.* The Supreme Court subsequently vacated the motions panel's injunction. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Plaintiffs-Appellants limited their appeal in this Court to the district court's denial of a preliminary injunction with respect to Proposition 200's proof-of-citizenship requirement. *Gonzalez I*, 485 F.3d at 1048. After briefing and argument, the *Gonzalez I* panel affirmed the district court's denial of the preliminary injunction, ruling as a matter of law that Proposition 200's proof-of-citizenship registration requirement was not a violation of the NVRA. *Id.* at 1050-51. The *Gonzalez I* panel also held as a matter of law that the registration requirement was not a poll tax. *Id.* at 1049.

After *Gonzalez I* was issued, the district court relied on it to grant the Secretary's motion for summary judgment, ruling that the proof-of-citizenship requirement was not a violation of the NVRA and not a poll tax. *Gonzalez II*, 2010 WL 4192623, at *2. Finally, after extensive discovery taken by Plaintiffs-Appellants, the trial court resolved the remaining claims in favor of Defendants-Appellees. *Id*. In the ensuing appeal, Plaintiffs-Appellants again challenged, among other issues, the determination that Arizona's proof-of-citizenship registration requirement does not violate the NVRA. *Id*.

On October 26, 2010, in a 2-1 decision, the panel in *Gonzalez II* held that the NVRA preempted Proposition 200's proof-of-citizenship requirement. *Id.* at *3-16. The majority panel also held that it was not bound to follow the previous panel's decision to the contrary by either the doctrine of law of the case or the doctrine of law of the circuit. *Id.* at *16-21.

ISSUES PRESENTED FOR REHEARING

1. Should this Court grant rehearing en banc because the majority panel erroneously held that the doctrines of law of the case or law of the circuit did not require it to follow the previous panel's decision regarding NVRA preemption?

2. Should this Court grant rehearing en banc because the panel erroneously held, contrary to the ruling by a previous panel in this Circuit in a

published opinion that the NVRA preempts Arizona's proof-of-citizenship requirement?

ARGUMENT

I. Both the Law of the Circuit and the Law of the Case Preclude the Panel's Holding in *Gonzalez II* That the NVRA Preempts Arizona's Proof-of-Citizenship Requirement.

In *Gonzalez I*, the prior panel held, in a published decision, that

> the language of the [NVRA] does not prohibit documentation requirements. Indeed, the statute permits states to "require[] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." The NVRA clearly conditions eligibility to vote on United States citizenship. Read together, these two provisions plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote.

Gonzalez I, 485 F.3d at 1050-51 (internal citations omitted). The *Gonzalez I* holding is both law of the circuit and the law of this case regarding whether the NVRA preempts Proposition 200's proof-of-citizenship requirement, and, therefore, is dispositive of this issue. Nevertheless, the *Gonzalez II* panel reversed *Gonzalez I* and held that "the NVRA supersedes Proposition 200's voter registration procedures, and that Arizona's documentary proof of citizenship requirement for registration is therefore invalid." *Gonzalez II*, 2010 WL 4192623, at *1. Chief Judge Kozinski dissented from the majority's conclusion on the grounds that not only was *Gonzalez I* correctly decided, but also that the law of the

circuit and the law of the case required the *Gonzalez II* panel to follow *Gonzalez I*. The dissent is right on both counts.

A. Law of the Circuit and Law of the Case.

The doctrines of law of the circuit and law of the case are similar, but they have important distinctions. The fundamental purpose underlying both doctrines is to avoid inconsistency and to insure that courts act alike in all cases of like nature. The ultimate effect of each doctrine, however, differs. Both doctrines apply in this case.

The law of the case doctrine posits that, as a general rule, when multiple appeals are taken in the course of a single piece of litigation, one panel of an appellate court will not reconsider decisions rendered by a prior panel in a previous appeal in the same case. *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995). This doctrine is prudential in nature, and is not a limitation on a court's power to revisit its prior decisions. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1391 (9th Cir. 1995) ("The doctrine 'merely expresses the practice of court generally to refuse to reopen what has been decided, not a limit to their power.'") (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *Merritt v. Mackey*, 932 F.2d 1217, 1320 (9th Cir. 1991) ("The doctrine is discretionary, not mandatory."). Although a court may reopen prior decisions, that discretion is limited and lower courts should be "loathe" to reconsider issues already decided "in the absence of extraordinary

circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). In this circuit, the law of the case controls in all but three exceptional circumstances: (1) where the decision is clearly erroneous and its enforcement constitutes a manifest injustice; (2) where intervening, controlling authority renders reconsideration appropriate; or (3) substantially different evidence was adduced at a later trial. *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.) (en banc) (*Jeffries V*), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997).

While the law of the case doctrine is a prudential creation of the courts, the law of the circuit doctrine is derived from legislation and from the structure of the federal courts of appeals. Courts of appeals sit in panels, or divisions, of "not more than three judges" pursuant to the authority granted in 28 U.S.C. § 46(c). The "decision of a division" is "the decision of the court." Revision Notes to 28 U.S.C. § 46 (citing *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941)). While the law of the case doctrine allows for certain exceptions, the law of the circuit doctrine does not. One three-judge panel does not have the authority to overrule a published decision of another three-judge panel of the court. *United States v. Washington*, 593 F.3d 790, 798 n.9 (9th Cir. 2010) (*Washington IV*). Only the Supreme Court or the Court of Appeals sitting en banc has that authority.

Id.; *see also United States v. Ruhe*, 191 F.3d 376, 388 (4th Cir. 1999) ("[A]s a simple panel, we are bound by prior precedent from other panels in this circuit absent contrary law from an *en banc* or Supreme Court decision.").

B. Law of the Circuit Required the *Gonzalez II* Panel to Follow the Holding in *Gonzalez I*.

The law of the circuit doctrine applies whether the published decision is in the same or a different case. Ninth Circuit law is well-settled on this point—three-judge panels *must* follow prior published opinions in the same case as law of the circuit. *Washington IV*, 593 F.3d at 798 n.9 (holding rehearing en banc necessary because three-judge panel was bound by law of the circuit); *Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 574 (9th Cir. 2005) ("[W]e have no discretion to depart from precedential aspects of our prior decision . . ., under the general law-of-the-circuit rule"); *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002) (same) (*Old Person II*).

Where, as in this case, both doctrines are in play, the law of the circuit doctrine supersedes the law of the case doctrine when panels hear multiple appeals from a single case. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 772 (9th Cir. 1996). Thus, even if one of the exceptions to the law of the case applied, the *Gonzalez II* panel remained bound by the published opinion of the prior panel as the law of the circuit and had no discretion to depart from it.

The *Gonzalez II* majority conflates the two principles (to the detriment of both), applies the exceptions to the law of the case doctrine, and finds that the *Gonzalez I* decision was clearly erroneous because it was based on "a fundamental misreading of the statute," *Gonzalez II*, 2010 WL 4192623, at *18, and that "this erroneous decision, were it to stand, would work a manifest injustice" because it would "impede the implementation of a major congressional enactment" and "pose[] a significant inequity to citizens who are required under the state law to navigate obstacles that do not exist under federal law in pursuit of the fundamental right to vote." *Id.* at *19. Despite the clear rule that only the Supreme Court or an en banc court can overrule a published decision, *Old Person II*, 312 F.3d at 1039, the majority creates an exception to the rule, arguing that it has the discretion to review the prior panel's published decision because "no subsequent published decision has relied upon the prior panel's decision for the proposition to be overturned," and under those circumstances, the law of the circuit doctrine does not preclude a subsequent panel from revising prior decisions in the same case as long as an exception to the law of the case is satisfied. *Id.* This is an unprecedented power never before granted to a single panel of the court, and it is contrary to the established rule that only an en banc court can overrule a published decision.

The majority derives its exception to the law of the circuit rule from *Jeffries V*, where the court cautioned that where "subsequent panels have relied on the initial decision," a subsequent panel "must be exceedingly careful in altering the law of its earlier opinion. Otherwise, intra-circuit conflict may arise, posing serious difficulties." *Jeffries V*, 114 F.3d at 1492. In *Jeffries V*, the Court, sitting en banc, held that the three-judge panel in *Jeffries IV* "should not have exercised its discretion to depart from its prior decision" in *Jeffries III*, in part because subsequent panels had relied upon the published decision, but also because none of the law of the case exceptions were applicable. *Jeffries V*, 114 F.3d at 1492-93.

Seizing upon the concept of subsequent reliance, the majority concludes that because no subsequent published Ninth Circuit opinion had relied on *Gonzalez I*, it was not bound by the prior panel's published opinion. The majority's reliance on *Jeffries V*, however, is misplaced. As the dissent notes, *Jeffries V* was about how law of the case should be applied when subsequent panels have relied on an initial decision, not law of the circuit. Furthermore, the *Jeffries V* majority noted that "[o]nly an en banc panel may overturn existing Ninth Circuit precedent" and that the law of the circuit doctrine also would have precluded the *Jeffries IV* panel from contradicting the *Jeffries III* opinion. *Id.* at 1493 & n.12.

The majority cites to two additional Ninth Circuit cases, *Mendenhall v. NTSB*, 213 F.3d 464, 469 (9th Cir. 2000) and *Tahoe-Sierra Pres. Council, Inc. v.*

Tahoe Reg'l Planning Agency, 216 F.3d 764, 786-87 (9th Cir. 2000), in support of its new exception to the law of the circuit rule, claiming that each reversed "a prior published appellate opinion as clearly erroneous under the exceptions to the law of the case" doctrine. *Gonzalez II*, 2010 WL 4192623, at *19. As noted in the dissent, "neither case contradicted the prior panel's legal ruling and therefore never disturbed the law of the circuit." *Id.* at *30. Because neither case departed from the precedential aspects of the prior panels' opinions, neither case, therefore, supports the *Gonzalez II* majority's conclusion. *Id.*

C. The Holding of *Gonzalez I* Was Not Clearly Erroneous and Is Binding as Law of the Case.

1. The Clearly Erroneous Test.

Even if the panel were free to create an exception to the law of the circuit doctrine, which they were not, the holding in *Gonzalez I* was not clearly erroneous and remains binding as the law of this case. In order for the "clearly erroneous" exception to allow the majority to revisit *Gonzalez I*, the holding must not only be wrong, it must be clearly wrong. *Leslie Salt*, 55 F.3d at 1393; *Merritt*, 932 F.2d at 1322 ("The question before us on this appeal is whether the majority decision in *Merritt I* is so *clearly* incorrect that we are justified in refusing to regard it as the law of the case."). Thus, as long as the *Gonzalez I* interpretation of the NVRA was plausible, it cannot be found to be clearly erroneous. *Leslie Salt*, 55 F.3d at 1394.

2. The Clearly Erroneous Exception Does Not Apply.

The majority bases its application of the clearly erroneous exception on what they see as the *Gonzalez I* panel's "misreading" of the NVRA. *Gonzalez II*, 2010 WL 4192623, at *19. The majority characterizes the *Gonzalez I* panel's conclusion as being

> based on *three provisions* of the statute. First, the panel indicated that under the NVRA states must "either 'accept and use the mail voter registration form prescribed by the Federal Election Commission' or, in the alternative, 'develop and use [their own] form,' as long as the latter conforms to the federal guidelines." *Gonzalez I*, 485 F.3d at 1050 (second alteration in original) (citations omitted). Second, the panel asserted that the NVRA "prohibits states from requiring the form to be notarized or otherwise formally authenticated." *Id.* Last, the panel described the NVRA as "permit[ting] states to 'require[] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." *Id.* (alterations in original). *Construing these provisions together*, the panel concluded that the statute plainly contemplates allowing states to require voters to present at least some evidence of citizenship at the time of registration. *Id.* at 1050.

Id. at *17 (emphasis added). According to the majority, the *Gonzalez I* panel misread the first provision, believing that the NVRA gives the states freedom to eschew accepting and using the federal form in favor of a state-developed form, when in actuality the NVRA mandates that the federal form be accepted and that a state-developed form may only be used in addition to accepting and using the federal form. *Id.* at *18. Because the *Gonzalez I* panel relied on this

misapprehension in reaching its conclusion, so reasons the majority, its conclusion is clearly wrong and therefore subject to the law of the case exception. *Id.*

There are two problems with this. First, as Judge Kozinski states in his dissent, it is entirely reasonable from reviewing the *Gonzalez I* panel's language that they easily could have meant that "a state may rely exclusively on the federal form or, in the alternative, also develop a state form" and "[t]his is a perfectly accurate description of the NVRA." *Id.* at *33.

Second, contrary to the assertion by the *Gonzalez II* majority, the *Gonzalez I* panel actually explicitly relied on the two provisions of the NVRA that speak specifically to voting eligibility and U.S. citizenship as an eligibility requirement.

> The language of the statute does not prohibit documentation requirements. Indeed, the statute permits states to "require[] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." [42 U.S.C.] § 1973gg-7(b)(1). The NVRA clearly conditions eligibility to vote on United States citizenship. *See* 42 U.S.C. §§ 1973gg, 1973gg-7(b)(2)(A). Read together, *these two provisions* plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote.

Gonzalez I, 485 F.3d at 1050-51 (emphasis added). Thus, it is apparent that the *Gonzalez I* panel did not use as a major factor the supposedly "misread" provision, as claimed by the majority, in coming to its decision. And, there is nothing to indicate that the *Gonzalez I* panel misinterpreted the two provisions they explicitly relied upon in concluding that Arizona's proof-of-citizenship registration

requirement did not violate the NVRA. The *Gonzalez I* panel did not misunderstand the law or the facts, and simply because the *Gonzalez I* reached a different conclusion than the *Gonzalez II* majority would have had they been considering the case the first time around is not sufficient to support a conclusion that the *Gonzalez I* decision was clearly erroneous.

II. The *Gonzalez I* Panel Correctly Decided that the NVRA Does Not Preempt Arizona's Proof-of-Citizenship Requirement.

States have constitutional authority to develop complete election codes for both federal and state elections that regulate not only the time, place, and manner of elections, but the registration of voters, as well as the prevention of fraud and corrupt practices. *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (noting the "bre[a]dth" of states' constitutional authority to regulate in the area of elections, including authority to promulgate election codes, to regulate registrations, prevent fraud, supervise voting, and to perform other functions). The NVRA does not prohibit states from acting within that constitutional authority to regulate elections by implementing regulations that permit states to assess voter eligibility.

The NVRA provides that states must "accept and use" the federal form. 42 U.S.C. § 1973gg-4(a)(1). In addition to accepting and using the federal form, states may develop and use a registration form as long as it "meets all of the criteria stated in [42 U.S.C. §] 1973gg-7(b)." *Id.* § 1973gg-4(a)(2). The NVRA also provides that the forms may "require[] such identifying information . . . as is

necessary to enable . . . election official[s] to assess the eligibility of the applicant." *Id.* § 1973gg-7(b)(1). The NVRA includes citizenship as an eligibility requirement. *Id.* § 1973gg-7(b)(2)(A). After a form is submitted, states must notify applicants of the "disposition" of their application. *Id.* § 1973gg-6(a)(2).

Contrary to the *Gonzalez II* majority's conclusion, the proof-of-citizenship registration requirement does not conflict with the NVRA's provision requiring states to "accept and use" the federal form. In Arizona, individuals may register using the federal form, just as they may register using the state form, and Arizona accepts both forms and makes use of them in registering voters. [Supplemental Excerpts of Record (SER) 23 ¶ 2, filed Feb. 4, 2009.] Applicants must, however, when submitting either form, include information required by state law, including satisfactory evidence of citizenship. *See* A.R.S. § 16-166(F) (listing acceptable forms of proof); [SER 23 ¶ 3]. Nothing in the NVRA says that states cannot require information in addition to the federal form.[2] And, as noted above, the NVRA says that states may ask for "identifying information . . . necessary . . . to assess the eligibility." 42 U.S.C. § 1973gg-7(b)(1). Evidence of citizenship is necessary to assess an applicant's eligibility, and, therefore, requiring it is compatible with the provisions and intent of the NVRA.

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[2] The NVRA explicitly prohibits just one thing—"notarization or other formal authentication." *Id*. § 1973gg-7(b)(3). A documentation requirement is not a notarization or formal authentication.

The majority states that if they agreed with the Secretary's arguments, then states would be free to add "any requirements they saw fit"—including a notarization requirement. *Gonzalez II*, at *12. This is, quite simply, not what the Secretary has argued or contends. Rather, states may only request additional identifying information when that information is necessary to assess eligibility. And since citizenship is an eligibility requirement, the states must be free to, at least to some extent, ask for information to enable them to assess citizenship.

The *Gonzalez II* majority's conclusion that "accept and use" means that the states cannot require any information in addition to that requested by the federal form itself implicates the registration procedures of several other states. As noted in the *Gonzalez II* dissent, other states require additional information in connection with the federal form, and the federal website containing the current federal form accommodates these additional requirements. *Id*. at *35. Like Arizona's supplemental informational requirement, these states require additional information to assess eligibility. The majority's holding would call into question these other states' requirements as well.

Because the language of the NVRA, which acknowledges citizenship as an eligibility requirement and allows states to require additional information to assess eligibility (including citizenship) when accepting and using the federal and state

forms, is compatible with the states' requiring evidence of citizenship, the NVRA does not preempt Arizona's proof-of-citizenship requirement.

CONCLUSION

The Court should grant the rehearing en banc.

Respectfully submitted this 16th day of November, 2010.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 40-1(a)

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 40-1(a) because it contains 3,740 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

/s Carrie J. Brennan
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 2010, I electronically filed the foregoing document with the Clerk of the Court for the United State 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 foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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