IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

ALAN KORWIN, et al., Plaintiffs/Appellants, v. DEBBIE COTTON, et al., Defendants/Appellees.	)	Court of Appeals, Division One Case No. 1 CA-CV 12-0878 Maricopa County Superior Court Case No. CV2011-009838

BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

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STATEMENT OF INTEREST

American Civil Liberties Union is a nationwide, nonpartisan organization with more than 500,000 members that since its founding in 1920, has dedicated itself to defending and promoting individual liberties secured by the U.S. Constitution and state constitutions and civil rights statutes. The American Civil Liberties Union of Arizona (the "ACLUAZ") is an affiliate of the American Civil Liberties Union. The ACLUAZ has a keen interest in the freedom-of-speech issue in this case and in developing Arizona jurisprudence on the speech protections granted by the Arizona Constitution.

STATEMENT OF FACTS

The ACLUAZ adopts the Statement of the Facts set forth in Appellants' Opening Brief.

STATEMENT ISSUES PRESENTED AND STANDARD OF REVIEW

The ACLUAZ adopts the Statement of the Issues Presented and Standard of Review forth in Appellants' Opening Brief. Additionally, the ACLUAZ submits the following statement of issue presented in this matter:

In light of the constitutional history and case law applicable to the Arizona Constitution, Article 2, Section 6, can the City of Phoenix impose the content-based restriction that it only accepts advertisements on bus shelters and bus furniture that "adequately display a commercial transaction"?

ARGUMENT

I. INTRODUCTION.

This case has profound implications beyond whether Appellants can post their proposed advertisement on City of Phoenix bus shelters. It involves the scope of the Arizona Constitution's grant to all persons of the right to freely speak, write and publish on all subjects. The framers of the Arizona Constitution intended to rigorously protect the right of free speech, and therefore adopted language broader than the language contained in the U.S. Constitution's free speech clause. Indeed, the Arizona Supreme Court has recognized that this strong, broad constitutional provision means that courts should be wary of balancing government interests against the right of persons to freely speak in this state. Despite this, the lower court brushed aside Appellants' claims under the Arizona Constitution in a footnote stating, without explanation, that the analysis was the same as under the much differently worded and interpreted First Amendment.

On appeal, the Court must determine whether the Arizona Constitution allows content-based restrictions on speech when there is no competing fundamental right. The ACLUAZ urges this Court to find that even when the government is acting as a proprietor, it cannot place direct restrictions on the content of speech when there is no competing fundamental right (such as a fair trial) and no exception (such as prohibitions on perjury or solicitation to commit a

crime). However, if this Court determines that content-based restrictions are allowed, the Court should reject the rigid and unworkable federal forum test and instead adopt a flexible, balancing test that provides the necessary deference for individual speech rights granted by the Arizona Constitution.

II. THE ARIZONA CONSTITUTION PROVIDES BROADER PROTECTION THAN THE FIRST AMENDMENT.

Appellants assert that the City of Phoenix 2011 transit advertising guidelines (the "Guidelines") violate the Arizona Constitution, Article 2, Section 6, as well as the First Amendment. The ACLUAZ agrees. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Arizona Constitution proclaims: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const., art. 2, § 6. The freedom of assembly counterpart states: "The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged." Ariz. Const., art. 2, § 5. Thus the Arizona Constitution's "freely speak" clause is different and far more expansive than the First Amendment, and supports applying a more stringent test in this case.

The Arizona Supreme Court has repeatedly stated the Arizona's speech clause provides broader speech protection than its federal counterpart. "The first

amendment to the United States Constitution provides only a protection against government action. The words of art. 2, § 6 of the Arizona Constitution, on the other hand, directly grant every Arizonan a broad free speech right." *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989); *Phoenix Newspapers, Inc. v. Superior Court* ("*Phoenix Newspapers*"), 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966), *in banc* ("The words of the Arizona Constitution are too plain for equivocation. The right of every person to freely speak, write and publish may not be limited …").

Significantly, however, Arizona courts have never addressed whether, **under the Arizona Constitution**, the government **can** impose a content-based restriction on speech, and if so, **what test** for speech restrictions applies where the government is proprietor of the communicative space. As discussed below, in cases involving the Arizona constitutional right of free speech in other contexts, Arizona courts have adopted a different and more stringent test than applies under the First Amendment. This Court should do likewise in this case – either disallowing content-based restrictions entirely, or at the very least, adopting a more stringent test for when they are allowed.

Furthermore, the U.S. Supreme Court ("USSC") has expressly given state judiciaries freedom to expand protections and liberties in reliance on their own state constitutions. *See Massachusetts v. Upton*, 466 U.S. 727, 735 (1984) (per

curium) (Stevens, J., concurring); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("[A] state is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."). Interpreting the Arizona Constitution to provide a right broader than provided by the First Amendment is in line with the famous observation by Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

In this case, the trial court did not even analyze what test applies under the Arizona Constitution before wrongly finding that there was no difference as applied under the Arizona Constitution and the First Amendment. (Index of Record ("I.R.") 61.) The trial court's failure constitutes a legal error requiring reversal, and this Court should provide guidance as to what test applies on remand.

A. The Plain Words of Arizona Constitution's "Freely Speak" Clause Require More Stringent Review Than Under the First Amendment.

Under the basic rules of statutory interpretation, the federal forum test does not apply to an analysis of a regulation restricting speech promulgated within

Arizona. Courts "interpret constitutional provisions by examining the text, and, where necessary, history in an attempt to determine the framers intent." *Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, 290, ¶ 23, 981 P.2d 584, 590 (App. 1998) (quoting *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 12-18, 730 P.2d 186, 189-95 (1986)). Applying this analysis to Article 2, Section 6 dictates that either content-based restrictions are disallowed, or a different, more stringent test applies under the freely speak provision than applies under the First Amendment.

The constitutional history also supports using a more stringent review of restrictions on speech under the Arizona Constitution. As noted above, the framers of the Arizona Constitution chose significantly different language from the First Amendment. They declined to merely copy the First Amendment free speech provision, even though they did use federal constitutional provisions as models for other provisions of the Arizona Constitution addressing individual rights, such as the right to due process and the prohibition on excessive bail and cruel and unusual punishment. *State v. Stummer*, 219 Ariz. 137, 142, ¶ 14 n.4, 194 P.3d 1043, 1048, n.4 (2008), *en banc* (citing *e.g.*, Ariz. Const. art. 2, § 4 (due process); *id.* art. 2, § 15 (excessive bail and cruel and unusual punishments)). This decision clearly evidences an intent to provide greater free speech protection than under the federal constitution. *Mountain States*, 160 Ariz. at 355-56, 773 P.2d at 360-61. "The encompassing text of Article 2, Section 6 indicates the Arizona framers' intent to

rigorously protect freedom of speech." *Stummer*, 219 Ariz. at 142, ¶ 15, 194 P.3d at 1048 (citing *Mountain States*). The framers were concerned that the state constitution include a Declaration of Rights, including the right to free speech, and not merely rely on those rights in the federal Bill of Rights. Constitutional convention delegate Fred L. Ingraham stated:

> The principles that were included in this [federal] Declaration of Rights have been, I take it, one of the most important portions of the Constitution of the United States. In that Declaration of Rights was preserved those principles for which the English and American people had struggled for centuries . . . the right of freedom of the press …. These have been salutary principles, valuable to the history and to the jurisprudence of the United States, and this Declaration of Rights in the Arizona constitution in a similar way will be just as valuable in the jurisprudence and history of this territory.

The Records of the Arizona Constitutional Convention of 1910, at p. 759 (recording Nov. 29, 1910, morning) (John S. Goff, ed. 1991). The delegates considered that every other state had a declaration of rights or included those rights somewhere in their state constitutions, and delegate A.R. Lynch agreed that the state declaration of rights was "absolutely necessary." *Id.* at p. 760; *see also Stummer*, 219 Ariz. at 142, ¶ 14 n.4, 194 P.3d at 1048 n.4 ("Arizona's constitution provides protection of speech independent of the First Amendment, which the Supreme Court had not yet applied to the states at the time of our constitutional convention.").

Based on the foregoing, the trial court erred in assuming (without any analysis) that the Arizona constitutional test is exactly the same as the federal constitutional test.

B. Arizona Courts Have Consistently Applied A More Stringent Review of Regulations Under Arizona's "Freely Speak" Clause.

Consistent with the plain language and constitutional history relating to the "freely speak" clause, Arizona courts have **repeatedly** emphasized that the "freely speak" clause provides broader protection than the First Amendment. *E.g.*, *Mountain States*, 160 Ariz. at 354, 773 P.2d at 459; *Stummer*, 219 Ariz. at 143, ¶ 17, 194 P.3d at 1049 (quoting *Mountain States*); *see also Phoenix Newspapers, Inc. v. Jennings* ("*Jennings*"), 107 Ariz. 557, 559, 490 P.2d 563, 565 (1971).

In *Mountain States*, the Supreme Court adopted a "more literal application of art. 2, § 6," writing:

> The Arizona Constitution does not speak of major or minor impediments but guarantees the right to "freely speak." Although we may need to balance competing constitutional rights, such as the right to a fair trial and the right of free speech, **we avoid, where possible, attempts to erode constitutional rights by balancing them against regulations serving governmental interests**.

160 Ariz. at 357, 773 P.2d at 462 (emphasis added).

In *Mountain States*, the phone company provided a service called "ScoopLines" that allowed customers to dial into a network to obtain, among other

things, sexually explicit messages. *Id.* at 351-52, 773 P.2d at 456-57. The company challenged an Arizona Corporation Commission (the "ACC") ruling requiring it to block all ScoopLines and propose a presubscription plan for the ACC's approval within forty-five days. *Id.* at 352-53, 773 P.2d at 457-58. Comparing the state and federal free speech clauses, the court stated: "Indeed, this court has previously given art. 2, § 6 greater scope than the first amendment." *Id.* at 354, 773 P.2d at 459. The court cited *Phoenix Newspapers*, which held that a trial judge's order prohibiting publication of an account of an open court pretrial hearing violated the state constitution because of the unequivocal language of Article 2, Section 6. *Id.* at 355, 773 P.2d at 460. "Not until ten years later did the United States Supreme Court hold that the first amendment provided a similar, though qualified, free speech protection." *Id.* *Mountain States* also cited *Jennings*, *supra*, where the court found that Article 2, Section 6 gave the public a right to attend criminal trials even though the USSC did not recognize a similar federal constitutional right until 1980, and even then, the right was only a qualified one. *Id.*

Mountain States found that any subscription plan for ScoopLines would burden the right to speak and publish. *Id.* *Any* restriction on the right to freely speak "must be drawn with narrow specificity." *Id.* at 358, 773 P.2d at 463 (citing *New Times, Inc. v. Ariz. Bd. Of Regents*, 110 Ariz. 367, 371, 519 P.2d 169, 173

(1974) (evaluating whether a Board of Regents' campus newspaper policy was a reasonable, time, place and manner regulation under the First Amendment). The ACC could regulate the phone tariffs and impose content-neutral, reasonable time, place and manner regulations that "tangentially affect speech." However, "given Arizona's constitutional protections, when dealing with regulations that affect speech, the ACC must regulate with **narrow specificity** so as to **affect as little as possible** the ability of the sender and receiver to communicate." *Id.* at 358, 773 P.2d at 463 (emphasis added). The record did not show that the ACC's regulation was drawn with narrow specificity; indeed, the phone company set forth proposals that demonstrated a plausible way to solve the ScoopLines issue without a total ban and presubscription plan. *Id.* Thus, the Court struck down the regulation.

Following *Mountain States,* the Arizona Supreme Court again held in *Stummer,* that a more stringent test applies under the "freely speak" clause. In *Stummer,* adult bookstore owners challenged a state statute forbidding them from opening during certain early morning hours. 219 Ariz. at 140, ¶ 1, 194 P.3d at 1046. The statute was content based, and directed to regulate the secondary effects of speech (such as prostitution and sexually oriented litter in the surrounding area). *Id.* at 140-41, ¶ 6, 143-44, ¶ 22, 194 P.3d at 1046-47, 1050-51. The *Stummer* court applied a more stringent test than under federal law for measuring the constitutionality of content-based secondary effects regulation. Such regulations

must "vindicate the constitutional right to free speech, yet accommodate the government's interest in protecting the public health, safety, and welfare." *Id.* at 144, ¶ 24, 194 P.3d at 1050. **First**, the state has to demonstrate both that it has a reasonable basis for regulating the speech based on the secondary effects, and an important government interest for the regulation. *Id.* at 144, ¶ 25, 194 P.3d at 1050. Regulations to reduce crime, protect children, or safeguard constitutional rights may justify some infringement on speech. But lesser concerns, such as abatement of litter or government convenience, will not. *Id.*

Second, to survive intermediate scrutiny, the State must show that, in addressing the secondary effects, the regulation does not "sweep too broadly." *Id.* at 144, ¶ 24, 194 P.3d at 1050. The regulation must significantly further the important government interest "without unduly interfering with protected speech" and the government must "show a close fit or nexus between the ends sought and the means employed for achieving those ends." *Id.* at 144-45, ¶ 30, 194 P.3d at 1050-51.

In our case, the City's Guidelines regulate content: the advertisement must propose a commercial transaction. The *Mountain States* test – allowing reasonable time, place and manner regulations that only tangentially affect speech, and are drawn with narrow specificity – while instructive, is not directly on-point because that test was stated for content-neutral restrictions. The *Stummer* test is limited to

restrictions of secondary effects; not the Guidelines' direct regulation of speech itself. Additionally, neither case addressed when the government is a proprietor.

Regardless, the *Mountain States* and *Stummer* tests demonstrate that the Arizona Constitution provides greater protection than the First Amendment. They also demonstrate that the Arizona constitutional analysis **does not turn on forum analysis** (as the trial court asserted here). Rather, Arizona courts focus on the imperative that all persons in Arizona may freely speak and what balance, if any, was required considering the government's stated interests.

On appeal, this Court should, using *Mountain States* and *Stummer* as guides, determine whether a government can directly regulate the content of non-obscene speech where no countervailing fundamental right (such as right to a fair trial) is implicated. Even if the Court finds that such content-based restrictions are allowed, the Court should adopt a flexible balancing test that is more protective of free-speech rights than the federal forum test.

III. THIS COURT SHOULD FIND THAT UNDER THE ARIZONA CONSTITUTION, CONTENT-BASED RESTRICTIONS ON SPEECH ARE IMPERMISSIBLE WHERE NO COUNTERVAILING CONSTITUTIONAL RIGHTS ARE INVOLVED.

The Arizona Constitution's broad grant of the right to freely speak does not allow room for the government to impose restrictions on the content of speech when (1) the content-restriction is not related to any abuse – such as perjury, obscenity or fighting words; and (2) where no countervailing constitutional right,

such as a fair trial, is implicated. In *Mountain States*, the court only allowed **content-neutral** regulation. No impediments to speech, even minor ones, were allowed absent a competing constitutional interest. 160 Ariz. at 357, 773 P.2d at 462. Likewise, in *Stummer*, the court did not allow a restriction on the **content** of speech. It only allowed regulation of the secondary effects of speech. 219 Ariz. at 144-45, ¶ 30, 194 P3d at 1050-51.

Common sense and case law support interpreting the Arizona Constitution to forbid content-based restrictions on speech where no competing constitutional right is concerned. Oregon case law is instructive on this issue. Oregon has a similar provision to the Arizona "freely speak" clause; it provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Or. Const., art. 1, § 8. The Oregon Supreme Court held that this provision forbids **any** content-based restrictions, *i.e.*, laws or regulations that forbid speech as such rather than directed against causing the forbidden effects. *State v. Robertson*, 293 Or. 402, 417, 649 P.2d 569, 579 (1982). The court reasoned that the provision:

> forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were

> adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.

Id. at 412, 649 P.2d at 576. Only historical exceptions, such as perjury, solicitation to commit a crime, and forgery, are excepted. *Id.* "[A]rticle I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences." *Id.* at 416, 649 P.2d at 580.

Presented with facts similar to those in the instant matter, the Oregon Court of Appeals recently held the *Robertson* rule applies even when the government is acting as a proprietor. *Karuk Tribe of Calif. v. Tri-County Metro. Transp. Dist. of Oregon*, 241 Or. App. 537, 251 P.3d 773 (Or. Ct. App. 2011), *rev. accepted*, 351 Or. 216, 262 P.3d 402 (Oct. 6, 2011). The court held the transportation district's advertising policy for advertisements on its buses violated the state constitutional prohibition against restricting free speech. The transportation district ("TriMet") only accepted "advertisements," meaning "a communication that promotes or offers goods or services," although TriMet could in its discretion accept "public service announcements" that did not contain a message "that is retail or commercial in nature." *Id.* at 542, 251 P.3d at 776. The policy forbid certain categories of advertisements, including "political campaign speech." *Id.* The court held that the content-based restriction – prohibiting content that was not an

advertisement or public service announcement – was unconstitutional. *Id.* at 548-49, 251 P.3d at 779. The Oregon Constitution did not allow for an exception for content-based restrictions simply because the government was acting as a proprietor.

Because of the language of Article 2, Section 6, the general broader grant of free speech rights, and the guidance of *Mountain States* and *Stummer*, this Court should follow Oregon's lead and disallow any content-based restrictions, absent a competing constitutional interest.

IV. IF THE COURT DETERMINES ARIZONA ALLOWS CONTENT-BASED SPEECH RESTRICTIONS, IT SHOULD ADOPT THE "BASIC INCOMPATIBILITY" BALANCING TEST TO RESOLVE CLAIMS THAT CONCERN THE ABRIDGEMENT OF SPEECH ON PUBLIC PROPERTY.

If this Court determines that content-based restrictions are allowed in certain circumstances under Arizona's free speech provision, the flexible balancing test used by its sister-states, and promoted by a number of constitutional scholars and USSC justices, is the appropriate approach to adopt. This Court should decline to superimpose upon the Arizona Constitution the highly formalistic and overly restrictive forum based approach currently employed by the USSC under the First Amendment to determine speaker access to various forms of government-controlled property. *See Perry Educ. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46 & n. 7 (1983). Rather than employing *Perry's* rigid tri-partite division

of government-owned property into traditional, designated and non-public fora,[1] a more appropriate test is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). In judging a regulation's constitutionality, the degree of incompatibility must be balanced against Arizona's constitutional guarantee that "[e]very person may freely speak, write, and publish on all subjects." Ariz. Const., art. 2, § 6. To withstand scrutiny, "the regulation must be narrowly tailored to further the State's legitimate interest." *Grayned*, 408 U.S. at 116.

The *Grayned* test has been adopted by several other states under their state constitution free speech clauses, including Connecticut and California.

A. Other States Have Properly Adopted the *Grayned* Test to Effectuate the Greater Protections Provided by Their Similarly Worded Free Speech Provisions.

Grayned involved the arrest of civil rights demonstrators convicted of violating anti-noise and anti-picketing statutes. To determine whether the municipality had the authority to control the use of public streets for the expression of views, Justice Marshall wrote: "Wherever the title of streets and parks may rest,

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[1] Further, even if the federal forum test were adopted, the ACLUAZ does not concede that the place for which the advertisement in question was submitted is not a traditional public forum. The advertisement was to be placed at a bus stop located on a public sidewalk and facing a public road. These characteristics fall squarely within the definition of a traditional public forum. *See infra* p. 29.

they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 115 (quoting *Hague v. Comm'n for Indus. Org.*, 307 U.S. 499, 515-16 (1939) (Robertson, J.)). He went on to state flatly, "the right to use a public place for expressive activity may be restricted only for weighty reasons." *Id.* "This was a blunt rejection of the notion that there were certain kinds of public property on which the government, like the owner of a private home, could abridge speech simply by virtue of its proprietary interest." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1730 (1987).

The Court found the municipality had the power to **reasonably** regulate expressive activity on public property **only** if such regulations advanced significant government interests, reasoning "the nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'" *Grayned*, 408 U.S. at 116. The crucial question was "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.*

Although the USSC has subsequently abandoned the incompatibility test in favor of a rigid tri-partite forum analysis test, both Connecticut[2] and California[3] – which have nearly identical constitutional "freely speak" provisions as Arizona – have adopted the *Grayned* test rather than the federal forum test.

The California Court of Appeals rejected the USSC's public forum doctrine and instead applied the *Grayned* incompatibility test to determine whether the visitor center of a nuclear power facility could be used for an anti-nuclear presentation. *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Lab.* ("*Livermore*"), 154 Cal. App. 3d 1157, 1164, 201 Cal. Rptr. 837 (1984). The visitor center in question displayed the operation of the plant and housed an auditorium for presentations. *Id.* at 1161. The U.C. Nuclear Weapons Labs Conversion Project sought to use the auditorium to present an antinuclear program, but the laboratory refused the Project's request. *Id.* Thereafter, the Project filed a complaint for an injunction allowing access to the visitors center. *Id.* at 1164.

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[2] The Connecticut Constitution, Article 1, Section 4, states: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." The only difference from the Arizona provision is the use of the word "citizen," rather than Arizona's "person." Arizona's provision is thus broader than Connecticut's in terms of who can exercise this free speech right.

[3] California's Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const., art. 1, § 2(a).

The *Livermore* court first referred to the California Supreme Court's observation that "federal principles are relevant but not conclusive" for conducting the state constitutional analysis. *Id.* at 1163 (citation omitted). The court followed the same interpretive analysis used in Arizona (*see Mountain States*, *Stummer*, *supra*), observing that California Constitution's speech provision "does not **mirror** the First Amendment either in form or content." *Id.* at 1163 (emphasis in original). *Livermore* also relied on California constitutional history in adopting a different test from the First Amendment test. "[T]he right of free speech in this state is a vigorous one, largely because of the obligation and right of our citizens to be actively involved in government through the processes of initiative, referendum and recall which distinguish our state constitutional system." *Id.* The court determined that the concept of "public forum" analysis is a "continuum", rather than a strict categorization, with "public streets and parks on one end and government institutions like hospitals and prisons on the other." *Id*. at 1164 (citing a California Court of Appeals case, *Prisoners Union v. Dep't of Corrections*, 135 Cal. App. 3d 930, 935 (1983), rejecting the "rigid formulation" of the public forum concept). *Livermore* therefore reiterated that California had adopted the "basic incompatibility" test to determine when the government could permissibly restrict speech on public property. *Id.* (citing *Prisoners Union*, 135 Cal. App. 3d at 936). The purpose of the Livermore center was to provide information to people about

the work at the Livermore Lab, and the government had no legitimate interest in monopolizing the dissemination of information on that topic. *Id.* at 1167.

Likewise, in *State v. Linares*, 232 Conn. 345, 655 A.2d 737 (1995), the Connecticut Supreme Court thoroughly examined the "freely speak" provision of the Connecticut Constitution and concluded that the incompatibility approach (rather than the forum test) "will best protect free speech under [the Connecticut] constitution." *Id.* at 385, 655 A.2d at 755. In *Linares*, the defendant was attending the governor's address to the legislators and unfurled a large pink banner that was tied to the railing, and which read: "WE DEMAND LESBIAN AND GAY RIGHTS, BILL," while simultaneously chanting or shouting in a loud voice, "gay rights lesbian rights," over and over again without stopping. *Id.* at 353, 655 A.2d at 741-42. The defendant was arrested under a state statute prohibiting intentional interference with the legislative process, and then challenged the constitutionality of the statute under Connecticut's "freely speak" clause.

The Connecticut court noted that under the *Grayned* approach, "the [USSC's] first amendment analysis often relied not on any consideration of the government's proprietary right to exclude, but only on whether the particular speech in issue was consistent with the uses of the specific public property involved." *Id.* at 378, 655 A.2d at 753. "The central issue under that approach was 'whether the manner of expression is basically incompatible with the normal

activity of a particular place at a particular time. …'" *Id.* (quoting *Grayned*, 408 U.S. at 116-17). "This emphasis on basic compatibility, rather than on categorization of particular 'types' of public property, reflected the court's attempt 'to serve the first amendment value of maximizing social communication.'" *Id.* (quoting Post, *supra*, 34 UCLA L. Rev. at 1731).

The Connecticut court stated "that federal constitutional law sets **minimum** national standards for individual rights and that states may afford individuals greater protections under their own state constitutions." *Id.* (emphasis added) (citing cases). To determine whether the Connecticut Constitution affords greater rights than the federal Constitution in this context, the court considered the following "tools of analysis": (1) the "textual" approach – consideration of the specific words in the constitution; (2) holdings and dicta of this court and the Connecticut appellate court; (3) federal precedent; (4) the "sibling" approach – examination of other states' decisions; (5) the "historical" approach – including consideration of the historical constitutional setting and the debates of the framers; and (6) economic and sociological or public policy considerations. *Id.* at 379, 655 A.2d at 753.

The Connecticut Supreme Court found that, like Arizona's Constitution, the "state constitution offers language, i.e. 'remonstrance,' that sets forth free speech rights more emphatically than its federal counterpart…. These differences warrant

an interpretation separate and distinct from that of the first amendment." *Id.* (citation omitted). *Linares* also focused on the framers' intent that the document stand the test of time, and not be "interpreted too narrowly or too literally so that it fails to have contemporary effectiveness of all of our citizens." *Id.* at 382, 655 A.2d at 755 (citation omitted). In addition, the court noted that (like Arizona) prior Connecticut court decisions had recognized that the Connecticut Constitution's protections of free speech are greater than those of the First Amendment. *Id.* at 381-82, 655 A.2d at 754-55. The court cited to critiques of the forum test and praise of the incompatibility approach contained in the numerous dissenting and concurring USSC opinions and concluded:

> We are persuaded by these observations concerning the flexibility of the *Grayned* approach and the failings of the current federal model; accordingly, we believe that our adoption of the *Grayned* approach will best protect free speech under our state constitution.

Id. at 384, 655 A.2d at 755-56.

B. <u>If Arizona Allows Content-Based Restrictions, it Should Adopt the *Grayned* Test.</u>

If Arizona determines that its constitutional provisions protecting speech allow content-based restrictions on speech, it should follow California and Connecticut and adopt the *Grayned* test or risk nullifying the language and intent of the framers to go beyond the protections of the First Amendment. "The test does not limit heightened free speech protection to a closed set of historically-

determined fora, but extends this protection to all appropriate loci." R. Alexander Acosta, *Revealing the Inadequacy of the Public Forum Doctrine: International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992)*, 16 Harv. J.L. & Pub. Pol'y 269, 278-79 (1993). "With respect to the designated public forum appropriate for limited expression, the test permits expression to be curtailed based upon a balance between government interests and free speech freedoms, rather than purely upon government whim."[4] *Id.* "A balancing test, moreover, removes disincentives to clarify speech restrictions in designated public fora." *Id.* A direct balancing of the governmental and free speech interests solves the problems of public forum analysis, and is the better approach under the Arizona Constitution.

V. THE GUIDELINES DO NOT MEET THE *GRAYNED* TEST.

Under the "basic incompatibility" framework outlined above, the City of Phoenix's Guidelines do not pass muster under the Arizona Constitution. In December 2009, the City adopted the latest in a series of "transit advertising standards," which governed what materials the City would allow to be displayed as paid "advertisements" on public buses, transit shelters, and benches. These "2009

[4] The "whims" of the particular governmental agent reviewing content based regulations are certainly in play here. As discussed at length in Appellants' brief, it appears that the content restrictive regulations have been applied in an arbitrary and capricious manner. Among others, minimally commercial and primarily religious advertisements have been allowed, whereas Appellants' ad has been disallowed.

Standards" provided, in relevant part: "The subject matter of the transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction." (Appellants' Opening Br., App. 3.) In 2011, the City changed the "standards" to "guidelines," eliminated the "limited to speech which proposes a commercial transaction" language, and replaced it with a requirement that a "commercial transaction must be proposed and must be adequately displayed." (Appellants' Opening Br., App. 4.)

Noticeably absent from the record on appeal is **any** evidence indicating that an advertisement containing non-commercial speech, or speech that does not "adequately display" a commercial transaction, is incompatible with the primary purpose of a bus stop shelter, which is itself located on a public sidewalk facing a public street. Rather, as Justice Brennan noted in his *Lehman v. City of Shaker Heights* dissent, "[a] forum for communication was voluntarily established when the city installed the physical facilities for the advertisements," and by doing so, "the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation." 418 U.S. 298, 314 (1974) (Brennan, J., dissenting). "By accepting commercial and public service advertisements, the city opened the door to 'sometimes controversial or unsettling speech' and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of

transporting passengers." *Id.* at 319. In addition, Justice Brennan aptly observed that:

> Transit passengers are not forced or compelled to read any of the messages, nor are they incapable of declining to receive [them]. Should passengers chance to glance at advertisements they find offensive, they can effectively avoid further bombardment of their sensibilities simply by averting their eyes. Surely that minor inconvenience is a small price to pay for the continued preservation of so precious a liberty as free speech.

Id. at 320-21 (alteration in original) (citations omitted).

By installing the physical facilities for advertisements on its bus shelters, the City concedes that advertising **is** compatible with the bus shelter's primary purpose of providing bus passengers with a place to sit or providing some minimal shelter for waiting bus passengers. Non-commercial or quasi-commercial advertising surely does not unduly interfere with the primary purpose of the bus shelter any more than commercial advertising. Bus passengers are not forced to read any of the messages contained in **any** advertisements and are free to avert their eyes if they find their content offensive, whether it advertises cigarettes, religious radio stations, free pregnancy tests, or gun ranges/training. Because the Guidelines place content-based restrictions on speech on public property when that speech is not incompatible with the primary purpose of that public property, the Guidelines violate Article 2, Section 6 of the Arizona Constitution and must be struck down.

Moreover, even if an advertisement that does not "adequately display a commercial transaction" were somehow incompatible with the primary purpose of a bus shelter, the Guidelines are nevertheless not narrowly tailored to further a legitimate government interest. *See Grayned*, 408 U.S. at 116-17. The City has alleged that the advertising guidelines advance the following legitimate government interests:

1. Avoiding the appearance that the City is favoring or disfavoring any particular candidate, political view, or side in a debate over contentious issues of the day;
2. Avoiding the appearance that the City, advertisers or the forum (bus or shelter) is associated with any particular social cause, political cause, or viewpoint;
3. Maintaining a position of neutrality on religious issues; and
4. Not violating the Establishment Clause.

(I.R. 22, ¶ 11.) However, as discussed by California Court of Appeals, it is unclear how limiting acceptable advertisements to those that adequately display a commercial transaction is **narrowly** tailored to advance any of these interests:

> A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisement that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message

> calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program. The [City] would accept an advertisement from a television station that is commercially inspired, but would refuse a paid nonsolicitation message from a strictly educational television station. Advertisements for travel, foods, clothing, toiletries, automobiles, legal drugs -- all these are acceptable, but the American Legion would not have the right to place a paid advertisement reading, "support Our Boys in Viet Nam. Send Holiday Packages."

Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51, 57-58, 434 P.2d 982, 986-987 (1967).

Instead of making an arbitrary distinction based on whether a given advertisement adequately displays a commercial transaction, the City should impose narrowly tailored, neutral regulations, which do not distinguish among advertisements on the basis of subject matter and yet further the City's legitimate interests. For example, the impression of City endorsement or association could easily be dispelled by requiring disclaimers to appear prominently on the face of every advertisement. *See Lehman*, 418 U.S. at 321-22 (Brennan, J., dissenting). The City has chosen instead to implement overbroad advertising standards that both prohibit speech that is not basically incompatible with the purpose of the bus

shelters, and also are not narrowly tailored to further legitimate government interests. As such, the Guideline's restriction on commercial speech should be struck down as violative of Article 2, Section 6 of the Arizona Constitution.

VI. THIS COURT SHOULD REJECT THE FEDERAL FORUM ANALYSIS TEST UNDER THE ARIZONA CONSTITUTION.

Forum analysis is a complex, confusing, and rigid judicial invention that unduly burdens free speech and has fractured federal courts across the country. By allowing the government to define the extent of its First Amendment obligations, and by being incapable of adapting to a rapidly changing world, forum analysis offers very little protection to speech on government property and instead acts as a device to limit the freedom of speech. Given Arizona's more expansive freely speak clause, there is no good reason to adopt a flawed federal test that applies to more limited federal protections.

A. Forum Analysis Background and Current Status.

The USSC "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Children of the Rosary v. City of Phoenix* ("*COR*"), 154 F.3d 972, 976 (9th Cir. 1998) (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)). In "assessing a First Amendment claim for speech on government property, '[courts] must [first] identify the nature of the forum, because

the extent to which the Government may limit access depends on whether the forum is public or nonpublic.'" *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (citing *Cornelius*, 473 U.S. at 797). According to the USSC and the 9th Circuit in *COR*, "forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora." *COR*, 154 F.3d at 976 (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee* ("*ISKCON*"), 505 U.S. 672, 678-79 (1992)).

1. <u>Traditional Public Forum</u>.

"A traditional public forum is a place 'that has traditionally been available for public expression,' such as a public park." *COR*, 154. F.3d at 976 (citing *ISKCON*, 505 U.S. at 678). The USSC has further described a traditional public forum as property that "has as a principal purpose the free exchange of ideas." *ISKCON*, 505 U.S. at 679 (citations and quotations omitted). The notion that individuals have a right to use streets and parks for expressive communication flows from the fact that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *ISKCON*, 505 U.S. at 679 (citing *Hague*, 307 U.S. at 515-16). In a traditional public forum, content-based governmental restrictions on speech must satisfy strict scrutiny review – i.e. speakers can be excluded "only when the

exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *See Hopper*, 241 F.3d at 1074 (citing *Cornelius*, 473 U.S. at 800).

2. <u>Designated Public Forum</u>.

As to the second category of fora, the Ninth Circuit explained that "a designated public forum is a nontraditional forum that the government has opened for expressive activity by part or all of the public." *COR*, 154 F.3d at 976 (citing *Perry*, 460 U.S. at 46 & n. 7). The creation of a designated public forum requires a decision by the government to intentionally open a nontraditional forum for public discourse. *Id.* (citing *Cornelius*, 473 U.S. at 802). In fact, the USSC has made clear that government intent is the **essential question** in determining whether a designated public forum has been established. *Hopper*, 241 F.3d at 1075 (citing *Cornelius*, 473 U.S. at 802). Specifically, in *Cornelius*, the USSC wrote:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional public forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

Cornelius, 473 U.S. at 802 (emphasis in original).

Generally speaking, content-based restrictions on expressive activity in a "designated public forum" are subject to the same limitations that govern a traditional public forum (i.e. strict scrutiny). *Hopper*, 241 F.3d at 1074 (citations and quotations omitted).

However, this does not fully explain the middle category of fora, which "has been a source of much confusion" in First Amendment jurisprudence. *Id.*; *see also* Seth D. Rogers, *Constitutional Law - A Forum by Any Other Name . . . Would Be Just As Confusing*, 4 Wyo. L. Rev. 753, 767-68, n. 134 (2004) (citing federal cases across the country, which arrive at conflicting conclusions regarding the nature of the designated public forum and what level of judicial review should apply in that forum); *Strict Scrutiny in the Middle Forum,* 122 Harv. L. Rev. 2140, 2147-49 (2009) (explaining and analyzing the confusion surrounding the nature of the designated public forum).

In *COR*, the court set forth the three basic categories of fora: public fora, designated public fora, and nonpublic fora. 154 F.3d at 976. Just a few years later, however, the same court noted a fourth category: the limited public forum. *Hopper*, 241 F.3d at 1075. The court stated that "a limited public forum is a sub-category of a designated public forum that refers to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Id.* (citations and quotations omitted). It is not clear what degree of access restriction

is necessary to turn a designated public forum into a nonpublic forum. Regardless, the *Hopper* court held that in a limited public forum, "restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible." *Id.*

3. Nonpublic Forum.

The nonpublic forum encompasses all public property that does not fit into any of the other categories of fora. *ISKCON*, 505 U.S. at 678-79. In "a nonpublic forum, the government has the 'right to make distinctions in access on the basis of subject matter and speaker identity.'" *COR*, 154 F.3d at 978 (citing *Perry*, 460 U.S. at 49). However, the government "must not [make distinctions] based on the speaker's viewpoint." *Id.* (citing *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998)) (alterations in original). The "touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (citing *Perry*, 460 U.S. at 49). The government restrictions on speech in a nonpublic forum "need only be reasonable; [they] need not be the most reasonable or the only reasonable limitation." *Id.* at 978-79 (citing *ISKCON*, 505 U.S. at 683) (alteration in original).

B. Arizona Courts Should Reject Forum Analysis Because It Is Overly Complex And Unnecessarily Confusing.

This Court should decline to apply the overly complex and unnecessarily confusing forum analysis. This brief is hardly the first time that modern forum

analysis has been criticized,[5] and such criticism generally stems from a few discrete points. First, the USSC has failed to provide a workable "designated public forum" (i.e. the middle category), which has left federal courts across the country fractured, and scrambling to come up with their own definitions, sub-categories, and standards of review within the designated public forum. Second, forum analysis generally permits the government to define the extent of its First Amendment obligations. This is problematic because the First Amendment was intended to be a protection from the government, not a protection for the government. Third, forum analysis is incapable of adapting to a rapidly changing world. As such, the number of locations entitled to heightened First Amendment protection has been unduly limited.

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[5] For additional criticisms of the public forum doctrine, *see e.g.*, Daniel Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984); Robert W. Finke, *The Connecticut Constitution and the Public Forum Analysis*, 14 QLR 105 (1994); Post, 34 UCLA L. Rev. 1713, *supra*; Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L. Rev. 109, 117 (1986); *ISKCON*, 505 U.S. at 694 (Kennedy, J., concurring) (warning that the "public doctrine [is becoming] a jurisprudence of categories . . . inconsistent with the values underlying the Speech and Press Clauses of the First Amendment"); *ISKCON*, 505 U.S. at 703 (Souter, J., concurring); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 749 (Breyer, J., concurring); *United States v. Kolinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) (questioning "whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand"); *Cornelius*, 473 U.S. at 813 (Blackmun, J., dissenting); *Arkansas Educ.*, 523 U.S. at 683 (Stevens, J., dissenting).

Under Ninth Circuit precedent, content-based restrictions on speech in traditional public forums and designated public fora are subject to strict scrutiny review. *See Hopper*, 241 F.3d at 1074-75. Conversely, content-based restrictions on speech in limited public forums and nonpublic fora are subject only to a "reasonableness review." *See id.* The result of this system "is that speech rights on [limited public] [and] nonpublic fora receive, essentially, no protection" because the "reasonableness standard of judicial review used in such cases is essentially no review at all." Rogers, *supra*, 4 Wyo. L. Rev. at 786. Indeed, "invocation of the [reasonableness] review is simply a means of articulating judicial deference to the governmental judgment." *Id.* Otherwise stated, under modern forum analysis, "[t]he entire success of a free speech claim now hinges on whether the government property in question receives the label of 'public' or 'nonpublic' forum. Once the label is attached[,] all conversation stops." *Id.* at 792.

Given that so much depends on how courts characterize a given forum, one would expect the various categories of fora to be rather uniform, well defined, and easily distinguishable from one another. However, as the *Hopper* court observed, the "designated public forum" has been the source of much confusion, and the terms "designated public forum" and "limited public forum" have not always been clear. *See Hopper*, 241 F.3d at 1074 (citations omitted). Other circuits have similarly recognized this confusion. *See, e.g., Bowman v. White*, 444 F.3d 967,

975 (8th Cir. 2006) (first stating that what constitutes a designated public forum is "far from lucid", and then proceeding to list various circuits coming to a variety of conclusions). While some courts have equated designated public fora and limited public fora as being the same thing, other courts have found them to be distinct. *Hopper*, 241 F.3d at 1074. Still other courts have invented entirely new categories. *See, e.g., Bowman*, 444 F.3d at 976 (explaining the difference between "limited designated public fora" and "unlimited designated public fora").

The current status of forum analysis in the Ninth Circuit is particularly confusing, with the original three categories of fora – traditional public, designated public, and nonpublic – more properly characterized as sub-categories of two, overarching fora categories – public and nonpublic. *Hopper*, 241 F.3d at 1074. *Hopper* further explained that the "designated public forum" also has a sub-category of its own – the limited public forum. *Id.* And, lest there be any confusion as to what that category entails, the Ninth Circuit has held that the "**limited public forum** is a sub-category of a **designated public forum** that refers to a type of **nonpublic forum** that the government has intentionally opened to certain groups or to certain topics." *Id.* (emphasis added). As one scholar has stated, "[t]his confusing statement not only identifies designated public fora and limited public fora as two distinct categories, but also situates the limited public forum as a subset of both the middle category (the designated public forum) and

the nonpublic forum. Such technicalities make critiques of forum analysis as a 'jurisprudence of labels' very appropriate." *Strict Scrutiny in the Middle Forum*, 122 Harv. L. Rev. at 2148.

The confusion does not stop there and instead is compounded further depending on circumstances. First, the court's analysis will probably change if the government is acting as a "proprietor" as opposed to a "lawmaker." *COR*, 154 F.3d at 979 (citing *ISKCON*, 505 U.S. at 678). Second, the court's analysis will change where the government itself is acting as the speaker. *See, Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009). Third, as *Hopper* makes abundantly clear, even where the government **intended** to open a **nonpublic** forum in the first place, that forum can end up being treated by courts as a **public** forum if the government arbitrarily and inconsistently limits access to that forum. *See Hopper*, 241 F.3d at 1075-76. In other words, *Hopper* introduces the ideas that (1) forums, once designated, can potentially transform, and (2) courts are left with the discretion of deciding whether the government has "consistently" limited access to the forum so as to keep the forum nonpublic, or, conversely, whether the government has "haphazardly permitted exceptions" so as to transform the forum to a public forum. *Id.*

In sum, the current status of forum analysis is highly unsatisfactory. At best, forum analysis leaves courts wading through muddy, uncertain waters as they

attempt to apply this perplexing doctrine. At worst, forum analysis allows courts, using overlapping categories and vague guideposts, to make outcome-determinative forum characterizations, in potentially arbitrary ways, based on the court's desired result. A court must answer a plethora of questions to make its decision, which, taken together, leave courts confused and with too much discretion. For example, which of the two, or three, or four (depending on how one reads *Hopper*) categories should a piece of government property fit into? Is the government acting as proprietor in the market place or as a lawmaker? Has the government allowed exceptions to their restricting of the forum, and if so, are those exceptions permitted "haphazardly"? Or has the government been "consistent" in its restrictions? While it is true that "line drawing may be a feature of all legal decisions, categorical approaches that invite such line drawing simultaneously invite outcome-determinative manipulation that is especially troublesome where free speech rights are at stake." *What Rudy Hasn't Taken Credit for: First Amendment Limits on Regulation of Advertising on Government Property*, 42 Ariz. L. Rev. 607, 638 (2000).

The basic incompatibility test largely avoids the plethora of problems and undue burdens on speech that stem from the confusing and rigid forum analysis approach. The basic incompatibility test allows balancing of the governmental and free speech interests on a case-by-case basis, and is the better approach.

C. Forum Analysis Unwisely And Inappropriately Permits The Government Itself To Define The Extent Of Its Own First Amendment Obligations.

One of the crucial problems with designating a property as in a particular form is that whether a forum is considered public or nonpublic is determined by the government itself. *See COR*, 154 F.3d at 976 (citing *Cornelius*, 473 U.S. at 802). "The government does not create a public forum by inaction or by permitting limited discourse, but only by **intentionally** opening a nontraditional public forum for public discourse." *Hopper*, 241 F. 3d at 1075 (citing *Cornelius* 473 U.S. at 802) (emphasis in original). Justice Kennedy has argued that determining the forum based on government intent essentially "convert[s] what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat." *ISKCON*, 505 U.S. at 694 (Kennedy, J., concurring).

> The First Amendment is a **limitation** on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view, the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there.

Id. at 695 (emphasis added).

Stated differently, "[t]he guarantees of the First Amendment should not turn entirely on . . . the grace of the Government." *Cornelius*, 473 U.S. at 822 (Blackmun, J., dissenting). Instead of using a test that categorizes fora based on

government intent, "the inquiry [should] be an objective one, based on actual, physical characteristics and uses of the property." *ISKCON*, 505 U.S. at 695 (Kennedy, J., concurring); *see also First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) (adopting the objective criteria test from Kennedy's concurrence in *ISKCON*).

D. The Rigid Forum Analysis Framework Unduly Burdens Free Speech By Severely Limiting The Number Of Locations Entitled To Heightened First Amendment Protection.

In the absence of express governmental approval, a piece of government property will only be considered a public forum, and thereby subject to strict scrutiny review, where the property (1) has a principal purpose of the free exchange of ideas, and (2) that purpose is evidenced by a long-standing historical practice of permitting speech. *ISKCON*, 505 U.S. at 694 (Kennedy, J., concurring). In *ISKCON*, the Court held that airport terminals were not a public forum, in large part because of their relative newness. *Id.* at 680. This approach is problematic because "it leaves almost no scope for the development of new public forums absent the rare approval of the government." *Id.* at 695 (Kennedy, J., concurring).

This framework essentially means that absent the government's express approval, parks, streets, and public sidewalks are the only pieces of government property that will be classified as public forums. Rogers, 4 Wyo. L. Rev. at 786

(citing Erwin Chemerinsky, Constitutional Law: Principles and Policies 1083, 1102 (2d ed. 2002)); *see generally also ISKCON*, 505 U.S. at 679-81. As Justice Kennedy points out, not "even [these] quintessential public forums . . . [contain] the necessary elements of what the Court defines as a public forum." *ISKCON*, 505 U.S. at 696-97 (Kennedy, J., concurring). After all, the principal purpose of streets and sidewalks is to facilitate transportation, not public discourse, and the purpose of public parks may be as much for beauty and open space as for discourse. *Id.*

This framework unduly burdens speech without any apparent constitutional basis. Why should modern fora receive less protection simply by nature of the fact that they are modern? R. Alexander Acosta, 16 Harv. J.L. & Pub. Pol'y at 277. The First Amendment never discusses preferential treatment for older versus newer loci. *Id.* Should television receive less First Amendment protection than newspapers simply because televisions are a more modern avenue of expression? *Id.*

As Justice Kennedy further explained:

> Without this recognition [forum analysis] retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, [the Court's] failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

ISKCON, 505 U.S. at 697-98 (Kennedy, J., concurring).

"Rigid historical restrictions are simply inadequate for dealing with the fast changing character of modern public speech. If the Court's model of the public forum is to avoid becoming a legal anachronism, a more common-sense application of forum analysis will be needed." Rogers, *supra*, 4 Wyo. L. Rev. at 792. What is "needed is a framework of court analysis that does more than simply ask where Americans exercised their speech rights in the eighteenth and nineteenth centuries." *Id.*

In analyzing this exact issue, the Supreme Court of Connecticut stated:

> [W]e have recognized that our state constitution is an instrument of progress, . . . intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens. **This concern for contemporary effectiveness would be undermined if we followed federal forum analysis, which affords the most rigorous protection for speech only at traditional forums and narrowly defines 'traditional' to exclude modern public gathering places often otherwise compatible with public expression.**

Linares, 232 Conn. at 382, 655 A.2d at 755 (emphasis added) (citations and quotations omitted).

In short, the forum analysis is a complex, confusing, and rigid judicial invention that unduly burdens free speech. Arizona courts should not interpret the free speech provision of the Arizona Constitution under the forum analysis

framework, and should instead utilize the more flexible and common-sense incompatibility test first established in *Grayned* and adopted by California and Connecticut.

CONCLUSION

Based on all of the foregoing, as well as the reasons stated in Appellants' Opening Brief, the ACLUAZ respectfully requests that the Court reverse the lower court's decision in this matter.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

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