**SUPREME COURT OF ARIZONA**

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| DEBRA ROUNDTREE, an individual; STEVEN KIDMAN, an individual; PAGE ACTION COMMITTEE, a registered political committee; | ) | Arizona Supreme Court CV-24-0144-PR |
| Plaintiffs/Petitioners, | ) | Court of Appeals Division One 1 CA-CV 24-0387 EL |
| v. | ) | |
| CITY OF PAGE, a political subdivision of the State of Arizona; KARY HOLLOWAY, in her official capacity as City Clerk; KIM LARSON, in her official capacity as Acting Deputy City Clerk; | ) | Coconino County Superior Court S0300CV20240027 |
| Defendants/Respondents. | ) | |

**BRIEF OF *AMICUS CURIAE***
**LEAGUE OF ARIZONA CITIES AND TOWNS**
**IN SUPPORT OF DEFENDANTS/RESPONDENTS**
**CITY OF PAGE, KARY HOLLOWAY, AND KIM LARSON**
(FILED WITH WRITTEN CONSENT OF THE PARTIES)

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## INTEREST OF AMICUS CURIAE

This amicus curiae brief ("Brief") is submitted by the League of Arizona Cities and Towns ("League") pursuant to Rule 14 and Rule 16 of the Arizona Rules of Civil Appellate Procedure in support of Defendants/Respondents City of Page ("City" or "Page"), Kary Holloway, and Kim Larson (collectively "Respondents").[1] Respondents and Plaintiffs/Petitioners Debra Roundtree, Steven Kidman, and Page Action Committee ("Petitioners") consented in writing to the filing of this Brief.

The League is a voluntary association of all 91 incorporated cities and towns in Arizona, representing approximately 79% of Arizona's total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and amongst its member municipalities. The League also files amicus briefs in cases with potential statewide impacts on its members like this case.

League members have a significant interest in this case because it involves statutory and constitutional limitations on local initiatives. At issue is the validity of Petitioners' initiative petition, I-2023-03 ("the Initiative"), which attempts to prohibit the City from making certain alterations to a segment of a City street. The lower courts correctly concluded that the Initiative is not valid because it

[1] The League is neither a party nor controlled by any party to the appeal. No person or entity other than the League provided financial resources for the preparation or submission of this Brief.

impermissibly directs *administrative* actions regarding a matter that is not subject to the electorate's legislative power at the local level.

League members own, construct, manage, and maintain a significant number of streets at considerable public cost. Consequently, they are vitally interested in and concerned with any decision that may allow initiatives to interfere with their administrative functions regarding street improvements and their ability to make basic financial and land use decisions regarding their own real estate. They are also concerned about any impact on their ability to provide for the immediate and long-range needs of their citizens and meet ever-expanding obligations imposed by state and federal governments. Finally, League members are interested in protecting their limited budgets from the costs of running unnecessary elections.

## INTRODUCTION

The Initiative is an improper use of the local initiative power. First, the local initiative power may only be used to control *legislative* actions and the Initiative impermissibly controls a broad range of executive and administrative actions. Second, the Initiative is inconsistent with multiple provisions of state law, including those that delegate *exclusive* control over public streets to the City. Third, the Initiative would impermissibly interfere with a city council's essential government functions under state law concerning city finances, public infrastructure plans, land

use, and planning.[2] Finally, the Initiative is unconstitutional because impermissibly binds the acts of future councils and divest a city of its control over the use of a public street.

Local public works projects are garden-variety administrative actions. There are scores of street projects underway in every city and town at any given time and a multitude of ways to complete each project. Allowing initiatives to interrupt and veto actions and decisions regarding street projects would produce chaotic and absurd results. Considering the low number of signatures needed for a local initiative, property owners could easily utilize the initiative process whenever they have a different notion of what a project should look like. Multiple street improvements within the same city could be subject to countless initiatives, creating a nightmare scenario for planning and managing street projects.

While the right to adopt legislation by initiative is an important one under the Arizona Constitution, there is no constitutional right to place an *invalid* initiative on the ballot. The League urges the Court to reject appellants' invitation to abandon settled precedent and affirm so the City can avoid the unnecessary expense and disruption of presenting an invalid initiative to City voters.

[2] The initiative would also impair existing contracts.

## ARGUMENT

The constitutional power for a *local* initiative is much narrower than for a statewide initiative. While "*any*" measure or constitutional amendment can be initiated at the state level, local initiatives are limited to "local, city, [or] town . . . matters on which such incorporated cities [and] towns . . . are or shall be *empowered by general laws* to *legislate*." ARIZ. CONST. art. IV, pt. 1, § 1(8) (local initiatives) (emphasis added); *compare with* ARIZ. CONST. art. IV, pt. 1, § 1(2) (statewide initiatives); *see also City of Scottsdale v. Superior Court*, 103 Ariz. 204, 205 (1968) (noting that, although the Legislature may submit *any* measure enacted by itself to voters, there is no express constitutional provision for the legislative authority of a city to refer a non-charter matter to the voters). In view of that, the power of the people to legislate is no greater than the City Council and the power does not apply to administrative matters. *See Robertson v. Graziano*, 189 Ariz. 350, 352 (Ct. App. 1997).

### I. THE INITIATIVE UNLAWFULLY SEEKS TO DIRECT ADMINISTRATIVE ACTS.

Only *legislative* acts can be submitted to the ballot via initiative; administrative acts cannot. *See* ARIZ. CONST. art. IV, pt. 1, § 1(8) (matters on which incorporated cities "are or shall be empowered by general laws to *legislate*"); *see also, e.g., Wennerstrom v. City of Mesa*, 169 Ariz. 485, 494, 495 (1991) (affirming

city clerk's rejection of petitions because of the administrative nature of the city council's conceptual and final approval of a street project); *Maricopa Citizens Protecting Taxpayers v. Price*, 244 Ariz. 330, 336 (App. 2017) (affirming city clerk's rejection of petitions because of the administrative nature of approving a conditional-use permit to build a motorsports facility); *Respect the Promise in Opposition to R-14-02 v. Hanna*, 238 Ariz. 296, 304 (App. 2015) (holding a clerk has authority to reject petitions because a city council's approval of a settlement agreement and expenditures for public improvements is administrative in nature); *Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576 (App. 2005) (affirming city clerk's refusal to transmit petition signatures because utility rate making is not a legislative act). This constitutional limitation is necessary because permitting initiatives on executive and administrative actions would bring government operations to a halt. *See Redelsperger v. City of Avondale*, 207 Ariz. 430, 432, ¶ 9 (App. 2004).

Under Arizona's system of government, there is *no separation of powers* with respect to the legislative, executive, proprietary, and administrative functions of cities and towns. *See, e.g.*, *Wennerstrom*, 169 Ariz. at 488. Thus, when a city council acts in an administrative capacity to discuss or approve a matter, the city is not using its legislative authority and its electors do not enjoy constitutional power to initiate that same act or approval. The fact that a city council may exercise some discretion

in a matter does not render the action or decision legislative in nature. For example, a city council can perform, delegate or share the administrative functions of a planning department, planning agency, and planning commission. *See* A.R.S. §§ 9-461.03 (giving city councils the option of creating a planning department); 9-461.01 (giving city councils the option of delegating the functions of a "planning agency" to staff); 9-461.02 (giving city councils the option of creating a planning commission); 9-462.04(G) (stating that, if there is no planning commission or hearing officer, the city council will perform the functions assigned to a planning commission or hearing officer); 9-500.49 (providing that a city council can authorize administrative personnel to review and approve site plans, development plans, land divisions, lot line adjustments, lot ties, preliminary plats, final plats and plat amendments without a public hearing). State law even defines a city's "planning agency" as whoever is designated by local ordinance to carry out planning functions, which may be performed by the planning department, a planning commission, a hearing officer, the legislative body itself, or any combination thereof. A.R.S. §§ 9-461(4) (defining "planning agency" relating to municipal planning); 9-463(5) (defining "planning agency" relating to municipal subdivision regulations).[3]

[3] In contrast, city councils cannot delegate their legislative powers to rezone or annex property. *See, e.g.,* A.R.S. §§ 9-462.04 (rezoning); 9-471 (annexation).

The leading case on determining the nature of a city council's act is *Wennerstrom*, which provided the following:

> Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. In this connection an ordinance which shows an intent to form a permanent rule of government until repealed is one of permanent operation.
>
> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. Similarly, an act or resolution constituting a declaration of public purpose and making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body.

*Id.* at 489 (quoting 5 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 16.55 at 266 (3d rev. ed. 1989)). The Court of Appeals in this case also noted the following from the same treatise:

> Acts that deal with a small segment of an overall policy question generally are administrative, as are decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice, even though they may also be said to involve the establishment of policy.

*Roundtree v. City of Page*, No. 1 CA-CV 24-0387 EL, 2024 WL 3273984, at *3 (Ariz. Ct. App. July 2, 2024) (quoting MCQUILLIN, at § 16:53).

In *Wennerstrom* itself, this Court found that a charter city's actions were not legislative in nature. *Wennerstrom*, 169 Ariz. at 495. The city's voters in 1987 had

approved the issuance and sale of general obligations bonds to improve city streets and highways. *Id.* at 487. Several years later, the city council passed a resolution "conceptually approving" widening a portion of a street from five to seven lanes "with alignment as indicated by staff." *Id.* A few months later, the city council passed two other resolutions approving a project for alignment of certain sections of the street and authorizing the city manager to sign an intergovernmental agreement to share the costs. *Id.* The first resolution with the conceptual approval was not legislative because there was no indication the city council had made a final decision. *Id.* at 490. While the voting members were all in favor of widening the street, they had neither allocated funding for the improvements nor authorized construction. *Id.* While the second resolution gave final approval to the project, it merely carried out the public purpose that was declared at the 1987 bond election when voters (road improvement and construction) and provided the ways and means for its accomplishment (the bond revenues). *Id*. This was true even though the bond proposal itself did not specifically mention widening the street at issue. *Id*.

In *Respect The Promise*, the Court of Appeals considered petitions that sought to challenge a city council's approval of a resolution and settlement agreement under which the city agreed to drop its opposition to a proposed casino project. *Respect The Promise*, 238 Ariz. at 298. The court held that the resolution and settlement agreement were not legislative acts, reasoning that:

> If the terms of a settlement agreement were ultimately subject to the approval of voters, the ability of municipalities to act in their executive and administrative capacities to effectively negotiate and resolve litigation with other parties would be substantially undermined. Allowing a city's voters to share the ability to control litigation with a city council would result in chaotic, if not absurd, results. In addition, the effectiveness of the judicial system would be compromised if the parties' settlement agreements and corresponding withdrawals from litigation could later be rejected by voters.

*Id*. at 302 (citation omitted). To the extent the plaintiff argued the city's obligation to construct offsite infrastructure rendered the settlement agreement legislative, the court stated there was no authority "supporting the proposition that a government expenditure for a public improvement is, by definition, subject to referendum." *Id*. It was also contrary to the Constitution providing that laws "for the support and maintenance of the departments of the state and state institutions" cannot be submitted to the voters. *Id*. (discussing ARIZ. CONST. art. IV, pt. 1, § 1(3)); *see also, e.g.*, *Okerson v. Common Council of City of Hot Springs*, 767 N.W.2d 531, 536 (S.D. 2009) (concluding a settlement agreement concerning the construction of a public golf course is administrative); *Housing & Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 293 Minn. 227, 198 N.W.2d 531 (1972) (concluding a settlement agreement is an administrative and noting the "chaotic situation in city government" that could result if interfered with).

Here, the Initiative would add a new chapter to the City Code relating to a portion of Lake Powell Boulevard and it provides, in part:

> The citizens of Page, Arizona do hereby find and determine that it is in the best interest of the citizens to maintain the size and number of traffic lanes at Laek [sic] Powell Boulevard from Rim View Drive to Aspen Street as presently existed on October 1, 2023. And further, that making changes that degrade the usefulness of this portion of road is wasteful of the public fisc [sic] and harmful to the general welfare.
>
> . . .
>
> Neither public resources of the City nor outside funds from any source shall be used in anyway [sic] to facilitate, encourage, support, or actualize a reduction in the number of lanes or size of Lake Powell Boulevard between Rim View Drive and Aspen Street from the current size and number of lanes.

The Initiative does not qualify as legislative. As further discussed below, state law grants cities and towns *exclusive* control and jurisdiction over their streets. *See, e.g.*, A.R.S. § 9-240(B). Thus, cities and towns are merely administering an *existing statutory policy*.

Notwithstanding that statutory delegation, the Initiative is also administrative in nature. Legislation "must enact *something*." *Fritz v. City of Kingman*, 191 Ariz. 432, 434 (1998) (while a general plan includes a statement of broad policies, goals, and principles, it is not legislative because it does not enact something definite or specific). The Initiative does not command anything or make any permanent change to the characteristics of any property; it *prohibits* action. The initiative merely seeks to preserves the status quo and *hinders* the implementation of existing plans, contracts, and ordinances.

The Initiative's reach is also very limited—it governs the City (not the public) with respect to specific street improvements on a portion of a single street (not a

street-wide or city-wide act). Furthermore, the Initiative does not provide the City with the "ways and means" to accomplish any particular action. Instead, it robs the City of *all* discretion in the matter. If approved by the voters, all future participation or input from members of the public in the matter would also be futile—and the City would be paralyzed to do anything about it.

The administrative nature of the functions regarding the planning and construction of public infrastructure makes sense. Street projects require careful study, technical expertise, and knowledge about capital improvement plans, the City's fiscal affairs, and other matters. These decisions may fluctuate based on changing needs, budgets, economic conditions, traffic flows, vehicle loads, availability of grant funds, intergovernmental cooperation, public transit options, new technologies (e.g., autonomous vehicles and delivery devices), geotechnical concerns, property rights, zoning changes, contract requirements, population growth, and a multitude of other factors. Allowing street projects to be blocked or "second guessed" by the electorate would wreak havoc on infrastructure planning and development in Arizona, especially at a time when cities and towns are facing unprecedented growth. League members have interests in avoiding this outcome and in protecting their limited budgets from the costs of running unnecessary elections. The League urges this Court to avoid these results and affirm because the Initiative is clearly administrative and cannot submitted to the voters.

## II. THE INITIATIVE CONFLICTS WITH STATE LAW.

A local initiative cannot violate the Constitution or attempt to circumvent state law. The delegates to the Constitutional Convention discussed the limits on the powers of cities and towns with respect to local initiative and referendum initiatives. They expressed concerns about citizens overstepping the scope of powers granted to counties and municipalities. *Hancock v. McCarroll*, 188 Ariz. 492, 497–98 (Ct. App. 1996). One delegate argued the phrase "local special legislation" in the draft was sufficient to limit local initiative powers to matters delegated to local jurisdictions pursuant to state law. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 178 (John S. Goff ed., 1991). Another delegate suggested that the phrase did not go far enough to define the scope of local initiative power:

> Now, I say, if this language is ambiguous or uncertain, and I find that it is uncertain because members of the convention do not agree as to what it means, then now is the time to make it certain, and if it means to *authorize counties to legislate only on matters concerning subjects on which they are authorized by general law* then why not add those words and make it specific—make it certain.

*Id.* at 179 (emphasis added). In the end, the phrase "local special legislation" was replaced with the current phrase "on which such incorporated cities, towns and counties are or shall be empowered by general laws to legislate." *See* ARIZ. CONST. art. IV, pt. 1, § 1(8).

Arizona courts have interpreted issues of delegated powers consistent with this understanding of the Constitution. Non-charter municipalities like Page have only such legislative powers as have been expressly, or by necessary implication, delegated to them by the Constitution or the Legislature. *See City of Phoenix v. Arizona Sash, Door and Glass Co*., 80 Ariz. 100 (1956).[4]

The decision in *Cota-Robles v. Mayor & Council of Tucson*, 163 Ariz. 143, 144 (App. 1989) is relevant because it dealt with a complaint seeking to compel Tucson to hold an election regarding a proposed highway alignment. *Id*. at 144. In February 1981, the Pima Association of Governments, Tucson, South Tucson, Marana, and Oro Valley, adopted a regional transportation plan that included highway at issue. *Id*. Engineering consultants were hired, numerous public hearings were held, and a concept location study was published with four alignment options. *Id*. The Tucson Council selected one of the four options and approved an intergovernmental agreement with the Department of Transportation (ADOT) pursuant to which ADOT agreed to reimburse Tucson for design costs. *Id*. After several design and engineering contracts were entered, citizens sought an order requiring Tucson to hold an election on the proposed alignment. *Id*. The court concluded that that street project was administrative, noting that street projects are a

[4] Charter cities may be further restricted or limited by their city charters. *See City of Scottsdale*, 103 Ariz. at 205.

subject matter of statewide concern, state law has appropriated the field, and the project was to be funded by state highway revenue user funds. *Id.* at 146. Thus, the attempt to require an election on the alignment would result in an "irreconcilable conflict" with the Constitution. *Id*. at 147; *see also Clayton v. State*, 38 Ariz. 135, 140 (1931) (recognizing the state's plenary power over the highways, including those within cities and towns).

The delegation of power to Arizona cities and towns with respect to streets is like delegation of power to ADOT. State law expressly provides that a city council "*shall* [] have power within the limits of the [City] . . . to exercise *exclusive* control over the streets, alleys, avenues and sidewalks" of the city. A.R.S. § 9-240(B)(3)(a) (emphasis added and citation omitted).[5] This grant of this exclusive control has been in place since at least 1893. *See, e.g., Town of Tempe v. Corbell*, 17 Ariz. 1, 8 (1915) (discussing 1893 ARIZ. SESS. LAWS No. 72, art. III, § 1, subd. 3, conferring the power upon councilmen to have "the exclusive control over the streets, alleys, avenues and sidewalks of the town; . . . to widen, extend, straighten, regulate, grade, clean or otherwise improve the same") (citations omitted).[6] Thus, because state laws

[5] These delegated powers make sense because cities and towns are tasked with keeping streets reasonably safe. *See, e.g*., *Beach v. City of Phoenix*, 136 Ariz. 601, 603 (1983) (cities are responsible for keeping streets, alleys, avenues and sidewalks reasonably safe).

[6] *See also*, e.g., A.R.S. §§ 9-240(A) (granting council the authority to allocate funds); 9-461.10 (granting council the authority to establish administrative rules and procedures for the implementation of specific plans and regulations, assign or

delegated exclusive control and authority to local governments to manage their streets as they see fit, local governments are merely administering an existing policy under state law.

Courts in other states have arrived at similar conclusions. Regarding proposed initiatives relating to public projects. For example, in *Seattle Building & Construction Trades Council v. City of Seattle*, 94 Wash. 2d 740 (1980), the Washington Supreme Court held that a proposed city initiative that sought to prohibit expansion of Interstate 90 facilities on a lake went beyond the scope of the initiative power. *Id.* at 749. The state held title to the highway and assumed full jurisdiction, responsibility, and control of the roadway. *Id.* at 747. Thus, the city (and its electorate) held power over a highway only to the extent authorized by the state legislature. *Id.* at 749. Any such delegated powers were administrative in nature. *Id.*; *see also Mervynne v. Acker*, 189 Cal. App. 2d 558 (1961) (holding a petition seeking the repeal of parking meter ordinances was not subject to the initiative process because the state legislatively occupied the field of vehicular traffic on public streets and specifically delegated particular authority to cities); *State v. Leeman*, 149 Neb. 847 (1948) (holding that an initiative attempting to order the purchase of land, selection of plans, and letting of contracts to build a municipal auditorium was not

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delegate administrative powers and duties, and provide compensation for the work); 9-461.01(B)(1)-(2) (authorizing planning agencies to develop specific plans and periodically review the capital improvement program).

legislative in nature because it involved the executive and administrative duties of the municipality); *Priorities First v. City of Spokane*, 93 Wash. App. 406 (1998) (initiative that would require the city to obtain voter approval before pledging parking meter revenue to fund a parking garage was administrative because it conflicted with the exercise of a power delegated by state law to the governing body of the city).

In sum, the Initiative is invalid because it interferes with the exercise of powers delegated by state law to a city or town council.

## III. THE INITIATIVE IS UNCONSTITUTIONAL.

The non-legislative nature of the Initiative is not the only constitutional issue. The Initiative conflicts with the Constitution in at least three other respects.

First, the Initiative impermissibly ties the hands of future councils in the performance of a duty owing to the public. *See, e.g., Higgins' Estate v. Hubbs*, 31 Ariz. 252 (1926) (describing legislation that denies a future legislative body the right to repeal an act is "of course unconstitutional, illegal, and void")*; Toma v. Fontes*, 553 P.3d 881 (Ariz. Ct. App. 2024) (stating that one legislative body cannot limit or bind the acts of a future one to alter, limit, or repeal statutes); *Corbell*, 17 Ariz. at 8 (concluding that a contract that prevented the city council from selecting another contractor for at least one year was void because it deprived the succeeding council

of the statutory right to control the streets and the ability to exercise discretion in the performance of a duty owing to the public).

Second, the Initiative attempts to pass a an impermissible "local or special law" regarding the "laying out, opening, altering, or vacating" of a specific road, street or alley. ARIZ. CONST. art. IV, pt. 2, § 19(8). In *Graham Cnty. v. Dowell*, 50 Ariz. 221, 222 (1937), the court applied this constitutional provision and held that directing construction of public highway by special act was unconstitutional.

Finally, the Initiative attempts to impair existing contractual obligations under the intergovernmental agreement with the state and other construction-related contracts, which is prohibited under the federal and state constitutions. U.S. CONST. art. I, § 10, cl. 1; ARIZ CONST. art. II, § 25; *Samaritan Health Sys. v. Superior Ct. of State of Ariz.*, 194 Ariz. 284, 293 (Ct. App. 1998) (a law cannot impair obligations under existing contracts).

## CONCLUSION

Expanding the power of initiative to administrative matters would run afoul of the Arizona Constitution, conflict with state law, and severely disrupt municipal operations. Municipalities should not be bogged down with time consuming and costly initiative concerning basic administrative functions. The League urges the Court to reject appellants' invitation to abandon settled precedent and affirm.

**RESPECTFULLY SUBMITTED** this 8th day of January 2025 by:

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