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6 **SUPERIOR COURT OF ARIZONA**
7
8 **GILA COUNTY**

9 TRANSPARENT PAYSON, a political committee
registered pursuant to Arizona Revised Statutes
10 Section 16-905, JEFFREY AAL individually as a
11 citizen of the Town of Payson, and in his capacity as
Chairman of Transparent Payson, KIMBERLY ANN
12 NICHOLS, individually,

13 Plaintiffs,

14 vs.

15 TOWN OF PAYSON, ARIZONA, a public entity,
16 and TRACIE BAILEY, in her official capacity as
17 Payson Town Clerk,

18 Defendants.
19

No. CV2023-00118

**REPLY TO TOWN'S
RESPONSE IN
OPPOSITION TO THE
APPLICATION FOR
ORDER TO SHOW
CAUSE**

20 The Defendants Town of Payson and Tracie Bailey (collectively, "Town")
21 put themselves in the extraordinarily awkward position of arguing for the invalidity
22 of the Town's own Municipal Code. The arguments put forward by the Town to
23 justify this unprecedented legal action, as well as its justification for eviscerating
24 what was passed by the Town's own electors, do not hold up. This Court should
25 enter the order to show cause and ultimately grant Plaintiffs relief.

1 **I. THE TOWN’S ARGUMENT THAT THE TOWN COUNCIL LACKS**
2 **AUTHORITY TO REFER MATTERS PURSUANT TO**
3 **PROPOSITIONS 401 AND 402 TO THE BALLOT IS A RED**
4 **HERRING**

5 Propositions 401 and 402 (“the Propositions”) operate to place matters on the
6 ballot automatically, as a requirement of law. The whole point of the Propositions
7 is to cut the Town Council out of any meaningful decision-making role with regard
8 to the realms in which the Propositions apply. The Town Council is not required to
9 do anything (other than perhaps ministerial election related duties). So there can be
10 no argument that lack of authority is an excuse to invalidate the Propositions when
11 such authority is not really needed anyway.

12 The powers of initiative, exercised by the Town electorate, are very broad
13 under the Arizona Constitution, and “the qualified electors shall have the right to
14 propose any measure...” Ariz. Const. Art. IV, § 4, Pt. 1 (Emphasis added). If the
15 Propositions require that an action by the Town appear on the ballot, that was a
16 decision made by the electorate acting pursuant to its power of initiative. Any duties
17 that the Clerk or Town Council have are ministerial.

18 The language of § 1(3) of Article IV of the Arizona Constitution supports
19 this view. That section states that “the legislature...may order the submission to the
20 people at the polls of any measure, or item, section or part of any measure, enacted
21 by the legislature.” (Emphasis added). This tells us what an actual referral is—it is
22 something that the legislative body actually adopts and passes itself—hence the
23 requirement that a measure receive 31 House votes and 16 Senate voters in the
24 Arizona Legislature to appear on the ballot as a referendum. *Id.*

1 In the case of the Propositions, there is no such *enactment* of anything by the
2 Town Council—the matters are placed on the ballot by operation of law, pursuant
3 to legislation passed by the people through initiative. In contrast to the Legislature,
4 which votes to put something on the ballot, if the Town Council passes something
5 that falls within the purview of the Propositions, the measure goes on the ballot
6 automatically for the electorate to decide whether the Council likes that or not.
7

8 **II. THE PAYSON ELECTORATE MAY ORDER SPECIFIC MATTERS**
9 **TO AUTOMATICALLY BE PLACED ON THE BALLOT, AND**
10 **EVEN IF THE TOWN’S ADMINISTRATIVE VS. LEGISLATIVE**
11 **ARGUMENT HAS ANY MERIT, EACH PARTICULAR BALLOT**
12 **PLACEMENT MUST BE JUDGED ON ITS OWN MERITS**

13 Another awkward aspect of the Town’s legal position is the way it claims
14 that it does not have certain powers. Usually governmental entities argue the
15 opposite. And indeed, the Mayor’s involvement in trying to invalidate provisions
16 of the Town Code goes against the duties imposed on the Mayor by the Town Code,
17 which provides that “[t]he Mayor shall enforce the provisions of this code.” Payson
18 Town Code § 30.22(C).

19 The Town’s legal position, if credited, would put at risk a number of legal
20 provisions of other municipalities that have these type of automatic ballot placement
21 laws. These laws are hardly unusual, and a cursory survey of different municipal
22 laws produces examples from both the Cities of Phoenix and Scottsdale. Phoenix
23 and Scottsdale are charter cities—but while respective charter powers would seem
24 to allow their councils to refer matters to the electorate, that would not give them
25 the power to refer administrative matters to the ballot. *See Wennerstrom v. City of*

1 Mesa, 169 Ariz. 485, 488 (1991)(“[U]nder the Arizona Constitution, only the
2 Council's legislative actions were subject to referendum.”)

3 In Phoenix’s case, its Charter provides:
4

5 Notwithstanding any other provision of the charter of the City of
6 Phoenix, the City shall not expend public funds, grant tax concessions
7 or relief, or incur any form of debt in an amount greater than three
8 million dollars, and/or exchange or grant City-owned land of a fair
9 market value of three million dollars to construct or aid in the
10 construction of any amphitheater, sports complex or arena, stadium,
11 convention facility or arena without approval of the majority of the
12 electorate voting thereon at the next general election.

13 Chapter XXVII(A), Phoenix City Charter¹.

14 In addition, Scottsdale has a charter provision requiring any change of land
15 in the Scottsdale Preserve from its “natural state” to go to the ballot for the
16 electorate’s approval:
17

18 No land designated as preserve land pursuant to Section 8 of this article shall
19 be altered from its natural state unless specifically authorized by a majority
20 of the votes cast thereon at a general or special municipal election.

21 Article VIII, § 12(A), Scottsdale City Charter².

22 In other words, if the city administration wanted to move a couple of cactuses
23 to improve a sidewalk, an administrative act under the Town’s logic if ever there
24 were one, they would have to go to the electorate. And that is not the only such
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¹ [Chapter XXVII Voter Approval for Certain Public Expenditures; Limitation on
Emergency Clause | Phoenix City Charter \(municipal.codes\)](#)

² [City of Scottsdale - City Charter \(scottsdaleaz.gov\)](#)

1 Scottsdale Charter provision. *See* Art. VIII, § 11³ (requiring electorate approval of
2 portions of land greater in size than one acre from the Scottsdale preserve).

3
4 Under the Town’s interpretation, these Phoenix and Scottsdale charter
5 provisions are illegal. Or at least they have illegal applications.

6
7 If we had only these other municipal laws to look at, it might be tempting to
8 simply conclude that those laws are illegal, and the fact that other municipalities
9 have illegal provisions on the books does not make the Propositions legal. However,
10 in this case, there is more to the story. Under A.R.S. § 9-282(C), “[i]f a majority of
11 the electors voting thereon ratify the proposed charter, it shall be submitted to the
12 governor for his approval, who shall approve it if not in conflict with the constitution
13 or the laws of the state.” That means the municipal charter provisions quoted above
14 have been reviewed by the Governor and found to be consistent with the
15 “constitution” and “laws of the state.” While not a court of law, the highest public
16 official in the State has nonetheless made the legal determination that these
17 automatic ballot placement provisions are legal, even though they could clearly
18 involve administrative matters, and in some cases may necessarily involve
19 administrative matters.
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24 The potential that the Phoenix and Scottsdale charter provisions cited above
25 could have both legal and illegal applications, depending on the specific
circumstances of the municipal action that would be placed on the ballot pursuant

³ [City of Scottsdale - City Charter \(scottsdaleaz.gov\)](http://scottsdaleaz.gov)

1 to those charters, brings us back to the point alluded to above—every action must
2 be judged to be legislative or administrative on its own merit. The Town’s claim
3 that the Court should just assume every single action affected by the Propositions
4 would be administrative is simply wrong. This could be a situation in which the
5 Propositions are not invalid *per se*, but could have both valid and invalid
6 applications, and the invalid applications may never even present themselves.
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9 In this posture, we have a situation in which the distinction between a facial
10 challenge and as applied challenge to a law is critical. As the Arizona Supreme
11 Court has stated:

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13 To succeed on a facial challenge [to a law], an admittedly difficult
14 feat, “the challenger must establish that no set of circumstances exists
15 under which the Act would be valid. The fact that the [Act] might
16 operate unconstitutionally under some conceivable set of
17 circumstances is insufficient to render it wholly invalid.”

18 *See State v. Wein*, 244 Ariz. 22, 31 (2018)(quoting *U.S. v. Salerno*, 481 U.S. 739,
19 745,107 S.Ct. 2095 (1987)(brackets in original).

20 Clearly, at best for the Town it has not even come close to meeting the
21 difficult burden of demonstrating that this Court should strike down the Propositions
22 as facially invalid, incapable of ever having a valid application. The Town’s
23 argument on this points fails for this reason alone.
24
25

1 **III. THE VOTER PROTECTION ACT DOES APPLY TO**
2 **MUNICIPALITIES, AND THE TOWN OF PAYSON IN**
3 **PARTICULAR**

4 Notwithstanding the Town’s arguments, the Arizona Constitution, § 8 of Art.
5 IV., Pt. 1 incorporates the same powers and rights that state voters enjoy into
6 municipal initiative matters:

7 Local, city, town or county matters. The powers of the initiative and
8 the referendum are hereby further reserved to the qualified electors of
9 every incorporated city, town, and county as to all local, city, town,
10 or county matters on which such incorporated cities, towns, and
11 counties are or shall be empowered by general laws to legislate.

12 The Town has exactly backwards in its argument—there is nothing in the
13 legislative history of Proposition 105, the Voter Protection Act, indicating that the
14 voters of Arizona intended to set up a two-tier initiative system⁴. That is, statewide
15 measures were protected, but measures passed by municipal and county voters were
16 somehow of a lesser power, able to be nullified with a simply majority vote of the
17 elected officials. The silence in the legislative history should not be interpreted as
18 an endorsement of this “lesser power” theory. Clearly the “power” of the initiative,
19 as prescribed by the “State Constitution”, includes the power to enact measures that
20 become largely off-limits to legislative body. That is a massive power provided by
21 the Arizona Constitution, and it is provided at every level of government. Ariz.
22 Const. IV., § 8, Pt. 1.

24 There is also A.R.S. § 19-141(D), which provides that “[t]he procedure with
25 respect to municipal and county legislation shall be as nearly as practicable the same

⁴ The publicity pamphlet for the 1998 General Election can be found here: [Untitled Document \(azsos.gov\)](#)

1 as the procedure relating to initiative and referendum provided for the state at large,
2 except the procedure for verifying signatures on initiative or referendum petitions
3 may be established by a city or town by charter or ordinance.”

4 Lastly, the Town does not even attempt to address Payson Town Code, §
5 30.65, which states: “[t]here is reserved to the qualified electors of the town the
6 power of the initiative and the referendum as prescribed by the State Constitution.”

7 (Emphasis added). There can be no question that this provision is intended to keep
8 whatever rights to referendum exist under the Arizona Constitution for state voters
9 on par with those enjoyed by the Town’s electorate. And the right to have a
10 meaningful vote on a matter, one that cannot simply be negated by elected officials
11 the next day, is part and parcel of the right to initiative in the Arizona Constitution.
12 The Town Code confirms that this applies to the Town, and not just to statewide
13 matters.
14

15 Lastly, because the Voter Protection Act applies, it does not permit the type
16 of “preemptive strike” that the Town has taken. If the Propositions do have what
17 the Town views as an invalid application in that one requires that an administrative
18 matter be placed on the ballot illegally, the Town should take that up then when the
19 circumstance actually presents itself, perhaps by way of a declaratory judgment
20 action.
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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Plaintiff requests that this Court enter the
3 requested order to show cause and allow this matter to proceed to resolution on the
4 merits.
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6 **RESPECTFULLY SUBMITTED** this 18th day of July, 2023.

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I hereby certify that on July 18, 2023 I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants, with automatic email to the Judge.

I hereby certify that on July 18, 2023 I emailed copies of the foregoing documents to the following:

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