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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CITY OF FLAGSTAFF, a political subdivision of the State of Arizona, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	No. CV2021-011210 **CITY OF TUCSON AND LEAGUE OF ARIZONA CITIES AND TOWNS *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** (Assigned to Hon. Timothy Ryan)

BRIEF OF *AMICI CURIAE* CITY OF TUCSON AND LEAGUE OF ARIZONA CITIES AND TOWNS

I. Identity and Interests of Amici Curiae

The City of Tucson ("**Tucson**") is an Arizona charter city and municipal corporation organized and governed pursuant to Art. 13, § 2 of the Arizona Constitution, the voters of

which, like Flagstaff voters, have approved a local minimum wage.[1] The League of Arizona Cities and Towns ("**League**") is a voluntary membership association of all the 91 incorporated cities and towns in the State of Arizona. The identity and interests of the *amici curiae* are further described in the accompanying Motion for Leave to Participate as Amici Curiae, which is incorporated herein by this reference.

II. Argument

A. HB 2756 unconstitutionally penalizes local jurisdictions – and their voters and taxpayers – for exercising constitutionally protected rights.

Just as our federal system of government respects the authority of both the national and state governments, so too does Arizona's system of government respect the role of both the state and local governments. Cities and towns in Arizona, though political subdivisions of the State, are not created by the Arizona Legislature. *See* Ariz. Const. art. 13, § 1 ("Municipal corporations shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation and organization of cities and towns…, subject to the provisions of this article.") and art. 4, pt. 2, § 19(17) ("No local or special laws shall be enacted in any of the following cases … (17) Incorporation of cities, towns, or villages, or amending their charters"). Instead, they are formed by local residents who choose to incorporate for the purpose of local self-governance.[2] Ariz. Const. art. 13, § 1. Charter cities like Flagstaff and Tucson enjoy a heightened degree of constitutionally protected autonomy; a city charter, when approved by city voters, becomes local "organic law"[3] (Ariz. Const. art. 13, § 2), even governing over conflicting state laws on matters of purely local concern. *City of Tucson v. State*, 229 Ariz. 172, 174 ¶ 10 (2012) ("[A] home rule city deriving its powers

[1] Tucson voters approved Tucson's minimum wage ordinance as an initiative matter in November 2021.

[2] Of course, the incorporation process is governed by general state laws. *See, e.g.*, A.R.S. §§ 9-101 (city or town is formed by petition signed by 2/3 of all qualified electors in community, or by majority of votes cast at election called based on petition signed by 10% of qualified electors).

[3] Black's Law Dictionary defines "organic law" as "[t]he body of laws (as in a constitution) that define and establish a government; FUNDAMENTAL LAW." ORGANIC LAW, Black's Law Dictionary (11th ed. 2019).

from the Constitution is independent of the state Legislature as to all subjects of strictly local municipal concern." (Citations omitted.)).

Important matters are entrusted to local governments including local zoning and land development; the financing, construction, and maintenance of public infrastructure; the creation and maintenance of public transportation systems; and basic sanitary measures like the provision of potable water and wastewater treatment. Local governments are subject to various generally applicable state laws regarding those matters, but they also have considerable local legislative discretion – whether exercised by an elected local governing board or by the local electors though the initiative power – to tailor policies and priorities to the needs of local residents as well as the local economy. In 2006, Arizona voters chose to extend this local legislative discretion by enacting "Prop 202," which granted authority to counties, cities, and towns to "by ordinance regulate minimum wages and benefits within [their] geographic boundaries" so long as the local minimum wage is not lower than the state minimum wage. A.R.S. § 23-364(I).

Just as authority is shared between the State and local jurisdictions in Arizona, the legislative authority of the State and each local jurisdiction is shared between their respective legislative bodies and their voters exercising their constitutional initiative powers. *See* Ariz. Const. art. 4, pt. 1, § 1(1)("The legislative authority of the State shall be vested in the Legislature, consisting of a Senate and a House of Representatives, but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature.") and (8) ("The powers of the initiative and the referendum are hereby further reserved to the qualified electors of every incorporated city, town and county as to all local, city, town or county matters on which such incorporated cities, towns and counties are or shall be empowered by general laws to legislate."); *Cave Creek Unified School Dist.* v. *Ducey*, 233 Ariz. 1, 4 (2013) ("The legislature and the electorate share lawmaking power under Arizona's system of government." (Internal punctuation and citations omitted.)); *also see, Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 519–20, ¶ 10 (2000) (legislature's powers must

be exercised in a manner consistent with express and implied limitations on that authority in the state and federal constitutions).

The Voter Protection Act ("**VPA**"), which is codified in the Arizona Constitution as Ariz. Const. art. 4, pt. 1, § 1(6), was adopted by the voters in 1998 to restore that balance of power between state voters and the Legislature. Backers of the measure were concerned that the Legislature was abusing its power by amending and repealing voter-endorsed measures. *See, e.g.*, Ariz. Sec'y of State 1998 Publicity Pamphlet at 47-48 (statement of Richard Mahoney, campaign chairman). The measure, proponents wrote, would prohibit the Legislature from repealing citizen-initiated measures approved by voters and prohibit the Governor from vetoing ballot measures with a minor exception for "[t]echnical amendments," which would themselves be permitted only with a supermajority vote and in furtherance of the purpose of the measure. *Id.*; Ariz. Const. art. 4, pt. 1, § 1(6)(C) (legislature can amend an initiative measure only if "the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to amend such measure."). [4]

The Attorney General at the time was a strong proponent of the VPA:

> The ultimate test of a democracy is whether a citizen's vote actually counts. There is a disturbing trend in Arizona in which citizens pass initiatives by overwhelming margins, only to watch the legislature turn around within months and gut what the voters passed. . . I don't agree with every initiative that has passed in Arizona, but I fundamentally believe that the politicians at the legislature have no right to thwart the mandate of voters. We must honor the will of the people. . . So vote Yes on the Voter Protection Amendment. Let the will of the people stand.

Ariz. Sec'y of State 1998 Publicity Pamphlet at 48-49 (statement of Grant Woods, Arizona Attorney General).

[4] Before the passage of the VPA, Legislators could "by a majority vote ... amend or repeal any ballot measure ... approved by the voters, [unless] that ballot measure was approved by a majority of the people ... registered to vote in this state, rather than by a majority of people who voted on the ballot measure." Ariz. Sec'y of State 1998 Publicity Pamphlet at 47 (Statement of Legislative Council); *see also Adams v. Bolin*, 74 Ariz. 269, 276 (1952).

The Arizona Legislature, through enactment of HB 2756, has attempted once again to disrupt the balance of authority between the voters and the Legislature and between the State and local jurisdictions by allowing the Legislature to allocate a portion of the State's general expenses to any local jurisdiction – ultimately, the taxpayers of any local jurisdiction – that adopts a local minimum wage that exceeds the state minimum wage. This it cannot do. The Legislature cannot penalize the exercise of a constitutional right.[5] That includes the right to adopt a local minimum wage as authorized by Prop 202 which, though codified in statute, is constitutionally protected by the VPA.

In *State v. Maestas*, 244 Ariz. 9 (2018), the Arizona Supreme Court addressed an attempt by the Legislature to modify a different voter initiative—the Arizona Medical Marijuana Act (AMMA). 244 Ariz. at 10, ¶ 1. Among other things, the AMMA broadly immunizes the use of medical marijuana except in three specific locations. *Id.* (discussing A.R.S. § 36-2802(B)). After voters approved the AMMA, the Legislature enacted a separate statute adding college campuses to the locations in which AMMA immunity does not apply. *Id.* at 13, ¶16 (discussing A.R.S. § 15-108(A)). The court held that this "plainly" did not further the purposes of the AMMA, and that the legislation therefore violated the VPA. *Id.* at 14, ¶ 20. In other words, the Legislature could not penalize AMMA-compliant possession of medical marijuana on a college campus because voter approval of the AMMA, combined with the protections of the VPA, had made such possession a constitutionally protected right. In the same way, the Legislature cannot penalize Flagstaff – and its local voters and taxpayers – for exercising the constitutionally protected right to adopt an ordinance setting a local minimum wage higher than the State's.

This is also illustrated by a recent California case, *Cultiva La Salud v. State of California*, 306 Cal. Rptr. 3d 627 (App. 2023). That case involved a statute passed by the California legislature prohibiting cities and towns from imposing any taxes, fees, or

[5] Under the "unconstitutional conditions" doctrine, the State cannot even *incentivize* the *waiver* of a constitutional right by conditioning a benefit on such a waiver. *State v. Okken*, 238 Ariz. 566, 572, ¶ 22 (App. 2015).

assessments on certain grocery items, including sodas and other sugared drinks. It imposed a penalty (withholding of state-shared revenues) on any charter city that enacted such a tax or fee as a valid exercise of its home-rule authority under the California constitution. The California Court of Appeal, Third District, observed that the statute "improperly uses the threat of crippling penalties to chill charter cities from exercising their constitutional rights," *id*. at 638, and that the Legislature's goal was to discourage charter cities from enacting a tax, fee, or assessment on sugared drinks, even though "it could not lawfully prohibit them from doing so," *id*. at 639. The court struck down the statute on that basis, noting that "[a]s our Supreme Court has explained, '[i]f a law has "no other purpose ... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'" *Id*. at 638 (internal punctuation and citations omitted).

Similarly, the Arizona Legislature cannot penalize a local jurisdiction's exercise of its constitutional right to enact a local minimum wage ordinance.[6] This is particularly compelling where – as is the case with the two cities in Arizona that have thus far exercised that right, Flagstaff and Tucson – the minimum wage ordinance is approved by local voters exercising their constitutionally protected initiative powers. Whatever limited authority the Legislature might have under the VPA to amend a statewide initiative measure, it has no authority to interfere with or amend a local initiative measure that is consistent with the general laws of the State.

B. Characterizing the allocation as a "reimbursement" rather than a "penalty" does not save it; it just creates another constitutional problem.

Of course, the State argues that HB 2756 does not "penalize" local jurisdictions; rather, it simply requires the local jurisdiction to "reimburse" the State for costs that the State anticipates incurring as an indirect result of the jurisdiction's adoption of a local minimum

[6] Tucson and Flagstaff, like the cities targeted by the California Legislature, are charter cities, but the argument here does not rely on that fact because Prop 202 gives *every* city, town, and county the constitutionally protected right to regulate minimum wages and benefits within their jurisdictions.

wage higher than the State's. It asserts that Prop 202 and the VPA cannot be interpreted to prevent this because, if they were, it would mean that Prop 202 "allow[s] counties, cities, and towns to unilaterally incur costs on behalf of the State," which "would violate the Constitution." (State's Motion for Summary Judgement ("**SMSJ**") at 12:23-24[7]; *see also* 13:8-10 (arguing that Prop 202 could not have been intended to shield local jurisdictions from a legislative assessment because that would be a "legally impossible intent" to "allow local governments to unilaterally impose costs on State taxpayers")).[8] Though stated in a backward fashion, the State's argument is essentially that Prop 202 allows local jurisdictions to impose local minimum wage requirements on employers doing business with the State; that this amounts to an unconstitutional imposition of costs on the State; and therefore its enactment of HB 2756 was necessary to cure that constitutional defect. That is bizarre logic for two reasons.

First, even assuming for purposes of argument that the Constitution prohibits a local jurisdiction's "unilateral imposition of costs on the State," it defies common sense to interpret that phrase broadly enough to encompass an action by a local jurisdiction that at most might indirectly increase the cost of some state contracts. In fact, the Arizona Supreme Court has rejected that notion – in a case, moreover, that is cited by the State (SMSJ at 2:22 to 3:1). Prop 206, approved by voters in 2016, increased the state minimum wage and established earned paid sick leave but exempted the State from these requirements. The Arizona Chamber of Commerce and Industry filed a lawsuit claiming, among other things, that Prop 206 violated Ariz. Const. art. 9, § 23, which requires an initiative "that proposes a mandatory expenditure of state revenues for any purpose," to also "provide for an increased source of revenues" for the expenditure. *Arizona Chamber of Com. & Indus. v. Kiley*, 242

[7] The page numbers used in this Brief for citation to the motion are the page numbers of the PDF document, not the page numbers at the bottom of the pages.

[8] In support of its assertion, the State cites to Ariz. Const. art. 9, § 5, and art. 9, § 20. (SMSJ at 12:25-26.) The first provision simply authorizes the state to contract debts. The second establishes expenditure limits for local jurisdictions. Neither implies, much less states, that an action by a local jurisdiction that might indirectly raise the costs of some state contracts is prohibited.

Ariz. 533, 536, ¶2 (2017). The court rejected this argument. It noted that the higher minimum wage might indirectly increase the cost of state contracts with private employers subject to the law,[9] but concluded that this indirect impact does not amount to a mandatory expenditure of state funds. *Id*. at 540, ¶ 24. A locally imposed minimum wage that does not apply directly to the State as an employer has the same type of potential indirect impact on the State as the state minimum wage. As with the state minimum wage, that impact does not amount to a requirement that the State expend money.

This reasoning has also been soundly rejected in the context of the state and federal governments. A state does not, by taxing contractors with whom the federal government does business, violate the prohibition on a state taxing the United States even though the federal government ultimately bears the cost of the tax. *Tucson Mech. Contracting, Inc. v. Arizona Dep't of Revenue*, 175 Ariz. 176, 178-179 (App. 1992) (citing several opinions from the United States Supreme Court). Applying the same reasoning here, a local jurisdiction is not improperly imposing costs on the state government simply by adopting a minimum wage ordinance that is applicable to some state contractors and might therefore indirectly increase the costs of some state contracts.

Second, even if a local jurisdiction's minimum wage ordinance *did* purport to apply to the State and its employees,[10] and therefore *did* directly "impose" costs on the State, which we will assume for purposes of argument *would* raise constitutional questions, that would not legitimize the Legislature's attempt to allocate those costs to the local jurisdiction. The appropriate remedy in such a case would be for the State to seek declaratory and injunctive relief from a court to prevent the local jurisdiction from attempting to enforce its ordinance

[9] The State cites the case for this point (SMSJ at 2:22 to 3:1) but doesn't mention that the court goes on to acknowledge that the law might also provide the state with increased tax revenues and "perhaps other financial benefits." 242 Ariz. at 540, ¶ 24.

[10] A.R.S. § 23-362(B) excludes the state from the definition of "employers" as used in Prop 202. But the language about local minimum wages in § 23-364(I) does not use the word "employers." Instead, it states broadly that "[a] county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries." The language of Prop 202 itself therefore doesn't explicitly prohibit a local jurisdiction from including the State and its employees within the scope of its minimum wage ordinance.

against the State. It would not be up to the Legislature to fashion its own remedy by *legislatively* imposing a monetary assessment – whether characterized as a penalty or a reimbursement – on the local jurisdiction and its taxpayers. If the Legislature is allocating a portion of the State's budget to local jurisdictions to remedy a constitutional problem that has not been found by a court to exist, then it is usurping the authority of the judicial branch in violation of the constitutional requirement that the three branches of Arizona government "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. 3.

C. HB 2756 suffers from additional constitutional defects.

The Arizona Constitution reminds us that "[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Ariz. Const. art. 2, § 1. In addition to the separation of powers doctrine cited above, those fundamental principles include prohibitions on the Legislature depriving a person of "life, liberty, or property without due process of law" (Ariz. Const. art. 2, § 4) and enacting "local or special laws" regarding the "assessment and collection of taxes" (Ariz. Const. art. 4, pt. 2, § 19(9)). The "allocation" scheme in HB 2756, at least as interpreted by the State, violates both of those principles.

Due Process

A law that impacts substantive rights violates due process if it "has no reasonable relation to any proper governmental purpose, or [] is so far beyond the necessity of the case as to be an arbitrary exercise of governmental powers." *Valley Nat. Bank of Phoenix v. Glover*, 62 Ariz. 538, 553 (1945). It requires "that statutes shall be general in operation and affect the rights of all who should properly be brought within their provisions." *Id.* The burden of a statute may constitutionally fall on a particular class of persons and not others, but only if the classification is "natural and reasonable," is based on "a substantial difference between those to whom it applies and those to whom it does not apply," and is not "arbitrary and capricious." *Id.* Because an HB 2756 allocation is random both in its application and its amount, HB 2756 violates due process.

An HB 2756 assessment is essentially the levy of a new tax for the general support of the state government,[11] but on only one class of state taxpayers, those that happen to live or shop or do business in a local jurisdiction, the legislative body of which has adopted a local minimum wage higher than the State's. The apparent rationale is that these taxpayers somehow caused the State's increased contract expenses and can therefore be required to pay them. But adoption of a minimum wage is not the only action that a local jurisdiction can take that might indirectly increase the State's costs. For example, a city's economic development activities[12] that help revitalize a downtown area might lead – indirectly and in concert with a slew of other economic factors – to the State paying higher rent if it leases downtown office space. Even if it were otherwise constitutionally permissible for the Legislature to tax the taxpayers of a local jurisdiction for cost increases that are supposedly indirectly caused by an action taken by their local government (it isn't), there is no rational reason to single out increases ostensibly due to adoption of a local minimum wage.

The amount of the tax is also arbitrary. HB 2756 requires state budget units to estimate the indirect future costs they anticipate incurring that they conclude, based on whatever assumptions they make and data they consider, are caused, even in part, by a local jurisdiction's adoption of a minimum wage higher than the State's minimum wage. As this court's previous ruling explains in detail, that is an immensely complex and uncertain calculation. The State acknowledges that state budget units were not provided any formal guidance or standards for this calculation (Stipulated Facts at 7:8-11), and the varying responses from those budget units make it clear that they did not in fact utilize any consistent methodology when making the calculations on which the allocation in SB 1827 was based. (Stipulated Facts at 5:1 to 7:4.) The estimates also disregard any increases in state revenues

[11] The State has specifically acknowledged that the goal of HB 2756 is to shift a portion of the state's costs to the taxpayers of any local jurisdiction that has adopted a local minimum wage higher than the state's (SMSJ at 4:1-3, 12:21-24, 17:11-14). *See also* *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 932 (9th Cir. 1996) ("Assessments treated as general revenues and paid into the state's general fund are taxes.").

[12] *See* A.R.S. § 9-500.11 (authorizing cities and towns to carry out economic development activities).

and decreases in state costs that might indirectly result from the higher minimum wage,[13] which is inherently irrational. And the budget unit estimates don't even define the ultimate allocation; instead, the Legislature, after merely "considering" the estimates provided by the budget units, sets the allocation in any amount of its choosing. *Or not*, because making *any* allocation is entirely discretionary. A.R.S. § 35-121.01(A) ("the legislature *may* allocate" (emphasis added)). No taxpayer who bears the burden of paying a portion of such an allocation could obtain a judicial determination of the allocation's accuracy because accuracy and accountability is simply not required by the statute. *See Seafirst Corp. v. Arizona Dep't of Revenue*, 172 Ariz. 54, 57 (Ariz. Tax Ct. 1992) (due process requires that there be a way for taxpayers to "appeal to an impartial tribunal any act of government which affects the validity or amount of any tax to which the government asserts the taxpayer is subject.").

This irrational scheme is not consistent with due process guarantees. If it were to be approved by the Court, the same rationale could be utilized to impose arbitrary assessments on local jurisdictions to "reimburse" the State for any increased state cost that the Legislature anticipates *might* be incurred in the future and *might* be indirectly caused, even in part, by an action by a local jurisdiction. This would disrupt what is surely one of the most basic tenets of taxation – that the State's budget is funded by all state taxpayers.

Special and Local Laws

Indeed, that notion that the Legislature levies taxes statewide is embedded in the Arizona Constitution. The special-law prohibition in Ariz. Const. art. 4, pt. 2, § 19, "'confine[s] the power of the legislature to the enactment of general statutes conducive to

[13] The Fiscal Impact Statement for Prop 202 noted that higher minimum wages might increase certain tax revenues while also decreasing the cost of public assistance programs (Stipulated Facts at 2:21-26). It didn't, admittedly, use the words "increase" or "decrease," but that appears to be what the statement is referencing when it says that "[a] increase in wages may also have an economic impact on state and local revenue collections and state spending. By increasing wages and business costs, the proposition may affect individual income tax, corporate income tax and sale tax collections. In addition, a minimum wage increase may affect participation in, and the cost of, public assistance programs."

the welfare of the state as a whole, to prevent diversity of laws on the same subject, to secure uniformity of law throughout the state as far as possible, and to prevent the granting of special privileges.' In addition, it 'prevents the enlargement of the rights of persons in discrimination against others' rights....'" *State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993) (citations omitted). The State has conceded – or perhaps it would be more accurate to say that the State has proudly asserted – that the setting of an HB 2756 allocation is a "case-by-case" calculation (SMSJ at 12:5-4). Even without that concession, it is difficult to image how a supposedly legislative act can be more special or local than a yearly allocation of a portion of the State's general expenses, in any amount of the Legislature's choosing, to the taxpayers of a specific local jurisdiction. Because, as noted previously (*see* n.11, at 10:25-27 of this brief), the allocation is appropriately characterized as a tax, it is impossible, in the exercise of common sense, to characterize SB 1827 as anything other than an unconstitutional special and local law regarding the assessment[14] of taxes.

III. Conclusion

The VPA was approved by Arizona voters to restore the balance of legislative authority between themselves and the Legislature, which had been eroded by the Legislature's alteration of voter-approved initiative measures codified as state statutes. Prop 202 was later approved by Arizona voters to ensure that local jurisdictions can adopt local minimum wage ordinances unimpeded by the Legislature. HB 2756 attempts to disrupt those divisions of authority – between the State and local jurisdictions and between the Legislature and Arizona voters – by allowing the Legislature to allocate a portion of the State's general expenses to a local jurisdiction that has adopted a local minimum wage, ostensibly to recoup increased state costs "attributable to" that local minimum wage. Under the State's interpretation of "attributable to," this means cost increases that are *indirectly* caused by the application of the minimum wage requirement, not to the State itself, but to state contractors.

[14] The prohibition applies to statutes that impose or set the amount of taxes as well as those that "specify the means by which taxes already levied are to be assessed and collected." *Tucson Elec. Power Co. v. Apache Cnty.*, 185 Ariz. 5, 12 (App. 1995).

Such an allocation amounts to an impermissible penalty on the local jurisdiction's exercise of its right, which is constitutionally protected by the VPA, to adopt such a minimum wage.

In addition, the entire scheme as interpreted by the State, with its lack of any consistent methodology for calculating those indirect costs, and the discretionary nature of the allocation and its amount, raises other constitutional questions. Flagstaff's interpretation of "attributable to" – as meaning the direct cost of complying with a local minimum wage ordinance that purports to apply to the State and its employees – doesn't necessarily resolve *all* those constitutional issues (see the discussion in section II.B of this brief). But it is a more sensible and fair reading of the phrase; it does not render HB 2756 meaningless because Prop 202 does not explicitly exempt the State from local minimum wage requirements (*see* fn. 10 at 8:26-28 of this brief); and – because both local minimum wage ordinances adopted to date exempt the State from their scope – it allows the Court to avoid those constitutional issues for now.

Amici urge the Court to preserve the balance of authorities established by the Arizona Constitution and confirmed by Arizona voters through their adoption of the VPA and Prop 202 by granting summary judgment in favor of Flagstaff.

RESPECTFULLY SUBMITTED this 15th day of September 2023.

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