STATE OF ARIZONA

COURT OF APPEALS, DIVISION ONE

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

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF THE CASE

This declaratory judgment action was filed on May 8, 2014 by the City of Scottsdale seeking a judgment declaring that pursuant to Article 13, Section 2 of the Arizona Constitution, *Strode v. Sullivan*, 72 Ariz. 360, 236 P.2d 48 (1951), and *City of Tucson v. State of Arizona*, 229 Ariz. 172, 273 P.3d 624 (2012), Scottsdale's municipal ordinance, S.R.C. § 16-353(c), and the Scottsdale City Charter supersede the provisions in amended A.R.S. § 9-499.13. The City further sought judgment declaring that amended A.R.S. § 9-499.13 cannot be constitutionally applied to a charter city and therefore Scottsdale is exempt from that statute's provisions.[1]

Plaintiff/Appellant and Defendant/Appellee filed cross motions for summary judgment. On August 26, 2014, the Court granted the State of Arizona's motion, and denied the City of Scottsdale's motion. Specifically, the Court concluded that:

> [b]ased on this Court's interpretation of the Supreme Court decisions in Levitz v. State of Arizona, 126 Ariz. 203 (1980) and City of Tucson v. State of Arizona, 229 Ariz. 172 (2012) and the Arizona Court of Appeals decision in State v. Coles, 234 Ariz. 573 (App. 2014), it seems that the state has demonstrated a matter of sufficient statewide concern and a desire to preempt the 'sign spinner' field.
>
> THE COURT FURTHER FINDS that the valid local municipal interests of regulating a city's own sidewalks, aesthetics, and safety

[1] The City of Scottsdale is not arguing the statute is unconstitutional overall. It may be constitutionally applied to non-charter cities.

> are not purely local matters to which the city has a sovereign right to regulate in a manner inconsistent with the state law.

(Index of Record on Appeal (hereinafter "IRA") 43 at p. 2)

Judgment was entered on November 6, 2014. (IRA 49) Appellants timely filed this appeal. (IRA 51) This Court has jurisdiction pursuant to Ariz. Const. art. 6, § 9 and A.R.S. § 12-2101.

Appellants herein pray this honorable Court, upon *de novo* review, reverses the judgment of the Superior Court and enters judgment in favor of the City of Scottsdale on this matter of law.

II. STATEMENT OF FACTS

Scottsdale is a charter city, framed in 1961, under Article 13, § 2 of the Arizona Constitution, and is sovereign in all matters that are of strictly local, municipal concern. (IRA 25 at p. 1, ¶ 1) It is well recognized that the heart of constitutional charter authority is providing the options needed by cities to deal with the individual needs and demands of the community through the maximum exercise of local determination. (IRA 25 at p. 1, ¶ 2) In the case at bar, the individual needs and demands of the community require the regulation of City property, *i.e.*, sidewalks, streets, alleys, public grounds, walkways, and pedestrian thoroughfares, to protect the aesthetics of the community and to protect the safety

of the inhabitants[2] of Scottsdale from the immediate hazards created by sign walkers in distracting drivers within the City's borders. (IRA 24 at p. 2, ¶ 3)

In prior proceedings involving the City's ordinance, the City was able to establish to the Superior Court's satisfaction a number of facts that inform the present litigation, including that sign walkers (sometimes referred to as "sign spinners") are predominantly, if not solely, engaged in commercial speech, often advertising retail sales of goods.[3] (IRA 24 at p. 2, ¶ 4) Sign walkers want to maximize the audience for their advertising by locating where large numbers of people will see them. (IRA 24 at p. 2, ¶ 5) Sign walkers often locate on busy intersections or streets waving or tossing their signs to attract the attention of passing motorists. (IRA 24 at p. 2, ¶ 6) Sign walkers use the movement or animation of their signs to gain the attention of drivers so they will view their advertising. (IRA 24 at p. 2, ¶ 7) The motion of the human-held signs is more distracting than fixed signs, and thereby, more dangerous. (IRA 24 at p. 2, ¶ 8) Distracting drivers increases the risk of traffic accidents, which can result in

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[2] The word "inhabitants" as referred to herein is meant to include any persons within the boundaries of the City, including residents and visitors.

[3] Appellant asks the Court to take judicial notice of the February 11, 2008 decision of the Maricopa County Superior Court in *State of Arizona v. James Edwin Torgeson*, LC2007-000710-001 DT, by the Honorable Margaret H. Downie. (IRA 25, Exhibit 3)

property damage, injury and death.[4] (IRA 24 at p. 2, ¶ 9) The citizens of Scottsdale consider sign walkers to be a visual blight. (IRA 24 at p. 3, ¶ 11) The City reportedly has received hundreds of complaints related to the unsightliness of human-borne animated advertising by sign walkers. (IRA 24 at p. 3, ¶ 12) Removing sign walkers from City sidewalks, walkways, and pedestrian thoroughfares protects the peace and beauty of the City as desired by its citizens. (IRA 24 at p. 3, ¶ 13)

The City's Charter grants the City the power[5] to regulate City property by

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[4] A recent study conducted by the Arizona Department of Public Safety reveals the significant negative impact of distracted driving. (IRA 24 at pp. 2-3, ¶ 10) During the months of November 27, 2013 through April 1, 2014 there were a total of 10,166 crashes on Arizona state highways. *Id*. Of those crashes, 1,163 (11.44%) were related to distracted driving. *Id*. The leading cause of distracted driving crashes was "outside distractions" which resulted in a total of 255 crashes (22 % of the distracted driving crashes). *Id*. From April 10, 2014 to April 15, 2014 DPS saw similar numbers during its concentrated educational campaign. During this campaign, out of a total of 29 crashes caused by distracted driving, seven (or 24%) were attributed to distractions from outside of the vehicle. *Id*.

[5] "[T]he powers derived by a municipality from its charter are three-fold: those granted in express words, those fairly implied in the powers expressly granted, and those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable." *Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 83, 270 P.3d 902, 910 ¶ 33 (App. 2012). Here, Scottsdale's Charter authorizes the ordinance found at S.R.C. § 16-353(c), and allows Scottsdale to retain home rule authority on the local interests of preserving the aesthetics of the community, protecting the public from distracted drivers, and regulating the use of its municipal sidewalks, walkways, and pedestrian thoroughfares.

providing that "[t]he city shall have all the powers granted to municipal corporations and to cities by the constitution and laws of this state and by this charter, together with all the implied powers necessary to carry into execution all the powers granted, and these further rights and powers, to wit . . . . (F) The city has the exclusive control and regulation of the use and enjoyment of its streets, alleys, public grounds or ways." Scottsdale City Charter, art. 1, sec. 3 (F). (IRA 24 at pp. 3-4, ¶ 14) The City's Charter also gives the City the power "[t]o provide for the preservation and enhancement of the environment of the City of Scottsdale." (IRA 24 at p. 4, ¶ 15)

Pursuant to the powers granted in the City's Charter, the City adopted S.R.C. § 16-353, which provides in pertinent part:

> 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.

(IRA 24 at p. 4, ¶ 16) The City defines "street" to mean "all that area dedicated to public use for public street purposes and includes roadways, parkways, alleys and sidewalks." (IRA 24 at p. 4, ¶ 17) The City defines "sidewalk" to mean "any

surface provided for the use of pedestrians." (IRA 24 at p. 5, ¶ 18)[6] Notwithstanding this ordinance, a sign walker may stand on private property. (IRA 24 at p. 5, ¶ 20)

In 2008, the Arizona state legislature enacted A.R.S. § 9-499.13, which provided:

> A. From and after December 31, 2008, notwithstanding the authority to regulate signs pursuant to section 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.
>
> B. For the purposes of this section, "sign walker" means a person who wears, holds or balances a sign.

(IRA 24 at p. 5, ¶ 21)

In 2007, an amendment to A.R.S. § 9-499.13, HB 2369, never became law after it was vetoed by the Governor. The legislative history demonstrates that the legislative actors were extremely uncomfortable about encroaching on an area of local municipal concern, and balances were struck in order to reserve the municipalities' powers in regulating sign walkers. Indeed, former Governor Napolitano vetoed the prior version of this statute ("HB 2369") stating that "this

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[6] Recognizing the immediate need to protect the aesthetics and safety of the City, the Ordinance enacting S.R.C. § 16-353(c) provided that, "the immediate operation of the provisions of this ordinance is necessary for the preservation of the public health, safety and welfare, an EMERGENCY is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage and adoption by the Council and approval by the Mayor." (IRA 24 at pp. 4-5, ¶ 19)

issue is not appropriate for a statewide mandate." (IRA 35 at pp. 6-7, ¶ 35) The reasons behind the Governor's veto were safety concerns, municipal leaders being the most familiar with their streets, and the overly broad drafting of the proposed bill. *Id*. Significantly, Governor Napolitano recognized that:

> ***sign walkers can pose safety hazards by distracting or obstructing the view of motorists and pedestrians. Municipal leaders, who are most familiar with their community's roads and traffic accident history, must retain the regulatory flexibility to ensure the safety of their residents. <u>This issue is not appropriate for a statewide mandate</u>***.

Id. (emphasis added).

Those expressed concerns notwithstanding, during the Arizona legislature's 2014 Second Regular Session, it enacted HB 2528, which amended A.R.S. § 9-499.13.[7] (IRA 24 at p. 5, ¶ 22) Amended A.R.S. § 9-499.13 took effect on July 23, 2014. (IRA 24 at p. 5, ¶ 23)

Amended A.R.S. § 9-499.13 now prohibits municipalities from adopting reasonable time, place and manner regulations relating to sign walkers which restrict a sign walker from using a public sidewalk, walkway or pedestrian thoroughfare. (IRA 24 at pp. 5-6, ¶ 24) Specifically, amended A.R.S. § 9-499.13 provides (amendment additions in all caps and alterations in strike-through text):

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[7] The City registered as opposed to HB 2528 on March 19, 2014. (IRA 35 at p. 6, ¶ 34)

A. From and after December 31, 2008, notwithstanding the authority to regulate signs pursuant to section 9-462.01, and as a matter of statewide concern, all municipalities shall allow the posting, display and use of sign walkers. EXCEPT AS PROVIDED BY SUBSECTION B OF THIS SECTION, municipalities may adopt reasonable time, place and manner regulations relating to sign walkers.

B. A MUNICIPALITY THAT ADOPTS REASONABLE TIME, PLACE AND MANNER REGULATIONS RELATING TO SIGN WALKERS MAY NOT RESTRICT A SIGN WALKER FROM USING A PUBLIC SIDEWALK, WALKWAY OR PEDESTRIAN THOROUGHFARE.

C. THIS SECTION MAY BE ENFORCED IN A PRIVATE CIVIL ACTION AND RELIEF, INCLUDING AN INJUNCTION, MAY BE AWARDED AGAINST A MUNICIPALITY. THE COURT SHALL AWARD REASONABLE ATTORNEY FEES TO A PARTY THAT PREVAILS IN AN ACTION AGAINST A MUNICIPALITY FOR A VIOLATION OF THIS SECTION.

~~B.~~ D. For the purposes of this section, "sign walker" means a person who wears, holds or balances a sign.

Id. The legislative intent accompanying this amendment to A.R.S. § 9-499.13 further provides:

The legislature finds, determines and declares that:

1. In a traditional public forum, freedom of speech is a fundamental right that must be protected from unreasonable abridgment by municipal regulation and enforcement.

2. Public sidewalks, walkways and pedestrian thoroughfares within a municipality are traditional forums and have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions.

> 3. 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.
>
> 4. 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.
>
> 5. The legislature intends that section 9-499.13, Arizona Revised Statutes, as amended by this act, be construed in favor of allowing sign walker speech and permitting sign walker access to traditional public forums within a municipality.

(IRA 24 at pp. 6-7, ¶ 25)

The legislative scheme and placement of the statute and the ordinance demonstrate that neither the Arizona legislature nor the City of Scottsdale intended either law to be a zoning law. The Arizona legislature categorized A.R.S. § 9-499.13 under Title 9 "Cities and Towns," Chapter 4 "General Powers," Article 8 "Miscellaneous." (IRA 35 at p. 6, ¶ 30) The legislature did not choose to enact this legislation under Title 9, Chapter 4, Article 6.1 "Municipal Zoning." (IRA 35 at p. 6, ¶ 31) Likewise, the Scottsdale City Council did not enact S.R.C. § 16-353 as part of the Scottsdale Zoning Ordinance. The Scottsdale City Council enacted S.R.C. § 16-353 under Chapter 16 "Licenses, Taxation and Miscellaneous Business Regulations," Article 10 "Street Sales and Solicitations." (IRA 35 at p. 6,

¶ 32) By contrast, the City's Zoning Ordinance is found in appendix B to the Scottsdale Revised Code. (IRA 35 at p. 6, ¶ 33) The City's Zoning Ordinance does regulate signage within the City. *See id*.

Because Scottsdale is a charter city, the Arizona constitution prevents A.R.S. § 9-499.13 from interfering with its manner of regulating the use of its own property and with its self-governance in the areas of preservation of community aesthetics and protection of the inhabitants of Scottsdale from the immediate dangers posed by distracted drivers. These are matters of strictly local municipal concern. In the Superior Court proceedings the State failed to demonstrate a legitimate statewide interest which could outweigh Scottsdale's interests in self-governance.

III. STATEMENT OF THE ISSUES

A. Is A.R.S. § 9-499.13 superseded by the constitutional authority of a charter city to direct its own affairs?

1. Does Scottsdale, a charter city, retain home rule authority to regulate the use of its own property?
2. Is a charter city's regulation of its own property an exercise of police or zoning power subject to the will and control of the State?

3. Does public policy favor charter city autonomy in the regulation and use of its own property?

IV. STANDARD OF REVIEW

Whether A.R.S. § 9-499.13 improperly preempts the constitutional authority of a charter city to direct its own affairs is a question of law the Court reviews *de novo*. *See City of Tucson v. State of Arizona*, 235 Ariz. 434, 333 P.3d 761, 763 ¶ 6 (App. 2014) ("City of Tucson (App. 2014)"); *Creative Learning Systems, Inc. v. State of Arizona*, 166 Ariz. 63, 65, 800 P.2d 50, 52 (App. 1990).

V. ARGUMENT

A. SCOTTSDALE, A CHARTER CITY, RETAINS HOME RULE AUTHORITY TO REGULATE THE USE OF ITS OWN PROPERTY

1. The Arizona Constitution Grants Charter Cities Authority Over Local Matters

Article 13 of the Arizona Constitution declares the rights of cities to frame their own government charter which, in essence, becomes the constitution of the municipality. Specifically, the Arizona Constitution provides in pertinent part:

> Any city containing . . . a population of more than 3500 may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state. . . . Upon such approval said charter shall become the organic law of such city. . . . Thereafter all courts shall take judicial notice of said charter.

Ariz. Const., art. 13, § 2. "[A] city charter . . . becomes the organic law of the city and the provisions of the charter supersede all laws of the state in conflict with such charter provisions insofar as such laws relate to purely municipal affairs." *Strode v. Sullivan*, 72 Ariz. 360, 365, 236 P.2d 48, 51 (1951). Charter cities of constitutional origin do "not exist subject to the will [of the] legislature." *City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 4, 164 P.2d 598, 599 (1945). Indeed, "[t]he purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible." *City of Tucson v. State of Arizona*, 229 Ariz. 172, 273 P.3d 624 (2012) (citation omitted) ("City of Tucson (2012)").

"[W]here the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter." *Id.* (quoting *City of Tucson v. Walker*, 60 Ariz. 232, 239, 135 P.2d 223, 226 (1943)). "[T]he possibility of a statewide interest in a statute does not bar the conclusion that the statute impermissibly reaches an area of 'purely' or 'solely' local interest." *City of Tucson* (App. 2014) at ¶ 11.

2. Cities Have the Right to Control Their Real Property

Charter cities have long held the right to control the disposition of their own property. *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330,

336, 195 P.2d 562, 566 (1948) ("*City of Tucson v. Arizona ASAE*") (holding recognized by *Strode v. Sullivan*, 72 Ariz. 360, 366, 236 P.2d 48, 52-53 (1951)). In *City of Tucson v. Arizona ASAE*, the State had enacted a statute requiring certain bidding and other provisions be followed when a City was going to sell its own property. The property at issue, just like in the case before the Court, was a public right-of-way owned by the City. The only issue in the case was whether the City's failure to follow the state statute invalidated the deed. The Arizona Supreme Court held that it did not, that the state had no power to tell a charter city what it needed to do to sell its own property. Similar to the case at bar, in that case there was a constitutional limitation on what a city could do. Pursuant to the "gift clause," Ariz. Const. art. 9, § 7, the city could not get value that was grossly disproportionate. The State argued that in order to make sure the constitution was not violated, the City needed to have a public auction. However, the Court held that the State could not impose that requirement:

> We believe in view of our constitution and the code sections involved that ***the manner and method of disposal of real estate of a city is not a matter of state-wide public concern***. It is of no interest to the cities of Phoenix, Yuma, or any other city or town in the State of Arizona, what the provisions of the charter of the City of Tucson provide in this respect. ***The people of Arizona, through their duly elected representatives, should not be concerned with legislation looking to the intricacies of management of a large city.*** Its problems are myriad and personal. It is for this reason that the constitution authorized cities of a certain size to enact ***charters*** for their self-government, within the limitations of the constitution. ***We***

> ***therefore hold that the sale or disposition of property by charter cities is not a matter of general or public concern***, and that the provisions of section 16-801 . . . relating to the sale of real estate, which is a limitation upon the powers of cities and towns organized under article 2, chapter 16, A. C. A. 1939, have no application to charter cities and constitute no limitation upon them.

City of Tucson v. Arizona ASAE, 67 Ariz. at 336, 195 P.2d at 566 (emphasis added).

Likewise, charter cities have long held the right to control the use of their own property. *McMann v. City of Tucson*, 202 Ariz. 468, 47 P.3d 672 (App. 2002). In *McMann*, the Court of Appeals examined a case in which the State had passed a law that prohibited cities from regulating gun sales. 202 Ariz. 468, 47 P.3d 672 (App. 2002). The City of Tucson had an ordinance which required gun shows in Tucson's convention center to have instant background checks, a regulation over gun sales. *Id*. The Court was faced with determining whether the city ordinance was preempted by the state statute that prohibited the city from enacting "any ordinance . . . relating to the transportation, possession, carrying, sale or use of firearms." *Id*. at ¶ 7. The Court of Appeals concluded that the City's ordinance was not preempted. *Id*. at ¶ 18. In reaching its decision, the Court relied upon the holding in *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746, 44 P.3d 120 (2002) and explained that:

> [i]n that case, the California Supreme Court determined that several statutes purporting to limit a political subdivision's right to regulate firearms did not preempt a county ordinance that prohibited holding gun shows on county property. In doing so, the court concluded that ***a county's power to " 'manage' [its own] property must necessarily include the fundamental decision as to how the property will be used.***" *Id.* at 130, quoting Cal.Govt. Code § 23004(d) (West 2001). The ***county was thus "empowered to ban [gun] shows on its own property"*** and, even if it did allow gun shows to take place, it could "impose more stringent restrictions on the sale of firearms than state law prescribes." *Great Western Shows*, at 131; *see also Nordyke v. King*, 27 Cal.4th 875, 118 Cal.Rptr.2d 761, 44 P.3d 133, 137 (2002). ***Based on a charter city's power to sell or dispose of real property, and its constitutional right to use its property for business purposes, we reach the same conclusion here***.

McMann, 202 Ariz. at 472-473, 47 P.3d at 676-77 ¶ 12 (emphasis added). Thus, the Court of Appeals concluded, "***[b]ecause the use permit is a disposition of property, albeit for a short time period***, binding precedent from the supreme court dictates that the issue here is one of ***solely local concern*** not subject to the will of the legislature." *McMann*, 202 Ariz. at 472, 47 P.3d at 676 ¶ 10 (emphasis added) (citing *City of Tucson v. Arizona ASAE*, *supra*, and *Foundation Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 442, 788 P.2d 1189, 1193 (1990) (lease is conveyance of property)).

Here, the use of City of Scottsdale's rights of way by sign walkers is a use of the City's property analogous to that in *McMann*. Sign walkers are using the City's rights of way for a business purpose, albeit for a short period of time. While no "use permit" is required, the analysis is the same. The City of Scottsdale should

maintain the power to manage its own property, including decisions as to how the property will be used by sign walkers. This use of the City's property by sign walkers is a matter of solely local concern not subject to the will of the legislature.

Regulation and control of a city's own property is a matter of strictly local municipal concern and is not subject to the will of the legislature. *See Gear v. City of Phoenix*, 93 Ariz. 260, 263, 379 P.2d 972, 974 (1963) ("A municipality clearly has the power to regulate the use of its streets. . . .") (citation omitted). Persuasive authority for this proposition also can be found when the legislature assigns responsibilities to non-charter cities. In such instances, the legislature has explicitly recognized that non-charter municipalities should have control of their sidewalks. *See* A.R.S. § 9-240(B)(3)(a)(b) (f) (the common council of a city has "exclusive control over the streets, alleys, avenues and sidewalks of the town . . . . to abate and remove all encumbrances and obstructions thereon . . . [and] to protect the same from encroachment and injury"); A.R.S. § 9-240(B)(4) (the common council of a city has the power "to erect and maintain . . . sidewalks and crossways, and prevent and punish for injuries thereto or obstructions thereon"); A.R.S. § 9-240(B)(15) (the common council of a city has the power "(a) To prohibit and punish any amusements or practice tending to annoy or obstruct persons passing upon the streets or sidewalks….(b) To restrain and punish the ringing of bells. . . crying of goods or other noises, performances and practices tending to cause the

collection of persons upon the streets or sidewalks and the obstruction thereof."); A.R.S. § 9-276(A) ("In addition to the powers already vested in cities by their respective charters and by general law, cities and their governing bodies may: (1) . . . regulate the use . . . [of] streets, alleys, avenues, sidewalks. . . (2) Prevent and remove encroachments or obstructions . . . on streets, alleys, avenues, sidewalks. . . . (6) Regulate the use of sidewalks and all structures thereunder").

As further evidence of the exclusive control expected to be exercised by municipalities over their sidewalks and thoroughfares is the fact that municipalities bear the risk of liability with regard to known hazards thereon, and must either correct or warn of dangerous conditions. *See Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3d 625 (2000) (City has non-delegable duty to maintain streets in a reasonably safe condition for travel). By contrast, the State bears no similar burden with regard to City sidewalks or streets.

3. The Charter City's Proprietary Functions in Promoting Local Aesthetics and Safety Are Synonymous With Home Rule Authority

Municipal government essentially has two classes of functions: those undertaken in a sovereign or governmental capacity, and those undertaken in a proprietary capacity. *City of Scottsdale v. Mun. Court of City of Tempe*, 90 Ariz. 393, 403, 368 P.2d 637, 643 (1962).

> [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. . . . ***Promotion of the public health and welfare of a community is a duty of the municipality***; it certainly has a sovereign right to accomplish this within its borders.

Id. (citation omitted) (emphasis added). Our Supreme Court has further recognized that:

> courts differ as to what activities of the city are of local interest or concern and therefore free from legislative interference. . . . Whether it is . . . [a local concern] 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. ***If it is exercised by the city in its proprietary capacity, it is a power incidental to home rule***.

Luhrs v. City of Phoenix, 52 Ariz. 438, 442-43, 83 P.2d 283, 285 (1938) (emphasis added). The significance of proprietary capacity to home rule authority is further described in the definitive treatise on municipal corporation law, McQuillin's *The Law of Municipal Corporations*:

> Although it has been said that the character and nature of municipal corporations remain at all times the same, in their public or governmental capacity they act as the agent of the state for the benefit and welfare of the state as a whole, ***but when acting for the peculiar and special advantage of their inhabitants they act in a private or proprietary capacity***. ***When acting in their private or proprietary character, they are a separate entity acting for their own purposes, and not a subdivision of the state***, and they represent those proprietary interests that appertain to them in common with other corporations. ***Private powers of a municipal corporation are synonymous with the terms home rule and local self-government***.

1 Eugene McQuillin, *The Law of Municipal Corporations* § 2:13 (3d ed. 1996) (internal citations omitted) (emphasis added).[8]

The Scottsdale ordinance at issue, S.R.C. § 16-353 (c), addresses the City's significant interests of regulating the use of its own property to preserve the aesthetics of the community, as well as to protect the City's inhabitants from the immediate danger posed by the sign walkers' attempts to distract drivers.[9] Aesthetics and the immediate safety of those inside the City's boundaries are solely local concerns. As one court stated:

> Aesthetics: This issue should not be underestimated. . . . .the appearance of a community relates closely to its citizens' happiness, comfort and general well-being. Accordingly, it is our finding that there is a legitimate governmental interest in maintaining the

[8] Clearly, as described herein, the City's interest in preserving the aesthetics of the community, protecting the public from the immediate dangers posed by sign walkers' actions to distract drivers, and regulating the use of its own property are matters of strictly municipal concern. However, should the Court determine that the interests are mixed state and local concerns, "a balancing test evaluating the issues and determining which is paramount is . . . appropriate." *City of Tucson v. State of Arizona*, 191 Ariz. 436, 439, 957 P.2d 341, 344 (App. 1998) (citing 2 Eugene McQuillin, *The Law of Municipal Corporations* § 4.85 (3d ed. 1996)). Pursuant to *City of Tucson* (App. 1998), that balancing test would include a determination as to whether the stated statewide concern was legitimate. *Id*.

[9] Aesthetics and traffic safety are substantial government interests. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981) ("The prohibition of offsite advertising is directly related to the stated objectives of traffic safety and aesthetics.") (expressly concluding that the city's aesthetic interests were substantial and justified the prohibition of billboards).

> aesthetics of the community. ***This is an issue which is usually left to local governments, and it is difficult to comprehend how it might be regulated competently to any degree of detail by the state***.

Dublin v. State, 118 Ohio Misc. 2d 18, 97-98, 769 N.E.2d 436, 500 (2002) (internal citation omitted) (emphasis added). "A municipality's concern for the aesthetics of its public ways is a significant interest. . . . [T]here is a legitimate governmental interest in maintaining the aesthetics of the community because the appearance of a community relates closely to its citizens' happiness, comfort and general well-being." *Id*. at 490 (internal citation omitted) (emphasis added). "[S]afeguarding the general health, safety and welfare of the community has long been considered a proper goal for municipal government. . . [and] protecting aesthetic values by avoiding visual clutter is a constitutionally sanctioned objective for a municipality." *State of Arizona v. Watson*, 198 Ariz. 48, 53, 6 P.3d 752, 757 ¶ 15 (Ariz. App. 2000) (emphasis added).

"[T]he visual assault on the citizens . . . presented by an accumulation of signs . . . constitutes a significant substantive evil within the City's power to prohibit. The city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-807 (1984) (internal citation omitted). Citizens of a municipality have a psychological and economic interest "in maintaining pleasant surroundings and enhancing property

values" in commercial areas as well as residential areas. *Metromedia*, 453 U.S. at 552 (agreeing with plurality on this issue, but dissenting on other grounds). "The character of the environment affects property values and the quality of life. . . " *Id.*

In the case at bar, the City is acting in its proprietary capacity in the regulation of the use of its own property to protect the comfort, convenience, safety and happiness of its citizens and inhabitants, not the welfare of the general public of Arizona. Specifically, the regulation of sign walkers is a local interest because Scottsdale is regulating the use of its own property. The State's requirement that the City not be able to enact even reasonable time, place and manner restrictions on the use of its own rights of way is akin to the State mandating that the City allow sign walkers to twirl their signs inside City Hall while employees try to carry on the business of the City. Additionally, S.R.C. § 16-353 (c) protects inhabitants within the boundaries of Scottsdale from sign walkers' attempts to distract drivers.[10] Distracted driving is a known cause of traffic accidents. *Id.; see also*

[10] "[S]igns other than right-of-way should not be placed adjacent to the roadway because they 'would be distracting the motorist's attention to the traffic control device.' . . . . Guidelines state that signage not in conformity with the Manual of Uniform Traffic Control Devices should not be on the roadway. . . . . [U]nauthorized signage . . . are '[b]asically a distraction' that can cause accidents. A human-held sign will be even more distracting than a fixed sign. . . . [M]ost of the signage that fits the bill of non-conforming human-held signs in the city is commercial. Removal of this signage materially advances the city's interest in safety. The city code advances safety by removing human-powered signage. Uniformity is important in signage and placement of non-conforming signs

IRA 24 at pp. 2-3, ¶¶ 4-10. Such distractions could result in immediate harm at the location of the distraction, but would not likely affect driving behavior once outside the City. The City's limited public safety resources would be expended in responding to accidents caused by distracted drivers within its borders. Likewise, the aesthetic value of prohibiting sign walkers is purely a local concern. Citizens of Scottsdale have complained regarding the unsightly presence of sign walkers, and expressed their desire that sign walkers not be permitted in Scottsdale. The citizens of Scottsdale have a psychological and economic interest in maintaining the beauty of their surroundings and enhancing property values. The City's peace and beauty are preserved by the City's regulation of sign walkers.

Accordingly, only local interests are served by the City's regulation of sign walkers. As such, Scottsdale should be recognized as retaining home rule authority to regulate its own property in order to preserve the community's aesthetic values and protect the City's inhabitants.

a. The Possibility of a Statewide Interest in a Statute Does Not Bar the Conclusion that the Statute Impermissibly Reaches an Area of Purely or Solely Local Interest

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threatens safety. This is the consensus view of traffic engineering studies. These studies show that a human dynamic makes a sign more dangerous. Only signs relating to the driving task should be placed on roadways." (IRA 35 at pp. 4-5, ¶ 26)

Beyond the declared interest of ensuring uniformity of free speech for sign walkers, discussed further *infra*, neither the legislature nor the State in the action below were able to articulate a statewide interest for the limitations in the amended statute. The State proffered that the City's "expansive interpretation of home-rule authority would result in a patchwork quilt of differing local regulations, confusing businesses that operate in two or more cities, discouraging businesses from expanding operations into more cities, and adversely affecting economics and competitive strategies." (IRA 27 at 12:15-18) This statement was only argument advanced by the State's attorneys, and no actual evidence was brought forward by the State to establish those "facts" to show any necessity of having every city have exactly the same restrictions on sign walkers in order to accomplish business goals. Of course, it will always be possible to posit some fact or scenario under which there might be some reason to consider non-regulation of sign walkers to be a matter of statewide concern. However, "[t]he possibility of a statewide interest in a statute does not bar the conclusion that the statute impermissibly reaches an area of 'purely' or 'solely' local interest." *City of Tucson* (App. 2014) at ¶ 11. With no legitimate statewide interest articulated by the legislature or in the proceedings below, it is clear that no legitimate basis for statewide preemption exists.

Instead of presenting such evidence of statewide concerns, the State incorrectly framed the argument in terms of zoning. Specifically, the State told the trial court:

> [T]he sole issue is whether charter cities are permitted to use police and zoning powers (which the state delegates to them) to forbid conduct that Arizona statute expressly permits.

(IRA 38 at 2:13-15) However, zoning has no application to this case and no police powers dictate State control over City property.

B. A CHARTER CITY'S REGULATION OF ITS REAL PROPERTY IS NOT AN EXERCISE OF POLICE OR ZONING POWER SUBJECT TO THE WILL AND CONTROL OF THE STATE

Following the argument advanced by the State, the trial court incorrectly applied case law related to zoning in its analysis of the issues. (*See* IRA 43 at p. 2, *relying upon Levitz v. State of Arizona*, 126 Ariz. 203, 613 P.2d 1259 (1980)) However, neither A.R.S. § 9-499.13 nor S.R.C. § 16-353 (c) is a zoning law.

Zoning is where the City tells property owners what they can and cannot do with their own (the property owners') property. Zoning is not where the City tells property owners what they can and cannot do on *the City's* property. For example, the City has a 30,000 acre preserve that is all City property. There is a Preserve Ordinance, S.R.C. § 21-1, *et seq*., that tells people they can be there from sun up to sun down, they can take photographs, they cannot smoke, they can ride horses, and

they cannot ride SUV's. This is not a zoning ordinance, and it is not an exercise of the police power because it only concerns what happens on the City's property. The same is true with the City's banning sign walkers from the City's sidewalks. The fact that signs are involved, and that a separate zoning ordinance regulates the size and location of signs, should not confuse the issue. The question here is not a matter of zoning and never has been. The ordinance and statute at issue address whether sign walkers have a legal right to use, without restriction, the City's property, not whether the City's property is *zoned* to prohibit these types of signs or sign walkers. Clearly, zoning has no applicability to the issue here.

Similarly, the City of Scottsdale cannot be stripped of its constitutionally endowed charter city sovereignty by the suggestion that *the manner of enforcement* of its ordinances through police powers is determinative of the issue. To the contrary, it is the subject matter of the concern which must determine whether a matter is of local or statewide concern, not the manner of its enforcement.

1. Neither the State Statute, A.R.S. § 9-499.13, nor City Ordinance, S.R.C. § 16-353 (c), Is a Zoning Law

Until the Assistant Attorneys General created the arguments in their briefing, no one in Arizona mistook amended A.R.S. § 9-499.13 for a zoning law. In strategically crafting their position in this case, the attorneys for the State have endeavored to re-characterize the issue from charter city sovereignty to delegated

zoning. However, the arguments of counsel are not evidence. When the State drafted the statute, it never gave as its enacting purpose the exercise of the police power or zoning law.

A closer examination of the enacting categorization of these laws demonstrates that neither A.R.S. § 9-499.13 nor S.R.C. § 16-353 (c) is a zoning law. *See McMann v. City of Tucson*, 202 Ariz. 468, 47 P.3d 672 (App. 2002). For example, in *McMann*, the Court of Appeals examined how the legislative scheme and placement of the ordinance established legislative intent. *Id*. The *McMann* Court found that the "placement strongly suggests that the legislature only intended to preempt municipalities from enacting local criminal ordinances relating to firearms." *McMann* at ¶ 14 (examining the legislature's placement of the new statute in the criminal code rather than in Title 9 relating to cities and towns or Title 33 relating to property rights in general).

Applying the same analysis as in *McMann* to the present case, it is clear that the Arizona legislature did not intend or interpret amended A.R.S. § 9-499.13 as a zoning law. The Arizona legislature categorized A.R.S. § 9-499.13 under Title 9 "Cities and Towns," Chapter 4 "General Powers," Article 8 "Miscellaneous." (IRA 35 at p. 6, ¶ 30) The legislature did not choose to enact this legislation under Title 9, Chapter 4, Article 6.1 "Municipal Zoning." *Id*. Even the language of the statute itself recognizes that it is not a zoning regulation by referring separately to

the actual zoning law, A.R.S. § 9-462.01. *See* A.R.S. § 9-499.13 ("notwithstanding the authority to regulate signs pursuant to section 9-462.01. . ."). Thus, contrary to what the State would ask the Court to believe, the legislature did not intend for A.R.S. § 9-499.13 to be a limitation on state-delegated municipal zoning.

Likewise, the Scottsdale City Council did not enact S.R.C. § 16-353 as part of the Scottsdale Zoning Ordinance. The Scottsdale City Council enacted S.R.C. § 16-353 under Chapter 16 "Licenses, Taxation and Miscellaneous Business Regulations," Article 10 "Street Sales and Solicitations." (IRA 35 at p. 6, ¶ 32) By contrast, the City's Zoning Ordinance is found in Appendix B to the Scottsdale Revised Code. *See* S.R.C., app. B (1969); (IRA 35 at p. 6, ¶ 303) The City's Zoning Ordinance does regulate signage within the City. *See id*. For example, the City's Zoning Ordinance regulates sign placement by allowing signs on public property or in the City's rights of way only if the signs are for traffic management, street name, or erected by a government for a governmental purpose. *See* S.R.C., app. B, Section 8.102. However, as more fully explained herein, the restrictions found in S.R.C. § 16-353(c) at issue here are not zoning regulations, but rather are an example of the City exercising control over the public's use of City property.

Zoning laws limit property rights by placing certain restrictions on what an owner is allowed do on his or her property. *See* Digest of Commercial Laws of the

World § 31:49. Zoning laws do not regulate what the public at large is allowed to do on someone else's property.[11] For instance, "trespass" is not a concept that the Scottsdale Zoning Ordinance attempts to regulate. While the City may choose to regulate how it uses its own property in the Zoning Ordinance, it does not regulate how the public is allowed to use City property. Rather, how the public is allowed to use City property, particularly on a right-of-way which the City has a non-delegable duty to keep reasonably safe, is regulated elsewhere in the City Code.[12] At issue here, S.R.C. § 16-353(c) and A.R.S. § 9-499.13 address whether sign walkers have a legal right to use the City's right-of-way, not whether the City's

[11] When a person wishes to use land that he has no property right to use (because he is not the owner, renter, or licensee), the issue is not what will the zoning regulations allow him to do with the property. Rather, the issue is that he has no property rights to begin with. For example, a city's zoning ordinance may allow a 20 square foot sign to be erected on a piece of property. However, neighbor Smith (who has no legal entitlement to neighbor Jones' property) would have no right to erect such a sign in Jones' front yard, even if the sign would meet the city's zoning requirements. In that example, if the sign did not meet the city's zoning requirements (perhaps because it was 30 square feet in size), Jones' argument against Smith's actions would not be that Smith violated the city's zoning code. Rather, Jones' argument would be that Smith had no property rights and yet erected a sign in Jones' yard.

[12] For example, other *non-zoning* ordinances which regulate how the public is allowed to use the City's property include: the Streets Ordinance, S.R.C. § 47-1, *et seq*., the Parks and Recreation Ordinance, S.R.C. § 20-1, *et seq*., the McDowell Sonoran Preserve Ordinance, S.R.C. § 21-1, *et seq*., the Motor Vehicles and Traffic Ordinance, S.R.C. § 17-1, *et seq*., and the Licenses, Taxation and Miscellaneous Business Regulations Ordinance, S.R.C. § 16-1, *et seq*. (part of which is the sign walker ordinance at issue here, S.R.C. § 16-353(c)).

right-of-way is *zoned* to restrict the City from having these types of signs in its rights-of-way.

2. The Exercise of the Proprietary Function of Government in Regulating Its Own Property is Not an Exercise of Police Power

The "police power" is the power exercised by the government for the benefit of all the citizens. It is contrasted with what is at issue in this case, the proprietary function of the city government when regulating the use of its own property to address local concerns.

In the Superior Court, the State argued that the State's ability to regulate and restrict zoning "and police powers" was the central question for the Court. The sole legal support for the State's argument regarding "police powers," separate and apart from zoning as a police power, was *Luhrs v. City of Phoenix*, 52 Ariz. 438, 443, 83 P.2d 283, 285 (1938). (IRA 27 at ¶ 13:7-10) Each inquiry into whether a concern is purely local, or is a statewide concern, is necessarily fact dependent. The *Luhrs* case is no different.

In *Luhrs*, the Court examined the constitutionality of two statutes, one providing for the establishment of pension funds for policemen and the other prescribing minimum wages to be paid to police and fire fighters. 52 Ariz. at 441-42, 83 P.2d at 285. The Court concluded that the compensation and retirement

system of public safety officials are functions of government undertaken in a governmental capacity, and thus a matter of statewide concern. 52 Ariz. at 448, 83 P.2d at 288. In reaching its decision, the Court distinguished that situation from activities undertaken by a municipality in its proprietary capacity, which is a power incidental to home rule. 52 Ariz. at 442-43, 83 P.2d at 285. A city "exercises proprietary functions when it promotes the ***comfort, convenience, safety and happiness of its own inhabitants*** rather than the welfare of the general public. . . . ***Promotion of the public health and welfare of a community is a duty of the municipality***." *City of Scottsdale v. Mun. Court of City of Tempe*, 90 Ariz. 393, 403, 368 P.2d 637, 643 (1962) (emphasis added).

To be certain, in exercising its proprietary functions over local matters, a city must enforce its regulations through the police and court action. However, the fact that the police have to enforce whatever local regulations the City makes does not make it a "police power" matter, nor does the fact that the City has to prosecute violators in the name of the State.

The Arizona Constitution gives to the state legislature authority over the courts, and the legislature has said that all actions brought in city court to enforce city ordinances have to be brought in the name of the State. *See* A.R.S. § 22-

421(A).[13] To suggest that a city loses its charter sovereignty simply because the city must *enforce* its ordinances in the name of the State defies logic and good sense. Such a rule would say absolutely nothing about whether the ordinances deal with matters of statewide or local concern. If this were the test, then the courts could never have found, for example, regulation of smoking in restaurants or regulation of public parking to be matters of local concern because those are enforced through the courts. *See City of Tucson v. Grezaffi*, 200 Ariz. 130, 135, 23 P.3d 675, 680 (App. 2001) (regulation of smoking in restaurants is a matter of local concern); *see also Clayton v. State*, 38 Ariz. 135, 297 P. 1037 (1931) ("[T]he matter of 'local parking and other special regulations' is left in the control of the governing body of the city; that is, matters of peculiar local concern are left with the local authorities.").

The determinative question must be whether the ***subject matter sought to be regulated*** itself is a question of local or statewide concern, not the manner of enforcement of that regulation. *See Wonders v. Pima County*, 207 Ariz. 576, 579, ¶ 9, 89 P.3d 810, 813 (App. 2004) ("A state law only preempts conflicting local

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[13] A.R.S. § 22-421(A) provides that "[p]roceedings in the municipal court for violations of ordinances committed within the corporate limits of the city or town ***shall be commenced*** by complaint under oath and ***in the name of the state***, setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of and to answer the complaint." (emphasis added).

ordinances when the ***subject matter of the legislation*** is of statewide concern and the state has appropriated the field.") (emphasis added) (*quoted with approval in Coconino County v. Antco, Inc.*, 214 Ariz. 82, 90, 148 P.3d 1155, 1163 (App. 2006). If the State's position were accurate, constitutionally guaranteed charter sovereignty effectively would be stripped and unattainable under any circumstance. As a consequence, the Court should decline to adopt such an untenable position.

C. PUBLIC POLICY FAVORS CHARTER CITY AUTONOMY IN THE REGULATION AND USE OF ITS OWN PROPERTY

1. Charter City Scottsdale Has a Significant Interest in Self-Governance

As the foregoing discussion demonstrates, the City of Scottsdale has a significant interest in self-governance as the issues uniquely affect the property rights of the City of Scottsdale. Herein, the Appellant has cited the Court to Arizona cases which unequivocally state that the disposition and use of the City's property, as well as preventing accidents in the City and enhancing the City's aesthetics, are all matters of local concern. And, of course, it only makes sense. What difference does it make to someone in Yuma how Scottsdale uses its property, or whether someone on a City sidewalk in Scottsdale is damaging the aesthetics of a Scottsdale neighborhood, or whether someone on a sidewalk in Scottsdale creates a safety hazard in Scottsdale which injures a person in

Scottsdale and further causes Scottsdale to expend its limited public safety resources in responding to the accident and in defending accident claims in court?

Being a charter city must carry with it some meaning. There must be more to self-governance than the method of conducting elections. Otherwise, the constitutionally granted authority is rendered meaningless. Perhaps the Honorable Judge Oberbillig stated it best when he queried:

> If [there's] supposed to be some meat on the bone of charter communities, having some independent power to govern its own stuff, what is it? What do they get to govern besides elections? . . . Otherwise, it's . . . kind of a concept that's more maybe feel good, but in reality it doesn't really exist. There's no content to it. . . Because . . . everything's a police power, according to [the State], and therefore it doesn't matter that historically these things have been matters that are primarily local matters. . . . But if we're going to have any meat on the bone, I'm trying to figure out what it is. Is the only meat on the bone for a city to claim that it's got something, under these [charter] provisions – the only sovereignty it has is to determine how they're going to elect their own city council? That doesn't sound like very much.

(IRA 53, Exhibit A at 27:20 – 29:5)

If a charter city cannot even control how the public uses the city's own property, then what does being a constitutional charter city mean?

2. The Legislature's Declaration that the Matter is of Statewide Concern Does Not End the Inquiry or Determine the Outcome

The legislature's intent notwithstanding, whether S.R.C. § 16-353 (c) and its charter authority supersedes the provisions in amended A.R.S. § 9-499.13 is a question of constitutional interpretation; legislative intent is not determinative. *City of Tucson v. State of Arizona*, 229 Ariz. 172, 178, 273 P.3d 624, 630 ¶ 34 (2012). In *City of Tucson*, *supra*, the legislative history included the legislature's declaration that "the conduct of elections described in this section is a matter of statewide concern." 229 Ariz. at 178, 273 P.3d at 630. Disregarding the legislature's proclamation of statewide concern, the Court stated:

> [a]lthough we respect findings by the legislature, whether state law prevails over conflicting charter provisions under Article 13, Section 2 is a question of constitutional interpretation. . . . The issue is not whether the legislature acted constitutionally in enacting § 9-821.01(A)-(C); we presume that it did and assume, without deciding, that the statute applies to non-charter cities. We must instead determine whether, notwithstanding this statute, the constitution affords charter cities autonomy in structuring the elections of their governing councils.

Id. (citations omitted) (ultimately holding that "the local autonomy preserved for charter cities by Arizona's Constitution allows Tucson voters to continue electing their council members pursuant to the city's 1929 charter notwithstanding A.R.S. § 9-821.01 (B) and (C).")

While legislative findings are accorded deference, courts "must not merely rubber stamp the legislature's decision." *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991). California

and Colorado Supreme Courts' interpretations of their states' charter provisions explain the rationale behind this principle. State legislatures are "empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." *Johnson v. Bradley*, 4 Cal. 4th 389, 841 P.2d 990, 1000, 14 Cal. Rptr.2d 470, 480 (1992) (legislative declaration was insufficient to support state preemption of charter allowing public financing of local candidates); *Accord Cawdrey v. City of Redondo Beach*, 15 Cal. Appl.4th 1212, 1225-1128, 19 Cal. Rptr.2d 179, 186-188 (Cal. App. 1993) (city term limits are strictly of local concern and city is best able to determine the scope of such terms ***despite legislative findings to the contrary***). If city rights "to legislate as to their local affairs are to have any meaning, ***we must look beyond the mere declaration of a state interest and determine whether in fact the interest is present***." *City and County of Denver v. State*, 788 P.2d 764, 768 n.6 (Colo. 1990) (emphasis added). Following this reasoning, and building upon its own reasoning in *Strode v. Sullivan*, 72 Ariz. 360, 368, 236 P.2d 48, 54 (1951), the Arizona Supreme Court held the mere legislative declaration of statewide interests, in A.R.S. § 9-821.01 (A), was insufficient to overcome Tucson's autonomy to choose the structure and manner of its elections. *City of Tucson* (2012) at ¶ 31-34. If a charter city can enjoy autonomy in choosing the structure and manner of its elections, surely it can regulate the use of its own sidewalks.

3. The Legislature's Declared Statewide Interest Is Not a Legitimate Statewide Concern

The State's only expressed interest is in the uniformity of freedom of speech for sign walkers. However, this interest is protected by the Constitution and our courts. Reasonable time, place, and manner restrictions upon commercial speech are permitted under the state and federal constitution. *Salib v. City of Mesa*, 212 Ariz. 446, 454, 133 P.3d 756, 764 ¶ 24 (App. 2006) ("It is undisputed that both constitutions allow for reasonable time, place and manner restrictions that affect speech.") (citing *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 357-58, 773 P.2d 455, 462-63 (1989)). Therefore, requiring a city to allow sign walkers to use the City's property unrestricted by constitutionally permissible time, place and manner restrictions is not a legitimate protection of constitutional speech.

Attempting to usurp the Court's role, the legislature deems constitutionally reasonable time, place, and manner restrictions too great a limitation for sign walkers. This is in direct contravention of the Supreme Court of the United States' recognition that "[o]ur jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection . . .' and is subject to 'modes of regulation . . . ." *See Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989) (internal citation omitted); *see also Central Hudson Gas & Electric*

Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). And while Arizona's Court of Appeals has found sidewalks to be among the "quintessential" public fora for free speech, it also recognized that even public fora are subject to regulation. *State of Arizona v. Boehler*, 228 Ariz. 33, 37, 262 P.3d 637, 641 ¶ 10 (App. 2011) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The City does not claim that it is at liberty to impose any restriction it wants to. As the Arizona Constitution directs, the City's exercise of its powers has to be consistent with the superior laws found in the Arizona and federal constitutions. The sidewalks are a traditional public forum and therefore what the City does has to meet the constitutional tests for limiting speech in such a forum. So this case should be analyzed not on the basis that this is a public forum, which it is, but the same as if the state legislature had passed a law that said sign walkers can enter City offices at One Civic Center, the City's main administration building, and spin their signs in the hallways while the employees are trying to get their work done. In this instance, free speech is already protected by reasonable time, place, and

manner restrictions in place.[14] As such, the purported rationale of protecting free speech is not a legitimate statewide interest.[15] Clearly, there is no legitimate statewide concern present here to justify A.R.S. § 9-499.13's interference with charter city Scottsdale's regulation of its own property, including exercising its proprietary authority to control municipal aesthetics and protect City inhabitants.

In any event, the statutory amendment adopted by the legislature does not, in fact, achieve its stated purpose but rather accomplishes the exact opposite. In subsection three of the legislative intent accompanying the amendment to A.R.S. § 9-499.13, the legislature identifies the public policy that is of statewide importance as follows:

> 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.

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[14] The City's ordinance is presumptively constitutional. *See Ruiz v. Hull*, 191 Ariz. 441, 448, 957 P.2d 984, 991 ¶ 25 (1998) (every duly enacted law is entitled to a strong presumption of constitutionality); *see also State v. Seyrafi*, 201 Ariz. 147, 152, 32 P.3d 430, 435 ¶ 26 (App. 2001) (recognizing that "We are to view an ordinance with a presumption of constitutional validity.") (Weisberg, J., concurring).

[15] The constitutionality of the ordinance is not at issue in this appeal. It should be noted, however, that the ordinance has passed federal constitutional muster upon a prior challenge, with the Superior Court of Maricopa County finding, upon *de novo* review from a decision in City Court, that S.R.C. § 16-353(c) is sufficiently narrowly-drawn and that "[i]t is a time-place-manner restriction that demonstrates a reasonable 'fit' between the City's objectives and the means chosen to accomplish those goals." (IRA 25 Exhibit 3 at p. 7)

The amended statute, however, exempts sign walkers from reasonable time, place and manner restrictions while leaving cities free to impose such restrictions on all others using public sidewalks. It is hard to credit a statute that implements a policy that directly contradicts its stated purpose as being a viable means of addressing a matter of statewide concern.

VI. CONCLUSION

For the reasons stated above, the Superior Court's judgment against Appellant City of Scottsdale should be reversed. Appellant prays that this Honorable Court will grant summary judgment in its favor herein, reversing the decision of the trial court and declaring that: (1) Scottsdale's municipal ordinance, S.R.C. § 16-353(c), and the Scottsdale Charter supersede the provisions in amended A.R.S. § 9-499.13 and (2) Scottsdale is exempt from amended A.R.S. § 9-499.13 because amended A.R.S. § 9-499.13 cannot be constitutionally applied to the City of Scottsdale. Appellant further prays for any other relief this Court should deem just and proper.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

SCOTTSDALE CITY ATTORNEY'S OFFICE
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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief

☒ Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 11,415 words, or

☐ Uses monospaced type of no more than 10.5 characters per inch and,

☒ Does not exceed 40 pages.

Dated this 30th day of January, 2015.

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CERTIFICATE OF SERVICE

On this date, the below-signing lawyer e-filed the "Opening Brief" with the Clerk of the Court for Division One, and e-mailed copies of it to the following:

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