CHRISTINE GELB, a single woman,	)	**Arizona Supreme Court**
	)	**No. CV-10-0371-PR**
	)	
Appellant,	)	**Court of Appeals**
	)	**Division One**
vs.	)	**Case No. 1 CA-CV 09-0744**
	)	
DEPARTMENT OF FIRE, BUILDING & LIFE SAFETY, a political subdisivion of the State of Arizona; SEDONA CASA CONTENTA, HOMEOWNERS ASSOCIATION,	)	**Yavapai County, Superior Court Case No. CV820080197**
	)	
Appellees.	)	

APPELLEE SEDONA CASA CONTENTA'S RESPONSE TO AMICUS CURIAE BRIEF

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Appellee Sedona Casa Contenta Homeowners Association, Inc. submits the following response to the *amicus curiae* brief filed by George Staropoli.

A. ISSUES PRESENTED IN AMICUS CURIAE BRIEF, AS RESTATED BY APPELLEE

1. Whether the Court of Appeals erred in finding Laws 2006, Ch. 324, § 6 to be unconstitutional by focusing on the "nexus" between the Department's scope of regulatory authority and the type of private party dispute resolution?
2. Whether the Court of Appeals improperly relied on political issues in finding Laws 2006, Ch. 324, § 6 to be unconstitutional?

B. LEGAL ARGUMENT

1. The Court of Appeals correctly focused on the "nexus" test in finding Laws 2006, Ch. 324, § 6 to be unconstitutional.

The Court of Appeals correctly decided the constitutional question by focusing on whether there was a nexus between the mission of the Department of Fire, Building and Life Safety ("DFBLS") and its adjudication of rights between private parties related to the Planned Community and Condominium Acts and contractual deed restrictions. The nexus is the central issue in the case law that applies to the separation of powers analysis. Without the legislature delegating some level of regulatory oversight of planned communities and condominiums to an executive agency, no

executive agency can adjudicate private party disputes involving planned communities and condominiums.

The Arizona Constitution provides:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Ariz. Const. art. III. There can be no dispute that the adjudication of disputes between two private parties is the separate and distinct power of the Judicial department. Therefore, in order for the Executive department to adjudicate private party disputes, the case law requires the Executive department to regulate the area of law the private parties inhabit to some degree.

The case law clearly sets forth the requirement that an "administrative agency may resolve disputes between private parties **if this authority is auxiliary to and dependent upon the proper exercise of legitimate regulatory power**." *Cactus Wren Partners v. Arizona Dep't of Building and Fire Safety*, 177 Ariz. 559, 564, 869 P.2d 1212, 1217 (App. 1993), citing *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984) (emphasis supplied). This is the nexus that the Court of Appeals found lacking in its opinion on the law at

issue herein. Opinion at ¶ 16.

The *Cactus Wren* opinion goes on to discuss the various factors test adopted by the Court of Appeals in *J.W. Hancock*, implying that the Court and the parties conceded in that case that the DFBLS already had legitimate regulatory authority in the mobile home context. The *J.W. Hancock* opinion quotes the organic act for the DFBLS that the DFBLS was established to:

> Further the public interest of safety and welfare by maintaining and enforcing standards of quality and safety for manufactured homes [and] mobile homes . . . It is also the purpose of the department to establish a procedure to protect the consumer of such products and services.

A.R.S. § 41-2141(A). It is this language that creates the nexus between the DFBLS's mission and its authority to adjudicate private party disputes in the mobile home context. The DFBLS fully and legitimately regulates the manufacture and sales of mobile homes in Arizona and was given the power to protect the consumers of mobile homes subsequent to purchasing them. The DFBLS has never been given any regulatory authority over condominiums and planned communities. It does not license builders, developers or homeowners' associations. It does not set standards for construction and materials for single family homes or condominium units. It has no legitimate regulatory authority whatsoever over condominiums and planned communities, and it is that failure that is constitutionally fatal for

Laws 2006, Ch. 324, § 6.

The existence of the nexus is the single relevant and dispositive issue in the constitutional analysis. It is a prerequisite to the further discussion of the other factors discussed in the *J.W. Hancock* case. Such further analysis is both unnecessary and irrelevant absent a showing of this fundamental connection between an agency's regulatory power and its exercise of authority over private parties. This nexus test has existed since at least 1938 when the Arizona Supreme Court expounded upon the nature of the separation of powers:

> Where the Constitution expressly, or by implication, confers a certain power on one of the great departments of the government, that power may not be delegated to another department, but where the power so conferred is being exercised by the proper department and it is necessary, in order to carry out such a constitutional power, that some acts be performed which in their nature are more properly to be classified as falling under the jurisdiction of another department, such latter acts, *being merely auxiliary to and dependent upon the proper carrying out of the legitimate power of the department*, are not a violation of the constitution inhibition. (emphasis in original).

Udall v. Severn, 52 Ariz. 65, 77 (1938).

The *amicus curiae* fails to accept this required nexus. Nevertheless, in his brief, he attempts to argue that the nexus for mobile home park regulation is at least as tenuous as for condominiums and planned communities. He asserts that there is no reference to the Mobile Home Park Landlord Tenant

Act ("MHPLA") in the organic act for the DFBLS. While that is true, it simply ignores the fact that the DFBLS was given express authority to "establish a procedure to protect the consumer of such products and services", referring to manufactured and mobile homes.

The Court of Appeals in the present case essentially interpreted the third and fourth factors from *J.W. Hancock* as the required nexus set forth in *Udall v. Severn* and restated in *Cactus Wren*. Nevertheless, it is clear that the Court of Appeals in the present case found the nexus missing and as a result found that the statute was unconstitutional.

As the Court of Appeals correctly decided this issue of law, even if unnecessarily focused on the various factors of the *J.W. Hancock* case, the Petition for Review should be denied.

2. The Court of Appeals did not improperly rely on political issues.

The *amicus curiae* charges the Court of Appeals with relying on the fact that the government, including the DFBLS, the Attorney General and the legislature, failed to defend the constitutionality of the statute at issue. While the Court of Appeals did note this curious fact, it is not essential to the legal analysis in the decision. The Court simply noted that the DFBLS's actions in complying with the injunction order issued in a prior case that it did not appeal were consistent with the Court's conclusion of unconstitutionality.

The *amicus curiae* closes his brief with a conspiracy theory about the involvement of undersigned counsel in this case and the other cases in which the constitutionality of the statute was challenged. He questions why Appellee raised the constitutional issue at all in this case. The issue was presented in the initial administrative appeal to the Superior Court, which was filed by Petitioner and not by Appellee. While that administrative appeal was pending, the Superior Court in Maricopa County issued a permanent injunction prohibiting the DFBLS from taking any further action in cases arising out of Laws 2006, Ch. 324, § 6. In an attempt to prevent unnecessary time and expense in an appeal over a hearing process that already had been declared unconstitutional by a different section of the Superior Court, undersigned counsel then moved to dismiss the pending appeal. Additionally, legal counsel had the obligation to raise every legal issue available that could result in prevailing for his client in the pending case. The *amicus curiae* sees only conspiracy and fails to acknowledge that undersigned counsel and his law firm are engaged in a professional practice with duties to clients. It is truly fantastical that Mr. Staropoli suggests that undersigned counsel only raised the constitutional issue for the first time after he published statistics on his blog (as arbitrary as those statistics may be in determining the prevailing party) that owners prevailed in only 42% of the administrative cases filed

with the DFBLS.

The *amicus curiae* goes further and suggests that pursuing the claim of unconstitutionality was done to intimidate and coerce into submission the 42% of homeowners who dared to successfully challenge their community associations. Mr. Staropoli likens undersigned counsel and his firm to henchmen for authoritarian regimes suppressing the rights of homeowners. The conspiratorial hyperbole notwithstanding, the *amicus curiae* simply fails to recognize that counsel was representing his client to obtain a just and swift end to the litigation and appeal process in which it was involved.

The conspiracy theory in the *amicus* brief overlooks one simple and critical fact that completely undermines his position: the judicial system in Arizona, both state and federal, are well equipped - indeed the best equipped - to resolve disputes between private parties and provide due process rights. As Mr. Staropoli relates it, the courts are apparently an abysmal failure in providing due process protections and simply cannot be trusted with a question as complex as whether the Appellee had the authority to install crushed rock on its common area near the Petitioner's home in Sedona. If that is the case, he must object to the judiciary's exercise of power over all areas of law if the resolution of such a trivial matter cannot even be entrusted to the courts in his opinion.

It is clear from the brief that the *amicus curiae* simply wants to create new law that imposes constitutional protections on members in homeowners associations. The law has never supported that proposition. Decades of jurisprudence indicate that there is a simple method to analyze separation of powers cases, and the *amicus* brief presents no justifications why that case law is no longer appropriate. The solution to the problem is quite simple. The legislature simply needs to delegate proper and legitimate regulatory authority to the DFBLS if it wants the executive branch to be authorized to adjudicate private party disputes between homeowners and their associations.

C. Conclusion

For the foregoing reasons, the Appellee requests that the Supreme Court either deny the Petition for Review or in the alternative accept the Petition for Review and confirm that the statute is unconstitutional in the absence of any nexus between the DFBLS's legitimate regulatory and condominiums and planned communities.

RESPECTFULLY SUBMITTED this 22nd day of February, 2011.

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