IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA, ex rel. MARK BRNOVICH, Attorney General, Petitioner, v. CITY OF PHOENIX, Arizona, Respondent.	Supreme Court No. CV–20–0019

CITY OF PHOENIX'S RESPONSE TO PETITION FOR SPECIAL ACTION

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Introduction

A property owner's right to exclude others is "universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979). In a quintessential exercise of its proprietary rights as the owner and operator of Phoenix Sky Harbor International Airport (the "Airport"), the City of Phoenix (the "City") conditions commercial access to Airport property on the payment of various fees by the businesses that profit from using the property.

No City tax dollars support the Airport. Instead, to maintain the Airport, the City charges fees to all commercial users including: airlines, concessionaires, and, as relevant here, ground transportation providers that provide ridesharing services. In fact, the Airport is required by federal law to pay for itself and does so by charging businesses that use the Airport to make money.

In challenging the City's long-standing practice of charging these fees at the Airport, the Attorney General contends that this practice now violates article IX, section 25 of the Arizona Constitution ("article IX, § 25"), which was enacted by voters in 2018 as Proposition 126 ("Prop. 126"). But the text of article IX, § 25 refutes this argument.

Article IX, § 25 prohibits several specifically enumerated taxes as well as any "other transaction-based . . . fee[s] . . . on the privilege to engage in . . . any service performed in this state." Fees to use Airport

property are neither "transaction-based" nor "on the privilege to engage" in a state-wide service. And unlike the taxes prohibited by article IX, § 25, the fees at issue are imposed only at the Airport, are paid only for commercial use of the Airport, and fund only Airport expenses. They are not taxes.

The history and purpose of Prop. 126, in addition to its text, confirm this point. Proponents of Prop. 126 explained that it would "protect Arizonans from . . . regressive and inequitable taxes" by amending "the Arizona Constitution to prohibit the state and its political subdivisions from imposing any new taxes on services." [Appendix to Response to Petition for Special Action ("App.") 1 (11/6/2018 General Election Publicity Pamphlet ("Publicity Pamphlet")) at 24] Proponents also assured voters that by enacting it "there would not be any financial impact on governments because they do not collect such a tax." [*Id.* at 27] Nothing in the language, history, or purpose of Prop. 126 supports the conclusion that it applies to charges imposed by the City on businesses that want to use its Airport, or other property, to make a profit.

The City thus respectfully asks that this Court "resolve the issue" in this special action by determining that the fees charged to rideshare companies under Phoenix City Code ("City Code") section 4-78 do not "violate a provision of . . . the Constitution of Arizona." A.R.S. § 41-194.01(B)(2).

Statement of Facts

The City Operates the Airport as a Self-Sustaining Enterprise

Since Arizona became a state, its Constitution has guaranteed that "[e]very municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation." ARIZ. CONST. art. XIII, § 5.[1]

The City has operated the Airport as a self-sustaining enterprise since 1967. It is the largest municipal enterprise in the State, with an economic impact of more than $38 billion annually. *See Airport Development & Planning*, PHOENIX SKY HARBOR INT'L AIRPORT, http://www.skyharbor.com/about/development (last visited Feb. 16, 2020). To operate, maintain, and improve the Airport—which expects to serve more than 46 million passengers in fiscal year 2020—the City has annual operating expenses of about $275 million. And the City has outstanding $2.4 billion in bonds backed by airport revenue. *See* Finance Department, *Official Statement* at A-124, A-126, CITY OF PHOENIX (Nov. 6, 2019), https://www.phoenix.gov/financesite/Documents/

[1] As a result, cities in Arizona operate many enterprises, small and large, from swimming pools and libraries to convention centers and stadiums. Some enterprises are free, and some charge a fee. *See, e.g.*, *Visit a Park*, CITY OF PHOENIX, https://www.phoenix.gov/parks/parks (last visited Feb. 16, 2020) (identifying free public parks).

Final%20Airport%20FOS%2011-14-2019.pdf. To meet the needs of the traveling public and the airlines serving the Airport, the City plans to expend about $1.9 billion on additional capital improvements to the Airport between 2020 and 2026. *Id.* at A-121.

To meet these massive financial requirements, the Airport does not rely in any way on City tax dollars. Indeed, because the City receives federal funds, the City must "maintain a schedule of charges for use of facilities and services at the airport . . . that will make the airport as self-sustaining as possible under the circumstances existing at the airport." 49 U.S.C. § 47107(a)(13)(A). Charging use fees to ground transportation providers is one of the ways the City satisfies this federal obligation. These fees are designed to recover from ground transportation providers, including rideshare companies, their fair share of the costs of providing the infrastructure that allows them to conduct their profit-making activity at the Airport.

The City is also required as a matter of federal law to use all the airport revenue it generates only for the capital and operating costs of the Airport or other airports in the City's local airport system. *See* 49 U.S.C. §§ 47107(b)(1) & 47133(a). The user fees charged by the Airport—including the fees that are the subject of this case—therefore cannot be used for general public purposes. In short, airport revenue flows through a closed loop. The City does not tax its residents to support the Airport;

the City requires the users of the Airport to cover its costs; and none of this revenue generated at the Airport can be used by the City for general fund purposes.

All Businesses Pay for Their Use of Airport Property

No business may "use . . . any portion of the [A]irport for revenue-producing commercial activities" unless it has a lease, permit, or license to do so. City Code § 4-4. As a result, airlines pay a fee each time they land on an Airport runway or use Airport cargo areas, passenger ramps, and parking space. *See, e.g.*, *id.* § 4-9 ("No person shall land or take off an aircraft on or from a landing area, or use a landing area, ramp and apron area, passenger ramp and apron area, cargo ramp and apron area, or an aircraft parking and storage area, except upon the payment of such fees and charges . . . ."). And concessionaires and vendors pay rent or other charges for the fair market value of the space they use in the Airport. *See, e.g.*, *id.* §§ 4-138 (news racks), 4-79 (rental cars). Over 1000 businesses pay fees to use the Airport.

Ground transportation companies are no exception to this rule. For years, ground transportation providers—from taxicabs to shuttles to limousines to rideshare companies—have been required to pay a fee every time they use the Airport ground transportation system. *Id.* § 4-78 ("[A]ll authorized providers shall pay the trip fees set forth below.").

Like Other Businesses, Ridesharing Services Pay to Use Airport Property

Transportation Network Companies ("TNCs") started operating at the Airport in June 2016 and have expanded since then to account for more than two-thirds of all ground transportation pick-ups at the Airport. TNCs present operational and facility challenges for the Airport, as they do for airports across the country. They strain Airport infrastructure and congest Airport roadways, especially at the designated locations for pick-ups and drop-offs. *See, e.g.*, Patrick McGroarty, *Airports Tame the Ride-Sharing Rodeo*, WALL ST. J. (Nov. 12, 2019), https://www.wsj.com/articles/airports-tame-the-ridesharing-rodeo 11573468232.

Like all ground transportation providers, TNCs must apply for and receive permits to operate at the Airport. *See* City Code § 4-68. In their permits, which predate Prop. 126, the TNCs currently operating at the Airport expressly agreed to pay the trip fees in accordance with City Code section 4-78. [*See* App. 2 (7/16/2018 Uber Ground Transportation Permit) & App. 3 (6/15/2018 Lyft Ground Transportation Permit)] The City Code in turn establishes a schedule of fees for TNCs and others, the amount of which adjusts based on a variety of factors. [*See* App. 4 (Ordinance G-6164)] Presently, the standard trip fee for TNCs is $2.66 for pick-ups,

with no fee charged for drop-offs. [*See* App. 5 (5/13/2019 Ground Transportation Fees Benchmarking Study) at 12]

The Ordinance Ties Fees to the Use of Airport Property and Curb Space

On December 18, 2019, following a comprehensive study of ground transportation trip fees charged at the Airport, and based on detailed financial analysis and projections for future usage of the Airport, the City Council adopted City of Phoenix Ordinance G-6650 (the "Ordinance"), which amended the previous fee schedule for ground transportation providers' use of Airport property.

Among other things, the Ordinance revises section 4-78, "Fees," to expressly grant TNCs a specific percentage of the Airport's premium curb space. The Ordinance provides for a "TNC Curb Share," meaning a "minimum percentage of terminal curb linear feet allocated for transportation network companies, compared to the total terminal curb linear feet allocated for all authorized providers." [App. 6 (12/18/2019 Ordinance G-6650) at 6] The Ordinance grants TNCs 30% of curb space starting January 1, 2020, increasing up to 50% in 2022. [*Id.* at 29] Thereafter, curb sharing adjusts proportionally with TNCs' use of curb space. [*Id.*]

In the same section, the Ordinance also changes the fee structure under which commercial ground transportation providers must pay to

use Airport property. [*Id.* at 2–3, 25–26] Specifically, under the Ordinance, TNCs must pay for their different uses of Airport property—pick-ups and drop-offs—with these fees increasing over time (the "Fees"). [*Id.* at 25] The Ordinance also includes user fees for non-TNC authorized providers, with these fees also increasing over time. [*Id.* at 26]

All transportation providers pay a fee if they enter and use Airport property; the way the fee is collected depends on the provider's technology and business model. "For authorized providers using global positioning system (GPS) trip tracking, trip fees apply each time a driver enters a geofence,[2] makes one or more stops, and completes a pick-up or drop-off of one or more passengers." [*Id.* at 27[3]] "For all other authorized providers, trip fees apply each time a driver enters or exits an airport and stops at one or more designated passenger pick-up or drop-off locations." [*Id.*]

Notably, the fees differ depending on the location at the Airport the provider chooses to use. Providers receive a 30% discount if they choose to avoid the property at the terminal curb locations and use the less-

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[2] A geofence is "an electronic perimeter, designated by the Aviation Director, of airport property and sub-perimeters within airport property." [App. 6 at 3]

[3] All alterations within App. 6 indicating strikethroughs or additions of text have been omitted.

congested PHX Sky Train stations for their pick-up or drop-off.[4] [*Id.* at 28]

The Fees "are calculated to recover [the Airport's] costs for the [ground transportation] providers' proportionate share of existing and future ground-transportation infrastructure, improvements, and operation/maintenance of [Airport] infrastructure, including maintenance of the PHX Sky Train." [App. 7 (12/18/2019 City Council Report) at 1] In other words, the Fees paid by TNCs fund the maintenance and improvement of the same property and infrastructure they use to conduct their business.

This Action Under A.R.S. § 41-194.01

On December 18, 2019, pursuant to A.R.S. § 41-194.01, a legislator filed with the Attorney General a Request for Investigation (the "Request") as to "[w]hether [the Ordinance] violates article IX, section 25 of the Arizona Constitution." [App. 8 (Request) at 2] Specifically, the legislator challenged the Ordinance's requirement that TNCs pay a fee.

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[4] The PHX Sky Train ("Sky Train") is "an automated train that transports travelers between Valley Metro Rail at 44th and Washington streets, the East Economy Parking area and airport terminals." PHX Sky Train, PHOENIX SKY HARBOR INT'L AIRPORT, https://www.skyharbor.com/PHXSkyTrain (last visited Feb. 16, 2020). The Sky Train is critical for the TNCs' continued operations at the terminal curbs—prime Airport real estate—because the Sky Train decreases the overall number of vehicles on the roadways and curbsides at the Airport. This creates space for TNCs to operate curbside.

She claimed that the Ordinance conflicts with article IX, § 25 by "impos[ing] new fees and increas[ing] existing fees on ride-sharing services to and from" the Airport. [*Id.* at Attach. A] The Request does not mention any of the other fees in the Ordinance.

The City responded to the Request on January 7, 2020, explaining that article IX, § 25 does not prohibit the City from charging the Fees for using Airport property. [App. 9 (1/7/2020 City of Phoenix Response to Request)]

On January 16, 2020, the Attorney General published his Investigative Report ("Report"). He opined that "the Ordinance may violate the Arizona Constitution." [App. 10 (Report) at 2 (emphasis omitted)] Then, as required by A.R.S. § 41-194.01(B)(2), the Attorney General filed this "special action in" this Court "to resolve the issue."

Statement of the Issue

Whether article IX, § 25 bars the City from continuing to exercise its proprietary power and its right to operate an enterprise by charging TNCs to use the City-owned Airport.[5]

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[5] The Attorney General challenges (at 9) not only the Ordinance's requirement that TNCs pay certain fees, but also the fact that the Ordinance "imposes and increases new 'trip fees' for commercial ground transportation services beginning or terminating at the Airport." The Request, however, challenged only the Ordinance's fee requirements for TNCs. [*See* App. 8] And any alleged or identified violation under A.R.S. § 41-194.01, as well as any resulting judicial review, must be specific as

Argument

I. The Fees Are for Use of Airport Property.

The Fees charged to and paid by TNCs are the price they pay to use the Airport. To begin, the text of the Ordinance is explicit that the Fees are for the use of Airport property. In the same subsection enumerating the Fees, the Ordinance expressly establishes a TNC "curb share," of a certain "percentage of terminal curb linear feet." [App. 6 at 6, 29] Furthermore, the text of the Ordinance confirms that authorized providers must pay fees only when, among other things, they enter and use Airport property. [*Id.* at 27–28] No fee applies if providers conduct activity anywhere else in the City, off Airport property. [*Id.*]

Additionally, the way these Fees are calculated affirms that they are for the use of property. They are "calculated to recover [the Airport's] costs for the [ground transportation] providers' proportionate share of existing and future ground-transportation infrastructure, improvements, and operation/maintenance of [Airport] infrastructure, including maintenance of the PHX Sky Train." [App. 7 at 1]

Moreover, the TNCs agreed in their permits that the Fees are paid for use of property. Again, it has long been the law of the City that for

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to the particular provision of the Ordinance that conflicts with a particular provision of state law. *See, e.g.*, *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 592 ¶ 6 (2017). As a result, no other aspect of the Ordinance is at issue in this special action.

anyone to "use . . . any portion of the airport for revenue-producing commercial activities," the Aviation Director must authorize that use "by lease, permit or license agreement" and may impose certain "terms and conditions." City Code § 4-4. So, like all authorized providers, TNCs must have permits to use the Airport's space to conduct business. *See id.* § 4-68. These permits expressly require that the TNCs pay the fees enumerated by City Code § 4-78. [*See* App. 2, 3]

As the Ordinance establishes, the Fees compensate the Airport for TNCs' use of this property.

II. The Arizona Constitution Does Not Prohibit the Fees.

The Fees do not violate article IX, § 25. This provision prohibits: "[1] any . . . city" (and other governmental bodies) from "[2] impos[ing] or increas[ing] [3] any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other transaction-based tax, fee, stamp requirement or assessment [4] on the privilege to engage in, or the gross receipts of sales or gross income derived from, [5] any service performed in this state." Although the Attorney General agrees (at 15–20) that article IX, § 25 includes these elements, the Attorney General erroneously interprets them.

The "primary objective in interpreting a voter-enacted law is to effectuate the voters' intent." *Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 324–25 ¶ 11 (2014). "The best indicator of that

intent," this Court has declared, "is the statute's plain language." *Glazer v. State*, 244 Ariz. 612, 614 ¶ 9 (2018) (quoting *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 480 ¶ 8 (2018)).

When construing a specific provision or term, "'plain language' interpretation does not focus on statutory words or phrases in isolation." *Id.* ¶ 10. Rather, a court "must, if possible, give effect to every word, not merely select words." *State v. Burbey*, 243 Ariz. 145, 147 ¶ 10 (2017). And "[i]n giving effect to every word or phrase, the court must assign to the language its 'usual and commonly understood meaning unless the [electorate] clearly intended a different meaning.'" *Bilke v. State*, 206 Ariz. 462, 464–65 ¶ 11 (2003) (citation omitted).

"If we can discern the provision's meaning from its language alone, we will apply it without further analysis." *Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89, 95 ¶ 21 (2019). If not, courts also may consider the text "in conjunction with the history and purpose of the provision." *Id.* at 96 ¶ 22.

The Ordinance does not violate article IX, § 25 for three reasons. First, the Fees are not "transaction-based" within the plain meaning of article IX, § 25 because they are based on TNCs' use of Airport property, specifically Airport curb space. Second, the Fees are not "on the privilege to engage" in state-wide services because, among other things, the Fees are not for "services"; they are for the use of property. And third, article

IX, § 25 prohibits only certain taxes, but the Fees are not any such tax. The text of article IX, § 25, along with its history and purpose, also confirms that it was intended to prohibit only certain taxes on services—not fees to use property.

A. The Fees Are Not "Transaction-Based."

Article IX, § 25 prohibits, in relevant part, governmental bodies from imposing or increasing "any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other transaction-based tax, fee, stamp requirement or assessment." The Attorney General contends (at 16–19) that the Fees qualify as only one of these categories: "any other transaction-based . . . fee[s]." This contention, however, is contradicted by both the plain meaning of article IX, § 25 and the plain language of the Ordinance.

1. "Transaction-Based" Means Founded on a Commercial Agreement.

As a preliminary matter, neither article IX, § 25 nor Arizona's Constitution defines "transaction-based fee," or even "transaction-based," "transaction," or "based." "Because [the Constitution] does not define [these terms,] we use the[ir] common meaning . . . ." *Stambaugh v. Killian*, 242 Ariz. 508, 510 ¶ 10 (2017). As explained below, in this context, "transaction-based" means something that is triggered by a commercial agreement or an exchange of consideration.

There is little doubt that "based" means "[t]o form or provide a base for" or "[t]o find a basis for; establish." *Base*, AMERICAN HERITAGE COLLEGE DICTIONARY 117 (4th ed. 2002).

The term "transaction," by comparison, is defined several ways, only some of which are relevant here. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 418 (2012) (hereinafter "READING LAW") ("Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense."). Of these definitions, the plain, commonly understood and most apt meaning of the term "transaction" is "an exchange or transfer of goods, services, or funds." *Transaction*, MERRIAM-WEBSTER'S ONLINE DICTIONARY (last visited Feb. 16, 2020). This plain meaning necessarily involves some exchange of legal "consideration." *See, e.g.*, *Transaction*, BLACK'S LAW DICTIONARY 1802 (11th ed. 2019) ("1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. . . ."); *Transaction*, THE OXFORD AMERICAN DICTIONARY & THESAURUS 1622 (2003) ("a piece of esp. commercial business done").

This plain meaning is confirmed by the broader context of article IX, § 25 and, more specifically, the words with which the term "transaction" is associated. "In construing a specific provision, we look to

the statute [or section] as a whole . . . [,]" *City of Phoenix v. Orbitz Worldwide, Inc.*, 247 Ariz. 234, -- ¶ 10 (2019) (citation omitted), and we "do[] not focus on statutory words or phrases in isolation," *Glazer*, 244 Ariz. at 614 ¶ 10.

This Court has recently reiterated that the canon of interpretation "*[n]oscitur a sociis*—a word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used—is appropriate when several terms are associated in a context suggesting the terms have some quality in common." *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211 ¶ 13 (2019).

Applied here, the canon commands that the meaning of "transaction" be drawn from the terms with which it is associated. Specifically, article IX, § 25 refers to "any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other *transaction-based* tax, *fee*, stamp requirement or assessment." (Emphasis added). This list enumerates associated terms sharing a common characteristic: they are all taxes levied on certain commercial agreements or exchanges.[6] These

[6] A *sales tax* is "measured by the gross volume of business conducted within the state." *People of Faith Inc. v. Ariz. Dep't of Revenue*, 161 Ariz. 514, 518 (Ariz. Tax Ct. 1989) (citation omitted). A *transaction privilege tax* "is imposed on the seller for doing business in the state." *Business Basics: A Guide to Taxes for Arizona Business*, ARIZ. DEP'T OF REVENUE, Pub. 622 at 2 (Jan. 2020), https://azdor.gov/sites/default/files/media/PUBLICATION_622.pdf. A *luxury tax* "is an excise tax on the privilege

associated terms thus further evidence the electorate's intent that "transaction," as used in article IX, § 25, means a commercial agreement or an exchange of consideration.

Therefore, in applying the plain meaning of the terms "transaction" and "based," the term "transaction-based" as used in article IX, § 25 means something that is founded on a commercial agreement or an exchange of consideration. *See, e.g.*, *United States v. Elliott*, 62 F.3d 1304, 1310 (11th Cir. 1995) (observing that financial advisors "received 'transaction-based compensation' whenever a customer implemented their advice by purchasing an . . . investment product").

2. The Attorney General's Preferred Definition Is Not the Commonly Understood Meaning.

Straining to define the Fees as "transaction-based" in order to reach his preferred conclusion that they are barred by article IX, § 25, the Attorney General claims (at 17–18) that "transaction" must be read "expansively" and thus means "[a]ny activity involving two or more

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of selling particular luxury items to customers for consumption." *Watkins Cigarette Serv., Inc. v. Ariz. State Tax Comm'n*, 111 Ariz. 169, 171 (1974). An *excise tax* is a tax "directly levied (charged) on certain goods," such as "fuel" and "cigarettes." *Credit for Increased Excise Taxes*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/forms/individual/credit-increased-excise-taxes (last visited Feb. 16, 2020). And a *use tax* "is a tax on purchases made out-of-state for [certain] taxable items." *Aircraft Use Tax*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/transaction-privilege-tax/aircraft-use-tax (last visited Feb. 16, 2020).

persons." With this nearly boundless definition, the Attorney General then argues (at 19) that the Ordinance imposes transaction-based fees because "the 'transaction' consists of entering or exiting the airport (a 'pick-up' or 'drop-off'), which involves 'two or more persons' (drivers and passengers)." In other words, by implicitly (and correctly) conceding that the Fees are not based on any rideshare transaction between the passenger and the TNC, the Attorney General seeks to define the Fees as transaction-based because, he claims, there is *another* transaction: the drop-off or pick-up. Not so.

First, as discussed above, the full context of article IX, § 25—and the words with which the term "transaction" is associated—refute the Attorney General's claim that "transaction" should be defined without reference to any commercial agreement or exchange and should instead encompass *any* multi-person activity. *See* ARIZ. CONST. art. IX, § 25 (prohibiting certain "sales tax[es], transaction privilege tax[es], luxury tax[es], excise tax[es], use tax[es]," and others). This Court should "decline [the Attorney General's invitation] to stretch the [term "transaction"] . . . to cover [activities] so markedly different from those the [electorate] expressly included." *City of Surprise*, 246 Ariz. at 211 ¶ 14.

Second, in selecting this "any activity" definition—the last definition of three from Black's Law Dictionary—the Attorney General

overlooks that this definition covers circumstances that are irrelevant here. This term applies, for example, to legal issues like civil procedure and Double Jeopardy. *See* Fed. R. Civ. P. 13(a)(1)(A) ("A pleading must state as a counterclaim any claim that . . . arises out of the [same] *transaction* or occurrence . . . ." (emphasis added)); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 365 ¶ 21 (App. 1998) (vacating a lesser-included criminal conviction on Double Jeopardy grounds "because 'there is only one *transaction* involved and only one offense committed'" (emphasis added) (citation omitted)). The broad definition governing these legal terms does not apply to the term "transaction" as used in article IX, § 25—a provision concerning taxes. Nor does article IX, § 25 evince that "the [electorate] clearly intended" to reject the "usual and commonly understood meaning" of *transaction* in lieu of a "different meaning." *Bilke*, 206 Ariz. at 464–65 ¶ 11 (citation omitted).

And third, the Attorney General's preferred definition—"[a]ny activity involving two or more persons"—is not the "common meaning" of the term *transaction*. *Stambaugh*, 242 Ariz. at 510 ¶ 10. This legal definition is largely absent from non-legal dictionaries. *See, e.g.*, *Transaction*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1252 (10th ed. 1993). And it would be foreign to the voters who enacted Prop. 126.

As used in article IX, § 25, something is "transaction-based" if it is founded on or triggered by a commercial agreement or an exchange of consideration.

3. The Fees Are Not "Transaction-Based" Because They Are Triggered by Use of Airport Property.

The plain meaning of "transaction-based" compels the conclusion that Fees to use Airport property are not "transaction-based . . . fee[s]." ARIZ. CONST. art. IX, § 25. They are triggered instead when a TNC uses Airport property.

In challenging the Fees, the Attorney General (at 16) provides a 30,000-foot view of the Ordinance—without any grounded discussion (let alone analysis) of the Ordinance's specific language and definitions. But the very language the Attorney General ignores demonstrates that the Fees are not based on whether there is a commercial transaction. Rather, the Ordinance assesses the Fees based on a TNC's voluntary use of Airport property to conduct business.

Under the Ordinance, a TNC (like any "authorized provider") may be charged the Fees in different ways. [*See* App. 6 at 27 (assessing Fees based on either "[a]uthorized providers using global positioning system (GPS) trip tracking" or "all other authorized providers"); *id.* at 2–3 (defining "authorized provider"—and the associated terms "commercial ground transportation" and "ground transportation motor vehicle"—to

include not only TNCs, but also numerous other transportation companies)]

For some, the Fees "apply each time a driver [1] enters or exits an airport and [2] stops at one or more designated passenger pick-up or drop-off locations." [*Id.* at 27] For others, the Fees "apply each time a driver [1] enters a geofence, [2] makes one or more stops, and [3] completes a pick-up or drop-off of one or more passengers." [*Id.*] Either way, the Fees are based on the use of valuable, limited Airport curb space—not the presence or absence of a transaction.[7]

As the Ordinance language establishes, no matter the provider's technology, the Fees are based on a TNC's use of Airport property. They are conditioned specifically on use of space: "enter[ing] or exit[ing] an airport," "stop[ping] at" the curb, "enter[ing] a geofence," "mak[ing]" a stop, and "complet[ing] a pick-up or drop-off." [*Id.* at 27] These specific uses of Airport property are the "basis" for the Fees.

The fact of a transaction is separate from whether the Fees are assessed. For example, the Ordinance assesses a Fee when a driver, who is not using GPS, enters the Airport and stops at the designated area but does not finish dropping off or picking up a passenger. [*See id.* (applying

[7] In cases of GPS system failure, the Ordinance assesses fees a third way, based on historical usage. [App. 6 at 27–28]

the Fees "each time a driver enters or exits an airport and stops at one or more designated passenger pick-up or drop-off locations")]

Additionally, a TNC must pay the Fees when it picks up a passenger on Airport property, regardless of whether the TNC charges the passenger for the service. If a TNC offered passengers a free month of rides, for example, the TNC still must pay a Fee for each free ride it gives its customer to or from the Airport.[8]

Further, the Ordinance also imposes a single Fee regardless of the number of transactions. Assume that a driver stops at the Airport, picks up multiple passengers, negotiates a separate transaction with each passenger, and then drops off each passenger at a different location. Regardless of the number of transactions in this situation, the Ordinance imposes only a *single* Fee for the single use of Airport property.

In the end, the Fees are not "transaction-based" because they apply only if a provider uses Airport property; they do not depend on whether there is a rideshare transaction or on how many such transactions take place during a single use of Airport property. Because the Fees are not "transaction-based," they do not conflict with article IX, § 25.

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[8] The Ordinance, in fact, acknowledges that authorized providers must pay the Fees regardless of whether passengers pay for the services. [*See id.* at 2–3 (assessing fees in situations "where the authorized provider or driver does not directly charge or receive a fee from the passenger for the transportation service")]

B. The Fees Are Not "on the Privilege to Engage in" Any Service Performed in This State.

Article IX, § 25 also does not prohibit the Fees because they are not "on the privilege to engage in . . . any service performed in this state."

Most fundamentally, the Fees are not on the privilege to engage in a service at all. As set forth above (at Sec. I), the Ordinance requires that TNCs and other transportation providers, like all commercial users, pay fees for the right to use City-owned property, not for the privilege to engage in any particular service.[9]

Nonetheless, ignoring the specific language of the Ordinance, the Attorney General argues (at 20) that the Fees are prohibited by article IX, § 25 because they are on the "privilege . . . to provide [commercial ground transportation] services . . . at the airport." [*See also* Petition at 19 (fees are "on a 'privilege' that the City grants authorized providers to operate a business at the Airport")] In essence, the Attorney General's argument is that the "privilege to engage in . . . any service performed in this state" means the right to engage in a service at a particular location, including on property owned by others, like the Airport. But this

[9] Indeed, the Fees do not grant TNCs the privilege to engage in their services, any more than the payment of rent by the operator of the Airport's medical clinic grants its doctors the privilege to practice medicine. *See* A.R.S. § 32-1422 (discussing license to practice medicine). The Fees, like the clinic rent, are simply the price required to perform those activities on City-owned land at the Airport.

argument construes "privilege to engage in" far differently than the text of the provision allows.

The text of article IX, § 25, especially when read "as a whole," *Stambaugh*, 242 Ariz. at 509 ¶ 7, reveals that the phrase "privilege to engage in" refers to the threshold right to engage in the service in the taxing jurisdiction generally (like the City)—not just at a specific location within the taxing jurisdiction (like the Airport). This reading reflects the "natural, obvious and ordinary meaning," *State ex rel. Morrison v. Nabours*, 79 Ariz. 240, 245 (1955), of "privilege to engage in," as it is commonly used and understood.

Most commonly, "privilege to engage in" is used to refer to the rights conferred by government licensors to licensees to perform certain businesses or activities throughout a licensor's jurisdiction or authority. For example, "a liquor license is . . . a privilege to engage in a business subject to the regulation of the state." *See Ariz. State Liquor Bd. v. Poulos*, 112 Ariz. 119, 121 (1975); *see also, e.g.*, *Bolser Enters., Inc. v. Ariz. Registrar of Contractors*, 213 Ariz. 110, 113 ¶ 14 (App. 2006) ("[Plaintiff's] privileges to engage in construction work were affected by revocation of its license."). Indeed, in the specific context of ridesharing, the privilege to engage in that service is granted elsewhere in Arizona law. *See* A.R.S. § 28-9552 ("[A] person may not act as a transportation network company

driver in this state unless the transportation network company has been issued a permit by the department.").[10]

Additionally, reading the text of article IX, § 25 "as a whole" further confirms that "privilege to engage in" means the right to engage in an activity in the taxing jurisdiction. *Stambaugh*, 242 Ariz. at 509 ¶ 7. A prohibition on "transaction privilege tax[es]" appears in the same list prohibiting certain fees "on the privilege to engage in" services. ARIZ. CONST. art. IX, § 25. Both phrases use the word "privilege." And the definition of "transaction privilege tax" must inform the meaning of "privilege to engage in" as used in article IX, § 25. *See BSI Holdings, LLC v. Ariz. Dep't of Transp.*, 244 Ariz. 17, 19 ¶ 9 (2018) ("Words in statutes should be read in context in determining their meaning." (quoting *Stambaugh*, 242 Ariz. at 509 ¶ 7)).

Courts have defined a transaction privilege tax as "an excise on the privilege or right to engage in particular businesses *within the taxing jurisdiction*." *US W. Commc'ns, Inc. v. City of Tucson*, 198 Ariz. 515, 523 ¶ 24 (App. 2000) (emphasis added); *see also Ariz. Dep't of Revenue v. Action Marine, Inc.*, 218 Ariz. 141, 142 ¶ 6 (2008); *Transaction Privilege Tax*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/transaction-privilege-tax-

[10] Of course, just because a business has the privilege to engage in its work within the State does not mean that it may do so at any location within the state, free of conditions imposed by owners of the property on which a business seeks to operate.

tpt (last visited Feb. 16, 2020) ("[T]he Arizona transaction privilege tax (TPT) is . . . a tax on a vendor for the privilege of doing business in the state."). That the "privilege to engage in" means the privilege to engage in a "business within the taxing jurisdiction," in the transaction privilege tax context, should inform the meaning of "privilege to engage in" as it is used elsewhere in article IX, § 25.

In the end, article IX, § 25 does not prohibit the Fees because they are not for the "privilege to engage in" services; they are for the use of the Airport's scarce and valuable property. In any event, they are not on the "privilege to engage in" services because they do not apply to activities within the City, or State, more broadly.

C. Article IX, § 25 Prohibits Only Certain Taxes on Services, and the Fees Are Not Taxes.

Even if the Fees could somehow be considered both "transaction-based" and "on the privilege to engage in" a service, they are still outside the ambit of article IX, § 25 because they are not taxes. And article IX, § 25 applies only to taxes. Among other things, a tax must apply throughout a taxing jurisdiction; the Fees, though, apply only at the Airport. A tax also must raise revenue for general public purposes; revenue from the Fees, though, is used exclusively to maintain the Airport property on which the Fees are generated. For this additional reason, article IX, § 25 does not prohibit the Fees.

1. The Text of Article IX, § 25 Demonstrates that It Applies Only to Taxes.

Article IX, § 25 refers to taxes, first referencing taxing jurisdictions and then prohibiting specific taxes. *See Stambaugh*, 242 Ariz. at 509 ¶ 7 (requiring words to be read in context).

Further, *ejusdem generis*—"one of the oldest and most frequently applied canons" of interpretation, READING LAW at 8—demonstrates that article IX, § 25 applies only to certain taxes. As this Court has explained, when "general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose." *Ariz. Pub. Serv. Co. v. Town of Paradise Valley*, 125 Ariz. 447, 450 (1980) (quoting 39 A.L.R. 1404 (Originally published in 1925)); *see also Saban Rent-a-Car*, 246 Ariz. at 100 ¶ 47 (Bolick, J., concurring in part and dissenting in part) ("[W]here a general term, such as 'other special taxes,' follows a list of specific things, the general term should be construed narrowly . . . [like] the more specific terms.").

"This canon parallels common usage" because "when a drafter has tacked on a catchall phrase [like *any other*] at the end of an enumeration of specifics . . . . [i]t implies the addition of *similar* after the word *other*."

READING LAW at 199. Therefore, where—as here—"the initial terms all belong to an obvious and readily identifiable genus, one presumes the . . . writer has that category in mind for the entire passage." *Id.*

Article IX, § 25 prohibits imposing or increasing certain: (1) "sales tax[es]"; (2) "transaction privilege tax[es]"; (3) "luxury tax[es]"; (4) "excise tax[es]"; and (5) "use tax[es]." Each of these items is a specific type of tax. *See, e.g.*, *People of Faith*, 161 Ariz. at 517 (defining sales tax); *US W. Commc'ns*, 198 Ariz. at 523 ¶ 24 (defining transaction privilege tax); *Watkins*, 111 Ariz. at 171 (defining luxury tax); *Roseland v. City of Phoenix*, 14 Ariz. App. 117, 119–20 (1971) (defining excise tax); A.R.S. §§ 42-5151, -5155 (defining use tax).

Immediately after this list of specific taxes, Prop. 126's drafters added a catch-all category: "*any other* transaction-based tax, fee, stamp requirement or assessment." ARIZ. CONST. art. IX, § 25 (emphasis added). By including this general category after the specifically enumerated taxes, the electorate expressed its intent that the general category "be restricted by the particular designation" reflected in the specific categories. *Ariz. Pub. Serv.*, 125 Ariz. at 450 (citation omitted). That is, the electorate expressed its intent that "any other" refers to other types of taxes. *See Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 199 (1995) (holding that an enumerated list of taxable activities followed by a catch-all provision limited the taxable activities to those "of the same

kind or nature as the activities" enumerated in the list). And by including in this catch-all category "any other transaction-based tax, fee, stamp requirement or assessment," article IX, § 25 extends to certain taxes that, although referred to by another name, are nonetheless taxes.

2. The History and Purpose of Prop. 126 Further Confirm that Article IX, § 25 Applies Only to Certain Taxes.

The "history and purpose" of article IX, § 25 also make clear that Prop. 126 was intended to reach only certain taxes on services, not fees charged for the use of City-owned property. *See Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994) ("When interpreting the scope and meaning of a constitutional provision," the "primary purpose is to effectuate the intent . . . of the electorate that adopted it."). This is clear from, among other things, (1) the Publicity Pamphlet, (2) the text of Prop 126, and (3) the language of the ballot measure.

First, the Publicity Pamphlet confirms that the measure was about preventing additional taxes on services and was not intended to prohibit charging fees to use property. *See Saban Rent-a-Car*, 246 Ariz. at 93, 96–99 ¶¶ 12, 25, 30–32, 38 (considering statements in publicity pamphlet in interpreting the intent of constitutional provision); *Jett*, 180 Ariz. at 119 (same).

In the Publicity Pamphlet, proponents of Prop. 126 supported the

measure "to protect taxpayers from state and local governments imposing any new sales tax or use tax on services." [App. 1 at 27] But the Publicity Pamphlet *never* suggested to voters that Prop. 126 would prevent the State, counties, and municipalities from charging private businesses that seek to profit from their use of government-owned, government-managed property. Fees to use government property are nothing like sales taxes on services provided by a daycare center, hairdresser, auto mechanic, or plumber (or even transportation providers) that were the focus of Prop. 126.

The Publicity Pamphlet nowhere indicates, as the Attorney General asserts without support (at 21), "that the electorate intended to prohibit increased or newly-imposed fees on ride-sharing services." This claim is belied by the words of the Prop. 126 proponents themselves. Prop. 126 was a reaction to the fact that "politicians in other states have started taxing . . . vital everyday services." [App. 1 at 24] And it was meant to "protect Arizonans from these regressive and inequitable taxes." [*Id.*] But the Fees are not taxes.

Furthermore, when selling their proposition to voters, the proponents of Prop. 126 conveyed that it was not intended to cover things like the Fees. For example, the Fees have been in place since 2016, but in describing the impact of Prop. 126 proponents stressed that there "would not be any financial impact on governments because they do not

collect such a tax." [*Id.* at 27] In other words, proponents of Prop. 126 not only explicitly told voters it applied only to a "broad sales tax on services," but also explicitly disclaimed its application to any then-existing taxes or fees. [*Id.*]

Prop. 126 thus cannot be interpreted to prohibit user fees for property, which the voters never intended. *See Saban Rent-a-Car*, 246 Ariz. at 97 ¶ 31 (adopting an interpretation of a voter-approved amendment to Arizona's constitution because, "[n]otably, the [publicity] [p]amphlet also stated that adopting the referendum would maintain the status quo," because "Arizona had imposed [the taxes at issue] since 1935," and because "[t]his history suggests that neither the referendum drafter (the legislature) nor the voters considered [the already] existing taxes" to qualify under the referendum "or intended to include such taxes within the provision's ambit").

Second, the text of Prop. 126 makes clear that it was aimed only at preventing lawmakers from imposing a broad tax on everyday services, not fees for the use of government property. But the Attorney General nonetheless argues (at 22, 24) that voters "knew" and intended to block fees for the use of property because they place a "financial strain on working families." False. In making this argument, the Attorney General selectively quotes from Prop. 126's finding that: "[O]ther states have started taxing . . . vital everyday services, thereby making them more

expensive and increasing the financial strain on working families." [App. 1 at 24] Read in its entirety, this finding relates to preventing lawmakers from imposing "regressive and inequitable *taxes"* on services. [*Id.* (emphasis added)] It nowhere addresses or suggests, as the Attorney General now does, that Prop. 126 would prohibit the government from charging fees to those who use its property because those fees cause a "financial strain."

And third, the text of the ballot also confirms that Prop. 126 was intended to prohibit taxes on services—not fees to use property. [*See* App. 11 (Prop. 126–Sample Ballot/Ballot Format)] The ballot stated that a "Yes" vote "will prohibit the State and local governments from enacting any new or increased tax on services that was not already in effect on December 31, 2017." [*Id.*] The ballot itself said nothing about "fees" or any other charges for using publicly owned property for commercial purposes.

Thus, the history and purpose of article IX, § 25 further reinforce the plain meaning explained above. Article IX, § 25 was not intended to, and does not, prohibit the Fees.

3. The Fees are not Taxes.

Article IX, § 25 prohibits only certain taxes on services, and the Fees are not taxes. This is fatal to the Attorney General's claim that the Ordinance violates article IX, § 25. Under Arizona law, whether they are

called taxes, fees, assessments, or something else, taxes possess several key characteristics. "The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *Biggs v. Betlach*, 243 Ariz. 256, 259 ¶ 15 (2017) (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992)).

This Court has held that to determine whether something is a tax requires "examining three factors: '(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.'" *May v. McNally*, 203 Ariz. 425, 430–31 ¶ 24 (2002) (quoting *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)).

The Fees fail this test. Among other things, the Fees apply to a limited class of providers under limited circumstances: TNCs when their vehicles use the Airport. *See id.* at 431 ¶ 24 (noting that taxes are generally imposed on a "broad range of payers for a public purpose"). The Fees also apply not only at one specific facility—the Airport—but also only at designated portions of this specific facility.

Moreover, unlike general sales tax revenues deposited in the City's common fund, revenue from the Fees is used only to sustain the Airport.

See Jachimek v. State, 205 Ariz. 632, 637 ¶ 21 (App. 2003) ("[T]he amount paid per transaction 'bear[s] some reasonable relation to the service to be performed' on the payer's behalf." (citation omitted)). The Fees are not—and cannot be—used for general public purposes. *See* 49 U.S.C. §§ 47107(b)(1) & 47133(a). Accordingly, the Fees are not a "tax." *See Jachimek*, 205 Ariz. at 635 ¶ 10 ("[A] fee is a voluntary charge paid in return for a public service that bestows a particular benefit on the recipient, 'while a tax is a forced contribution of wealth to meet the public needs of the government.'" (second alteration in original) (citation omitted)).

A recent case from this Court confirms as much. In *Biggs*, the Court considered "whether [a] hospital assessment is a 'tax.'" 243 Ariz. at 258 ¶ 11. The director of an Arizona public agency levied the assessment "on Arizona hospitals." *Id.* ¶ 3. In applying the three-factor test above, this Court concluded that "[e]ach of the[se] factors suggests that [the relevant law] does not impose a 'tax.'" *Id.* at 260 ¶ 18. "First, the hospital assessment, although authorized by the statute, is imposed by the director." *Id.* Second, the assessment was "imposed on a narrow class": hospitals only. *Id.* ¶ 19. And third, "the assessment was expressly intended and in fact serves to benefit the hospitals," rather than the general public. *Id.* ¶ 22.

Like the assessment imposed only on hospitals and used to fund

these hospitals rather than general public purposes, the Fees similarly are imposed on a narrow class (commercial users of the Airport) and are used to benefit only the Airport, not another public purpose. Accordingly, because the Fees are not taxes and because article IX, § 25 prohibits only species of taxes, the Fees do not contravene article IX, § 25.

III. The Attorney General's Proposed Construction Would Conflict with Other Provisions of the Arizona Constitution.

Finally, construing article IX, § 25 to prohibit fees to use property, including the Fees, would conflict with two other key provisions of the Arizona Constitution: article XIII, section 5 and article XXI, section 1. This Court should avoid such a construction. *See Scheehle v. Justices of the Sup. Ct. of the State of Ariz.*, 211 Ariz. 282, 288 ¶ 16 (2005) ("We also avoid interpretations that unnecessarily implicate constitutional concerns.").

A. The Attorney General's Proposed Construction Would Conflict with Article XIII, Section 5.

Article XIII, section 5 guarantees that "[e]very municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation." *See also* ARIZ. CONST. art. II, § 34 (empowering municipal corporations "to engage in industrial pursuits").

Contrary to the Attorney General's single passing assertion to the contrary in his introduction (at 6), to construe article IX, § 25 to prohibit fees for the use of government-owned property conflicts with this guarantee. For the City and its Airport to conduct business activities—as they have a constitutional right to—they must be able to charge reasonable fees for use of their property. *See Vilas v. City of Manila*, 220 U.S. 345, 356–58 (1911) (noting "dual character of municipal corporations" in exercise of "governmental" powers on one hand, and "powers which are of a private or business character," like the power of property ownership, on the other); *see also Local 266, Int'l Bhd. Of Elec. Workers v. Salt River Project Agr. Imp. & Power Dist.*, 78 Ariz. 30, 39 (1954) (where "governmental entity functions in a proprietary nature . . . it should be permitted to perform it in a manner as efficiently as would a private person").

If cities, and even the state and its counties, cannot charge such fees, their operations, including their business operations, will be severely hampered. Nowhere is this clearer than at the Airport. And accepting the Attorney General's interpretation of article IX, § 25 would prohibit governments from charging fees to use government-owned or government-operated properties such as convention centers, public parks, town squares, parking lots, and sports arenas.

B. The Attorney General's Proposed Construction Would Conflict with Article XXI, Section 1.

Adopting the Attorney General's interpretation of Prop. 126 would also violate the separate amendment requirement contained in article XXI, section 1 of the Arizona Constitution. That section requires that if "more than one proposed amendment [to the Arizona Constitution] shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately." The separate amendment rule ensures "that voters [are] allowed to express their separate opinion as to each proposed constitutional amendment" and "cannot be constrained to adopt measures of which in reality they disapprove, in order to secure the enactment of others they earnestly desire." *Ariz. Together v. Brewer*, 214 Ariz. 118, 120 ¶ 3 (2007) (citations omitted). To satisfy the separate amendment rule, an amendment's component parts must be both "*topically related*" and "*sufficiently interrelated* so as to form a consistent and workable proposition that . . . 'should stand or fall as a whole.'" *Id.* at 121 ¶ 6 (quoting *Kerby v. Luhrs*, 44 Ariz. 208, 221 (1934)).

If interpreted as the Attorney General urges, Prop. 126 would satisfy neither of these requirements. First, Prop 126's components would not concern a single topic if the components included both a prohibition on service taxes and a prohibition on fees for use of

government-owned property. *See, e.g.*, *Taxpayer Prot. All. v. Arizonans Against Unfair Tax Schemes*, 199 Ariz. 180, 182 ¶ 6 (2001) (questioning whether one initiative "that affect[ed] both taxes and fees would comply" with the separate amendment rule). Second, even if some broad "topic" could encompass both service taxes and property use charges, Prop. 126 would still fail the interrelatedness test. *See, e.g.*, *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 11 (2010) (holding that provisions of an initiative that would have required the secret ballot for (1) public elections and (2) union-representative elections were not sufficiently interrelated simply because they both addressed the right to a secret ballot and were "government-administered and/or supervised" elections); *Taxpayer Prot. All.*, 199 Ariz. at 181 ¶ 3 (rejecting the argument that initiative's provisions were sufficiently interrelated simply because they related "to the single subject of taxation" and were all aimed at "relieving the burden of the tax system").

Broadly applicable taxes on services are an entirely distinct "context" from fees charged to specific individuals for use of City-owned property, and the two do not share a "common purpose" such that they should stand or fall together. *See McLaughlin*, 225 Ariz. at 354 ¶ 8. If Prop. 126 truly contained both prohibitions as the Attorney General argues, voters were entitled to vote on them separately. *See id.* at 353 ¶ 7. This Court should construe article IX, § 25 to avoid these concerns

and honor the will of the voters, who enacted one amendment, prohibiting certain taxes, to the Arizona Constitution. *See Slayton v. Shumway*, 166 Ariz. 87, 90 (1990), *partially abrogated on other grounds by Ariz. Together*, 214 Ariz. 118 (noting that the separate amendment rule is designed to avoid "confusing or deceiving the voters by inserting unrelated provisions in an initiative proposal and 'hiding them' from the voters").

This Court should construe article IX, § 25 to permit the Fees and to thereby avoid these constitutional conflicts. *See State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196 (1969) ("[W]here, as here, separate parts of a constitution are seemingly in conflict, it is the duty of the court to harmonize both so that the constitution is a consistent workable whole.").[11]

IV. The Bond Provision Is Unconstitutional and Unenforceable.

The parties agree that no bond is required for the City to defend its Ordinance in this special action. As noted by the Court in its January 22, 2020 Order, though, A.R.S. § 41-194.01(B)(2) (the "Bond Provision")

[11] The Attorney General argues at (25–27) that article IX, § 25 does not conflict with the text of article XIII, section 2. The City has never made such an argument. To be sure, the legislature amended article XIII, section 2 to expressly provide that "[n]otwithstanding any provision of this section to the contrary, no charter shall provide a city with any power to violate article IX, section 25, which preempts such power."

commands that, as a condition to participating in this matter, this Court "shall require the [City] to post a bond equal to the amount of state shared revenue paid to the [City]" in the preceding six months. For the reasons set forth below, the Bond Provision is unconstitutional or, at a minimum, unenforceable.

A. The Bond Provision Is Unconstitutional.

The requirement that a city or town post a multi-million-dollar bond based merely on the Attorney General's determination that an ordinance "may violate" state law is unconstitutional because it imposes an insurmountable obstacle to judicial review. It effectively empowers the Attorney General to make the final decision about what the law really is. Indeed, while declining to reach the issue, this Court has previously noted its "concerns regarding the bond's purpose, basis, practical application, and constitutionality." *State ex rel. Brnovich*, 242 Ariz. at 596, ¶ 32.

As the legislative history reveals, the oppressive effects of the Bond Provision are not coincidental. The Legislature enacted this statute precisely to "force municipalities to obey the law" as the Legislature and Attorney General construe it.[12] But that unambiguous desire

[12] *Senate Government Committee Meeting*, ARIZ. STATE LEGISLATURE (Feb. 17, 2016), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=16879&meta_id=341892.

contravenes the separation of powers, under which "[t]he only proper method for testing the legality or constitutionality of a legislative enactment, be it municipal, county or state, is by judicial review." *Citizens for Orderly Dev. & Env't v. City of Phoenix*, 112 Ariz. 258, 260 (1975). Put differently, the statute flaunts the fact that, in this country, and in this state, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

The Constitution guarantees the City the right to defend its Ordinance before the Court, which is the *only* body empowered to decide whether it violates state law. *See* ARIZ. CONST. art. VI, § 1 (vesting judicial power in the courts); *see also id.* art. III ("Distribution of Powers"). By conditioning that right on the payment of an exorbitant bond serving no purpose, the Bond Provision unconstitutionally blocks access to the courts. *See, e.g.*, *New v. Ariz. Bd. of Regents*, 127 Ariz. 68, 70 (App. 1980) (bond requirement unconstitutional because it served as blockade to courts).

B. The Bond Provision Is Unenforceable.

In any event, "the bond provision is unenforceable because it is incomplete and unintelligible." *State ex rel. Brnovich*, 242 Ariz. at 608 ¶ 85 (Gould, J., concurring in part). The Bond Provision "is a partial,

unfinished legislative directive that is impossible for this Court to enforce." *Id.* at 610 ¶ 97.

For example, it "fails to provide any direction as to how—or why—this Court should impose the bond." *Id.* at 608 ¶ 89. It also "contains no provision for . . . economic hardship," which almost any city or town would face in posting *half* of its state-shared revenue. *Id.* It also "does not state the bond's purpose." *Id.* ¶ 90.

Conclusion

The Constitution does not prohibit the Fees. The Fees are not "transaction-based" within the plain meaning of article IX, § 25. They also are not "on the privilege to engage" in state-wide services. Further, the text of article IX, § 25, along with its history and purpose, reveal that it was only intended to prohibit certain taxes on services—not fees to use property.

For these reasons, the City respectfully asks that this Court "resolve the issue" and determine that the Ordinance does not "violate a provision of . . . the Constitution of Arizona." A.R.S. § 41-194.01(B)(2). And the City respectfully requests that this Court hold that the bond requirement contained in A.R.S. § 41-194.01(B)(2) is unconstitutional or, at a minimum, unintelligible.

Attorneys' Fees

Pursuant to A.R.S. § 12-348.01, the City requests its reasonable attorneys' fees in this action, where the Attorney General, a "governmental officer acting in the officer's official capacity," filed a lawsuit against the "city." A.R.S. § 12-348.01; *see also State ex rel. Brnovich*, 242 Ariz. at 604 (awarding attorneys' fees to prevailing party in action brought pursuant to A.R.S. § 41-194.01).

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Respectfully submitted,

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