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-SA

AMICUS CURIAE BRIEF OF RIDE-SHARING DRIVERS AND PASSENGERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Constitutional Provisions

Pursuant to ARCAP 16, ride-sharing drivers and passengers Paul G. Rowe, Stephen Keierleber, Mackenzie Semerad, Stephen Doucette-Riise, and Jeremiah Willet respectfully submit this *amicus* brief in support of Petitioner State of Arizona ("State"). Counsel for the State and the City of Phoenix ("City") have consented to the filing of this brief.

INTEREST OF *AMICI*

Amici are ride-sharing drivers and passengers who have provided or used ride-sharing services to and from Sky Harbor for several years. The drivers are independent contractors who use ride-sharing platforms to pick up and drop off passengers at the Airport, among other places. They rely on ride-sharing services as a major source of income. The riders rely on these services for safe, efficient, and inexpensive ground transportation to access Sky Harbor.

Ordinance G-6650 substantially raises fees for these services. As a result, ride-sharing drivers will suffer a reduction in business and a significant loss of income, and ride-sharing riders will lose a primary means of transportation and/or bear the burden of substantially higher costs for the service of transportation to and from the Airport. These are precisely the sort of parties contemplated by the authors of Proposition 126 and the voters who added it to the Constitution as Article IX, Section 25.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Arizona Constitution (art. IX, § 25—hereafter Section 25) prohibits cities from "impos[ing] or *increas[ing]* any…*transaction-based*…*fee*…or assessment on the privilege to engage in, or the gross receipts of sales or gross income derived from, *any* service performed in this state." (Emphasis added). Despite this unequivocal prohibition, adopted overwhelmingly by voters in 2018, the City *twice* voted to increase fees and impose new fees on ride-sharing services to or from the Airport. The City now says these fees are not transaction-based and are not imposed on the privilege of engaging in a service, but are instead some kind of use-charge for access to Airport facilities. But that argument fails for several reasons.

First, it is the barest sort of formalism. The service in question *is* the service of providing transportation to and from the Airport. The City's argument depends on the distinguishing between (a) the service of carrying people to the Airport and (b) access to the Airport by service providers. But courts "avoid hypertechnical constructions that frustrate legislative intent," *Cave Creek Unified School District v. Ducey*, 231 Ariz. 342, 352 ¶ 29 (App. 2013), and construe tax laws strictly against the government and in favor of taxpayers, *Arizona Tax Commission v. Dairy & Consumers Cooperative Association*, 70 Ariz. 7, 18 (1950). Moreover, they construe ballot initiatives such as Section 25 so as to "effectuate the intent of

those who framed it and the electorate that adopted [them]." *State v. Pereyra*, 199 Ariz. 352, 354 ¶ 6 (App. 2001). Courts also avoid formalism in tax law. *See, e.g.*, *Centric-Jones Co. v. Town of Marana*, 188 Ariz. 464, 474–75 (App. 1996); *Cal. Cotton Coop. Ass'n v. Ariz. Dep't of Revenue*, 169 Ariz. 261, 265 (App. 1991). These fees are, in practice and intent, charges on the service of transporting people to or from the Airport.

Second, the City's litigation position should be viewed skeptically because the City itself previously described the fees on ride-sharing services at the Airport as "fees or taxes" and as "*trip* fees"—meaning fee per trip—rather than as charges to use Airport property. The latter argument was fashioned only for purposes of this case. The December 18, 2019, Report that was before the City Council when it voted on the fees characterized them as "trip fees." *See* City's App. No. 7 at 1. And the reason the Council voted on the fees *twice*—once on October 16, 2019, and again on December 18, 2019—is because *the City itself* determined they were new or increased taxes or fees under A.R.S. § 9-499.15, which prohibits municipalities from imposing or increasing taxes or fees without proper notification procedures. These are all admissions by the City that the increased fees are transaction-based service (trip) fees, not mere "use charges."

Third, the City's argument that the fees are actually use charges is nonsensical because ride-sharing companies are not paying to access Airport

facilities in the same way that restaurants, souvenir shops, or commercial airlines are. They do not make any lease, contract, or exclusive use agreement, which are all standard for actual commercial use of public facilities. Nor do they engage in competitive bidding, which is required for commercial concession activities at the Airport. And the City raised the fees on ride-sharing services as a legislative act—not in a proprietary capacity, but in a governmental capacity.

Finally, the City's argument that it is merely attempting to recover costs of providing infrastructure for ride-sharing does not survive even cursory review. No such fees are assessed on other, more frequent, users of curbside infrastructure, such as private citizens. Also, the Ordinance maintains or reduces existing fees on *non*-ride-sharing commercial services, such as taxis. Third, the vast majority of the increased fees go not to ride-sharing infrastructure, but to the Sky Train, which ride-sharing passengers do not use. Finally, the fees were not set by examining the impact of ride-sharing at Sky Harbor, but by reviewing what *other* airports around the country charge for these services.

Section 25 changed the legal landscape in this State. While the City may have been able to impose or increase fees on services before its passage, this is no longer permissible. Of course, nothing prohibits the City from negotiating at arm's length for the cost of using publicly-owned facilities, but that is not what happened here. Instead, it imposed a new fee and increased existing fees on the service of

ride-sharing to and from the Airport, and then tried to rationalize this in retrospect by claiming it was only charging for access to the Airport by ride-sharing services.

QUESTION PRESENTED

Does City of Phoenix Ordinance G-6650 violate article IX, Section 25 of the Arizona Constitution, which prohibits cities in Arizona from imposing any new fee or increasing any existing fee, by imposing new fees and increasing existing fees on ride-sharing services at Sky Harbor?

ARGUMENT

The Ordinance violates Section 25 because it imposes a new fee and increases an existing fee on ride-sharing services at the Airport.

Section 25's language is plain and unambiguous. It forbids cities from "impos[ing] or *increase[ing]* any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or *any other transaction-based tax, fee*, stamp requirement or assessment on the privilege to engage in, or the gross receipts of sales or gross income derived from, *any service* performed in this state." (Emphasis added).

In this case, the drop-off fee of $4.00, increasing annually to $5.00 in 2024 and then by the consumer price index (CPI) thereafter, on ride-sharing services to Sky Harbor is the imposition of a new fee that did not exist before December 31, 2017. Additionally, the pick-up fee of $2.66 was in effect before that, but the annual increases of those fees, also to $5.00 by 2024 and then by CPI thereafter,

were not. Thus, the Ordinance both imposes a new fee and increases an existing fee.

The City does not dispute that ride-sharing platforms and drivers provide "service[s]."[1] But it argues that the new and increased fees are not prohibited by Section 25 because they are really "charges" imposed "on businesses that want to use [the] Airport." City Resp. at 2. Section 25, it says, only prohibits fees that are like taxes, *see, e.g.*, *id.* at 31—even though Section 25 uses both words. That argument fails for the reasons stated below.

I. The fees are transaction-based.

The City argues that the fee is not transaction-based, because it is not "triggered by a commercial agreement." *Id*. at 14. This is both false and fallacious.

First, the fee *is* triggered by the transaction of a ride-sharing driver carrying a passenger to the Airport. It is imposed for "pick-ups" or "drop-offs" by commercial providers. "Pick-ups" and "drop-offs" are not defined in the Ordinance, but are used repeatedly and exclusively in the Ordinance in connection with the hire of a ride to or from the Airport. The fee does not apply to private parties who give friends rides. It does apply to "companies" (a commercial term)

[1] Incidentally, A.R.S. § 28-9551(3)-(4) defines the operation of ride-sharing platforms and transportation as "services."

and drivers for those companies who—"in exchange for payment"—operate vehicles engaged in the business of "picking up or dropping off … passenger[s] on [*sic*] an airport." City's App. No. 4 at 6. To construe this as anything other than a fee based on the transaction of a hired ride to/from the Airport would be the height of formalism. As a common-sense matter, this fee is transaction-based.

The City's argument to the contrary consists of dividing this common-sense transaction into parts, then showing that no individual part would be subject to the fee, then concluding that the fee must not be transaction-based. For example, it contends that if several riders shared a car, with each negotiating a separate price with the driver, the fee would only be assessed once, not on each individual contract. City Resp. at 22. But such an arrangement (e.g., through Uber's UberPool feature[2]) would *still* qualify as a single "transaction," since it would be a single commercial exchange, *cf. State Tax Comm'n v. Holmes & Narver, Inc*., 113 Ariz. 165, 168–69 (1976), and the fee *would* still apply to *that* transaction. Moreover, Section 25 does not merely prohibit *per* transaction taxes; it prohibits transaction-*based* taxes, and a tax on a group of transactions is still "transaction-based." Thus the City's hypothetical fails to show that this fee is not transaction-based. The City also argues that the fee would still apply if a ride-share company were to provide a "free month of rides." *Id.* But these free rides would still be

[2] https://www.ridester.com/uberpool-faq/

transactions, since they would be available only to subscribers. *Truly* free rides are not covered by the Ordinance (and the City does not claim otherwise) precisely because they are not *transactions*.[3] Therefore, this purported counterexample also fails to show that the fee is not transaction-based.

It is unnecessary to engage in this parsing of "transaction," however, because this Court does not indulge in "[f]ine semantic or grammatical distinctions, legalistic doctrine … [or] hypertechnical constructions that frustrate [voter] intent." *Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89, 95 ¶ 21 (2019) (citations and quotation marks omitted). Instead, applying Section 25 requires a focus on "syntax, history, initial principle, and … fundamental purpose." *Id.*

The publicity pamphlet makes Section 25's purpose plain. Voters were told that it would protect them against "sales taxes for services" such as had recently been proposed in other states. City's App. No. 1 at 24–26. Sales taxes on services means taxes on services that echo taxes on items.[4] Here, the Ordinance accomplishes this by imposing a "fee" that is triggered by the very nature of the

[3] The City observes that courtesy vehicles must pay the fee, but this only applies to situations where "the authorized provider or driver does not *directly* charge" the rider (emphasis added). City Resp. at 22. In other words, this provision primarily concerns hotel shuttles, which are *indirectly* paid for by customers.

[4] https://www.cbpp.org/research/state-budget-and-tax/expanding-sales-taxation-of-services-options-and-issues

service—in the same way that a tax on the "investment in grain" was "necessarily a tax on the grain itself" in *Archer-Daniels-Midland Co. v. Bd. of Equalization*, 48 N.W.2d 756, 759 (Neb. 1951), or that a tax on the "use" of soap is necessarily a tax on soap itself. *Mann v. McCarroll*, 130 S.W.2d 721, 725 (Ark. 1939). To claim this fee on transportation to the Airport is not on imposed on a service, but only on access to the Airport by companies that transport people there is like arguing that a tax on car repair isn't really a tax on car repair, but only on parts and labor.

Such formalism is particularly inappropriate here, given that transporting people to the airport has long been regarded as a distinct professional service. One ride-sharing company, Wingz,[5] actually specializes *just* in transporting people to airports. To say cities may *not* impose a fee on the *service* of driving people to the Airport, but *may* impose a fee on professional transportation companies that *access* the Airport is slicing matters too thin—and would defeat the voters' intent.

This Court is not "struck with blindness, and forbidden to know as judges what we see as men [and women]." *Rusak v. Holder*, 734 F.3d 894, 897 (9th Cir. 2013) (citation and quotation marks omitted). Arizona courts do not indulge in formalism in regard to restrictions on taxes, but instead interpret citizen initiatives that limit tax increases with an eye to "effect[uating] the voters' intent," *State v. Gear*, 239 Ariz. 343, 345 ¶ 11 (2016), and protecting taxpayers. *See, e.g., Ariz.*

[5] http://www.wingz.me.

Tax Comm'n, 70 Ariz. at 18. The Ordinance is a fee or tax on the service of Airport transportation, and legalistic legerdemain should not disguise that fact.

II. Before the filing of this Special Action, the City *itself* called the fees on ride-sharing services at Sky Harbor "fees or taxes."

Before adopting its current litigation position, the City acknowledged it was adopting a new fee, not as a use-charge, but as a form of exaction on the service of transporting people to and from the Airport. When the City Council passed the Ordinance, its Report action stated: "The proposal seeks to increase *trip fees* for permitted [ground transportation] providers, establish drop-off *trip fees* for providers, and provide for predictable, annual *trip-fee* rate increases." (Emphasis added). City's App. No. 7 at 1. In other words, the Report contemplated charges based on trips, not on use of facilities. Nowhere does the Report describe the fees on ride-sharing services as "charges imposed … on businesses that want to use [the] Airport." City Resp. at 2.

In addition, after the City Council initially voted on and passed identical fee increases on October 16, 2019, it then determined *on its own* that it had violated the notice requirements of A.R.S. § 9-499.15, which forbids municipalities from "assess[ing] any new taxes or fees or increas[ing] existing taxes or fees … *on a business*" without certain procedures. (Emphasis added). It therefore scheduled a

new vote for December 18. City of Phoenix Public Notice: Tax & Fee Changes.[6] Section 9-499.15 applies *only* to fees "*on a business*." It does not apply to anything else, such as charges to use Airport facilities. This indicates that when the City enacted the Ordinance, it believed the fees were not use-charges, but "fees or taxes" "on [the] business" of transporting people to the Airport.

III. The ride-sharing fees are not charges for commercial use of the Airport.

The City says the fees are "for using publicly owned property," City Resp. at 32, and "are paid only for commercial use of the Airport." *Id*. at 2. But the fees have no indicia of a commercial use agreement. Neither ride-sharing platforms nor drivers make any lease, contract, or other agreement to access Airport facilities. On the contrary, the permits under which they operate expressly indicate in all caps and boldface:

> **THIS PERMIT SHALL NOT BE CONSTRUED TO BE A CONTRACT, AGREEMENT OR GRANT OF A FRANCHISE OR ANY PROPERTY RIGHT TO ENGAGE IN COMMERCIAL ACTIVITY AT THE AIRPORT…**

City's App. No. 2 at 7; No. 3 at 7. In other words, neither ride-sharing platforms nor drivers are paying for a right to engage in commercial activity at the Airport. They are instead being assessed a fee for providing a service.

[6] https://www.phoenix.gov/public-notice-tax-and-fee-changes

This is why the City's analogy to airlines or concessionaires is inapt. Airlines sign complex "use and lease agreements" that govern the conditions under which they use Airport property, as well as payment for that use.[7] The same is true of concessionaires, such as restaurants, which must negotiate exclusive use agreements with the City. Moreover, all such commercial activities at the Airport must be managed and awarded through a competitive bid process.[8] But there is no competitive bidding for use of the curb, or any other Airport facility by ride-sharing companies. That is because the fees are not charges to access Airport facilities, but fees assessed on a service.

For the same reasons, the Airport is not "exercis[ing] its proprietary rights." City Resp. at 1. When the government acts in a proprietary capacity, certain safeguards such as the procurement process ensure that it appropriately disposes of publicly-owned resources. Of course, none of that happened here.

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[7] *See* https://www.faa.gov/airports/aip/media/airport-business-practices-and-their-impact-on-airline-competition.pdf ("Airports and airlines have developed complex contractual arrangements … to govern their ongoing business relationships. These agreements are legally binding contracts that specify the terms and conditions of the airlines' use of and payment for airfield and terminal facilities.").

[8] *See* https://www.skyharbor.com/business/Opportunities/Concessions ("All concession space at Phoenix Sky Harbor International Airport … is awarded through a competitive process managed by the City's Aviation Department.").

IV. The City's contention that ride-sharing fees are assessed merely to offset the costs of ride-sharing infrastructure at the Airport is not supported by the record.

The City claims the fees "fund the maintenance and improvement of *the same* property and infrastructure" that ride-sharing companies "use to conduct their business." *Id*. at 9 (emphasis added). That is not true.

First, ride-sharing platforms, on whom the fees are assessed, *do not use any infrastructure at all*. Ride-sharing platforms are software. Uber, Lyft, etc., are merely communication platforms by which drivers and passengers connect. Unlike airplanes or restaurants, they do not, and cannot, use physical infrastructure. And the City insists that the fees are assessed *on the platforms*, not on drivers or passengers. *See id*. at 4, 9.

Second, if fees are assessed to fund "the same property and infrastructure" used by ride-sharing *drivers*, then why aren't they also assessed on others who use airport infrastructure at greater rates? For example, private drivers drop off loved ones and use Airport infrastructure, but no fees are assessed on them. Non-commercial traffic accounted for 20,669,915 Airport trips in 2019, compared to only 2,560,085 commercial trips. City's App. No. 5 at 37. Even if ride-sharing companies constituted *all* ground transportation providers, which they do not, that would still be only 11% of Airport traffic.

The City also elected not to increase rates for other *commercial* users of infrastructure. For example, it *decreased* fees on taxis picking up passengers at the Airport.[9] City's App. No. 6 at 26. Yet, those "profit-making activities" also involve using Airport infrastructure. Thus, the City's argument that the fees merely offset the costs of infrastructure used by ride-sharing services is unpersuasive.

Third, most of the fees do not go to ride-sharing infrastructure at all. Of the $26 million the City believes the increased fees will raise, over $18 million will go to the Sky Train.[10] But the Sky Train is not ride-sharing infrastructure. Ride-sharing passengers do not use it when dropped off at Airport curbside. And if the fees will *not* be used to primarily benefit ride-sharing drivers or passengers, it is hard to see how those fees "recover from … rideshare companies, their fair share of the costs of providing the infrastructure." City Resp. at 4.

Finally, the City claims it conducted a "comprehensive study of ground transportation trip fees charged at the Airport," and adopted the new fees "based on detailed financial analysis and projections for future usage at the Airport." *Id*. at 7.

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[9] The City also imposed a new $1.75 drop-off fee for taxis. That means an increase of only $.25 per round-trip ride, compared to $5.34 for ride-sharing drivers.

[10] *See* https://www.fox10phoenix.com/news/city-council-votes-to-increase-fees-on-rideshare-services-at-sky-harbor; https://www.thecentersquare.com/arizona/phoenix-council-to-vote-dec-on-rideshare-tax-hike-at/article_8b883bbc-0bc5-11ea-ac50-5383b69afea1.html.

But this analysis showed that the City's decision in setting the fees was based not on the cost of "maintenance and improvement of *the same* property and infrastructure" that ride-sharing providers use, *id*. at 9, but on what *other* airports charge for ride-sharing trips *elsewhere*. City App. No. 5 at 48-60.

In sum, the fees were not based on infrastructure use by ride-sharing services, and do not primarily go to pay for those costs; the fees are transactional service fees used to fund facilities unrelated to ride-sharing.

CONCLUSION

This fee is a transactional fee on the service of driving passengers to or from the Airport. The fee is triggered by Airport use only in the sense that the service of driving someone to the Airport *necessarily* involves using the Airport. The Court should refuse the City's invitation to apply what this Court has called "[f]ine semantic or grammatical distinctions," or "hypertechnical constructions" that will lead to "results quite different from the objectives which the [voters] intended to accomplish" in Section 25. *Saban Rent-a-Car*, 246 Ariz. at 95 ¶ 21. This is not a use-charge, but a fee imposed on the transaction of hiring a ride to the Airport.

Respectfully submitted this 3rd day of March, 2020 by:

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