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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF GILA**

8 DEBORAH ROSE,

9 Plaintiff,

10 vs.

11 TOWN OF PAYSON; CHRIS HIGGINS, in  
12 his official capacity as Mayor of the Town of  
13 Payson; BARBARA UNDERWOOD, in her  
14 official capacity as Vice-Mayor of the Town  
15 of Payson; BRETT FLAHERTY, in his  
16 official capacity as a Council Member of the  
17 Town of Payson; JOEL MONA, in his  
18 official capacity as a Council Member of the  
19 Town of Payson; SCOTT NOSSEK, in his  
20 official capacity as a Council Member of the  
21 Town of Payson; JOLYNN SCHINSTOCK,  
22 in her official capacity as a Council Member  
23 of the Town of Payson; SUZY TUBBS-  
24 AVAKIAN, in her official capacity as a  
25 Council Member of the Town of Payson; and  
26 TROY SMITH, in his official capacity as the  
27 Town Manager of the Town of Payson,

28 Defendants.

Case No.

**APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER (WITH NOTICE) AND  
PRELIMINARY INJUNCTION**

23 Pursuant to Arizona Rule of Civil Procedure 65, Plaintiff requests that this Court  
24 issue a temporary restraining order pending a hearing for preliminary injunction enjoining  
25 Defendants from carrying out Resolution No. 3409. Plaintiff further requests that this  
26 Court set an Order to Show Cause hearing as to why a preliminary injunction should not  
27 be granted.  
28

1 This Motion is supported by the following Memorandum of Points and Authorities,  
2 its attachments, and Plaintiff’s Verified Complaint.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. Statement of facts in support of injunctive relief**

5 On August 21, 2024, the Payson Town Council passed Resolution No. 3409,  
6 authorizing the sale of \$70 million in bonds. Verified Compl. (“Compl.”) ¶ 14. Such  
7 measures are ordinarily subject to referendum petition by residents, and to this end, A.R.S.  
8 § 19-142 provides that municipal resolutions and ordinances may not go into effect until  
9 30 days after passage, “except emergency measures necessary for the immediate  
10 preservation of the peace, health or safety of the city or town.”

11 Resolution 3409 includes an “emergency clause” which states: “The immediate  
12 operation of the provisions of this Resolution is necessary for the preservation of the  
13 public peace, health and safety,” and “this Resolution will be in full force and effect from  
14 and after its passage by the Council and is hereby excepted from the referendum  
15 provisions of the Constitution and laws of the State of Arizona.” Ex. 1 to Compl. at 5  
16 § 11. But the purported “emergency” is a sham: the only “emergency” is the Council’s  
17 desire “to immediately sell the Obligations to secure the best, available [sic] economic  
18 terms therefor.” *Id.* This is not an emergency as contemplated by the statute.

19 In a presentation on the proposed bond measure, the Town’s bond underwriter  
20 speculated that adopting Resolution No. 3409 “with an *emergency clause* would allow the  
21 Town to take advantage of favorable interest rates or rallies in the market and to get ahead  
22 of the expected influx of competing issuances in late September/October as other issuers  
23 look to lock-in rates before the uncertainty related to the November Election.” Town of  
24 Payson Council Meeting (Aug. 21, 2024)<sup>1</sup> (“Council Meeting”) at 25:15-25:45  
25 (Powerpoint slide); Compl. ¶ 16. The underwriter acknowledged, however, that he had  
26 “no ability to predict interest rates,” and that his forecasts were uncertain. *Id.* at 25:55;  
27 Compl. ¶ 17. He stated: “By passing an emergency clause, it simply gives us a little more  
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<sup>1</sup> [https://payson.granicus.com/player/clip/2744?view\\_id=17&redirect=true](https://payson.granicus.com/player/clip/2744?view_id=17&redirect=true).

1 flexibility to see into the market and within the timeframe that we have, look for  
2 opportunistic times to go out and price the bond issues in the market.” Council Meeting at  
3 26:50–26:57; Compl. ¶ 18.

4 A member of the Town’s bond underwriting firm also indicated that the bond  
5 market has been consistently favorable throughout the past year, *see* Council Meeting at  
6 31:25–31:30; Compl. ¶ 19 (“For most bond issues sold in Arizona this year, demand has  
7 exceeded supply.”), and he presented a chart of “tax exempt interest rate movement” in  
8 which rates for comparable bonds have fluctuated by less than 0.8 percentage points over  
9 the past year. Council Meeting at 31:25–31:30; Compl. ¶ 20. The underwriters also  
10 indicated that bond rates increased by 0.6–0.8 percentage points in two recent presidential  
11 elections, and that rates did not meaningfully increase in two other recent presidential  
12 elections. Council Meeting at 35:15; Compl. ¶ 21 (“The Obama/Romney and  
13 Biden/Trump elections saw generally stable rates before election day and modest declines  
14 after election day.”).

15 Although the Town Council did not give any other justification for the use of an  
16 emergency clause, they made several other statements about their motivations for  
17 insulating Resolution 3409 from the referendum process. They noted that they wanted to  
18 enact the measure before an upcoming change in the Town Council’s composition as a  
19 result of a close recent primary election:

- 20 • “It may take years to recover the momentum if we don’t pull the trigger.” Council  
21 Meeting at 2:35:45–2:26:00; Compl. ¶ 23 (Councilmember Schinstock).
- 22 • “I did not hear any vision from the incoming council. They focused on criticizing  
23 our decision, and I really have no idea how they plan to move Payson forward.”  
24 Council Meeting at 2:40:57 (Councilmember Schinstock).

25 They also noted that they had been trying to enact similar bond measures and debt-  
26 funded municipal projects (particularly a recreation center and swimming pool) for  
27 several years, but that those projects had failed due to the political process:  
28

- 1 • “Now we’re making a third attempt to bring this community an indoor pool, and  
2 once again, the election results have put this project in jeopardy.”). Council  
3 Meeting at 2:27:10–2:27:30; Compl. ¶ 25 (Councilmember Schinstock).
- 4 • “We have endured too much political and personal criticism.” *Id.* at 2:40:55.
- 5 • “It’s been out there on the table for a long time, and a battle to get to this point.”  
6 Council Meeting at 2:49:50–2:50:05; Compl. ¶ 24 (Councilmember Flaherty).

7 The Town Council voted 5–1 to pass the resolution. The sole dissenter,  
8 Councilmember Tubbs-Avakian, expressed her discomfort with the use of an emergency  
9 clause to bypass the democratic process. *See, e.g., id.* at 2:45:15–2:45 (“The people have a  
10 voice and they should be allowed to vote on something this large.”); *id.* at 2:46:45–  
11 2:47:02 (noting that the Council had used emergency clauses to bypass referenda “four  
12 times since [she has] been here”).

13 Plaintiff is a Payson resident who is opposed to Resolution 3409 and wishes to  
14 organize a referendum to overturn the measure by a popular vote. Compl. ¶¶ 1, 2, 27, 28.  
15 She cannot do so, however, because the resolution’s emergency clause specifically states  
16 that it is exempt from referendum. Ex. 1 to Compl. at 5 § 11; Compl. ¶¶ 31.

17 The Town’s underwriters have stated that they “anticipat[e] entering the [bond]  
18 market ... early in the month of September,” and they “anticipate closing the bond issue  
19 ... at the end of September,” “the week of September 30.” Council Meeting at 19:53–  
20 20:30; Compl. ¶¶ 29–30. Once the bond issue closes, it will be irreversible, and Town  
21 residents opposed to Resolution 3409 will have no meaningful recourse. Ex. 1 to Compl.  
22 at 5 § 11; Compl. ¶¶ 31, 32.

## 23 **II. Standards for preliminary relief**

24 In deciding whether to grant a temporary restraining order or a preliminary  
25 injunction, courts consider (1) the likelihood of success on the merits, (2) the possibility of  
26 irreparable harm without an injunction, (3) the balance of hardships, and (4) public policy.  
27 *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). When determining whether preliminary  
28 relief is appropriate, courts apply a sliding scale rather than a strict balancing of the four

1 factors. *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410–11 ¶ 10  
2 (2006). Thus, to warrant a preliminary injunction, the plaintiff must “establish either 1)  
3 probable success on the merits and the possibility of irreparable injury; or 2) the presence  
4 of serious questions and that the balance of hardships tips sharply in favor of the moving  
5 party.” *Id.* (citation and internal marks omitted). In other words, “[t]he greater and less  
6 reparable the harm, the less the showing of a strong likelihood of success on the merits  
7 need be.” *Id.* All these factors decisively favor Plaintiff on each of her claims.

### 8 **III. Plaintiff’s challenge is likely to succeed on the merits.**

9 “The Arizona Constitution reserves the powers of initiative and referendum to the  
10 people.” *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 488 (1991) (citing Ariz. Const. art.  
11 4, pt. 1, § 1). “The constitutional referendum power” includes the right of Arizonans “to  
12 circulate petitions and refer to a popular vote legislation which has been enacted by their  
13 elected representatives.” *Id.*

14 To ensure that voters have the opportunity to exercise their constitutional right of  
15 referendum, “[a] city or town ordinance, resolution or franchise shall not become  
16 operative until thirty days after its passage by the council and approval by the mayor.”  
17 A.R.S. § 19-142(B). A narrow exception exists for “emergency measures necessary for  
18 the immediate preservation of the peace, health or safety of the city or town.” *Id.* “An  
19 emergency measure shall not become immediately operative unless it states in a separate  
20 section the reason why it is necessary that it should become immediately operative, and  
21 unless it is approved by the affirmative vote of three-fourths of all [council] members ...  
22 and ... by the mayor.” *Id.*

23 The “emergency measure” exception does not, however, “extend [to]  
24 municipalities the unconstrained use of emergency declarations to insulate their  
25 ordinances from popular vote.” *Israel v. Town of Cave Creek*, 196 Ariz. 150, 154–55 ¶ 22  
26 (App. 1999), *disapproved on other grounds by Leach v. Reagan*, 245 Ariz. 430 (2018).

27 Resolution 3409 is invalid as an emergency measure because it is not “necessary  
28 for the *immediate preservation of the peace, health or safety*” of the Town. A.R.S. § 19-

1 142(B) (emphasis added). The Town’s sole justification for the emergency measure is the  
2 Town Council’s desire “to immediately sell the Obligations to secure the best, available  
3 [sic] economic terms therefor.” Compl. Ex. 1 at 5 § 11. Resolution 3409 itself includes no  
4 findings or explanation to justify the contention that market conditions are so volatile as to  
5 require emergency issuance of a \$70 million bond *now*, rather giving residents 30 days to  
6 exercise their constitutional right of referendum.

7 Moreover, even the Town’s own staff admitted during the council meeting that  
8 they have “no ability to predict interest rates,” that municipal bond rates have been  
9 consistently favorable all year, and that presidential elections (the apparent reason for  
10 their belief that rates will increase) have historically involved bond rate increases of *at*  
11 *most* 0.6–0.8 percentage points, and sometimes *no* rate increases. Compl. ¶¶ 17, 19, 21.

12 Simply put, broad macroeconomic trends and an upcoming presidential election do  
13 not constitute an “emergency.” “The word ‘emergency’ has a well understood meaning. It  
14 is defined and understood as: ‘An unforeseen combination of circumstances which calls  
15 for immediate action.’” *Garvey v. Trew*, 64 Ariz. 342, 354 (1946) (quoting Webster’s  
16 New Int’l Dict., 2d ed.). That does not apply here.

17 What’s more, even assuming a more favorable bond market—an assumption that is  
18 not supported by the Town’s own analysis—*that* is not a basis that is “necessary for the  
19 *immediate preservation of the peace, health or safety*” of the Town. A.R.S. § 19-142(B)  
20 (emphasis added). Financial conditions for the issuance of bonds have nothing to do with  
21 “peace, health, or safety.” And more favorable financial terms do not result in the  
22 “immediate preservation” of any of these purposes.

23 In fact, Town Council members repeatedly stated during the August 21, 2024  
24 meeting that the bond measure and associated municipal projects have been foreseen and  
25 contemplated for *several years*, and that they are not the result of sudden or emergency  
26 circumstances. Compl. ¶ 24; *see, e.g.*, Council Meeting at 2:24:22–2:24:35  
27 (Councilmember Nossek) (noting the decision followed “over three years of open  
28 meetings, countless hours of study, discussion, and a great deal of citizen input. This

1 decision is not being rushed into by any stretch of the imagination.”); *id.* at 2:49:50–  
2 2:50:05 (Councilmember Flaherty) (“What we’re discussing is nothing new. It’s not  
3 rushed. It’s been out there on the table for a long time ...”).

4 Their stated justifications for rushing Resolution 3409 through on an emergency  
5 basis focused at least as much on political calculations (e.g. avoiding a popular vote and  
6 passing the measure before a change in Town Council composition with the upcoming  
7 election) as any purported threat to peace, health, or safety:

- 8 • “It may take years to recover the momentum if we don’t pull the trigger.” *Id.* at  
9 2:35:45–2:26:00; Compl. ¶ 23 (Councilmember Schinstock).
- 10 • “I did not hear any vision from the incoming council. They focused on criticizing  
11 our decision, and I really have no idea how they plan to move Payson forward.”  
12 Council Meeting at 2:40:57.
- 13 • “Now we’re making a third attempt to bring this community an indoor pool, and  
14 once again, the election results have put this project in jeopardy.”). *Id.* at 2:27:10–  
15 2:27:30; Compl. ¶ 25 (Councilmember Schinstock).
- 16 • “We have endured too much political and personal criticism.” Council Meeting at  
17 2:40:55.
- 18 • “It’s been out there on the table for a long time, and a battle to get to this point.” *Id.*  
19 at 2:49:50–2:50:05; Compl. ¶ 24 (Councilmember Flaherty).

20 The reasons for enacting Resolution 3409 and its emergency clause have been  
21 foreseeable for months, if not years, and nothing in the Resolution indicates that any new  
22 information or emergent development justifies bypassing the constitutional right of  
23 referendum. The Town’s desire to time the bond market based on its own speculation  
24 about financial trends is not an emergency, and Resolution 3409 is invalid under Section  
25 19-142(B).

1 **IV. Plaintiff faces irreparable harm without preliminary relief.**

2 “[W]hen the acts sought to be enjoined have declared unlawful or clearly are  
3 against the public interest, plaintiff need show neither irreparable injury nor a balance of  
4 hardship in his favor.” *Burton v. Celentano*, 134 Ariz. 594, 596 (App. 1982); *see also*,  
5 *e.g.*, *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 64 ¶ 26 (2020) (“Because Plaintiffs  
6 have shown that the Recorder has acted unlawfully and exceeded his constitutional and  
7 statutory authority, they need not satisfy the standard for injunctive relief.”).

8 Nevertheless, the Resolution will irreparably harm Plaintiff and thousands of other  
9 Payson residents in two ways. **First**, it will impose \$70 million of debt on Payson, and by  
10 extension, on Payson taxpayers. Once the Town closes on the proposed bond issue (likely  
11 by the end of this month), it will be too late to unwind that transaction, and any harm  
12 resulting from it will be irreparable.

13 **Second**, allowing the Resolution to proceed will deny Plaintiff and other Payson  
14 residents their constitutional right to vote via the referendum process. “It is a well  
15 established principle of constitutional law that the right to vote is fundamental, as it is  
16 preservative of all other rights.” *Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir. 2003).  
17 Accordingly, the denial of the right to bring a referendum petition and vote in a  
18 referendum election is irreparable. *See Ariz. All. for Retired Am. v. Hobbs*, 630 F. Supp.  
19 3d 1180, 1198 (D. Ariz. 2022) (“The denial of the opportunity to cast a vote that a person  
20 may otherwise be entitled to cast—even once—is an irreparable harm.”); *see also, e.g.*,  
21 *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL  
22 8669978, at \*11 (D. Ariz. Nov. 4, 2016) (collecting cases) (“[I]t is clear that abridgement  
23 of the right to vote constitutes irreparable injury.”).

24 **V. The balance of hardships and public interest favor Plaintiff.**

25 When a government entity is a party to a preliminary injunction action, it is  
26 appropriate to “consider the balance of equities and the public interest together.”  
27  
28



1 *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).<sup>2</sup> Here, the Court need not even  
2 reach these factors because Plaintiff has a strong likelihood of success on the merits.  
3 Nevertheless, “it is clearly in the public interest” that Plaintiff and other residents have the  
4 opportunity to exercise their right to vote—a right that “is sacrosanct and preservative of  
5 all other rights”—as provided for under Arizona’s Constitution and statutes. *Ariz. All. For*  
6 *Retired Am.*, 630 F. Supp. 3d at 1199; *Hoffard v. Cnty. of Cochise*, No. CV-20-00243-  
7 TUC-SHR, 2020 WL 6555235, at \*7 (D. Ariz. Oct. 22, 2020) (“There is a strong public  
8 interest in the fundamental right to vote and to provide all voters ... meaningful access to  
9 the election process.”).

10 Moreover, preliminary relief would impose little or no hardship on the Town. It  
11 would not bar the Town from raising money via bond, provided it does so properly, within  
12 the legally required timeframe that enables residents to exercise their own voice through  
13 the petition and referendum process. Moreover, even granting the Town’s speculative  
14 assumption that bond rates might increase in the coming months (something its own staff  
15 members admit they have “no ability to predict”), such increases would, by the Town’s  
16 own account, be minimal: at most, between 0.6 and 0.8 percentage points. And of course,  
17 because the Town’s predictions about the bond market could (by its staff’s own  
18 admission) prove incorrect, it is entirely possible that delaying bond issuance might even  
19 result in better bond rates.

20 The *possibility* of slightly less favorable bond terms is far outweighed by the  
21 *certainty* of denying residents the right to organize a referendum and to vote, and  
22 imposing on them a 25-year, \$70 million obligation undemocratically. Thus, the balance  
23 of equities and the public interest weigh in favor of preliminary relief.

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27 <sup>2</sup> See *Flynn v. Campbell*, 243 Ariz. 76, 80 ¶ 9 (2017) (“Although a federal court’s  
28 interpretation of a federal procedural rule is ‘not binding in the construction of our rule,’  
we recognize its instructive and persuasive value and that ‘uniformity in interpretation of  
our rules and the federal rules is highly desirable.’” (quoting *Orme Sch. v. Reeves*, 166  
Ariz. 301, 304 (1990))).

1 **VI. No Bond Should Be Required.**

2 A plaintiff seeking preliminary relief typically must post a bond “in such amount as  
3 the court considers proper to pay,” Ariz. R. Civ. P. 65(c)(1), but the Court has discretion  
4 to waive this requirement when doing so serves the interests of justice. *In re Wilcox*  
5 *Revocable Tr.*, 192 Ariz. 337, 341 ¶¶ 17–20 (App. 1988); *see also Save Our Sonoran, Inc.*  
6 *v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2004) (noting that “requiring nominal bonds is  
7 perfectly proper in public interest litigation.”).

8 Any bond in this matter should be nominal because Plaintiff is seeking in the  
9 public interest to enjoin a violation of the state constitution. As one federal court observed  
10 when interpreting Rule 56(c)’s federal counterpart, “requiring a bond to issue before  
11 enjoining potentially unconstitutional conduct by a governmental entity simply seems  
12 inappropriate,” because such a requirement would make “protection of [constitutional]  
13 rights ... contingent upon an ability to pay.” *Doctor John’s Inc. v. City of Sioux City*, 305  
14 F. Supp. 2d 1022, 1043–44 (N.D. Iowa 2004).

15 Plaintiff brings this case as a concerned citizen seeking to vindicate rights enjoyed  
16 by all similarly situated Payson residents. *Cf. Ctr. For Food Safety v. Vilsack*, 753 F.  
17 Supp. 2d 1051, 1062 (N.D. Cal. 2010) (requiring no bond where plaintiff was a “small  
18 non-profit” and “requiring the organization to pay a bond would fatal[ly] harm its ability  
19 to bring lawsuits on behalf of the public interest”). Anything more than a nominal bond  
20 will have a chilling effect on efforts to ensure legal compliance. *Cf. Wistuber v. Paradise*  
21 *Valley Unified Sch. Dist.*, 141 Ariz. 346, 350 (1984) (holding that attorney fees should not  
22 be awarded “[w]here aggrieved citizens, in good faith, seek a determination of the  
23 legitimacy of governmental actions ... . Courts exist to hear such cases; we should  
24 encourage resolution of constitutional arguments in court rather than on the streets.”). The  
25 Court should therefore waive the bond requirement or set it at a nominal amount.

26 **CONCLUSION**

27 Plaintiff respectfully requests that this Court grant her Motion and enter a  
28 temporary restraining order enjoining the enforcement of the Resolution in all respects

