**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

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| CITY OF SCOTTSDALE, an Arizona municipal corporation,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>STATE OF ARIZONA<br><br>Defendant-Appellee.<br><br>JIM TORGESON and SIGN KING LLC,<br><br>Intervenors. | No. 1 CA-CV-14-0798 A<br><br>Maricopa County Superior Court<br>No. CV 2014-003467<br><br>Hon. Robert Oberbillig |

# APPELLEE'S ANSWERING BRIEF

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## INTRODUCTION

This case is about a direct conflict between Arizona Revised Statute § 9-499.13, which defines the parameters of municipal regulation for human sign-walkers to access and operate in traditional public fora, and Scottsdale City Code § 16-353, which bans human sign-walkers from all public fora in the City of Scottsdale.

At issue is a common advertising practice where individuals, known as "sign-walkers," hold business signs on the roadside that advertise goods and services. This practice is common throughout Arizona and not unique to any particular town or community.

Plaintiff City of Scottsdale forbids the practice as criminal under Scottsdale City Code § 16-353 (the "Local Ordinance"), prohibiting people from holding business signs on public streets and sidewalks within Scottsdale's borders. The State of Arizona expressly allows and protects the practice under Arizona Revised Statute § 9-499.13 (the "State Law"), which directs that Arizona municipalities must treat sign-walkers no differently than other pedestrians.

Plaintiff sued the State here, assailing the State Law as an infringement on its charter city authority. Plaintiff urges an unprecedented expansion of charter authority under the Arizona Constitution that would imbue all charter cities and towns with broad, unilateral discretion to regulate any issues arising on their streets

and in their communities—whether or not the issue is common to other Arizona cities and without regard to general state laws.

Plaintiff misconstrues a municipal charter as the local equivalent of a Declaration of Independence. Plaintiff offers no Arizona decision so interpreting the Constitution and fails to account for or distinguish the bevy of adverse Arizona decisions that gut its arguments, including several decisions against the City of Scottsdale itself.

At bottom, a local ordinance or charter is invalid under Arizona law if and when it conflicts with state law on general laws and issues of statewide reach and concern, even if the concern is shared at state and local levels.

To be sure, charter cities are interested in the health, safety, and aesthetics of their communities, and often regulate in the areas under power delegated from the Arizona legislature. But the issue in this case is not whether health, safety, and aesthetics are proper areas for municipal regulation; not whether charter cities generally have power to regulate their streets; and not whether and to what extent local governments can regulate commercial speech under the First Amendment. Instead, the sole issue is whether charter cities are permitted to forbid and criminalize a common, statewide practice that Arizona law expressly permits. The answer is "no."

After briefing and oral argument, the trial court applied controlling precedent to reach an unsurprising conclusion—holding that the Local Ordinance is invalid because it conflicts with the State Law on a matter of statewide interest rather than purely local concern. This Court should affirm.

## STATEMENT OF FACTS

**The Ordinance**. The City of Scottsdale is an Arizona political subdivision and charter city. (R. 28, ¶¶ 1-2.)[1] At issue is the Local Ordinance in Scottsdale's City Code that directs:

> No person shall have, bear, wear or carry upon any street, any advertising banner, flag, board, sign, transparency, wearing apparel or other device advertising, publicly announcing or calling attention to any goods, wares, merchandise, or commodities, or to any place of business, occupation, show, exhibition, event or entertainment. The provisions of this subsection do not apply to the wearing of apparel without remuneration for doing so or business identification on wearing apparel.

Scottsdale Rev. Code § 16-353(c).

Plaintiff has interpreted and enforced the Local Ordinance as a complete ban on human-held signs in public streets: "Sign walkers are not allowed to conduct their business on public streets which is defined as all that area dedicated to public use for public street purposes and includes roadways, parkways, alleys, and sidewalks." (R. 28, ¶ 8.)

[1] "R.___" refers to the Maricopa County Superior Court Clerk's Index of Record and pertinent docket number(s).

The Local Ordinance is punished as a criminal misdemeanor. (R. 28, ¶ 10.) Plaintiff enforces the Ordinance as the "State of Arizona" rather than as the "City of Scottsdale." The caption in enforcement proceedings thus reads *The State of Arizona v. Defendant*. (R. 28, ¶ 9.)

Plaintiff asserts "two valid and substantial interests in the area of human-held roadway advertising. First, the ordinance promotes traffic and pedestrian safety; second, the ordinance eliminates the most pernicious form of roadway clutter." (R. 28, ex. 4 at 9.)

Plaintiff charged James Torgeson with a criminal misdemeanor under the Ordinance in January 2007. (R. 28, ¶ 10.) Mr. Torgeson is a resident of Chandler, Arizona. (R. 28, ex. 6 at 1.) He owns a company that sells human sign-walking advertising services. (R. 8.)

**The State Law**. The State Law is codified at A.R.S. § 9-499.13. It became effective in September of 2008 after passing the House (51-8) and Senate (23-7) and then signed into law by the Governor. It "mandate[d] that all cities and towns must allow sign walkers," and "authorize[d] cities and towns to regulate the sign walkers for public safety purposes only—such as time, place and manner." (R. 28, ¶ 15.)

The first sentence of the State Law explained that it represents a limitation on authority previously delegated from the state legislature to cities and towns under A.R.S. § 9-462.01:

> From and after December 31, 2008, notwithstanding the authority to regulate signs pursuant to § 9-462.01, and as a matter of statewide concern, all municipalities shall allow the posting, display and use of sign walkers. Municipalities may adopt reasonable time, place and manner regulations relating to sign walkers.

A.R.S. § 9-499.13(A). It further directed that the regulation involved "a matter of statewide concern." *Id.*

Plaintiff knew about the State Law before its passage and, notwithstanding its current position and argument, understood the impact on its Local Ordinance. On January 31, 2008, Plaintiff's Government Relations Director informed the City Council that "[t]he bill would preempt the City's ordinance that currently prohibits all commercial sign walkers in the public's right of way." (R. 28, ¶ 16.)

**Amended State Law**. The Legislature amended the State Law in 2014. The amendment (H.B. 2528) prohibits "a municipality that adopts reasonable time, place and manner regulations relating to sign walkers from restricting a sign walker's use of public sidewalks, walkways, or pedestrian thoroughfares." (R. 28, ¶ 19.) It further authorizes a civil enforcement action against municipalities who failed to comply. (*Id.* ¶ 20.)

At the February 2014 House Committee hearing on H.B. 2528, Representative Kavanagh reported "that he received a message from the City of Scottsdale stating that they are not taking a position on the bill." (*Id.* ¶ 23.)

H.B. 2528 passed with an overwhelming majority of votes in the House (57-0) and Senate (21-9), and the Governor signed it into law on April 17, 2014. (*Id.* ¶ 24.) The amended State Law again explains that it represents a limitation on authority previously delegated from the state legislature to cities and towns under A.R.S. § 9-462.01 and directs that it involves a "matter of statewide concern."

The amended State Law included an explanation of legislative intent:

> It is the public policy of this state that equal access to public sidewalks, walkways and pedestrian thoroughfares is fundamental to the exercise of free speech and expression. Notwithstanding reasonable time, place and manner regulations, the use of public sidewalks, walkways and pedestrian thoroughfares must be uniform as between sign walkers and all other individuals.
>
> Municipal regulations of time, place and manner that target sign walkers and prevent the equal use of public sidewalks, walkways and pedestrian thoroughfares by sign walkers violate the public policy of this state and are void.

A.R.S. § 9-499.13, Sec. 2 (3), (4).

Thus, in the end, both the original and amended Laws traversed the standard, well-worn path required of a bill to become a law—eight legislative committees,

majority votes in the House and Senate, and then signed by the Governor into law. Plaintiff then sued.

**This Lawsuit**. Plaintiff filed this lawsuit against the State on May 8, 2014. Plaintiff sought a declaration (i) that the State Law is unconstitutional as applied to the City of Scottsdale, and (ii) that the Scottsdale City Charter and Local Ordinance supersede the State Law. (R. 1, p. 12.) Plaintiff argued that the State lacked "jurisdiction or legal authority" to amend the State Law "in such manner that conflicts and interferes with the Scottsdale Charter regarding Scottsdale's control and regulation of the use and enjoyment of its streets, public grounds, and ways and related to its exercise of its police powers." (R. 1, ¶¶ 2, 4.)

At Plaintiff's request, the parties agreed to expedite briefing of the dispositive legal issue for the Superior Court to decide, without the need or benefit of evidence or discovery.

Plaintiff argued that the State Law "unconstitutionally interferes with [its] self-governance in three overall areas: the preservation of community aesthetics, the protection of the inhabitants of Scottsdale from the immediate dangers posed by distracted drivers, and the regulation and control of municipal streets and sidewalks." (R. 23, p. 7.) As the crux of its argument, Plaintiff concluded that "[t]hese are matters of strictly local concern" over which the State has no authority to regulate charter cities. (*Id*.)

**Lower Court Decision**. After briefing and oral argument, the Superior Court granted the State's motion for summary judgment and dismissed Plaintiff's lawsuit on August 18, 2014. (R. 43.) The court found that State Law preempted the Ordinance, that the "sign spinner" field was a matter of statewide concern, and that "the valid local municipal interests of regulating a city's own sidewalks, aesthetics, and safety are not purely local matters to which the city has a sovereign right to regulate in a manner inconsistent with the state law." (R. 43.)

Plaintiff appealed.

## ISSUE PRESENTED FOR REVIEW

At issue is whether the Arizona Constitution empowers charter cities under Article 13, Section 2 to unilaterally prohibit and criminalize unpopular conduct as a purely local concern if, when, or because it happens on their streets and in their communities, whether or not the conduct is unique or common to other Arizona cities, and whether or not the State has contrary laws.

## ARGUMENT

### I. The Superior Court correctly held that charter municipalities do not have broad, unilateral discretion under the Arizona Constitution to criminalize common, statewide practices without limitation or oversight from the Arizona legislature.

#### A. Standard of Review

The Superior Court granted summary judgment for the State after the parties agreed to brief the dispositive legal issue in cross-motions for summary judgment.

That decision is reviewed under a *de novo* standard. *City of Tempe v. Outdoor Systems, Inc.*, 201 Ariz. 106, 109, ¶ 7 (App. 2001). This Court "may affirm a summary judgment even if the trial court reached the right result for the wrong reason." *Guo v. Maricopa County Med. Ctr.*, 196 Ariz. 11, 15, ¶ 16 (App. 1999).

### B. A city charter is not the local equivalent of the Declaration of Independence.

Plaintiff argues that the Arizona Constitution erects a legal fortress around charter cities within which they can craft local ordinances to rid their streets and sidewalks of sign-wielding people who offend their aesthetic sensibilities, ostensibly protecting their inhabitants from distracted drivers—regardless of contrary state statutes and immune from state legislative control. Plaintiff's argument hinges on Article 13, Section 2 of the Constitution, which provides that cities or towns of at least 3,501 residents may "frame a charter for [their] own government consistent with, and subject to the laws of the state." Invoking this provision, Plaintiff asserts a constitutional right to prohibit and even criminalize a common, statewide advertising practice that Arizona law expressly permits.

It doesn't work. Plaintiff's argument fails to distinguish fact from fiction when it comes to charter autonomy under the Arizona Constitution and the relationship between the State and its 19 charter towns and cities. The Constitution does not confer unilateral license on all charter towns and cities to prohibit and criminalize unpopular conduct if, when, or because it happens on their streets and

in their communities, whether or not the conduct is unique or common to other Arizona cities, and whether or not the State has contrary laws. *See*, *e.g.*, *Strode v. Sullivan*, 72 Ariz. 360, 368 (1951) ("This provision conferring upon a qualified city power to frame a charter for its own government is not an enabling act conferring carte blanche authority or plenary power to adopt any legislation that it might desire.").

The Arizona Constitution, instead, confers authority on all towns and cities of at least 3,501 residents to create charters and regulate matters of strictly local concern without State interference or oversight. Ariz. Const. art. 13, § 2; *City of Scottsdale v. Scottsdale Assoc. Merch., Inc.*, 120 Ariz. 4, 5 (1978) ("*City of Scottsdale III*").[2] Arizona courts have recognized two narrow and discrete areas where charter cities have some measure of plenary power:

- Elections. Charter communities can structure the method and process by which they elect their local representatives without state interference. *See*, *e.g.*, *Strode*, 72 Ariz. at 368 ("We therefore specifically hold that the method and manner of conducting elections in the city of Phoenix is peculiarly the subject of local interest and is not a matter of statewide concern.").
- Proprietary dealings. Charter communities can decide how to sell or lease their own real or personal property, products, or services. *See*, *e.g.*, *City of Tucson v. Sigma Alpha Epsilon*, 67 Ariz. 330, 336 (1948) ("We therefore hold that the sale or disposition of property by charter cities is not a matter of general or public concern.").

[2] Of 91 incorporated Arizona cities, at least 70 meet the population requirement of 3,501 residents to become charter cities under the Constitution. U.S. Census Bureau, 2013 Population Estimates, available at http://factfinder.census.gov (last visited Feb. 26, 2015).

But on issues of statewide scope or relevance, the Arizona legislature retains plenary power and charter cities must yield. *City of Scottsdale III*, 120 Ariz. at 5 ("Charter cities have certain rights and privileges in local matters to legislate free from interference by the legislature. When the subject of legislation is a matter of statewide concern the Legislature has the power to bind all throughout the state including charter cities."). Moreover, where, as here, charter cities hope to wield powers delegated to them by the state legislature, the cities must exercise such powers as directed by the legislature or not at all. *City of Scottsdale III*, 120 Ariz. at 5.

Local charters and ordinances are invalid to the extent they conflict with state law on subjects that generally affect all Arizonans—whether or not the interest is shared at state and local levels. *Levitz v. State*, 126 Ariz. 203, 204-205 (1980) (rejecting argument that the regulation of advertising signs "is purely a local matter" for charter cities to regulate or "that advertising sign regulation is somehow exempt from the requirements of the state regulation"); *City of Casa Grande v. Arizona Water Co.*, 199 Ariz. 547, 551, ¶ 12 (App. 2001) (holding that local ordinance could not conflict with state statute on "a matter of both local and statewide concern"). As the seminal municipal law treatise explains:

> Needless to say, a municipality by adopting a charter form of government does not become an independent sovereignty. The state remains supreme in all matters not

> purely local. Otherwise stated, a charter must yield to the constitution and general laws of the state[.]

6 E. McQuillin, *The Law of Municipal Corporations* § 21:30 (3d ed. 2006) (hereinafter "McQuillin").

Arizona courts have never deemed charter cities to be independent and free-floating entities, imbued with absolute authority to regulate whatever issues or conduct might pique their community interest, all without State interference or oversight. *Clayton v. State*, 38 Ariz. 135, 144 (1931) ("The city does not assume under its charter all the powers that the state may exercise within its limits, but only powers incident to a city government."); *State v. Coles*, 234 Ariz. 573 (App. 2014) (invalidating City of Scottsdale ordinance that criminalized public drunkenness because it conflicted with state law).

The City of Scottsdale knows this well, having previously exceeded its authority, compelling Arizona courts to invalidate local Scottsdale ordinances in conflict with Arizona law:

In *City of Scottsdale III*, 120 Ariz. at 5, for instance, the Arizona Supreme Court invalidated a Scottsdale ordinance that conflicted with Arizona law on a sign regulation issue. *City of Scottsdale III*, 120 Ariz.at 5. As here, the City of Scottsdale argued that it need not comply with the Arizona statute as a charter city under the Arizona Constitution. *Id.* ("The City argues that it is a charter city with the authority to provide for zoning matters under its charter, and the authority for

[the sign ordinance] is not the state statute but the city charter."). The Supreme Court rejected that argument, reminding the City of Scottsdale that "[c]harter cities have certain rights and privileges in local matters to legislate free from interference by the legislature. When the subject of legislation is a matter of statewide concern the Legislature has the power to bind all throughout the state including charter cities." *Id*.

In *Folsom Investments, Inc. v. City of Scottsdale*, 620 F.Supp. 1372, 1375 (D. Ariz. 1985), the District of Arizona invalidated a Scottsdale ordinance that permitted the "denial of subdivision plats solely upon proposed zoning" in conflict with state law.

And last year, this Court invalidated another City of Scottsdale ordinance that conflicted with Arizona state law. *Coles*, 234 Ariz. 573. There, as here, Scottsdale criminalized conduct the State permitted—namely, Scottsdale City Code 19-8(a) criminalized public drunkenness as an independent offense, while A.R.S. § 36-2031 prohibited local governments from criminalizing public drunkenness as an independent offense. *Id.* at ¶ 12. As here, the Scottsdale ordinance was held invalid. *Id.* at ¶¶ 15-17. *Coles* is indistinguishable. There, Scottsdale prohibited intoxicated people from walking up and down its streets based on safety considerations; here it hopes to prohibit sign-bearing people from walking its streets for identical reasons.

The Superior Court's decision should be affirmed for at least two independent reasons: (1) the City Ordinance conflicts with a general Arizona state law on an issue of statewide reach and relevance; and (2) Plaintiff seeks to wield authority delegated from the Arizona legislature, which Plaintiff must exercise as prescribed or not at all.

### C. The City Ordinance is invalid because it conflicts with the State Law on a matter of statewide concern and relevance.

Plaintiff acknowledges a direct conflict between the State Law and Ordinance. (R. 1, ¶¶ 2, 4, 7, 39.) Indeed, that conflict represents the basis of Plaintiff's lawsuit: Plaintiff seeks to criminalize what the State expressly permits. But a city ordinance and charter may only conflict with valid state law if the local ordinance involves a matter of purely local concern; and an ordinance is invalid if it conflicts with state law on issues of statewide reach and concern—even if that interest is shared between state and local interests. *See, e.g.*, *Arizona Water*, 199 Ariz. at 551, ¶12 (holding that local ordinance could not conflict with state statute on "a matter of both local and statewide concern").

#### 1. The State Law has statewide relevance and application.

The State Law is a general law that applies in all parts of Arizona with equal force and identical terms. A.R.S. § 9–499.13. It does not prescribe different rules for different places, but instead operates uniformly from community to community. 6 McQuillin § 21:30 ("Thus, ordinarily, a general law enacted by the legislature

and applicable alike to all cities is paramount and supreme over any conflicting charter provision.").

Plaintiff actually articulates the statewide reach and interest when it describes its rationale for banning sign-walkers under the Ordinance. Plaintiff explains that it prohibits such "roadway signage" and "commercial advertising" to promote safety and eliminate roadway clutter:

> As a matter of law, the [City of Scottsdale] has two valid and substantial interests in the area of human-held roadway advertising. First, the ordinance promotes traffic and pedestrian safety; second, the ordinance eliminates the most pernicious form of roadway clutter. With respect to safety, human-powered commercial advertising on a roadway, with bearers actively vying for motorist's attention by moving a sign about and seeking to gain the immediate attention of drivers, obviously is much more distracting than any fixed off-roadway advertisement, no matter how large such non-moving displays may be. Equally clear, the same roadway signage that is the subject of the ordinance constitutes a visual blight for motorists to view as they are being distracted from their driving task.

(R. 28, ex. 4 at 9.)

These reasons are "of no immediate or special concern to the city as such. It is of general concern to the inhabitants of a city in common with all other residents of the state." *Clayton v. State*, 38 Ariz. at 148 ("The true purpose of all municipal ordinances is to regulate local affairs. The sobriety of drivers of motor vehicles is not a local affair. It is a matter of concern to all the people of the state. A driver under the influence of intoxicating liquor is a menace to every one (sic) who happens to be on the road or street while he is at large. It is true that he is a greater

menace when he selects a busy street as a driveway instead of a remote country road.").

Plaintiff amplifies the statewide nature and scope of its asserted interest with its exclusive reliance on statewide evidence (crashes on state highways) and statewide sources (the Arizona Department of Public Safety) to demonstrate the dangers of sign walkers. (OB at, 4; R. 1, ¶ 34.) Even more so when it argues "that uniformity is important in signage." (R. 1, ¶ 34(b)(10)); *Arizona Water*, 199 Ariz. at ¶10 ("A subject matter may be of statewide concern if uniform regulation is appropriate."). Uniform regulation is appropriate for signage issues, which are not unique to Plaintiff and arise across the entire state.

The Court need not speculate about the extraterritorial impact of Scottsdale's ordinance, which reaches all Arizona residents, not strictly Scottsdale residents: The City of Scottsdale charged James Torgeson with a criminal misdemeanor under the Ordinance. In doing so, Scottsdale pursued a Chandler resident based on conduct that is lawful in Chandler and everywhere else. (R. 28, ex. 6.) Since 2007, Scottsdale has enforced the ordinance against advertising companies from Peoria and Chandler. (R. 28, ex. 2.)

And as the trial court judge recognized when discussing Plaintiff's safety justification for the Ordinance, the people injured in hypothetical accidents caused by sign-walkers in Scottsdale "may or may not be from the City of Scottsdale, as

we all know, since we're all intertwined here. I drive through the City of Scottsdale all the time, and I live in Tempe." (R. 53 at 16.)

The statewide reach is particularly acute given the criminal nature of Plaintiff's ordinance. If 19 charter cities are allowed to enact and enforce their own criminal laws—in conflict with state law and one another—individuals and business interests will be shackled by a patchwork quilt of local ordinances, with serious consequences for non-compliance, including the deprivation of liberty. That is why local charters and ordinances cannot criminalize what the State permits. 6 McQuillin § 21:36 ("In connection with public offenses, an ordinance cannot authorize what a statute forbids nor forbid what a statute permits."); *State of Minnesota v. Kuhlman*, 729 N.W.2d 577, 580-82 (Minn. 2007) (holding charter city had "some power to enact traffic regulations, but those traffic regulations are not valid if they are in conflict with state law.").

And finally, the Arizona legislature expressly directs in the State Law itself that the issue and fundamental rights preserved therein are matters of statewide concern. The State Law (1) explains that it protects fundamental speech and expression rights, (2) directs that conflicting municipal ordinances are void as against public policy, (3) requires uniform regulations for all individuals, and (4) describes the issue as a matter of statewide concern. A.R.S. § 9–499.13, Sec. 2, Legislative Intent. The legislature is entitled to deference on what is and what is

not a matter of statewide concern. *Clayton*, 38 Ariz. at 149, 297 P. at 1042 (invalidating local ordinance that prohibited drunk driving because the "legislature determined that the sobriety or insobriety if a motor vehicle driver on the public highways of the state is a matter of state-wide policy and concern").

In the end, Plaintiff's aversion to human signage cannot overcome reality, which is that sign-walkers and sign-spinners operate in cities across the State of Arizona and are not unique to Plaintiff. While state and local governments have shared interests in protecting the public, that local interest must yield here. The alternative is chaos, with criminal laws and expectations changing from block to block.

### 2. Arizona courts have long treated comparable laws as matters of statewide concern.

Plaintiff first alleged the State Law interfered with its charter rights of self-government in three areas, which were permutations of traditional police powers:

> Amended A.R.S. § 9-499.13 unconstitutionally interferes with Scottsdale's self-governance in three overall areas: the regulation and control of its streets and sidewalks, the exercise of police power to protect the public safety, and the preservation of community aesthetics.

(R. 1. ¶ 26.)

Arizona courts have held that all three areas are of statewide concern, meaning that charter cities must yield to the legislature in the areas.

Arizona courts have long held that traditional police powers are primary functions of the state—subject to general laws. *Luhrs v. City of Phoenix*, 52 Ariz. 438, 443 (1938) ("We think the preservation of order and the protection of life and property and the suppression of crime are primary functions of the state; that the entire state is interested in these matters, and that they are proper subjects for general laws.").

Arizona courts have also held that zoning and sign regulation are matters of statewide concern. *City of Scottsdale III*, 120 Ariz. at 5 ("Zoning regulation is a matter of statewide concern."); *Levitz*, 126 Ariz. at 204 ("The City maintains that the regulation of signs is purely a local matter subject to regulation by the local government under the power given to charter cities by Article 13 § 2 of the Arizona Constitution. The position of the City is not correct.").

The same is true for aesthetics, *City of Scottsdale v. Arizona Sign Ass'n, Inc.*, 115 Ariz. 233, 234 (App. 1977) (communities regulate "aesthetics and design through the zoning power"); for advertising sign regulation, *Levitz*, 126 Ariz. at 205 ("We do not accept the suggestion of the City that advertising sign regulation is somehow exempt from the requirements of the state regulation."); for peddling, 7 McQuillin § 24:370 ("Where enactments of the legislature reveal that the state recognizes peddling and street vending as lawful businesses, and that street and itinerant vendors are engaged in the pursuit of a lawful business, a municipality

cannot by ordinance validly prohibit such businesses."); and for traffic and transportation, 6 McQuillin § 21:36 ("Naturally, on account of the prodigious growth of interstate, interurban, and urban motor vehicle transportation and traffic in recent days and the need of uniformity of regulation, both interurban and urban transportation and traffic have become of necessity matters of statewide importance, and courts everywhere are inclined to regard them as no longer municipal affairs.").

And where, as here, charter cities seek to regulate issues under powers delegated from the legislature, Arizona law directs that those issues are *per se* of statewide concern. *Luhrs*, 52 Ariz. at 443 ("Whether it is one or the other in such case depends upon whether the activity is carried on by the municipality as an agent of the state. If it is, it is of general or public concern.").

In sum, the Ordinance squarely conflicts with State Law on a matter of statewide concern and thus invalid. *City of Scottsdale III*, 120 Ariz. at 5; *Outdoor Systems*, 201 Ariz. at 110, ¶ 11 ("The Ordinance's blanket prohibition against making any alterations to non-conforming signs cannot be interpreted in harmony with the opposite mandate of the state statute. Because the statute controls over the

Ordinance, A.R.S. § 9-462.02 prevails and the conflicting language of the Ordinance is deemed invalid.").[3]

### 3. Plaintiff offers no authority for its expansive interpretation of unchecked charter authority.

Plaintiff peppers its argument with buzzwords and conclusions that the Local Ordinance and sign walker regulation are "matters of strictly local municipal concern," and thus protected from state legislative interference under the Arizona Constitution. Yet, Plaintiff offers no Arizona decision that (i) interprets the Constitution to confer broad, unchecked police and zoning powers upon charter cities, or (ii) insulates charter cities from legislative interference under the Constitution if and when regulating signage, preserving aesthetics, protecting the public, or controlling public streets and sidewalks.

Plaintiff instead relies on *City of Scottsdale v. Mun. Court of City of Tempe*, 90 Ariz. 393 (1962) ("*City of Scottsdale I*"), which Plaintiff cites (OB at 17-18) for the proposition that "a municipality usually exercises proprietary functions when it promotes the comfort, convenience, safety and happiness of its own inhabitants rather than the welfare of the general public."

But Plaintiff pulls that quote from the *dissent*, 90 Ariz. at 403, while the majority opinion firmly supports the State, not Plaintiff. The Court reaffirmed

[3] Plaintiff has since disavowed any connection to or reliance on police and zoning powers in favor of a pure proprietary function, but that argument fails under logic and the law. *Supra*.

"that the preservation of the public health is one of the duties that devolves upon the state as a sovereignty; that in its discharge the state is acting strictly in the discharge of one of the functions of government; and that a municipal corporation likewise in the discharge of such a duty is in the exercise of a purely governmental function affecting the welfare not only of the citizens, residing within its corporate limits but of the citizens of the state generally, all of whom have an interest in the prevention and spread of infectious or contagious diseases." *City of Scottsdale I*, 90 Ariz. at 389.

*Luhrs* is likewise unavailing. Plaintiff quotes *Luhrs* (OB at 18) for the proposition that "[i]f it is exercised by the city in its proprietary capacity, it is a power incidental to home rule," but never mentions the holding or analysis, which—again—firmly support the State, not Plaintiff:

> We think the preservation of order and the protection of life and property and the suppression of crime are primary functions of the state; that the entire state is interested in these matters, and that they are proper subjects for general laws.

*Luhrs*, 52 Ariz. at 448 ("[C]ertain functions have, by this court, definitely been determined governmental, the control of which remains in the state. The police power is one. A municipal corporation has no inherent police power, but derives it solely from delegation by the state. [citation omitted]. 'The protection of life, liberty, and property, and the preservation of the public peace and order, in every

part, division, and subdivision of the state, is a governmental duty, which devolves upon the State, and not upon its municipalities, any further than the state, in its sovereignty, may see fit to impose upon or delegate it to the municipalities.") (quoting *Kansas City v. J.I. Case Threshing Mach. Co.*, 87 S.W.2d 195 (Mo. 1935)).

Also misplaced is Plaintiff's reliance on *Strode v. Sullivan*, 72 Ariz. 360 (1951) and *City of Tucson v. State*, 229 Ariz. 172 (2012). Neither case addresses, much less resolves, the issue presented here. *Strode* and *City of Tucson* merely hold that the Constitution's home rule provision means what it says—namely, that charter cities have autonomy with respect to electing their own government. Ariz. Const. art. 13, § 2 (providing that persons may "frame a charter for its own government consistent with, and subject to the laws of the state."); *City of Tucson*, 229 Ariz. at ¶ 21 ("[W]hatever the general difficulties in identifying matters of local concern, Strode is absolutely clear that charter city governments enjoy autonomy with respect to structuring their own governments."); *Strode*, 72 Ariz. at 368 ("We can conceive of no essentials more inherently of local interest or concern to the electors of a city than who shall be its governing officers and how they shall be selected.").

In neither *Strode* nor *City of Tucson* was it argued (much less decided) that charter cities have autonomy to exercise police or zoning powers. Indeed, *Strode*

cautions against an expansive interpretation of authority. *Id.* at 364 ("This provision conferring upon a qualified city power to frame a charter for its own government is not an enabling act conferring carte blanche authority or plenary power to adopt any legislation that it might desire.").

Nor does Plaintiff benefit from *Clayton v. City of Phoenix*, 38 Ariz. 135 (1931), which it offers as expanding the inherent powers of charter cities to various additional areas (OB at 31), but which, in fact, actually concerns powers delegated from the state legislature to cities under the Highway Code.

Plaintiff elsewhere offers irrelevant or inconsequential decisions. To be clear, the issue in this case is not whether health, safety, and aesthetics are proper areas for municipal regulation, *State v. Watson*, 198 Ariz. 48, 53 (App. 2000) (OB at 20) ("safeguarding the general health, safety, and welfare of the community" is a "proper goal for municipal government"); not whether charter cities generally have power to regulate their streets, *Gear v. City of Phoenix*, 93 Ariz. 260, 263 (1963) (OB at 16) ("A municipality clearly has the power to regulate the use of its streets, including ingress thereto and egress therefrom."); and not whether and to what extent local governments can regulate commercial speech under the First Amendment, *State v. Boehler*, 228 Ariz. 33, 37 (App. 2011) (OB at 37) (recognizing that even public fora are subject to regulation).

To recognize that local governments have an interest in protecting the health, safety, and welfare of their communities is a far cry from holding that charter cities have absolute, unchecked authority to regulate in these areas.

Last, Plaintiff argues in footnote 8 (OB at 19) that a balancing test is appropriate where an interest is of mixed state and local concern, citing *City of Tucson v. State of Arizona*, 191 Ariz. 436 (App. 1998). Aside from the fact that no Arizona court had recognized the balancing test for 17 years after that decision, the Arizona Supreme Court explained that a balancing of policy considerations had no place in the analysis. *City of Tucson v. State*, 229 Ariz. 172, ¶ 46 (2012) ("Determining the method for electing city council members necessarily involves a weighing of competing policy concerns. Our opinion neither involves policy choices nor endorses one method of election over another; instead it considers whether Arizona's Constitution entrusts those issues to the voters of charter cities or the state legislature."). And this Court recently found that a trial court had erred in applying the balancing. *City of Tucson v. State*, 235 Ariz. 434, 439 n.6 (2014) ("[W]e agree with the state's contention that the trial court erred in applying a balancing test.").

**4. The City cannot hide under a proprietor's hat.**

In a novel attempt to manufacture some form of charter autonomy from the state, Plaintiff now claims to regulate and criminalize human sign-walkers as a

proprietor in the "proprietary function," rather than as a government in furtherance of zoning or police powers. But Plaintiff neither enacted nor seeks to enforce the Local Ordinance as a contractual limitation or condition on the lease or sale of its own property.

Plaintiff has not cited any authority to support its expansive view of charter authority and proprietary functions, but instead offers two square pegs—*City of Tucson v. Sigma Alpha Epsilon*, 67 Ariz. 330 (1948), and *McMann v. City of Tucson*, 202 Ariz. 468 (App. 2002)—for a round hole. Again, this case does *not* resemble *Sigma Alpha Epsilon*, where the City of Tucson argued it could convey its real property without first advertising for bids as an Arizona statute required. *Id*. *Nor* does it resemble *McMann*, where the City of Tucson argued that it could lease its real property—the Tucson Convention Center—on its own terms to gun show promoters to conduct background checks. *McMann*, 202 Ariz. at 470, ¶¶ 2-4.

No issue is presented about Scottsdale's power to lease or sell its own property on its own terms, which is logically "not a matter of state-wide public concern" and should be "of no interest to the cities of Phoenix, Yuma, or any other city or town in the State of Arizona." *Sigma Alpha Epsilon*, 67 Ariz. at 336 ("We therefore hold that the sale or disposition of property by charter cities is not a matter of general or public concern."). If the Ordinance concerned such matters, Scottsdale would be "presumed to act under the same restrictions as a private

person." *Id*. at ¶¶ 11-12. But it doesn't. The Ordinance at issue criminalizes conduct the State permits.

### D. The State Law merely represents a condition or limitation on powers delegated from the State to charter cities under A.R.S. § 9-462.01, which Plaintiff must recognize in order to continue exercising such authority.

Plaintiff's claim also fails because charter and non-charter municipalities receive their police or zoning power from the Arizona legislature and must exercise that power as directed by the legislature or not at all.

Arizona municipalities have no inherent zoning or police powers. *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 205 (1968) ("[I]t is fundamental that a municipal corporation has no inherent police power, and hence municipal power of zoning must exist by virtue of a delegated state power.") (hereinafter, "*City of Scottsdale II*"); *Transamerica*, 157 Ariz. at 350 ("[G]overnmental units, like the city and the county, do not inherently have the zoning power."). The Arizona Constitution vests the Legislature with plenary power to enact general laws. Ariz. Const. art. 4, pt. 1, § 1; *see also Earhart v. Frohmiller*, 65 Ariz. 221, 224 (1947) ("The Legislature is vested with the whole of the legislative power of the state, and may deal with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution.").

Of course, the Legislature can, and often does, delegate state government powers to charter and non-charter cities via enabling statutes that prescribe the

delegated powers. *Transamerica Title Ins. Co. v. City of Tucson*, 157 Ariz. 346, 350 (1988) ("The power to zone is part of the police power and may be delegated by the State, but the subordinate governmental unit has no greater power than that which is delegated.").

But, when so delegated, the legislature retains absolute authority to expand, restrict, or eliminate the delegated power. *See, e.g., City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, ¶ 25 (App. 1999) ("The City's power to enact zoning ordinances derives exclusively from the state. The City, therefore, does not have vested rights in its zoning powers, and the state can reduce or condition those powers."). And all municipalities—charter and non-charter—must exercise the authority as delegated—or not at all. *City of Scottsdale III*, 120 Ariz. at 5.

The City of Scottsdale is no stranger to this doctrine. The Arizona Supreme Court has *twice* directed the City that police and zoning powers come from the State, and *twice* admonished the City to exercise them as prescribed or not at all. *City of Scottsdale III*, 120 Ariz. at 5 (1978); *see also City of Scottsdale II*, 103 Ariz. at 205.

In the first case, on a matter of municipal zoning, the Arizona Supreme Court admonished Scottsdale that:

> [I]t is a well-established general rule that when the legislature grants to a municipal corporation power to do

> any act and prescribes the manner in which the power shall be exercised, the power must be exercised in the manner stated in the grant and *not otherwise*.

*City of Scottsdale II*, 103 Ariz. at 205 (emphasis added).

Then, in *City of Scottsdale III*, 120 Ariz. at 5, the Supreme Court again admonished the City of Scottsdale that charter and non-charter cities must exercise state delegated powers as the legislature directs:

> [Z]oning authority comes from the state. When the state grants zoning power to a city, the power must be exercised within the limits and in the manner prescribed in the grant *and not otherwise*.

*Id.* (emphasis added). Moreover, in reaching its decision, the Supreme Court rejected the City of Scottsdale's argument that it need not comply with the Arizona statute as charter city under the Arizona Constitution. *Id.* ("The City argues that it is a charter city with the authority to provide for zoning matters under its charter, and the authority for [the sign ordinance] is not the state statute but the city charter.").

These authorities apply with equal force here: The state legislature passed an enabling statute—A.R.S. § 9-462.01—that empowered charter and non-charter cities to "regulate signs and billboards" in order to "conserve and promote the public health, safety, and general welfare." Plaintiff had used that delegated authority to regulate and police conduct, including to ban human-held signage. *Clayton v. State*, 38 Ariz. 135 (1931) ("Therefore, if the city of Phoenix can pass

by-laws to regulate the conduct of drivers in the use of highways within its boundaries, it is because the power to do so has been delegated to it by the state.").[4] The legislature since passed the State Law, which expressly describes itself as a limitation on delegated authority under A.R.S. § 9-462.01. A.R.S. § 9-499.13.[5]

In the end, Plaintiff depends entirely on the Arizona Legislature for its police powers, which are of *per se* of statewide concern and must be exercised as delegated, limited, and conditioned by the Legislature—or not at all. *Luhrs*, 52 Ariz. at 443. Plaintiff cannot pick and choose among palatable and unpalatable conditions and limitations.

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[4] Plaintiff confirms the delegated source of its power when it presses and pursues charges under the Ordinance as the *State of Arizona*, not the *City of Scottsdale*, and when it defended the Ordinance against a constitutional attack as the *State of Arizona*, not the *City of Scottsdale* (R. 28, ¶ 9, 11.) Plaintiff does not assume the State's identity for formulaic reasons or because it sounds good. It does so because it derives its criminal prosecutorial authority from the State, and the State authorizes its political subdivisions to wield such power as the State's agent. *Roubos v. Miller*, 213 Ariz. 36, 40 (App. 2006) ("In short, the legislature has enabled municipalities to enforce their ordinances through criminal or civil proceedings and has specifically characterized civil proceedings used to enforce such ordinances as 'civil actions.'").

[5] Ignoring the State Law's first sentence, Plaintiff argues that the Law is unrelated to the enabling act because of where the legislature placed it. Based on the analysis in *McMann v. City of Tucson*, Plaintiff argues that "it is clear that the Arizona Legislature did not intend or interpret amended A.R.S. § 9-499.13 as a zoning law." (OB at 26.) But *McMann* hurts Plaintiff, rather than helps it. Here, the State Law was placed in Title 9 on cities and towns; not in the criminal code (Title 33).

The State Law does not invade the province of charter municipalities, but instead merely restricts powers delegated by the State to Plaintiff and other municipalities.

## CONCLUSION

Plaintiff's arguments and authorities afford no basis or reason to depart from the Superior Court's analysis and conclusion. This Court should affirm.

Respectfully submitted this 2nd day of March, 2015.

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