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ARIZONA COURT OF
APPEALS DIV. TWO
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JEFFREY P. HANDLER
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IN THE COURT OF APPEALS
THE STATE OF ARIZONA
DIVISION TWO

DIANA H.,

Petitioner,

vs.

HON. STEPHEN M. RUBIN, Pima

County Superior Court Judge,

Respondent,

and

ARIZONA DEPARTMENT OF

ECONOMIC SECURITY,

Real Party in Interest.

No. 2CA-SA 2007-0085

Superior Court of Pima County

No. J18180900

REPLY TO RESPONSE TO PETITION FOR SPECIAL ACTION

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1 **JURISDICTIONAL STATEMENT**

2 Petitioner reasserts her position that the Court of Appeals has jurisdiction
3 to hear this special action petition. *Petition for Special Action at 2-3.* The
4 issue raised by this petition is one of statewide concern because there is no
5 statute or case law in Arizona that directly answers the question of whether a
6 parent of a dependent child is permitted, as parents of nondependent children
7 clearly are, to assert a personal choice or religious exemption to having their
8 child immunized. *A.R.S. § 15-873 and §36-883.*

9
10 The Arizona Department of Economic Security (ADES) argues that this
11 Court lacks jurisdiction to hear this special action because Petitioner has an
12 equally plain, speedy and adequate remedy in an appeal. *Response to Petition*
13 *for Special Action (Response) at 5.* However, in the very same paragraph
14 ADES acknowledges that speed is of the essence in this case. Rejecting this
15 Petition for Special Action would necessitate the Petitioner filing an appeal
16 which, even though Juvenile appeals are accelerated, would take significantly
17 more time than resolution of the issue by Special Action. Jurisdiction is proper
18 in the form of a special action and the Court of Appeals has the authority to
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1 accept jurisdiction on this issue “without regard to its appellate jurisdiction”.

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3 *ARS § 12-201.21(4).*

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1 **FACTS**

2 Petitioner refutes several of the facts that ADES presents in its response as
3 not relevant.
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5 ADES states that "Petitioner presented no evidence to the juvenile court
6 about her claimed religious beliefs." *Response at 3-4 (citing App C. at 28-29)*.
7 As the response points out, ADES stated at the hearing it "[did not] have any
8 evidence suggesting that [Petitioner's] religio[ous] belief [was not] sincere". *Id*
9 *at 4*. The trial court, in fact, after hearing ADES' position on the issue of the
10 validity of Petitioner's belief determined that the issue was not contested.
11 *State's App. C at 29*. For ADES to imply at this juncture that petitioner's
12 religious belief or the validity of her objection to immunizing her child is
13 invalid or insincere is misleading and attempts to skirt the truly relevant facts
14 that are at issue in this case.
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20 Further, ADES relates as relevant the testimony of the child's pediatrician,
21 Dr. Peterson. *Response at 2-3*. Dr. Peterson's testimony involved her opinion
22 regarding the necessity of immunizations and the fact that the child was behind
23 on 15 immunizations. *State's App. H at 6, 13*. Dr. Peterson's testimony is not
24 relevant in the determination of the issue presented by this special action. The
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1 state legislature has granted parents the right to opt out of the general
2 requirement that a child be immunized. Obviously, has an opinion regarding
3 immunizations that differs from the Arizona Legislature statutory scheme.
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5 However, her opinion is completely irrelevant in resolving the current issue of
6 whether the parent of a dependent child retains the right to assert a religious
7 objection to her child's immunization.
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1 ARGUMENT

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3 **A parent of a child adjudicated dependent retains the right over religious**
4 **decisions, including the right to invoke a religious exemption to**
5 **immunizations as provided for by Arizona law.**

6 ADES' argument

7
8 ADES in its response spends a significant amount of time discussing the
9 benefits of immunizing children and the state's right and mandate to provide
10 children with appropriate medical care. *Response at 8-9.* Discussions on the
11 authority of ADES to provide immunizations absent the invocation of a parent's
12 religious freedom to object to the immunizations are red herring arguments.
13

14
15 The length to which the state goes defending the practice of immunizing
16 children completely skirts the actual issue. The issue is not one of whether
17 immunizing children is good or whether it makes for sound public policy; the
18 state legislature has already decided that issue. The issue is whether the parent
19 of a dependent child retain the right to make a religious objection to having her
20 child immunized.
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24 Residual Parental Rights

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26 For the purpose of Title 8 of the Arizona Revised Statutes, custody is
27 defined by ARS§8-531(5). The definition includes "the responsibility to
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1 provide the child with adequate food, clothing, shelter, education and medical
2 care, provided that such rights and responsibilities shall be exercised subject to
3 the powers, rights, duties and responsibilities of the guardian of the person and
4 **subject to the residual parental rights** and responsibilities if they have not
5 been terminated by judicial decree.” (emphasis added)
6

7
8 ADES recognized in its response that Arizona has not defined the phrase
9 “residual parental rights” however several other states have. *Response at 13-14.*
10 Alabama, Colorado, Ohio and Virginia have all included in these residual
11 parental rights the rights and duties to support, visit, consent to adoption and
12 determine the religious affiliation of the child. *Response at 13-14 citing Ala.*
13 *Code 1975§12-15-1(24) (Alabama); C.R.S.A. § 19-1-103(93) (Colorado); R.C.*
14 *§2151.011(A)(46) (Ohio); Va. Code Ann. §16.1-228(Virginia).*
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17 ADES concedes that these states interpretation should apply to Arizona. In
18 that case Arizona recognizes that religion is an area where a parent retains some
19 rights to her child.
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23 Arizona permits religious objection to immunizations
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25 ADES follows their analysis of “residual parental rights” with a discussion
26 about how determining a religious affiliation does not permit a parent to
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1 withhold medical care. *Response at 14.* It the present case Petitioner is not
2 objecting to emergency surgery or medical treatment for a current illness.
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4 Petitioner is asking that an elective procedure not be performed on her child for
5 religious reasons. The state of Arizona by virtue of its statutes has provided
6 that a parent can opt out of the immunization procedure for religious reasons
7 and still allow the child to attend state sanctioned daycare. ARS §36-883(C)
8 states that "*Any rule that relates to educational activities, physical examination,*
9 *medical treatment or immunization shall include appropriate exemptions for*
10 *children whose parent object on the ground that it conflicts with the tenets and*
11 *practices of a recognized church or religious denomination of which the parent*
12 *or child is an adherent or member.*" This child is not of school age, however
13 mention of the statute providing an exemption for school children based solely
14 on the parent's personal choice is relevant in that it shows that Arizona clearly
15 has a statutory scheme that permits parents to make that decision on either
16 religious or philosophical grounds. *ARS 15-873 (A)(1).*
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23 ADES improper use of analogous cases
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25 ADES analogizes the Petitioner's objection to immunizations to the facts in
26 an Iowa case. *Id at 14.* The facts in the Iowa case related to a surgical
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1 procedure on the children. The children in that case were experiencing medical
2 problems which doctors felt would be resolved by a surgical procedure. *In re*
3 *Karwath, 199 N.W.2d 147 (Iowa 1972 (citation omitted))*. That set of facts is
4 distinct from the facts here. Of crucial importance in any case arising in
5 Arizona is the fact that the Legislature has a statutory framework which allows
6 parents to chose, for religious reasons, to elect not to have their child
7 immunized and still allow those children admission to daycare centers and
8 schools. The Iowa case did not involve a parent objecting to immunizations.

9
10 ADES also cites an Arizona case which recognized that “if there is a direct
11 collision of a child’s right to good health and a parent’s religious beliefs, the
12 parent’s rights must give way.” *No. 5666-J, 133 Ariz. 163650 P.2d at 465*.

13
14 Due to the fact that Arizona permits religious exemptions to immunizations, it is
15 doubtful that immunizations were being contemplated by the Arizona Supreme
16 Court when it talked about the “collision of good health and religious beliefs”.

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18 By statute, Arizona has already weighed in favor of the parental religious belief
19 over immunizations.

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21 ADES cites *No. 5666-J* further in their response. *Response at 15*. The
22 Arizona Supreme Court affirmed the dismissal of a dependency in a situation
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1 where ADES only wanted to monitor the health of the children, but where there
2 were no known medical problems. *No. 5666-J 133 at 158, 650 P.2d at 460*
3 *(1982)*. ADES attempts to distinguish that case because that case “involved
4 weighing an otherwise fit parent’s right to custody of a child against religious
5 freedom”. *Response at 15*. It is erroneous to think that an “otherwise fit”
6 parent has a higher right to religious freedom than Petitioner does or that the
7 child of an otherwise “fit parent” should be entitled to less protection from the
8 state. The current case plan for Petitioner is family reunification and therefore
9 it is the goal of ADES to have this mother in a position where she is otherwise
10 fit in the near future. The argument may follow that if Petitioner were further
11 along in her case plan that the incantations of danger would be quieter and the
12 threat of death to the child not so important to the Department of Economic
13 Security. *See Response at 2, citing Dr. Peterson’s testimony (“significant risk*
14 *to the health and sometimes the life of [a] child”); Response at 16 (“...ADES*
15 *sought to...protect [child] from... potentially deadly diseases).*

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23 ADES’s slippery slope argument

24 In its summation ADES argues that to honor Petitioner’s request not to
25 have her child immunized would lead to all sorts of religious objections by
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1 parents, including psychotic ones, seriously compromising ADES's attempts to
2 achieve quality medical care for the children under its care. *Response at 16.*
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4 However, Petitioner is simply asserting an objection allowed by Arizona law.

5 ADES accepted Petitioner's assertion that she had a religious objection to her
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7 child being immunized. There is no reason to believe that when a parent's
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9 invocation of religion is untrustworthy or somehow not believable that an
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11 evidentiary hearing wouldn't be able to sort it out. In the present case ADES
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13 did not challenge the legitimacy of Petitioner's religious belief. Comparing a
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15 mother honoring her religious beliefs and objecting to her child's
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17 immunizations (pursuant to state law) to that of a psychotic parent invoking
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19 religion to deprive her child of necessary surgery is a gross overstatement and
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21 completely undercuts the public policy set out out by the state legislature.
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23 Again ADES misses the basic nature of the issue being presented.
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3 **CONCLUSION**
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6 The State of Arizona has created a statutory right in parents to refuse, on
7 religious grounds, to have their children immunized. ADES recognizes that one
8 of the residual parental rights retained by parents of dependent children is the
9 right to direct the religion of the child. It clearly follows that a parent of a
10 dependent child should be able to elect to not have her child immunized for
11 religious reason while the child is in the legal custody of the state. The trial
12 court abused its discretion when it granted the state authority to immunize the
13 child over the mother's religious objection.
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17 Whether one believes that a child could be at some heightened risk of
18 contracting childhood illnesses is beside the point as is any discussion about
19 whether childhood immunizations are good for children or good for the
20 community, because clearly the Arizona legislature has accepted that a religious
21 objection is a valid reason to opt out of childhood immunizations.
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25 ADES fails to understand the central issue: whether a parent to a dependent
26 child retains residual rights to religious choice. The issue is a legal one that
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1 simply rests on the interpretation of residual parental rights and whether a the
2 parent of a dependent child can invoke their religious objection to what is, in
3 essence, the elective procedure of immunization pursuant to Arizona law. The
4 use by ADES of inflammatory language like “martyring children” (*Response at*
5 *15*) is misleading, completely misses the issue and does not assist in resolving
6 the legal issue in front of us. If you follow the path that ADES presents then the
7 State of Arizona has codified a parent’s right to “martyr” their child.
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10 Arguments related to the safety and protection of the child ignore the current
11 laws that recognize a religious exemption to immunizations.
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14 Judge Rubin abused his discretion when permitting the ADES to immunize
15 the child in violation of mother’s right to direct the religious practices of her
16 child. She objects on religious grounds to the immunization of her child and
17 pursuant to Arizona law that should be honored.
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19
20 RESPECTFULLY SUBMITTED this 19th day of September 2007.
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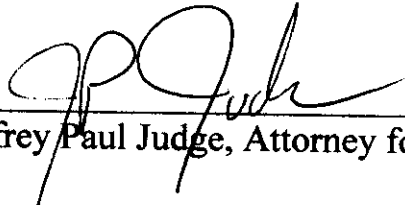
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CERTIFICATE OF COMPLIANCE

In accordance with Arizona Rules of Civil Appellate Procedure and Arizona Rules for Special Actions, the undersigned verifies this Reply and states that this Petition is double spaced, with a top margin and a bottom margin of 1 ¼ inches and side margins of 1 inch. This Petition has 14 point Time New Roman font, and contains 2,432 words.

By:  _____
Jeffrey Paul Judge, Attorney for Petitioner

