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8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 EDWARD HAROLD SCHAD, JR.,  
et. al.

12 Plaintiffs,

13 v.

14 JANICE K. BREWER,  
15 Governor Of the State of Arizona in Her  
16 Official Capacity,

17 SCOTT SMITH,  
18 Chief of Staff to Governor Brewer,  
In His Official Capacity

19 BRIAN LIVINGSTON,  
20 Chairman and Executive Director,  
21 Arizona Board of Executive Clemency

22 JOHN "JACK" LASOTA,  
23 Member, Arizona Board of Executive  
Clemency, In his Official Capacity

24 ELLEN KIRSCHBAUM,  
25 Member, Arizona Board of Executive  
26 Clemency, In Her Official Capacity

Case No. 2:13-cv-01962-ROS

**RESPONSE TO RULE 59 MOTION  
TO RECONSIDER ORDER  
DENYING PRELIMINARY  
INJUNCTION**

**CAPITAL CASE**

**EXECUTION SET FOR  
OCTOBER 9, 2013**

1 2 DONNA HARRRIS, 3 Member, Arizona Board of Executive 4 Clemency, In Her Official Capacity, 5 6 Defendants.	
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5 Defendants Governor Janice K. Brewer, Chief of Staff, Scott Smith,  
6 Chairman/Executive Director of the Arizona Board of Executive Clemency, Brian  
7 Livingston, Board Member, John “Jack” LaSota, Board Member Ellen Kirschbaum, and  
8 Board Member Donna Harris files this Response to Plaintiff’s Rule 59 Motion to  
9 Reconsider Order Denying Preliminary Injunction.

10 In the Ninth Circuit, a Rule 59(e) motion may be granted if: (1) the motion is  
11 necessary to correct manifest errors of law or fact upon which the appealable order is  
12 based; (2) the moving party presents newly discovered or previously unavailable  
13 evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an  
14 intervening change of law. See Turner v. Burlington Northern Santa Fe R. Co., 338 F.3d  
15 1058, 1063 (9th Cir.2003) (citations omitted). For the reasons outlined below, Plaintiff’s  
16 motion fails the standard above. Although Plaintiff’s Motion does not state which portion  
17 of Rule 59 it is relying on, Defendants are assuming it is under Rule 59 (e). Nevertheless,  
18 Plaintiff’s Motion fails to demonstrate under any standard why this Court should revisit  
19 its decision.

20 Mr. Thomas’s statement filed on October 3, 2013 raises no new issues or pertinent  
21 facts and contrary to plaintiff’s position, Mr. Thomas’s nebulous testimony was not  
22 perjurous. (Dkt. No. 31) Mr. Thomas letter’s and attachment is irrelevant to the issue of  
23 whether members of the Board have not and will not give fair clemency hearings. The  
24 Board conducted Schad’s clemency hearing on October 2, 2013. Jones Clemency  
25 hearing is scheduled for October 16, 2013.

26 Mr. Thomas’s statement with attachments provides no additional evidence that the

1 current Board is biased and did not (Schad) or will not (Jones) vote independently.  
2 Plaintiffs argue that Mr. Thomas has changed his story and committed perjury. Plaintiffs  
3 provide the following quote to substantiate his position that Mr. Thomas committed  
4 perjury: “The person who showed it to me was not a Board member[.]” Motion at p. 3.  
5 Plaintiffs, however, fail to accurately quote Mr. Thomas’s testimony. Further, within  
6 context, Mr. Thomas’s testimony does not contradict his affidavit provided to this court  
7 by Plaintiffs. The full and complete testimony of Mr. Thomas is as follows:

8 Q. The person who showed you the letter was not a Board member; is that correct?

9 A. No, ma’am.

10 Q. That’s not correct?

11 A. The person who showed it to me was not a Board member, **no**. (emphasis  
12 added) TR P.39 lns 23-25 through P. 40 ln 1.

13 Plaintiffs conveniently omitted the remainder of Mr. Thomas’s testimony wherein he  
14 states unequivocally that the question on direct examination is not correct; that the person  
15 who showed him the letter was *not* a Board member. The question posed above is not  
16 correct. His testimony states that it was a Board member that showed him the letter.  
17 This is consistent with his affidavit wherein he states it was Board member that showed  
18 him the letter. See Complaint Ex H, Further, consistent with his testimony and his  
19 affidavit, Mr. Thomas states in his submission that the individual that showed him the  
20 letter was Ms. Kirschbaum, a current Board member.

21 Plaintiffs then attempts to show that Ms. Kirschbaum’s testimony is suspect and  
22 that she attempted to intimidate Mr. Thomas. Mr. Thomas’s testimony was that he wasn’t  
23 really sure why he was shown the letter and he was merely speculating to as the reason  
24 why it was shown to him. Simply, he was guessing to the reason. Regardless, Mr.  
25 Thomas is not a current Board member and even if true is irrelevant to how the current  
26 Board members would or will vote.

Nor did Ms. Kirschbaum perjure herself either. Mr. Thomas’s hazy recollection

1 does not contradict Ms. Kirschbaum's affidavit or her sworn testimony. Ms.  
2 Kirschbaum's testified that she believed that former Board members suspected they were  
3 not reappointed because of their votes. TR 91 at lns 17-20. However, she did not testify  
4 to having actual knowledge of the reasons previous Board members were not  
5 reappointed. Ms. Kirchbaum testified that she did not believe that her votes would be a  
6 reason she would not be reappointed. TR 89 lns 23-25. Plaintiffs remaining arguments  
7 are also irrelevant and unpersuasive to the issue of the current Board members fairness.

8 Mr. Thomas submission does not provide any new relevant evidence or questions  
9 that the current Board has not or will not freely vote. Moreover, all the Board members,  
10 both past and present, all testified that they have always voted independently and were  
11 never told how to vote.

12 **CONCLUSION**

13 This Court has already reviewed and weighed the evidence presented including  
14 Mr. Thomas's submission. This Court correctly denied the Motion for the Temporary  
15 Restraining Order. This Court should deny Plaintiff's Motion for Reconsideration.

16 Dated this 4<sup>th</sup> day of October, 2013.

17 THOMAS C. HORNE  
18 Attorney General

19 By: /s Kelly Gillian-Gibson  
20 Kelly Gillilan-Gibson  
21 Brian P. Luse  
22 Attorneys for Defendants  
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1 Electronically filed this  
2 4<sup>th</sup> day of October, 2013 with:

3 Clerk of the U.S. District Court  
4 for the District of Arizona  
5 401 W. Washington  
6 Phoenix, Arizona 85003

6 I hereby certify that on October 4, 2013 that I emailed a copy of the same to counsel,  
7 Kelly Henry and Dale Baich. I further certify that I emailed copies to Ms. Kristine Fox,  
8 Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital  
9 Case Staff Attorney for the Sixth Circuit.

10 By: Kelly Gillilan-Gibson  
11 3565528

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