

**STATE OF ARIZONA**  
**COURT OF APPEALS, DIVISION ONE**

CITY OF SCOTTSDALE, an Arizona  
municipal corporation,

Plaintiff/Appellant,

vs.

STATE OF ARIZONA,

Defendant/Appellee.

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JIM TORGESON and SIGN KING LLC,

Intervenors/Appellees.

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Case No. 1-CA-CV 14-0798 A  
Maricopa County Superior Court  
Case No. CV 2014-003467  
Hon. Robert Oberbillig

**APPELLANT'S REPLY TO  
INTERVENOR APPELLEES' ANSWERING BRIEF**

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## I. INTRODUCTION

The argument made by the Intervenor Appellees (“Intervenors”) herein does not differ from that of the State Appellees, except for the inordinate amount of briefing regarding freedom of speech. Because the constitutionality of the ordinance is not at issue, it need not be addressed by the Court.

## II. ARGUMENT

The admitted primary interest of the Intervenor in intervening in this declaratory judgment action is to “protect their speech rights under the First Amendment.” (Intervenors Answering Brief at 1) However, as the Intervenor admit, they have reserved their constitutional claims until a determination on the matters at issue in this appeal. *Id.* at 2. Intervenor state “the constitutionality of the charter provision<sup>1</sup> is not yet directly at issue.” *Id.* at 17 n.6. Despite the fact that the Intervenor admit that the question of constitutionality of the ordinance is not before this Court, the Intervenor spend a substantial amount of time (11 of 18 pages) of their brief discussing just that. The sole issue in this case is that of charter autonomy over regulating the commercial use of City property.

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<sup>1</sup> This appears to be an error, in that, the “charter provision” was never at issue. At issue is the Scottsdale Ordinance, S.R.C. § 16-353(c) and the amended Arizona statute, A.R.S. § 9-499.13.

The City will not squander more time on the question of constitutionality except to state that the ordinance previously was challenged by the Intervenors and withstood constitutional scrutiny. (IRA 25 Exhibit 3 at p. 7) (The Superior Court of Maricopa County finding, upon *de novo* review from a decision in City Court, that S.R.C. § 16-353(c) is sufficiently narrowly-drawn and that “[i]t is a time-place-manner restriction that demonstrates a reasonable ‘fit’ between the City’s objectives and the means chosen to accomplish those goals.”) Moreover, to the extent that the Intervenors support the legislative declaration that the protection of freedom of speech is the statewide interest, the City states that such a declaration is pretextual and invalid. *See* Appellant’s Opening Brief and Appellant’s Reply to State Appellee’s Answering Brief for further discussion of the same.

Furthermore, a case pending before the Supreme Court of the United States may have direct implications upon the ordinance at issue. *See Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057 (9<sup>th</sup> Cir. 2013), *cert. granted*, 134 S.Ct. 2900 (2013). At issue in *Reed* is whether the Town of Gilbert’s mere assertion that its sign code lacks a discriminatory motive renders its facially content-based sign code content-neutral and justifies the code’s differential treatment of petitioners’ religious signs. *Id.* The Court heard oral arguments in that case on January 12, 2015. If the Court’s determination in *Reed* affects the City of Scottsdale’s ordinance, the City will amend its ordinance accordingly.

Beyond the misplaced constitutionality argument, Intervenor essentially restate the arguments of the State, namely that state law preempts charter cities with the exercise of police/zoning powers. As more fully developed in the City's Opening Brief and Reply to State Appellee's Brief, neither A.R.S. § 9-499.13 nor S.R.C. § 16-353(c) is a zoning law and the exercise of police powers is not at issue. Zoning is where the City tells property owners what they can and cannot do with their own (the property owners') property. Zoning is not where the City regulates commercial activity on the City's property. The question here is not a matter of zoning and never has been. The ordinance and statute at issue address whether sign walkers have a legal right to make commercial use, without restriction, of the City's property, not whether the City's property is *zoned* to prohibit these types of commercial activities. Clearly, zoning has no applicability to the issue here.

Similarly, the City of Scottsdale cannot be stripped of its constitutionally endowed charter city sovereignty by the suggestion that *the manner of enforcement* of its ordinances through police powers is determinative of the issue. To the contrary, it is *the subject matter of the concern* which must determine whether a matter is of local or statewide concern, not the manner of its enforcement. *See Wonders v. Pima County*, 207 Ariz. 576, 579, ¶ 9 (App. 2004) ("A state law only preempts conflicting local ordinances when *the subject matter of the legislation* is of statewide concern and the state has appropriated the field.") (emphasis added)

*(quoted with approval in Coconino County v. Antco, Inc., 214 Ariz. 82, 90 (App. 2006)).*

One final point should be addressed. At two points in its Brief the Intervenor asserts that the State intended to preserve employment opportunities by adopting A.R.S. § 9-499.13. (Intervenor Answering Brief at 4) Of course, the state legislature did not list that as a reason, and certainly did not identify that as a matter of statewide concern causing it to enact the statute. Nor do Intervenor offer any facts, argument, or evidence supporting such a proposition. In any event, when the courts held that charter cities could regulate the commercial use of their own property, that of necessity granted them the right to have some impact on employment in the process of doing so.

To avoid needless repetition of argument, the City incorporates herein, as if stated verbatim hereinafter, its arguments in its Opening Brief and Reply to the State Appellee's Brief.

### **III. CONCLUSION**

For the reasons stated above, the Superior Court's judgment against Appellant City of Scottsdale should be reversed. The City asks this Court to conclude that the legislative declaration of statewide interests in A.R.S. § 9-499.13 is insufficient to overcome Scottsdale's autonomy to choose how to regulate the

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

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March, 2015.

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**APPELLANT'S CERTIFICATE OF COMPLIANCE**

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains approximately 1040 words.

Dated this 17<sup>th</sup> day of March, 2015.

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## CERTIFICATE OF SERVICE

On this date, counsel undersigned e-filed Appellant's Reply to Intervenor Appellees' Answering Brief with the Clerk of the Court for Division One, and e-mailed copies of it to the following:

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