No. 08-17094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ, *et al.*,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
Case No. CV 06-01268-PHX-ROS

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

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INTRODUCTION

Pursuant to this Court's Order, dated December 10, 2010, Appellants Maria Gonzalez, *et. al.*, submit this response to Appellees' petition to rehear this appeal *en banc*, under FEDERAL RULE OF APPELLATE PROCEDURE 35(b). *See* Docket No. 135. In view of the limited nature of the panel's ruling, and the fact that the holding is supported by well-established Ninth Circuit precedent, Appellants respectfully submit that this appeal is not appropriate for *en banc* consideration.

In this case, the panel – including former U.S. Supreme Court Justice Sandra Day O'Connor sitting by designation – carefully modified the clearly erroneous legal analysis of a prior panel in this same case. *See Gonzalez v. Arizona ("Gonzalez II")*, No. 08-17094, 2010 WL 4192623, at *16-21 (9th Cir. Oct. 26, 2010) (modifying clearly erroneous analysis in *Gonzalez v. Arizona ("Gonzalez I")*, 485 F.3d 1041 (9th Cir. 2007)). The panel adjudicated issues raised in connection with the law of the case doctrine by correctly and faithfully applying the test set forth in *Jeffries v. Wood ("Jeffries V")*, 114 F.3d 1484 (9th Cir. 1997) (*en banc*) (both majority and dissent recognizing discretionary nature of the law of the case doctrine). Indeed, the panel's disposition of this appeal is unremarkable: the decision can be interpreted and applied without difficulty because its legal analysis and outcome does not conflict with Ninth Circuit precedent, and does not create a conflicting line of authority that should be resolved *en banc*.

Calls for this Court to adopt and apply a doctrine of "law of the circuit" are inappropriate here. This Court declined to follow such a route in *Jeffries V*. Appellees obfuscate the legal issues presented in this voting rights case by improperly suggesting that there is an "interplay between the law-of-the-case and the law-of-the-circuit doctrines" in this appeal. *Jeffries V*, 114 F.3d at 1511 n.16 (Kozinski, J., dissenting). Such is not the case. The dissent's disagreement with the Court's refusal to articulate a doctrine of "law of the circuit" in *Jeffries V* is well-known, but this alone does not make this appeal appropriate for *en banc* review. *Compare Jeffries V*, 114 F.3d at 1511 n.16 (Kozinski, J., dissenting) (disagreeing with the *en banc* Court's approach to the law of the case doctrine) *with Gonzalez II*, 2010 WL 4192623, at *31 (Kozinski, J., dissenting) (same).

In *Jeffries V* this Court, sitting *en banc*, declined to follow the approach proposed by Appellees and the dissent in this case, to adopt and apply a "law of the circuit" doctrine. Instead, *Jeffries V* relied exclusively on law of the case, well-developed in this circuit, to resolve the issues before the Court. Insofar as *Jeffries V* represents the Ninth Circuit's settled approach to the law of the case doctrine, and because the factual and legal complexities of this voting rights action render this case particularly ill-suited for re-examining *Jeffries V*, Appellants respectfully submit that this appeal is not appropriate for *en banc* consideration.

As discussed below, the panel correctly applied *Jeffries V* in this case. Maintaining public confidence in this Court's decisions – and preserving the integrity of its rulings – compelled the modification of the clearly erroneous legal analysis in *Gonzalez I*.

COUNTER STATEMENT OF FACTS

Proposition 200, adopted by Arizona voters in 2004, adds to the State's registration requirements by requiring prospective voters to present documentary proof of U.S. citizenship in order to register to vote. In the first 17 months following the implementation of Proposition 200, Arizona officials rejected over 31,000 applications for voter registration because the applicants failed to satisfy the additional paperwork requirements of the new law.[1] Voter registration in community-based voter drives plummeted 44%.[2]

Arizona county recorders now automatically reject all federal applications for voter registration, unless the applicant also submits the additional information required by the State pursuant to Proposition 200.[3] Since the plain language of the National Voter Registration Act of 1993 ("NVRA") requires states to "accept and use" the federal mail voter registration form as an integral component of a uniform,

[1] ER 3, CR 1041 at 13.
[2] ER 8, Tr. Ex. 966.
[3] ER 3, CR 1041 at 4; ER 9 at 102-103.

national system of voter registration, Arizona's refusal to "accept and use" the federal form violates the NVRA and is preempted. *See* 42 U.S.C. § 1973gg-4.

The voting restrictions imposed by Arizona's Proposition 200 – ostensibly to curb registration by immigrants who are not qualified to vote – come at a time when Latinos comprise Arizona's fastest-growing citizen voting age population and the State is engulfed in a heated debate about immigration. *See, e.g.*, *United States v. Arizona*, No. 10-16645 (9th Cir. argued Nov. 1, 2010) (challenging Arizona's enactment of immigration-related laws); *see also Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3498 (2010) (argued on Dec. 8, 2010) (same).

COUNTER PROCEDURAL BACKGROUND STATEMENT

Appellants, including U.S. citizens improperly denied voter registration pursuant to Proposition 200, filed their challenge on May 9, 2006, and moved for a preliminary injunction.[4] The district court denied the preliminary injunction motion. Plaintiffs appealed and filed an Emergency and Urgent Motion for Injunction Pending Appeal. On October 5, 2005, this Court granted the emergency motion, and enjoined implementation of Proposition 200. Arizona and four counties appealed that ruling to the U.S. Supreme Court, which vacated the Ninth Circuit's interim order. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Supreme

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[4] ER 7, CR 1; ER 4, CR 352.

Court, however, carefully noted that "we express no opinion here on the correct disposition" of these appeals "after full briefing and argument," and remanded to this Court for further proceedings. *Id.*

In a summary ruling at the preliminary injunction stage, a motions panel of this Court subsequently affirmed the district court's denial of preliminary injunctive relief, and found that the NVRA permits state-imposed documentary proof of citizenship requirements for voter registrants. *Gonzalez I*, 485 F.3d at 1041 (summarily disposing of complex NVRA issue in nine sentences without any meaningful legal analysis).

The district court granted summary judgment against Plaintiffs on their NVRA, Supremacy Clause and 24th Amendment claims on August 28, 2007.[5] Following a trial on the merits, the district court ruled against Plaintiffs on their remaining claims on August 20, 2008.[6]

Plaintiffs timely appealed,[7] and on October 26, 2010, in a 2-1 decision, a panel held that the NVRA preempted Proposition 200's proof of citizenship requirement. *Gonzalez II*, 2010 WL 4192623, at *12-13. Carefully applying the stringent standard set forth in *Jeffries V*, the panel concluded that it could not follow the prior panel's decision in *Gonzalez I* that the NVRA permits state-

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[5] ER 5, CR 330.
[6] ER 3, CR 1041, ER 2, CR 1042.
[7] ER 1, CR 1045.

imposed documentary proof of citizenship requirements for registrants using the federal voter registration application ("Federal Form") because this conclusion was clearly erroneous and contravened the text, structure and purpose of the NVRA. The panel modified the clearly erroneous legal analysis of the NVRA in *Gonzalez I* because it would work manifest injustice on Appellants.

ARGUMENT

I. The Law of the Circuit and Law of the Case Doctrines Do Not Preclude the Panel's Holding in *Gonzalez II* That the NVRA Preempts Arizona's Proof of Citizenship Requirement

A. The Law of the Case

Contrary to Appellees' contention, the panel properly found that it was appropriate to exercise its discretion to modify *Gonzalez I*'s clearly erroneous legal analysis of the NVRA because it would work a manifest injustice on Appellants if it was left undisturbed. *See, e.g.*, *Jeffries V*, at 1510 (Kozinski, J., dissenting) ("The court may – nay it must – go ahead and correct its own error, for no judicial sin is worse than issuance a judgment the judge knows to be wrong on the facts or law."). The panel's holding was entirely permissible under well-established Ninth Circuit law, including *Jeffries V*, and falls squarely within its judicial discretion. *See Jeffries V*, at 1492 ("We are mindful of the danger of reducing law of the case to a set of categorical rules, mechanically applied. Law of the case is not a

limitation on judicial power, but rather a guide to discretion.") (internal quotation marks and citations omitted).

Under the law of the case doctrine, "one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995) (citation and internal quotation marks omitted); *see also Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979) (same).

Notably, this Court has expressly found that "law of the case is a discretionary doctrine. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Jeffries V*, 114 F.3d at 1489 (citation and internal quotation marks omitted); *see Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) ("The doctrine is discretionary, not mandatory."); *see also King v. West Virginia*, 216 U.S. 92, 101 (1910) ("there is nothing in the Constitution of the United States to require [invocation of the doctrine], or to prevent a [court] from allowing a past action to be modified while a case remains in court"). The law of the case doctrine "is purely judge-made . . . to help manage efficiently their own affairs." *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 518 (9th Cir. 1989). It is, therefore, "a voluntary limitation," *Russell v. Comm'r of Internal Revenue*, 678 F.2d 782, 785

(9th Cir. 1982), that "directs a court's discretion," but "does not limit the tribunal's power," *Arizona v. California*, 460 U.S. 605, 618 (1983).

Courts have never construed this prudential doctrine as "an inflexible straightjacket that invariably requires rigid compliance." *Ne. Utils. Serv. Co. v. Fed. Energy Regulatory Comm'n*, 55 F.3d 686, 688 (1st Cir. 1995). In fact, this Court has identified three exceptional circumstances in which the law of the case should not operate as a constraint on judicial review: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries V*, 114 F.3d at 1489 (citations, internal quotation marks, and footnote omitted). In the instant case, adherence to the law of the case doctrine is inappropriate because the first exception applies.

As the *Gonzalez II* panel aptly recognized, the prior panel's conclusion that the NVRA permits state-imposed documentary proof of citizenship requirements on registrants using the Federal Form was based on a clearly erroneous and fundamental misreading of the NVRA. The NVRA simply does not give states freedom to "either" accept and use the Federal Form "or, in the alternative," develop their own form. *Compare Gonzalez II*, 2010 WL 4192623, at *16-21 (properly analyzing the NVRA) *with Gonzalez I*, 485 F.3d at 1041 (summarily

disposing of complex NVRA issue in nine sentences without any meaningful legal analysis). By its express terms, the NVRA commands that states – without exception – "shall" accept and use the Federal Form. *See* 42 U.S.C. § 1973gg-4(a). If states develop their own form, it can be used only "in addition to" accepting and using the Federal Form. *Id*.

As the *Gonzalez II* panel aptly concluded, *Gonzalez I*'s perfunctory legal analysis contravened the text, structure and purpose of the NVRA. Allowing *Gonzalez I*'s clearly erroneous legal analysis to stand would result in a manifest injustice because it would not only impede the implementation of a major congressional enactment, but also pose a substantial burden and inequity on Arizona residents who are required under state law to produce documentation that is simply not required or contemplated under federal law to exercise their fundamental right to vote. Therefore, contrary to Appellees' and the dissent's argument, the holding in *Gonzalez II* falls squarely within a special exception set forth in *Jeffries V*, and adherence to *Gonzalez I* would put this Court on a course that is sure error.

B. Law of the Circuit

In an attempt to obfuscate the legal issues presented in this voting rights case, Appellees and the dissent argue that, under the "law of the circuit" doctrine, *Gonzalez I* cannot be revised because the decision is a published opinion. This

argument is unfounded. The Ninth Circuit has declined to adopt a law of the circuit doctrine; thus it does not supersede or supplant the law of the case doctrine. Petition for Rehearing En Banc at 7 (misrepresenting Ninth Circuit precedent and improperly asserting that "the law of the circuit doctrine supersedes the law of the case doctrine").

Tellingly, language in the *Jeffries V* dissent reveals that under existing Ninth Circuit precedent, the law of the circuit doctrine does not preclude the application of the law of the case doctrine. *See Jeffries V*, 114 F.3d at 1511 n.16 (Kozinski, J., dissenting) (proposing – without persuading the *en banc* Court – "that, whenever law of the case and law of the circuit problems arise in the same case, the law of the circuit principle supplants any law of the case considerations"). As the panel aptly recognized in *Gonzalez II*, the dissent's proposed approach in *Jeffries V* – which continues to be stubbornly and improperly advanced in this appeal – has not been adopted by this Court.

Notably, even though *Gonzalez I* is a published opinion, no other panel has relied on *Gonzalez I* for the proposition that *Gonzalez II* modified. As the panel correctly concluded, under such circumstances, the law of the circuit doctrine does not preclude the modification of a prior decision in the *same case* under a well-established exception to the law of the case doctrine. *See, e.g.*, *Mendenhall v. Nat'l Transp. Safety Bd.*, 213 F.3d 464, 469 (9th Cir. 2000) (reversing a prior

published appellate opinion as clearly erroneous under exceptions to the law of the case doctrine); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 786-87 (9th Cir. 2000) (same). In light of *Mendenhall* and *Tahoe-Sierra*, it is disingenuous for Appellees to claim that the panel in this case exercised "an unprecedented power never granted to a single panel of the Court." Petition for Rehearing En Banc at 8. This alarmist language is a thinly veiled effort to subject the panel's careful and faithful application of *Jeffries V* to *en banc* review.

Appellees and the dissent argue that *Mendenhall* and *Tahoe-Sierra* do not support the holding in *Gonzalez II* because neither case "departed from *precedential aspects* of the prior panels' opinions." Petition for Rehearing En Banc at 10 (emphasis added). Aside from the difficulty and subjectivity inherent in parsing the purportedly precedential and non-precedential "aspects" of *Mendenhall* and *Tahoe-Sierra*, Appellants respectfully submit that these cases cannot be meaningfully distinguished from *Gonzalez II*. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("We adhere . . . not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). Ultimately, *Mendenhall* and *Tahoe-Sierra* modified the adjudication

of points there in issue thus changing the legal relationship between the parties and outcome of the litigation. As such, these cases illustrate that this Court – in appropriate cases – has occasionally corrected fundamental errors in the disposition of published cases. The panel's approach in *Gonzalez II* falls squarely within this well-established precedent.

Last, Appellees' reliance on *United States v. Washington ("Washington IV")*, 593 F.3d 790 (9th Cir. 2010) (*en banc*), to invoke the law of the circuit doctrine is unavailing. *See* Petition for Rehearing En Banc at 7 (misrepresenting holding in *Washington VI*).

In *Washington VI*, this Court resolved an inconsistency between two conflicting lines of precedent. *Compare United States v. Washington ("Washington III")*, 394 F.3d 1152 (9th Cir. 2005) *with Greene v. United States ("Greene I")*, 996 F.2d 973, 976-77 (9th Cir. 1993) *and Greene v. United States ("Greene II")*, 64 F.3d 1266, 1270-71 (9th Cir. 1995). *Washington VI* stands for the uncontroversial proposition that a three-judge panel cannot resolve a conflict between *Washington III*, and *Greene I* and *II*, and that *en banc* proceedings should be used to resolve inconsistencies between conflicting lines of precedent. Nothing in *Washington VI* overruled or modified *Jeffries V*. In light of all of the cases discussed above, the panel properly applied *Jeffries V* and revised the clearly erroneous legal analysis of the NVRA in *Gonzalez I*.

C. Adhering to Gonzalez I and Declining to Modify Clearly Erroneous Legal Reasoning Contained Therein Would Erode Public Confidence in the Integrity of this Court's Jurisprudence

Modestly revising a clearly erroneous ruling is appropriate here because this Court's ability to correct its mistakes is important to fulfill its objectives, and to maintain public confidence. *See, e.g.*, *Jeffries V*, at 1510 (Kozinski, J., dissenting) ("The court may – nay it must – go ahead and correct its own error, for no judicial sin is worse than issuance a judgment the judge knows to be wrong on the facts or law.").

The erroneous holding in *Gonzalez I* greatly impaired the integrity of this Court's jurisprudence. Allowing the ruling in *Gonzalez I* to stand is damaging to public confidence in the equity of our system of justice, and the panel in *Gonzalez II* was compelled to act decisively to preserve public confidence in the judicial process and correct the harmful effects on Appellants. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("to perform its high function in the best way 'justice must satisfy the appearance of justice'") (citation omitted); *see also Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (noting that, in certain circumstances, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process"). "Public confidence in the administrative process requires a [court] to admit its

errors and not push a matter to its erroneous conclusion under the guise of procedural regularity." *Burns Elec. Sec. Serv., Inc. v. N.L.R.B.*, 624 F.2d 403, 410 (2d Cir. 1980) (citation omitted). Under the stringent *Jeffries V* test, the panel properly found that this was an appropriate case in which to exercise its discretion to correct a fundamental error.

II. The *Gonzalez II* Panel Correctly Concluded That The NVRA Preempts Arizona's Proof of Citizenship Requirement

The district court and *Gonzalez I* erred in concluding that the NVRA permits states to use their own voter registration forms to the exclusion of the Federal Form. As the *Gonzalez II* panel correctly found, the plain language of the NVRA requires states to "accept and use" the federal mail voter registration form as an integral component of a uniform, national system of voter registration. 42 U.S.C. § 1973gg-4. Arizona's refusal to "accept and use" the federal form violates the NVRA.

In the NVRA, Congress specifically set forth the contents of a national voter registration form and required all states to accept and process the Federal Form for registration to vote in federal elections. Congress vested a federal agency with the authority to design a simple, universal form in a "postcard" format. 42 U.S.C. § 1973gg-7. Congress also instructed the Federal Election Commission (now the Election Assistance Commission ("EAC")) to follow specific requirements when the agency designs the national form. *See id.*

In the NVRA, neither the language instructing the EAC on the contents of the form nor the provision requiring its acceptance by states permit states to require additional information with the Federal Form. Although states are authorized to design and use their own mail voter registration form, nothing in the statute permits states to use their forms to the exclusion of the Federal Form. *See* 42 U.S.C. 1973gg-4 (2) ("*In addition to* accepting and using the [federal] form . . . a state may develop and use a mail voter registration form . . .") (emphasis added).

The NVRA provides that a signature on the registration form, which includes both the requirements of voter eligibility and states the penalties for perjury by filing a false application, is sufficient to ensure that the information provided on the form is truthful. In fact, Congress specifically prohibited states from requiring "notarization or other formal authentication." 42 U.S.C. 1973gg-7(b)(3). The Arizona requirement for additional, supporting documentation of citizenship directly contradicts the statute. Rather than relying on the attestation signature, Arizona officials require additional official government documents in order to authenticate applications.

The hurdles imposed by Proposition 200 are precisely the type of restrictions that Congress intended to prevent for registration in federal elections. To allow their implementation not only violates the language of the NVRA, but also renders meaningless the entire uniform mail registration program.

Moreover, as the panel in *Gonzalez II* aptly recognized, Proposition 200 also impedes and frustrates the purposes of the NVRA. The purpose of the NVRA is to broaden registration opportunities by, among other things, establishing a uniform mail voter registration form that can be used by an applicant anywhere in the United States. Congress ensured that the NVRA *did not* permit states to ask for documentary proof of citizenship from applicants submitting the federal mail registration form. In fact, when the Senate adopted an amendment to the NVRA bill that would have permitted states to require "presentation of documentary evidence of the citizenship of an applicant for voter registration," the conference committee rejected the amendment, declaring "[i]t is not necessary or consistent with the purposes of this Act." 139 Cong. Rec. S2897, S2901 (daily ed. March 16, 1993); *see also* H.Rep. 103-66 at 23-24 (1993) (Conf. Rep.).

Because the NVRA is a comprehensive statute providing a uniform and national method of registration to vote in federal elections, states may not enact laws that frustrate the purpose of the NVRA or that impose burdens not contemplated by Congress when it enacted the NVRA. Proposition 200 stands as an impediment to the NVRA because voters cannot exercise their right to use the Federal Form in Arizona – unless they provide the information required by Proposition 200 – because the federal form will be rejected by Arizona election officials.

CONCLUSION

For the reasons discussed above, Appellants respectfully submit that this appeal is not appropriate for *en banc* consideration.

Dated: December 20, 2010

Respectfully Submitted,

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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 3,737 words.

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.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December 2010, I electronically filed the foregoing document with the Clerk of the Court for the United States 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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