



September 28, 2009

<p>Governor Janice K. Brewer  <u>VIA FAX# 602-542-7602 and U.S. Mail</u>          Honorary Chairperson          2009 Capitol Christmas Tree Project          1700 W. Washington St.          Phoenix, AZ 85007</p>	<p>Deb Bumpus  <u>VIA U.S. Mail</u>          Ecosystem Staff Officer          Apache-Sitgreaves National Forests          PO Box 640          Springerville, AZ 85938</p>
<p>Chief Tom Tidwell  <u>VIA U.S. Mail</u>          U.S. Forest Service          1400 Independence Ave., SW          Washington, D.C. 20250-0003</p>	<p>Richard Davalos  <u>VIA FAX# 928-333-5966 and U.S. Mail</u>          Capitol Christmas Tree Coordinator          U.S. Department of Agriculture          Apache-Sitgreaves National Forests          30 South Chiricahua Drive          Springerville, Arizona 85938</p>
<p>Chris Knopp, Forest Supervisor  <u>VIA U.S. Mail</u>          Apache-Sitgreaves National Forests          PO Box 640          Springerville, AZ 85938</p>	

Re: Discrimination against Religious Viewpoints in 2009 Capitol Christmas Tree Ornament event

Dear Officials:

Candace Duncan contacted the Alliance Defense Fund (ADF) regarding the desire of her child to submit three ornaments to appear on the Capitol Christmas Tree 2009. Mrs. Duncan and her child are residents of Arizona who are Christians and desire to participate in the 2009 Capitol Christmas Tree Ornament event.

Since 1964, the United States Forest Service has selected a state each year to decorate the Christmas Tree erected in Washington, D.C. This year Arizona school children have been chosen to decorate the tree. These children must submit ornaments for approval, and if approved, these ornaments will appear on the Christmas tree. According to the 2009 Capitol Tree Website, those ornaments must meet numerous criteria regarding size, weight, etc. But according to one criterion, “[o]rnaments cannot reflect a religious or political theme. Instead, share your

interpretation of our theme ‘Arizona’s Gift, from the Grand Canyon State.’” (emphasis added). This application procedure is evidentially administered by the United States Forest Service via the Apache-Sitgreaves National Forests office.

The child of Mrs. Duncan would like to submit ornaments addressing the theme of Arizona, but wishes to do so from a religious perspective or viewpoint. For example, one ornament will say “Happy Birthday, Jesus.” Another ornament will say “Merry Christmas.” The third ornament will contain a manger scene with the baby Jesus. But all of these ornaments will simultaneously address the topic of Arizona whether about the history, geography or motto (“Ditat Deus” or God Enriches) of Arizona.

While Mrs. Duncan and her child would like to submit these ornaments, they are precluded from doing so because the current policy singles out and excludes ornaments reflecting a religious viewpoint.

### LEGAL ANALYSIS

#### **THE FIRST AMENDMENT PROTECTS DESIRED SPEECH OF MRS. DUNCAN’S CHILD**

Mrs. Duncan’s child desires to convey a message about Arizona from his religious perspective via Christmas ornaments. It is well established that expression of religious beliefs is protected by the First Amendment of the United States Constitution. Religious expression is speech and is entitled to the same level of protection as other kinds of speech. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995). Even expression that comes through symbols, such as ornaments, is protected speech under the First Amendment. *See, e.g., Curry v. Hensiner*, 513 F.3d 570, 577 (6th Cir. 2008) (considering candy cane pipe-cleaner ornament, made by elementary school student, to be “speech”). *See also Texas v. Johnson*, 491 U.S. 397, 404 (1989) (symbolic speech protected if intended to convey a particularized message, and there is a great likelihood that intended message is understood by those who view symbol). Thus, the Christmas ornaments of Mrs. Duncan’s child are clearly protected by the First Amendment.

#### **GOVERNMENT MAY NOT EXCLUDE RELIGIOUS VIEWPOINTS FROM 2009 CAPITOL CHRISTMAS TREE**

The Supreme Court has consistently condemned viewpoint discrimination regardless where it occurs. *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 682 (1998); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985). Viewpoint discrimination is an “egregious” form of discrimination that occurs “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject.” *Rosenberger v. Rector and Visitors*

of the Univ. of Va., 515 U.S. 819, 829 (1995). When this happens, “the violation of the First Amendment is all the more blatant” because “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.* Viewpoint-based restrictions on speech are presumptively unconstitutional. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). As a result, viewpoint discrimination is “almost universally condemned and rarely passes constitutional scrutiny.” *Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999).

When the government excludes speech from a forum on an otherwise includible subject because of its perspective, it engages in viewpoint discrimination. *Cornelius*, 473 U.S. at 806. And exclusion of religious speech is no different. Excluding a religious perspective on an otherwise permissible subject is an obvious form of viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). *See also Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008) (regulation allowing vanity license plates promoting various groups except for those promoting “a specific religion, faith, or antireligious belief” was viewpoint discriminatory); *Gentala v. City of Tucson*, 213 F.3d 1055, 1064-65 (9th Cir. 2000) (city committed viewpoint discrimination when it created a civic events fund to pay for various civic events but rejected application to fund religious event because of rule refusing to fund “events held in direct support of religious organizations.”).

Here, there is little question that government officials have opened up a forum for speech on a particular topic --- the topic of Arizona --- yet have singled out and forbidden religious viewpoints about this topic.<sup>1</sup> The written criteria for ornaments specifically prohibit religious viewpoints. Thus, while children may submit ornaments about Arizona from all different viewpoints --- whether from different historical or cultural or geographical or economic perspectives --- these children may not submit an ornament about Arizona from a religious perspective. Indeed, the only perspective or viewpoint that has been denied access to the Capitol Tree is a religious one.

For this reason, this situation is no different from *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). In *Rosenberger*, the University of Virginia gave funds to various students groups but not to groups conducting religious activities. *Id.* at 824-25. The Supreme Court ruled that such disparate treatment was viewpoint discrimination. *Id.* at 828-37. *See also Grossbaum v. Indianapolis-Marion Bldg. Auth.*, 63 F.3d 581, 591-92 (7th Cir. 1995) (prohibiting a

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<sup>1</sup> The precise type of forum that the state has created does not matter in this situation since viewpoint discrimination is never permissible, even in a non-public forum. *Lamb’s Chapel*, 508 U.S. at 394.

religious holiday display such as a menorah, while allowing a secular holiday display constituted viewpoint discrimination). Just as in *Rosenberger*, government officials here have opened up a forum for private speakers to express a message about Arizona via ornaments on a Christmas tree, but these officials have singled out and excluded religious viewpoints from this forum. Such viewpoint discrimination is simply not permitted by the First Amendment.

DEMAND

I trust this information helps clarify the rights and responsibilities of local, state, and federal officials. In summary, the First Amendment does not allow officials to exclude the ornaments of Mrs. Duncan's child because these ornaments communicate a religious viewpoint about Arizona. Because Mrs. Duncan's child strongly desires to participate in the 2009 Capitol Tree event, and the deadline to submit an ornament is very soon (October 5), we demand that you notify us in writing – no later than close of business day October 4 – that you will rescind your prohibition of religious viewpoints and allow Mrs. Duncan's child to submit ornaments for consideration even though his ornaments express a religious viewpoint. Otherwise, Mrs. Duncan will be forced to take legal action to protect her child's First Amendment rights.

Sincerely,



Jonathan Scruggs  
Litigation Staff Counsel

JAS/mk  
cc: Candace Duncan