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November 24, 2010

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States of America v. State of Arizona et al.*, Case No. 10-16645 (Judges Noonan, Paez, and Bea)

Rule 28(j) Supplemental Authority: Law of the Circuit, Supreme Court Reversal of Prior Decision

Dear Ms. Dwyer:

At oral argument, the Court asked whether it was bound by a prior panel's decision in *National Center for Immigrants' Rights v. INS*, 913 F.2d 1350, 1370 (9th Cir. 1990) ("*NCIR*"), *reversed*, 502 U.S. 183 (1991): "We are bound by what the prior three-judge panel said, unless there is a change in the law, either by the Supreme Court, or by an en banc panel, or by a statute."

No party briefed the law of the circuit. On November 16, 2010, Appellants State of Arizona filed a Petition for En Banc Reconsideration in a pending unrelated preemption case, *Gonzalez v. Arizona*, No. 08-17094, 08-17115, (Docket # 117), dealing extensively with the law of the circuit.

In this case, the Court may have been confused about *NCIR*'s continued viability because both parties erroneously cited *NCIR* as having been reversed "*on other grounds*." Brief for Appellee, at 37; Appellants'

Reply Brief, at 16, n. 11. This characterization is incorrect; the reversal was complete. 502 U.S. at 196.

The relevant passage was reviewed by the Supreme Court, which unanimously rejected the prior panel's analysis, characterizing the prior panel's analysis as discussing "[t]he peripheral concern of the Act with the employment of illegal aliens," 502 U.S. at 186-87, citing the relevant pages, 502 U.S. at 187-88, and characterizing the prior panel's analysis as "misplaced" and "too cramped." 502 U.S. at 192-93.

Most important for the present question, the Supreme Court reversed the prior panel's analysis of immigration law and congressional intent. 502 U.S. at 191-94. The prior panel had proposed a "balance" of factors in prohibiting employment of illegal immigrants. 913 F.2d at 1366-70. The Supreme Court rejected that analysis, instead strongly reiterating that "We have often recognized that a primary purpose in restricting immigration is to preserve jobs for American workers. ... This policy of immigration was forcefully recognized most recently in the IRCA." 502 U.S. at 194 and n. 8. This was a complete reversal, not "on other grounds."

This panel should not feel bound by a reversed prior opinion. *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984).

/s/

Counsel for *Amicus Curiae* American Unity
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 24, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

November 24, 2010

/s/ _____
Barnaby W. Zall