COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FREEDOM FROM RELIGION FOUNDATION, Inc., a Wisconsin non-profit corporation, Valley of the Sun Chapter of the Freedom From Religion Foundation, an Arizona non-profit corporation, Mike Wasdin, Michael Renzulli, Justin Grant, Jim Sharpe, Crystal Keshawarz, Bill Barker and Barry Hess, Appellants, v Janice K. Brewer, Governor of the State of Arizona, Appellee.	Court of Appeals Case No. 1CA-CV 12-0684 Maricopa County Superior Court Case No. CV2012-070001

APPELLANTS' REPLY TO APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

This is a case of first impression dealing with the Arizona Constitution and the separation of church and state. Both sides agree the law requires such a separation. The question is whether Governor Brewer violated this fundamental principle of law.

Appellants (collectively referred to herein as "FFRF") argue a proclamation issued by Governor Brewer ("Appellee") in her official capacity as governor is a matter of state, and when such a proclamation calls upon its citizens to pray through the proclamations, necessarily molests inhabitants of the state as to their mode of religious worship, or lack of the same, and is prohibited under Article XX of the Arizona Constitution.

FFRF further argues that such proclamations appropriate public money and property to religious worship, exercise and instruction, in violation of Article II, § 12 of the Arizona Constitution.

Governor Brewer, on the other hand, claims proclamations which are not commands are not prohibited and she may properly call upon the citizens of Arizona to pray to the Christian god in which she

believes.

To prevent this Court from deciding the issue on its merits, as shown below, Governor Brewer raises "red herring" arguments and quotes a controlling case out of context regarding whether this case should be heard on its merits and argues the case should die in the dustbin of a procedural morass.

ARGUMENT

I. *Sears* is inapposite to the instant case as to the standing requirement and the waiver thereof.

The Governor relies heavily on *Sears v. Hull*, 192 Ariz. 65; 961 P.2d 1013 (1998), in an attempt to demonstrate that FFRF has not demonstrated an entitlement to standing, or to a waiver in standing. This is in error.

A. *Sears* was a request for a writ of mandamus

As set forth in the Governor's response, in *Sears*, citizens brought a suit for mandamus in accordance with A.R.S. § 12-2021, against the Governor in an attempt to enjoin her from entering into gaming compacts under A.R.S. § 5-601 and the Indian Gaming Regulatory Act,

25 U.S.C. § 2701, *et seq*. The Sears wished to prevent the governor's entry into a gaming compact with the Salt River Pima-Maricopa Indian Community, arguing it was illegal to do so under the statute. The appellate court stated that a writ of mandamus cannot be issued to **prevent** a government actor from doing something; rather, it is a compulsion to act in accordance with the requirements of a law. The Court accordingly held the Sears' lacked standing to sue.

Mandamus was the deciding issue in *Sears*. Though the *Sears* Court looked at other factors, because the instant case is a request for an injunction, not mandamus, it is therefore a valid legal request. This one fact distinguishes this case from *Sears*. Sears is inapplicable with regard to the standing issue in this case. The remainder of *Sears* is mere dicta, not controlling law.

B. *Sears* does not insurmountably restrict the waiver of standing in the instant case.

The Governor notes the Arizona Supreme Court in *Sears* referred to an established standard—that waiver of standing occurs "generally in cases involving issues of great public importance that are likely to

recur." While this is a correct quotation from *Sears*, the Governor fails to point out to this Court the fact that the *Sears* court misquoted the context of the source of the quotation by placing the word "that" in place of the word "or" as in the original. This was an insignificant error in *Sears* but a major error in this case.

The *Sears* court based the standing requirement on its holding in *Fraternal Order of Police Lodge 2 v. Phoenix Employees Relations Bd.*, 133 Ariz. 126; 650 P.2d 428 (1982). In that case, the original language reads, "We will make an exception, however, to consider a question of great public importance ***or*** one which is likely to recur even though the question is presented in a moot case." (emphasis added, citations omitted). Either situation represents an individual and distinct avenue for a waiver to standing in the state of Arizona.

The Court in *Sears* did not give any indication it was replacing that standard; the Court simply misquoted *Fraternal Order*. The misquote in *Sears* did not affect the result because the *Sears* Court deemed the Sears' complaint as **neither** one of great public importance **nor** one which is likely to recur, so the error went undetected and it

was not relevant to the outcome of the case. However, when the Governor cites *Sears* as authority on this topic, she inadvertently misleads this Court.

C. Matters of Great Public Importance Merit Waiver

The Arizona Supreme Court has gone into specifics for what constitutes a matter of great public importance. Cases which "concern a matter of statewide importance, involve constitutional questions, or present issues of … great public importance" are subject to a waiver of the standing requirement. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 142; 108 P.3d 917, 921 (2005). In *Fernandez*, the plaintiff attempted to bring a products liability class action suit against a seat belt manufacturer, but she was not a member of the class affected by the alleged defects in the products. This particular products liability suit did not meet the above standard, thereby precluding a waiver of standing.

By contrast, the instant case is not a class action suit, nor are the plaintiffs alleging mere "deterioration of their quality of life" as in *Sears*, 192 Ariz. at 72. The most on-point case is *Goodyear Farms v. City*

of Avondale, 148 Ariz. 216; 714 P.2d 386 (1986).

In *Goodyear*, Goodyear Farms claimed an Arizona law providing "only property owners can initiate annexation" violated "the equal protection clauses of the Federal and Arizona Constitutions." At 217. Because of the Constitutional issues involved, the Arizona Supreme Court **did** consider the merits in spite of a lack of standing, citing *Fraternal Order*. *Id.* The instant case involves a question of constitutional importance, meaning FFRF is entitled to the same waiver.

D. Violations Likely to Recur Merit Waiver.

While FFRF is unaware of a specific instance in which the Court waived standing for an otherwise moot issue solely on the basis of the violation's likelihood of recurrence, the Court preserved its right to do so in *Fraternal Order* through it's use of the word "or."

The Court appears to be properly concerned that parties who would violate the law should not be able to use the rigorous standing requirement as a shield to protect their illicit activities. This position is further evidenced by the Court's decision to additionally preserve its

right to review violations which "evade review."

E. Violations Which Evade Review Merit Waiver.

A third avenue for waiver of the standing requirement exists in Arizona case law. In a case referenced by the Court in *Sears*, *Big D Const. Corp. v. Court of Appeals for State of Ariz., Div. One*, 163 Ariz. 560, 789 P.2d 1061(1990), the *Big D* Court examines its right to intervene in cases which are otherwise moot but tend to evade review.

Big D dealt with the constitutionality of a law pertaining to competitive bidding in construction contracts. The parties settled, rendering the matter moot. However, the court considered the constitutional question a matter of public importance and noting the issue was likely to recur. The *Big D* Court even went a step further and stated the issue was one that "evades review" because time frames for projects approved under the law were far shorter than the time required to litigate the issue. This situation would ensure that no challenge to the law could ever be heard prior to the issue becoming moot. Exactly the situation here. The Court recognized this could allow future unconstitutional activity to escape review and emphasized it had

authority to hear cases which evade review.

The Governor's proclamations violate two sections of the Arizona Constitution. They address a subject of the deepest human importance. The Governor purports her annual proclamations to be some sort of spur of the moment idea to shield herself from the recurrence standard and to evade review. However, the evidence of the recurring nature belies her claim in that the dates marked on each annual proclamation coincide with the National Day of Prayer. Further, the Governor holds that any violation she has committed in the past is not challengeable or even subject to the rule of law for no other reason than it already occurred.

Through these two mechanisms—(1) that the proclamations have occurred and (2) may nor may not recur in the future—she seeks to place herself above the Constitution and safely out the reach of the legal system, evading review by the court.

In order to decline to issue a waiver of standing and hear this case, this Court must hold that Constitutional violations are not a matter of great public importance, freedom of and from religion is not a

matter of great public importance, abandon its authority to review recurring violations of the law which are designed by the perpetrators to slip through the standing requirement, and abandon its authority to review violations intentionally placed outside of judicial review due to time constraints. FFRF doubts this Court would so hold.

II. Even without a waiver, FFRF is still entitled to have their case heard because their injuries meet the standing requirement.

The distinct, palpable, and particularized injury suffered by the FFRF appellants in this case have not yet been universally recognized by the courts. FFRF contends they are indeed harmed by the Governor's proclamations in the same way that a Protestant would be harmed were the Governor's proclamations strictly worded to endorse only the beliefs of Catholics or a Jewish person harmed if the proclamations were solely directed to Islamic prayer. Perhaps the best way to illustrate the harm to the plaintiffs is to point out the long history of religious strife in the western world as evidence of the emotional impact religious concerns have historically had upon the

masses.

Whenever a government chooses one religion over another, the religions not selected for favoritism are insulted and historically the insulted religions have become disfavored, sometimes resulting in persecution, resistance or revolt. In examples that should be familiar enough to all parties, religious divisiveness has been at the root of some of the worst conflicts humanity has ever known.

a. *Catholic League* is on point

The proclamations by the Governor may not be the direct sort of insult cited in *Catholic League* but, like the board's action in *Catholic League*, the proclamations are insulting. The insult is there because the very act of proclaiming a day of Evangelical Christian Prayer implies that those who do not wish to join in government-sponsored or endorsed prayer are not in accordance with the preferred policies of the state. Alternative views on the subject of religion are not respected or as important or valid as those expressed by the "official" state proclamation.

The Day of Prayer proclamations are carefully crafted silent dog

whistles. By regularly proclaiming the religious messages requested by Shirley Dobson on the day of her Christian organization's choosing, Governor Brewer has endorsed Evangelical Christianity as the official faith of this state and thumbed her nose at anyone who favors private prayer, a different religion, or no religion.

If such were not the case, Governor Brewer would show citizens with different or no religious beliefs a basic level of courtesy and refrain from insulting the religious beliefs and philosophical positions at the core of citizens of Arizona holding differing beliefs. The FFRF appellants in this case are victims of the Governor's religious bigotry and their harm is identical to the harm found in *Catholic League*.

These citizens of Arizona have been molested on account of their mode of religious worship. Such molestation is and always has been illegal in the State of Arizona. They seek justice through the court system.

III. Condemnation of Prior Breaches of Law is Appropriate.

While the damage inflicted by the Governor's repeated and

regular violations of the constitution will not be completely reversed by declaring the prior proclamations to have been issued illegally, the victims of her crimes would feel a partial restoration of the value of their residency in the State of Arizona when they are declared equal before the eyes of the law. They will feel safer in the future knowing their religious views and traditions are treated as equal by at least one branch of the State Government.

Further, the prior violations of law are part of an ongoing annual pattern of discrimination practiced by the Governor. Declaring the past proclamations to have been illegally issued and enjoining her from further repetition of the offense are really the same action and have the same restorative effect. Future Arizonans not yet molested by the Governor will be protected and future politicians will take seriously the Constitutional admonishment not to molest the citizens by reason of their mode of religious worship or lack of same.

IV. The governor's proclamations are regular, predictable occurrences touching on a prohibited subject. They may be enjoined.

The governor claims that because the content of future prayer proclamations is unknown, the Court cannot enjoin future proclamations as this would constitute a prohibited advisory opinion. This point is both not true and irrelevant because any proclamation urging the people of Arizona to engage in or refrain from any mode of religious worship is in direct violation of Article XX of the Arizona Constitution and illegal. The Court is well within its authority to tell the Governor she is no longer permitted to break the law and define consequences should she continue doing so.

Finally, the Governor's Answering Brief takes pain to claim it exceeds the power of the court to interfere with the Governor's authority, appealing to the separation of powers. Again, not true. FFRF shudders to dismiss this argument so briefly but rather than waste the Court's time with a long-winded argument, FFRF responds merely by pointing out lawbreaking is not a legitimate and protected power of the executive branch. There is no divine right of governorship akin to the divine right of kings. If the governor were accused of bribery, this court would not be constrained to leave her budgeting decisions alone for

fear of interfering with her independent right to make executive decisions. Here she is accused of violating the Constitution—breaking the highest law of land—and this Court has not merely a right to weigh in on these accusations but a responsibility.

CONCLUSION

The FFRF appellants have expressed their grievances and shared their pain. Their injuries are palpable. They are Arizona taxpayers who have had a portion of their tax dollars spent on promoting and elevating religious activity directly adverse to their religious views and traditions. As such, they deserve to have their case heard on the merits.

Should the court decline to address the FFRF appellants' injuries, the FFRF appellants still raise issues of great importance to the State of Arizona. The FFRF appellants challenge the annually occurring violations of law committed by the executive branch of this State. They challenge behavior of Governor Brewer as an openly partisan religious supporter, though she has denied this even in the face of overwhelming evidence for the sole purpose of evading judicial review.

In the alternative, the FFRF appellants believe a waiver of standing is appropriate to permit this case to be heard on its merits, request the dismissal order be vacated and the matter remanded so the Governor's constitutional violations may be judicially addressed.

Respectfully submitted, January 22, 2013.

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Certification of Compliance

I certify this brief contains 2,592 words, as computed by WordPerfect X6.

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Certificate of Service

I certify that on January 22, 2013, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Arizona Court of Appeals, Division One, for filing using the AZTurboCourt System, and TWO COPIES of the foregoing sent via First Class mail to:

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