SUPREME COURT OF ARIZONA

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Petitioner, v. CITY OF PHOENIX, Arizona, Respondent.	Case No.: CV–20–0019

REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION

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INTRODUCTION

The City of Phoenix's imposition and increase of "trip fees" on commercial ground transportation companies for transporting passengers to and from the Sky Harbor International Airport ("Airport") violates the unambiguous language of the prohibition against "impos[ing] or increas[ing] any … transaction-based … fee … on the privilege to engage in … any service performed in this state." ARIZ. CONST. art. IX, § 25. See Petition for Special Action ("Petition") at 13–20.

The City's arguments to the contrary all fail. *First*, despite the Constitution's express inclusion of "fee[s], stamp requirement[s,]" and "assessment[s]," the City argues at length that the "trip fees" at issue here "are not taxes" and that article IX, § 25 "prohibit[s] only certain taxes[.]" Response to Petition for Special Action ("Response") at 2, 14, 26. This argument must be rejected because it effectively asks this Court to read "fee, stamp requirement or assessment" out of the Constitution and give those words no meaning. *See Adams v. Bolin*, 74 Ariz. 269, 276 (1952) ("[E]ach word, phrase, and sentence" in a constitutional provision "must be given meaning so that no part will be void, inert, redundant, or trivial").

Second, the "trip fees" are not "based on the use of valuable, limited Airport curb space," as the City contends. Response at 21. Instead, like the enumerated types of transaction-based taxes listed in article IX, § 25, the "trip fees" are

"transaction-based" and are imposed on a "privilege" to engage in a "service" performed in the state; the "trip fees" are therefore prohibited by article IX, § 25. The City's re-labeling of its "trip fees" as "use fees" does not change the conclusion that the "trip fees" satisfy all parts of the Constitution's text.

Third, the City's attempts to invoke other constitutional provisions are unavailing. See Response at 35–39. Article IX, § 25's protection of Arizonans against new and increased transaction-based taxes, fees, and assessments does not infringe upon the City's constitutional power granted under article XIII, § 5 to engage in business. In other words, the City's authority to manage its property while engaging in business is not unlimited, and does not somehow exempt the City from complying with article IX, § 25. And it is far too late for the City to invoke the separate amendment rule under article XXI, § 1 to argue now, for the first time, that article IX, § 25—which voters passed in 2018 through Prop 126 to amend our state Constitution—never should have been allowed on the ballot in the first place. The City cites no authority for its apparent position that constitutional amendments can be wiped away years later through the separate amendment rule, which allows courts to consider procedural challenges to *proposed* initiatives.

This Court should declare the Ordinance violates the Arizona Constitution and is null and void.

ARGUMENT

I. The Plain Language Of Article IX, § 25 Prohibits The "Trip Fees"

The City does not dispute that it is "created by law with authority to impose any … fee" within the meaning of article IX, § 25. Nor does the City dispute that it "impose[d]" or "increase[d]" a fee. Instead, the City makes various arguments urging this Court to effectively rewrite the Constitution's broad language. The City's arguments are unpersuasive.

A. The City's Urging Of A Narrow Interpretation Is Inconsistent With The Constitution's Broadly-Inclusive Text

The Constitutional provision applies to "*any* … transaction-based … fee" imposed on the privilege to engage in "*any* service" performed in this state. ARIZ. CONST. art. IX, § 25 (emphasis added). See Petition at 17–18. As discussed in the Petition, this Court has repeatedly observed that "the word 'any' is 'broadly inclusive,'" while rejecting the City's arguments proposing narrow readings of the word "any" in similar cases. *See City of Phoenix v. Glenayre Electronics*, 242 Ariz. 139, 144, ¶¶ 17–18 (2017) (reasoning that "notwithstanding any other statute" "applies broadly and inclusively to all other statutes"); *City of Phoenix v. Tanner*, 63 Ariz. 278, 279-80 (1945) (reasoning—where contract stated the City agreed "to pay all costs and expenses" and "will not suffer or permit *any liens* to be imposed"—that "'any liens' would cover registration liens as the word 'any' is, in its ordinary sense, broadly inclusive") (emphasis added).

Here, the City contends that article IX, § 25 prohibits only new or increased "taxes." Response at 26–35. But the City's interpretation is irreconcilable with the plain language of the Constitution's express proscription against "any" new or increased "fee, stamp requirement or assessment" and the broadly-inclusive language accompanying these words. *See* ARIZ. CONST. art. IX, § 25. Under the City's interpretation, the words, "fee, stamp requirement or assessment" would be rendered void and meaningless. *See Adams*, 74 Ariz. at 276. Courts must "avoid interpretations that render [constitutional] provisions meaningless[.]" *Ariz. Dep't. of Revenue v. Action Marine, Inc.*, 218 Ariz. 141, 143, ¶ 10 (2008).

As in *Glenayre* and *Tanner*, the City's narrow definitions of the words used in article IX, § 25—and its apparent proposal to eliminate other words—must be rejected. *See also Coleman v. Johnsen*, 235 Ariz. 195, 197, ¶ 12 (2014) (rejecting an interpretation of the Arizona Constitution that "effectively would rewrite the [C]onstitution"); *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 406, 413, ¶¶ 15, 39 (2005) (rejecting a restrictive interpretation of article XVIII, § 5 of the Arizona Constitution in light of "[t]he framers' use of [] broad language" and noting that judges "are not free to rewrite our fundamental document").

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B. The *Ejusdem Generis* And *Noscitur A Sociis* Canons Support The Attorney General's Interpretation

Relying on the *ejusdem generis* and *noscitur a sociis* canons of interpretation, the City insists that the voters did not intend what is written in article IX, § 25. Response at 16, 28. These "closely related" canons "dictate[] that a statutory term is interpreted in context of the accompanying words." *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, ¶ 13 (2011); *see City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211, ¶ 13 (2019) (the "*[n]oscitur a sociis*" interpretive canon—"a word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used—is appropriate when several terms are associated in a context suggesting the terms have some quality in common"); *Bilke v. State*, 206 Ariz. 462, 465, ¶ 13 (2003) ("[t]he *ejusdem generis* rule applies 'where general words follow the enumeration of particular classes of things'" and is used "to aid in interpretation of statutes that include a list or series of specific, but similar, persons or things") (quoting Black's Law Dictionary 517 (6th ed. 1990)) (emphasis omitted).

The City argues that: (1) the list of items preceding "any other transaction-based … fee" in the Constitution's text enumerates "associated terms sharing a common characteristic: they are all taxes levied on certain commercial agreements or exchanges"; and (2) through this enumerated list, "the electorate expressed its intent that 'any other' refers to other types of taxes." Response at 16, 28. But if

voters had intended to prohibit only taxes, as the City argues, then article IX, § 25 would simply list the enumerated taxes, followed by "...or any other tax." This is not what the Constitution says. Instead, article IX, § 25 prohibits certain types of taxes, as well as "any other transaction-based tax, fee, stamp requirement or assessment[.]" ARIZ. CONST. art. IX, § 25. This text is the best evidence of the voters' intent. *See Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994) (to effectuate the intent of the electorate, "we first examine the plain language of the provision").

Applying the *ejusdem generis* and *noscitur a sociis* canons, the common characteristic shared by the terms included in the list under article IX, § 25 is that all of the described assessments are "transaction-based." Transaction privilege taxes ("TPT") are levied under A.R.S. § 42–5008. *See also* A.R.S. § 42–5061 to –5076 (describing classifications that are subject to Arizona's TPT). Arizona's TPT "is not a sales tax[.]" *Action Marine, Inc.*, 218 Ariz. at 142, ¶ 6. Instead, it is an "excise tax on the privilege or right to engage in an occupation or business in the State of Arizona." *Ariz. Dep't. of Revenue v. Mountain States Tel. & Tel. Co.*, 113 Ariz. 467, 468 (1976). "Local excise taxes" are collected "in the same manner as authorized" for TPTs. A.R.S. § 42–6002.

TPTs are "imposed *on transactions* consummated within a state," while "use taxes are designed to reach out-of-state sales of tangible personal property to a state's residents for use, storage, or consumption in the state." *Qwest Dex., Inc. v.*

Ariz. Dep't. of Revenue, 210 Ariz. 223, 225, ¶ 12 (App. 2005) (emphasis added); *see also* A.R.S. § 42–5155 (levying a "use tax"). The tax base against which a tax rate is applied is generally the gross proceeds or income derived from the business. *See, e.g.,* A.R.S. § 42–5061(A). A business operator bears the burden of paying a TPT (but may "pass the tax through to its customers"), while "the burden of a true sales tax is on the purchaser." *S. Pac. Transp. Co., v. State, Dep't. of Revenue*, 202 Ariz. 326, 333, ¶¶ 25–26 (App. 2002). "Arizona's sales tax and use tax are complementary; they are intended to reach *all applicable transactions*, either by imposing a sales tax on the seller or a use tax on the purchaser." *Ariz. Dep't. of Revenue v. Care Comput. Sys., Inc.*, 197 Ariz. 414, 419, ¶ 22 (App. 2000) (emphasis added).

The State imposes a "luxury tax" on the sale of certain items, including liquor, cigarettes, tobacco in various forms, and cigars. *See* A.R.S. §§ 42–3051, –3052; *Watkins Cigarette Serv., Inc. v. Ariz. State Tax Comm'n*, 111 Ariz. 169, 171 (1974) ("The luxury privilege tax is an excise tax on the privilege of selling particular luxury items to customers for consumption."). Unlike TPTs that are levied on income earned, luxury taxes are levied on the amount or volume of the product itself. For example, taxes on wines and spirits are generally levied against the amount of wine or spirit sold. *See* A.R.S. § 42–3052(1)–(4). Similarly, with respect to tobacco products, the charge is typically a flat tax per product sold. *See*

A.R.S. § 42–3052(5)–(9). This is identical in substance to the City's flat charge per "pick up" or "drop off" at the Airport.

Accordingly, the assessments listed in article IX, § 25 share a common characteristic: they are charges based on wide-ranging types of business "transactions" (sales taxes) or business activities (privilege taxes) or products sold (luxury taxes). The Constitution's language, in context, shows that voters did not intend to limit the prohibition against certain taxes; instead, the Constitution prohibits new or increased "transaction-based" charges "on the privilege to engage in, or the gross receipts of sales or gross income derived from, any service performed in this state"—without regard their label ("tax, fee, stamp requirement or assessment").

C. The "Trip Fees" Are "Transaction-Based" And Are Imposed On A "Privilege" To Engage In A "Service"

As noted in the Petition, the ordinary meaning of "transaction" encompasses at least three dictionary definitions and one statutory definition. Petition at 17. *See Transaction*, Black's Law Dictionary (11th ed. 2019) ("transaction" is "[t]he act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract," "a business agreement or exchange," or "[a]ny activity involving two or more persons"); A.R.S. § 44–7002(17) ("'Transaction' means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs").

The text of the Ordinance satisfies any of these definitions because the authorized providers who pay the "trip fees" are conducting business activities at the Airport, and the "pick-up" and "drop-off" fees apply when the actions described in the Ordinance are satisfied.

The City prefers one of these definitions, arguing that "transaction-based" for purposes of article IX, § 25 "means something that is founded on a commercial agreement or an exchange of consideration." (Response at 17.) But the fact that there are several commonly-understood meanings of "transaction" weighs in favor of the Attorney General's proposal to broadly interpret article IX, § 25. As shown above, the types of charges described in article IX, § 25 cover a broad array of business transactions, activities, and products.

To the extent the commonly-understood meaning of "transaction" is ambiguous, the history and purpose of article IX, § 25 confirm that the voters did not intend for "transaction" to have a limited meaning in this context. See Petition at 20–24. To the contrary, the publicity pamphlet confirms that voters intended to block all taxes and fees imposed by government entities on a wide array of services that Arizonans use every day. See *id.* And an expansive interpretation of "transaction" in article IX, § 25 is not a "boundless definition" under which *any* type of tax, fee, or assessment would be prohibited. See Response at 18. As the text makes clear, three requirements must be satisfied for an assessment to be

subject to the prohibition: the assessment must be (1) "transaction-based" and (2) imposed "on the privilege to engage in" (3) "any service performed in this state." ARIZ. CONST. art. IX, § 25. Similar to a TPT, which is "an excise on the privilege or right to engage in particular businesses within the taxing jurisdiction," *see US West Commc'ns., Inc. v. City of Tucson*, 198 Ariz. 515, 523, ¶ 24 (App. 2000), the authorized providers here are required to pay "trip fees" for "the privilege"—granted by the City under a permit or contract—to engage in a ground transportation "service" that begins or ends at the Airport. See Petition at 19–20. Thus, the "trip fees" satisfy all parts of the Constitution's text.

D. The Three-Factor Test To Determine Whether A Charge Is A Fee Or A Tax Under *May v. McNally* Does Not Apply

In the City's view, the dispositive issue here is whether the "trip fees" qualify as "taxes," and the City asserts that the fees "fail th[e] test" established in *May v. McNally*, 203 Ariz. 425, 430–31, ¶ 24 (2002). Response at 33. The City is mistaken because the Constitution's plain language encompasses fees, as discussed above. The *May* test has no application here.

In *May*, this Court upheld the constitutionality of a surcharge on fines collected to fund the Citizens Clean Elections Act. 203 Ariz. at 426–27, ¶¶ 1–2. Although this Court stated that "[w]hether an assessment should be categorized as a tax or fee *generally* is determined by examining three factors[,]"*id.* at 430–31, ¶ 24 (emphasis added), this Court made clear that "whether the surcharge is a tax

or fee is not dispositive of the issues in th[e] case" because the outcome did not "turn[] on whether the assessment was a fee or a tax," *id.* at ¶ 23. This Court "address[ed] the [tax v. fee] issue briefly" only because an amicus in the case had argued that the surcharge "must be analyzed differently" under the First Amendment if it qualified as a fee. *Id.* Accordingly, this Court did not hold—as the City appears to suggest—that *May*'s three-factor test applies any time the word "tax" appears in the Arizona Constitution.

The City's reliance on *Biggs v. Betlach*, 243 Ariz. 256, 259–61, ¶¶ 17–24 (2017) (Response at 34–35) is likewise misplaced. In *Biggs*, this Court stated that "the *May* test provides a useful analytical tool for distinguishing taxes from fees or assessments" and applied the "*May* factors" to conclude that a hospital assessment did not impose a "tax" subject to a supermajority vote requirement under article IX, § 22 of the Arizona Constitution. 243 Ariz. at 259–61, ¶¶ 16–24.

The legal issue here, in contrast to *May* and *Biggs*, requires no delineation between transaction-based taxes and transaction-based fees because any imposition or increase of a "transaction-based tax, fee, stamp requirement or assessment" imposed on the privilege to engage in a service performed in the state runs afoul of the Constitution. ARIZ. CONST. art. IX, § 25. Simply put, the *May* test is irrelevant to determine whether the City's "trip fees" fall within the ambit of article IX, § 25.

II. The City's Re-Labeling Of Its "Trip Fees" As "Use Fees" Does Not Alter The Outcome

The City asserts that its "trip fees" are "charged to and paid by" transportation network companies ("TNCs") to simply allow TNCs "to use the Airport." Response at 11–12, 20–22. This apparent re-labeling of the "trip fees" as "use fees" does not change the legal conclusion that the "trip fees" are transaction-based for the reasons discussed above and in the Petition.

Indeed, other provisions of the City's Code demonstrate that the "trip fees" are unlike other fees that the City arguably charges for use of its property and nothing else. For example, the City imposes "parking rates" for "hourly, daily, and monthly parking," stating that "[a] person who drives a vehicle from an airport public parking area shall pay, or make arrangements to pay, all prescribed fees before taking the vehicle from the area." *See* City Code, Ch. 4, art. III, § 4–58(A). These "parking rates" are not imposed on any "privilege" to engage in any "service performed in the state," and are therefore distinguishable from the transaction-based "trip fees" here, which are expressly based on "pick-up[s]" and "drop-off[s]" of passengers to and from the Airport *and* imposed on the privilege of operating commercial business activities at the Airport. And even assuming, *arguendo*, that the "trip fees" are *partially* based on commercial ground transportation companies' "use" of Airport curb space, such a conclusion does not show that the "trip fees" fall outside the scope of article IX, § 25.

The City also cites federal law that requires the City to ensure that "the airport [is] self-sustaining as possible," claiming that "[c]harging use fees to ground transportation providers is one of the ways the City satisfies this federal obligation." Response at 4 (citing 49 U.S.C. § 47107(a)(13)(A)). But the City already imposes "minimum standards fees" to "ensure that the [A]irport is self-sustaining," *see* City Code, Ch. 4, art. VIII, § 4–160, separate and apart from the "trip fees" at issue here. Simply put, federal law does not exempt the City from complying with article IX, § 25.

III. The City's Attempt To Invoke Other Constitutional Provisions Is Unavailing

The City also argues that construing article IX, § 25 to prohibit the "trip fees" would "conflict with two other key provisions of the Arizona Constitution: article XIII, [§] 5 and article XXI, [§] 1." Response at 35. No such conflict exists. Article IX, § 25 reflects a limitation of the general power granted to cities under article XIII, § 5, and these two provisions are easily harmonized. And the City's separate-amendment-rule challenge under Article XXI, § 1 is untimely and improper.

A. Although The City Has General Authority To "Engage In Any Business" And To Adopt A Charter, This Authority Is Expressly Made Subject To Article IX, § 25

The City first suggests that its power to engage in a "business or enterprise" under article XIII, § 5 prevails over article IX, § 25. Response at 35–36. *See* ARIZ.

CONST. art. XIII, § 5 ("Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation.").

Article IX, § 25 does not infringe upon cities' constitutional power to engage in businesses or enterprises; instead, it establishes a prohibition that applies to new or increased transaction-based taxes, fees, and assessments on a privilege to engage in services performed in the state. *See* ARIZ. CONST. art. IX, § 25. The provisions govern different subject matter and are not incompatible or irreconcilable but rather should be "harmonize[d]." *See Hughes v. Martin*, 203 Ariz. 165, 167–68, ¶ 11 (2002). As discussed in the Petition (at 25–26), a City's power "to engage in business [i]s not self-executing," *Buntman v. City of Phoenix*, 32 Ariz. 18, 26–27 (1927), and a City's charter must be "consistent with and subject to" the Arizona Constitution, A.R.S. § 9–284(B).

Moreover, the electorate made its intent absolutely clear by amending the home rule charter provision of the Arizona Constitution to expressly state that "[n]otwithstanding *any* provision of this section to the contrary, no charter shall provide a city with *any* power to violate article IX, [§] 25, which preempts such power." ARIZ. CONST. art. XIII, § 2 (emphasis added). The addition of this language to the charter provision is particularly relevant here because use and disposition of municipal property, which the City argues is at issue here, is perhaps

the only conceivable area where a charter could otherwise preempt state law. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 602, ¶¶ 56–57 (2017) (noting "only two areas" of purely local concern).[1] Therefore, the voters made clear, out of an abundance of caution, that the prohibition in article IX, § 25 applies even to areas where a charter could conceivably preempt state law.

B. The City Cannot Invoke The Separate Amendment Rule To Invalidate Article IX, § 25

The City's assertion that article IX, § 25 (which the City now cites as Prop. 126, its former title) violates the separate amendment rule is baseless. See Response at 37–39. Article XXI, § 1 "sets forth the manner in which proposed constitutional amendments shall be submitted to the vote of the people[.]" *League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 560 n.3 (2006). For this reason, Arizona courts have long held that separate-amendment-rule challenges must be brought "before the election is held." *See Tilson v. Mofford*, 153 Ariz. 468, 470–71 (1987) (separate amendment rule challenge could be brought before enactment because it concerned a procedural issue). After the people have voted, this procedural issue "cannot be questioned." *Id.* at 470; *see also Hoffman v. Reagan*, 245 Ariz. 313, 315, ¶ 7 (2018) ("Allowing a pre-election challenge … comports

[1] The State does not concede that there are any areas where a charter can preempt state law. *See City of Tucson*, 242 Ariz. at 604–08, ¶¶ 66-84 (Bolick, J., concurring).

with our practice of allowing pre-election challenges to ballot measures based on procedural claims but not substantive challenges.").

The voters enacted Prop. 126 in 2018. As such, the time for bringing a separate-amendment-rule challenge has long since passed and the City's attempt to invoke this provision to nullify Prop. 126 is improper. *See Hoffman*, 245 Ariz. at 315, ¶ 7. In any event, the City's argument is again based on the faulty premise that the Ordinance imposes a fee for the use of government-owned property.

IV. Because The Ordinance Is Not Severable, It Must Be Declared Null And Void In Its Entirety

In a footnote, the City suggests that this Court's "judicial review" is limited to the constitutionality of the Ordinance's "trip fees" as applied to TNCs because Representative Barto's Request "challenged only the Ordinance's fee requirements for TNCs." Response at 10 n.5. Although the Request asked for an investigation of the constitutionality of the "trip fees" as applied to TNCs, the entirety of § 4–78 of the Ordinance must be declared null and void because it is not severable. *See City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 110, ¶ 12 (App. 2001) (explaining that "whether an invalid portion of an ordinance is severable" requires an analysis of whether the remaining portion "is independent of the invalid part and enforceable standing alone") (quoting *Randolph v. Groscost*, 195 Ariz. 423, 427, ¶ 14 (1999)).

Here, the "valid and invalid portions" of the Ordinance are "so intimately connected as to raise the presumption the [City] would not have enacted one without the other." *See City of Tempe*, 201 Ariz. at 110, ¶ 12 (quotation omitted). The City approved of the "trip fees" for all authorized providers the same day. See Pet. Appendix, Exhibit D. Specifically, the City *increased* pick-up fees for TNCs (from $2.66 to $4.00) while *decreasing* pick-up fees for taxis (from $2.66 to $1.75), shuttles (from $3.48 to $2.25), and charter buses (from $7.38 to $5.00). *Id.* The City also imposed an entirely new category of "drop-off" fees that all authorized providers must pay, ranging from $1.75 for taxis to $4.00 for TNCs and $5.00 for charter buses. *See id.* Thus, because the invalid fees (*i.e.*, the increased pick-up fees and new drop-off fees) cannot be severed from the remaining valid portions of the Ordinance (*i.e.*, the decreased pick-up fees), the entire Ordinance should be declared null and void.

V. The Bond Provision In A.R.S. § 41–194.01(B)(2) Is Not At Issue; In Any Event, The City Has Failed To Satisfy Its Burden Of Demonstrating That The Bond Provision Is Unconstitutional

This Court directed the parties to "address the enforceability of the mandatory bond under A.R.S. § 41–194.01(B)(2)" ("bond provision"). See 1/22/20 Order. The bond provision provides that "[t]he court shall require the county, city or town to post a bond equal to the amount of state shared revenue

paid to the county, city or town pursuant to § 42–5029 and 43–206 in the preceding six months." A.R.S. § 41–194.01(B)(2).

As the City correctly notes, the parties agree that no bond is required for the City to defend the constitutionality of its Ordinance. Response at 39. Because there is no attempt to enforce the bond provision, there is no need for this Court to address whether the provision is enforceable. Although the bond provision "is mandatory" in nature, it does not state that posting the bond is "a precondition for a political subdivision to defend its position or for this Court to address and rule on the merits" of the issue presented in the Petition. *City of Tucson*, 242 Ariz. at 596-97, ¶¶ 32-33. As in *City of Tucson*, the City here agreed to stay its Ordinance pending this litigation. *See id.* at 597, ¶ 34. Accordingly, "given the procedural posture of this case, there is no reason to address the enforceability of (B)(2)'s bond provision." *Id.* at 597, ¶ 35; *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) ("fundamental principle of judicial restraint that courts should [not] anticipate a question of constitutional law in advance of the necessity of deciding it" (quotations omitted)).

If the Court, nevertheless, addresses the enforceability of the bond provision, it should give the statute "a sensible construction" which will "accomplish the legislative intent and purpose and which will avoid an absurd conclusion or result." *State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 152 (1976). If the bond's

purpose is to ensure that a municipality or county does not benefit from receiving state-shared revenue while possibly violating state law, then an agreement to cease the violating act (and enforcement thereof) is likely to fulfill that purpose in the same way as a bond. That is the situation here.

Assuming this Court is inclined to consider the constitutionality or enforceability of the bond provision in the situation where a city, county, or town does not voluntarily cease its actions pending outcome of a case (or such ordinance is not stayed by the Court under Rule 7 of the Rules of Procedure for Special Actions), the City has also failed to carry its burden. *See City of Tucson*, 242 Ariz. at 609, ¶¶ 94–96 (reasoning that statutes are generally afforded "a presumption of constitutionality" and declining to find the bond provision unconstitutional on the basis that it "places an undue financial burden on the City" because "the record is undeveloped as to the actual bond amount the City [of Tucson] will have to post") (Gould, J., concurring in part and in the result). The record contains no evidence about the actual financial impact on the City of posting a bond. And there is no evidence that the City is unable to post a security bond. The City's bald assertion that the bond provision is "exorbitant" (Response at 41) does not overcome the presumption of unconstitutionality. This is particularly so here where the City unquestionably has been provided access to the Court.

In a different case, if a municipality or county could demonstrate impossibility or other severe financial hardship from having to post the full bond, then the Court should avoid this absurd result by reducing the amount of the bond, consistent with general rules governing bonds. *Cf.* Ariz. R. Civ. App. P. 7(a)(9)(B) (court may "lower the bond amount to an amount that will not cause a requesting party substantial economic harm"). This solution would also reconcile the bond provision with A.R.S. §§ 42–5029 and 43–206, which provide that funding may not be withheld when a municipality certifies that it is "necessary to make any required deposits or payments for debt service on bonds or other long-term obligations[.]"

The City argues that the bond provision is unconstitutional because it allegedly invades this Court's judicial power under article VI, § 1 and violates separation of powers under article III of the Arizona Constitution. Response at 40–41. But *City of Tucson* refutes these arguments. Section 41–194.01(B)(2) confers mandatory jurisdiction on this Court to "resolve the issue" presented in a special action when the Attorney General concludes that an ordinance "[m]ay violate a provision of state law or the Constitution of Arizona." This Court rejected a separation-of-powers challenge to this portion of the statute in *City of Tucson*, reasoning that "the legislature's apparent objective in [enacting A.R.S. § 41–194.01(B)(2)] was not to usurp executive or judicial authority but rather to require

and incentivize political subdivisions to comply with state law." 242 Ariz. at 593, ¶ 16. This Court then held that its jurisdiction is "mandatory" under A.R.S. § 41–194.01(B)(2). *Id.* at 594–96, ¶¶ 21–29.

Nothing in the bond provision undermines this Court's holding in *City of Tucson*. To the contrary, *City of Tucson* upheld the constitutionality of the procedure under A.R.S. § 41–194.01(B)(2), and this holding confirms that the bond provision is a separate and severable enforcement mechanism that does not implicate separation-of-powers concerns. The City's allegation that the bond "condition[s]" the City's right to defend its Ordinance "on the payment of an exorbitant bond serving no purpose" (Response at 41) is meritless. The bond provision does *not* state that posting the bond is "a precondition for a political subdivision to defend its position or for this Court to address and rule on the merits" of the issue presented in the Attorney General's Petition. *City of Tucson*, 242 Ariz. at 597, ¶ 33.

If the Court were, however, to find that the bond provision is unconstitutional, it should be severed without invalidating the entire statute. *See State Comp. Fund v. Symington*, 174 Ariz. 188, 195 (1993).

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CONCLUSION

The Ordinance imposes and increases transaction-based fees on the privilege to engage in a service performed in this State, and therefore violates article IX, § 25 of the Arizona Constitution. This Court should declare the Ordinance violates the Arizona Constitution and is null and void.

RESPECTFULLY SUBMITTED this 3rd day of March, 2020.

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ARIZONA SUPREME COURT

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Petitioner, v. CITY OF PHOENIX, Arizona, Respondent.	Case No.: CV–20–0019

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, Petitioner's Reply in Support of Petition for Special Action and Certificate of Compliance were e-filed with the Arizona Supreme Court. I further certify that copies of the foregoing were emailed the same day via AZTurboCourt to:

I certify that service will be accomplished via email to:

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By: /s/ *Linley Wilson*

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Petitioner, v. CITY OF PHOENIX, Arizona, Respondent.	Case No.: CV–20–0019

CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7 of the Arizona Rules of Procedure for Special Actions, undersigned counsel certifies that the Attorney General's Reply In Support of Petition for Special Action filed this date does not exceed 5,250 words, is double-spaced in 14-point Times New Roman font, and complies with ARCAP Rule 4.

/s/ Linley Wilson
Linley Wilson