COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBORAH ROSE,

Plaintiff / Appellant

v.

TOWN OF PAYSON; CHRIS HIGGINS, in his official capacity as Mayor of the Town of Payson; BARBARA UNDERWOOD, in her official capacity as Vice-Mayor of the Town of Payson; BRETT FLAHERTY, in his official capacity as a Council Member of the Town of Payson; JOEL MONA, in his official capacity as a Council Member of the Town of Payson; SCOTT NOSSEK, in his official capacity as a Council Member of the Town of Payson; JOLYNN SCHINSTOCK, in her official capacity as a Council Member of the Town of Payson; SUZY TUBBS-AVAKIAN, in her official capacity as a Council Member of the Town of Payson; and TROY SMITH, in his official capacity as the Town Manager of the Town of Payson,

Defendants / Appellees.

No. 2 CA-CV 2024-0346

Gila County Superior Court
No. S0400cv202400271

APPELLANT'S CORRECTED OPENING BRIEF

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INTRODUCTION

This case is about the Payson Town Council's $70 million "emergency" bond measure to fund several municipal projects, from ordinary items like street and drainage improvements to larger projects like "an aquatic and recreation center," that Town staff had been planning for many years. The Arizona Constitution entitles residents to put such measures to a vote by calling a referendum, Ariz. Const. art. 4, pt. 1, § 1—and to protect that right, laws ordinarily do not take effect until 30 days after passage, giving voters the chance to refer measures to the ballot. A.R.S. § 19-142(B). But the Payson Town Council prevented any referendum on the bond measure by including an emergency clause and invoking an exception to the referendum process in Section 19-142(B).

Section 19-142(B)'s "emergency" exception, however, only applies to actual "emergency measures"—those that are "necessary for the immediate preservation of the peace, health or safety of the city or town." That is not the case here. Instead, by the Town's own admission, it bypassed the referendum process simply to obtain slightly better municipal bond rates and to avoid an election on a controversial measure.

Plaintiff-Appellant Deborah Rose sought declaratory and injunctive relief against the "emergency" bond measure. But the Superior Court denied relief, reasoning that it was required to defer to the Town Council's decision to include an

emergency clause, and in the alternative, that Rose's challenge was moot because she failed to file a referendum petition.

That was error. Whether Section 19-142(B) authorizes an emergency measure is a matter for judicial cognizance, not deference. Moreover, it makes no sense to require an elector to file an *unauthorized* referendum petition, and conduct a sham referendum campaign, simply to preserve her right to challenge a false emergency clause in court.

Although the Town Council repealed the Resolution at issue after Rose appealed, *see* Payson Town Council, Resolution No. 3423 (Oct. 23, 2024)[1] (the "Repeal Resolution"), her claim for declaratory judgment still merits judicial review. That is because this case raises issues of exceptional public importance that are likely to recur yet evade review due to the extremely limited timeframe available to challenge a government entity's use of an emergency clause. Applying the mootness doctrine in cases like this one would effectively block appellate oversight, undermining accountability in matters of significant public importance.

This Court should reverse.

[1] https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2931434/Res_3423_Repealing_Resolution_3409.pdf

COMBINED STATEMENT OF FACTS AND STATEMENT OF THE CASE

Factual Background

On August 21, 2024, the Payson Town Council passed Resolution No. 3409 (the "Resolution"), authorizing the sale of $70 million in bonds. ROA1 ep. 2 ¶ 14. Such measures are ordinarily subject to referendum petition by residents, and to this end, A.R.S. § 19-142 provides that municipal resolutions and ordinances may not go into effect until 30 days after passage, "except emergency measures necessary for the immediate preservation of the peace, health or safety of the city or town."

The Town added an emergency clause to its resolution (the "Emergency Clause") which states:

> The immediate operation of the provisions of this Resolution is necessary for the preservation of the public peace, health and safety, *particularly to immediately sell the Obligations to secure the best, available economic terms therefor,* and an emergency is hereby declared to exist, and this Resolution will be in full force and effect from and after its passage by the Council and it is hereby excepted from the referendum provisions of the Constitution and laws of the State of Arizona. After any of the Obligations are delivered by the Trustee to the Underwriter and upon receipt of payment therefor, this Resolution shall be and remain irrepealable until the Obligations and the interest and premium, if any, thereon shall have been fully paid, cancelled and discharged.

ROA1 ep. 14 § 11 (emphasis added).

The Emergency Clause exempted the Resolution from referendum and allowed it to take effect immediately. But in reality, there was no "emergency" at all. The only *purported* emergency discernible from the language of the Resolution was the Town Council's desire "to immediately sell the Obligations to secure the best, available [sic] economic terms therefor." *Id.*

Statements by Town staff, councilmembers, and others during official proceedings indicated several other rationales for the Emergency Clause, too, but none of them satisfy Section 19-142(B)'s requirement that "emergency measures" be "necessary for the immediate preservation of the peace, health or safety of the city or town."

In a presentation to the Town Council on the proposed bond measure the day the Resolution was passed, the Town's bond underwriter speculated that adopting the Resolution "with an emergency clause would allow the Town to take advantage of favorable interest rates or rallies in the market and to get ahead of the expected influx of competing issuances in late September/October as other issuers look to lock-in rates before the uncertainty related to the November Election." ROA1 ep. 3 ¶ 16. The underwriter acknowledged, however, that he had "no ability to predict interest rates," and that his forecasts were uncertain. *Id.* ¶ 17. He stated: "By passing an emergency clause, it simply gives us a little more flexibility to see into

the market and within the timeframe that we have, look for opportunistic times to go out and price the bond issues in the market." *Id.* ¶ 18.

One of the Town's underwriters also indicated that the bond market has been consistently favorable throughout the past year, *see id.* ¶ 19 ("For most bond issues sold in Arizona this year, demand has exceeded supply."), and he presented a chart of "tax-exempt interest rate movement" in which rates for comparable bonds have fluctuated by less than 0.8 percentage points over the past year, *id.* ¶ 20. Further underscoring the speculative nature of their advice, the underwriters stated that bond rates had increased by 0.6–0.8 percentage points in two recent presidential elections, but did *not* meaningfully increase in two other recent presidential elections. *See id.* at ep. 4 ¶ 21 ("The Obama/Romney and Biden/Trump elections saw generally stable rates before election day and modest declines after election day.").

During the same meeting, Town Council members made several statements about their motivations for using an Emergency Clause to insulate the Resolution from the referendum process. They noted that they wanted to enact the measure before an upcoming change in the Town Council's composition resulting from a recent primary election. For example:

- "It may take years to recover the momentum if we don't pull the trigger." *Id.* ¶ 23 (Councilmember Schinstock).

- "I did not hear any vision from the incoming council. They focused on criticizing our decision, and I really have no idea how they plan to move Payson forward." *Id.* (Councilmember Schinstock).

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

- Now we're making a third attempt to bring this community an indoor pool, and once again, the election results have put this project in jeopardy."). *Id.* ep. 4–5 ¶ 25 (Councilmember Schinstock).
- "We have endured too much political and personal criticism." ROA2 ep. 4.
- "It's been out there on the table for a long time, and a battle to get to this point." ROA1 ep. 4 ¶ 24 (Councilmember Flaherty).

The Town Council voted 5–1 to pass the Resolution. The sole dissenter, Councilmember Tubbs-Avakian, expressed her discomfort with the use of an emergency clause to bypass the democratic process. ROA2 ep. 4 ("The people have a voice and they should be allowed to vote on something this large."); *id.* (noting that the Council had used emergency clauses to bypass referenda "four times since [she has] been here").

During the August 21, 2024 meeting, the Town's underwriters explained that they "anticipate[d] entering the [bond] market … early in the month of September," and they "anticipate[d] closing the bond issue … at the end of September," "the week of September 30." ROA1 ep. 5 ¶¶ 29–30.

Deborah Rose is a Payson resident who has been politically engaged for many years, including running for Town Council and participating in several other political campaigns. ROA1 ep. 1–2 ¶¶ 1–2; Tr. at ep. 22:25–23:1, 32:25. She was opposed to the Resolution, and she wished to organize a referendum to overturn the measure by a popular vote. ROA1 ep. 5 ¶¶ 27, 28. She could not do so, however, because the Resolution's Emergency Clause specifically stated that the Resolution was exempt from referendum. *Id.* ¶ 28. In fact, when Rose went to the Town Clerk's office, she had a lengthy conversation with the Town Clerk and another staff member in which she was informed that filing a referendum petition would be "pointless" "because of the emergency clause."[2] Tr. at ep. 42:11–21.

[2] As detailed in Section III below, this exchange was discussed at length during the preliminary injunction hearing, and Rose proffered testimony about it, but the Superior Court declined to hear her testimony and ruled against her challenge in part because of her failure to obtain a referendum petition. It was improper for the Court to disregard her testimony on the very matter on which it ruled, but the key point here is that, as a matter of law, the Emergency Clause did not allow Rose to organize a referendum.

Procedural History

Rose filed suit on September 10, 2024, naming as defendants the Town of Payson as well as the mayor, all councilmembers, and the town manager (in their official capacities) and seeking declaratory and injunctive relief. ROA1 ep. 1. The same day, she filed an Application for Temporary Restraining Order (With Notice) and Preliminary Injunction, asking the Superior Court to enjoin the Resolution and arguing that the Emergency Clause (and by extension the entire Resolution, which was predicated on the timing the Emergency Clause allowed) violated Section 19-142(B) and unlawfully abridged the right of referendum under article IV, part 1, section 1 of the Arizona Constitution. ROA2 ep. 1–11.

Defendants opposed Rose's request for preliminary relief. ROA17. While they raised a variety of arguments regarding procedure, jurisdiction, and the applicability of Section 19-142(B), Defendants did not explain how the enactment of the Resolution *was* in fact "necessary for the preservation of the public peace, health, and safety." *Id.*

On September 24, 2024, the Superior Court held a hearing on Rose's request for preliminary relief. ROA21. After hearing legal argument from both sides regarding standing, mootness, and whether the Emergency Clause was subject to judicial review, the court denied Rose's application for a temporary restraining order and preliminary injunction. Tr. at ep. 79:18–20. The Superior Court found

that Rose did "not have a strong likelihood of success on the merits." Tr. at ep. 73:7. It declined to decide whether Section 19-142 allowed Defendants to invoke an "emergency" and bypass the referendum process based on the justifications Defendants had offered regarding "preservation of the public peace, health or safety," and instead deferred to the Town Council's judgment on that question. The court also found that the case was moot because Rose did not file a petition for referendum within 30 days of the Resolution's enactment. *See* Tr. at ep. 22:22–24, 42:10–21; 80:20–21.[3]

The parties stipulated to consolidate the September 24, 2024 hearing on Rose's application for preliminary relief with a trial on the merits pursuant to Arizona Rule of Civil Procedure 65(a)(2), and on October 2, 2024, the Superior Court entered a final judgment in favor of Defendants on all counts. ROA23. Rose filed a timely notice of appeal on October 9, 2024. ROA24; *see* Ariz. R. Civ. App. P. 9(a).

[3] Addressing the remaining preliminary injunction factors, the Superior Court recognized the parties' arguments on both sides regarding irreparable harm, balance of interests, and public policy, and that these factors "trail[] in importance to the first [factor]," namely, "whether there's a strong likelihood of success on the merits." Tr. at ep. 75:15–17.

Post-Appeal Developments[4]

After Rose filed her notice of appeal, on October 23, 2024, the Town Council repealed the Resolution, stating that "as a result of multitude of circumstances outlined in the Staff Report to Council dated October 23, 2024,[5] the Town has been placed in the unfortunate position that it cannot realistically sell bonds to fund numerous improvements desired by the community." Repeal Resolution at 1.[6]

The staff report explained that the Town Council had "worked with the community and staff for more than 3-years" and "took several steps to create funding to build a better Payson and meet the needs of the community, including the authorization to sell excise tax backed bonds." Staff Report to Council at 4 (Oct. 23, 2024). However, the report concluded that because of a "multitude of circumstances outlined in the previous sections"—including Rose's lawsuit and appeal, "other litigation" regarding separate Town Council measures, and turnover

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[4] This Court may take judicial notice of town council resolutions, reports, and other documents publicly available on a government website whose authenticity cannot reasonably be disputed. *See* *Encanterra Residents Against Annexation v. Town of Queen Creek*, No. 2 CA-CV 2020-0002, 2020 WL 1157024, at *8 ¶ 33 n.9 (Ariz. App. Mar. 9, 2020).

[5] https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2932685/Staff_Report_-_Res_3423_To_Rescind_Res_3409.pdf

[6] https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2931434/Res_3423_Repealing_Resolution_3409.pdf

in elected officials—it could not "realistically sell [the] bonds" authorized by the Resolution. *Id.*

STATEMENT OF THE ISSUES

I. Did the Superior Court err in declining to hold that the Emergency Clause was invalid?

II. Did the Superior Court err in deferring to the Town on the validity of the Emergency Clause?

III. Did the Superior Court err in holding that Rose could not challenge the Emergency Clause because she did not first file a referendum petition?

IV. Should this Court decide this case, despite the Town's repeal of the Resolution, where the Town's misuse of emergency clauses is likely to recur, the case involves issues of great public importance, and emergency clause challenges will virtually never see appellate review before it's too late to undo the measure in question?

STANDARD OF REVIEW

This Court "review[s] questions of statutory interpretation and constitutional law de novo." *State ex rel. Thomas v. Klein*, 214 Ariz. 205, 207 ¶ 5 (App. 2007). The Court also reviews questions of standing and mootness de novo. *See Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523 ¶ 11 (2021).

Likewise, while the Court "review[s] a denial of injunctive relief for an abuse of discretion" and "defer[s] to the court's findings of fact unless clearly erroneous." *Arizona Creditors Bar Ass'n v. State*, 549 P.3d 205, 208 ¶ 8 (Ariz. App. 2024) (citation omitted), it "review[s] de novo [the Superior Court's] legal conclusions." *Id.*; *see also* *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1, 3 ¶ 11 (App. 2016).

ARGUMENT

I. The Emergency Clause was illegal.

"The Arizona Constitution reserves the powers of initiative and referendum to the people." *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 488 (1991). Specifically, Article 4, Part 1, Section 1 guarantees Arizonans' right "to circulate petitions and refer to a popular vote legislation which has been enacted by their elected representatives." *Wennerstrom*, 169 Ariz. at 488.

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

should become immediately operative, and unless it is approved by the affirmative vote of three-fourths of all [council] members … and … by the mayor." *Id.*

The "emergency measure" exception does not, however, "extend [to] municipalities the unconstrained use of emergency declarations to insulate their ordinances from popular vote." *Israel v. Town of Cave Creek*, 196 Ariz. 150, 154–55 ¶ 22 (App. 1999); *see also State ex rel. Humiston v. Meyers*, 380 P.2d 735, 776 (Wash. 1963) ("[T]he legislature has no right to tack an emergency clause onto an act in order to prevent the people from exercising their right of referendum, unless that act is clearly within the exception … ."). "It would be scandalous indeed if the constitutional right of referendum could be thwarted by the mere use of false labels." *State ex rel. Kennedy v. Reeves*, 157 P.2d 721, 723 (Wash. 1945).

If a municipality wants to bypass the constitutional right of referendum and enact an immediately effective law, Section 19-142(B) sets a high bar. To begin with, "[t]he word 'emergency' has a well understood meaning. It is defined and understood as: 'An unforeseen combination of circumstances which calls for immediate action.'" *Garvey v. Trew*, 64 Ariz. 342, 354 (1946) (quoting Webster's New Int'l Dict., 2d ed.); *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."); *In re Drummond*, 543 P.3d 1022, 1025 ¶ 7 (Ariz. 2024) ("Absent a statutory definition,

courts generally give words their ordinary meaning and may look to dictionary definitions.").

Thus, in *Meyers*, 380 P.2d 735, the court found an emergency clause invalid in a statute that amended the state's gambling laws to allow cardrooms and bingo. "[W]e are unable to conceive of an emergency springing from a law which has been in force for 54 years," it said. *Id.* at 740. In *State ex rel. Burt v. Hutchinson*, 21 P.2d 514 (Wash. 1933), too, it found an emergency clause improper in a law concerning the regulation of horse-racing, because "[i]t cannot be seriously contended" that the regulation was "justified as 'necessary for the immediate preservation of the public peace, health or safety,'" and to enforce the clause would "deprive[] [the voters] of the right of passing upon the [statute] by referendum." *Id.* at 514–15. And in *Reeves*, *supra*, an emergency clause was found inapplicable to a law expanding state jurisdiction over timberlands. Although the government argued that the court should defer to its assertion of an emergency, the court refused. "[T]he custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent," it said, "has become so general" that deference was inappropriate. 157 P.2d at 724. Perhaps the very first case ever to interpret the referendum power was *Oklahoma City v. Shields*, 100 P. 559 (Okla. 1908), decided less than a year after Oklahoma became the first state to establish that right. *Shields* concerned a law providing for

street improvements—as does the Resolution in this case—and, as in this case, the legislators included an "emergency" provision in order to shield the law from referendum. The court found that improper. First, it refused to engage in rubber-stamp deference toward the emergency clause, because such an "unlimited power" to bypass voters would mean "the entire effects of the Constitution were destroyed; the initiative and referendum must go and we return … to the ordinary forms of legislating in other states." *Id.* at 563. Then it held that emergency clauses are proper only where "the safety of our people [is] in danger" from such serious incidents as riots or pandemics. *Id.* at 564. But repaving the streets did not fall within those limits, because "public peace was [not] being disturbed or in danger." *Id.*

Similarly, in *City of Marion v. Haynes*, 164 S.W. 79 (Ky. 1914), Kentucky's highest court found that an emergency clause was improper in a law adopted for creating a municipal waterworks. It defined "emergency" as "some sudden or unexpected occasion for action," which is "out of the ordinary state of things," which "requires immediate attention." *Id.* at 84. But creating a waterworks was not of this class: "[w]hile waterworks and a drainage system may be very desirable … their absence no more creates an emergency now than it has done at any time in the past 10 or 20 years, and the declaration of the general council of the town in its ordinance, that an emergency existed, did not make it so." *Id.*

Here, Section 19-142(B)'s plain language gives three substantive requirements for an emergency clause (all of which echo those used in Washington and Oklahoma): (1) it must be "necessary," (2) the need must be "*immediate*," and (3) it must be directed toward the "*preservation* of peace, health or safety of the city or town" (emphasis added).

None of the Town's rationales for the Resolution satisfy Section 19-142(B)'s "emergency" requirements because they were foreseeable (contrary to the well understood meaning of "emergency"), and because they were not necessary, immediately needed, or directed toward preserving peace, health, or safety.

A. Trying to time the municipal bond market is not necessary for the immediate preservation of peace, health or safety.

The Town's principal justification for declaring an emergency—and the only one indicated in the Resolution itself)—was "to immediately sell the Obligations to secure the best, available [sic] economic terms therefor." ROA1 ep. 14 § 11. But that is not an "emergency" as contemplated by Section 19-142(B).

The Resolution includes no findings or explanation to justify the contention that market conditions were so volatile as to require emergency issuance of a $70 million bond *now*, rather giving residents 30 days to exercise their constitutional right of referendum. Moreover, even the Town's own staff and underwriters admitted during the council meeting that they have "no ability to predict interest rates," that municipal bond rates have been consistently favorable all year, and that

presidential elections (the apparent reason for their belief that rates will increase) have historically involved bond rate increases of at most 0.6–0.8 percentage points, and sometimes no rate increases. ROA1 ep. 3–4 ¶¶ 17, 19, 21.

Simply put, broad macroeconomic trends and an upcoming election do not constitute an "emergency." They do not represent a threat to the public health and safety, or an urgent or unforeseen threat to the peace or welfare of the community. Even assuming the bond market was slightly more favorable in September/October 2024 than it would have been in November 2024—an assumption that is not supported by the Town's own analysis—that is not a basis that is "necessary for the immediate preservation of the peace, health or safety" of the Town. A.R.S. § 19-142(B). Predictions about future financial conditions for the issuance of bonds have little to do with "peace, health, or safety." And more favorable financial terms on a new bond sale do not result in the "immediate preservation" of any of these purposes.

B. Advancing long-anticipated public works projects and political calculations is not necessary for the immediate preservation of peace, health or safety.

Town Council members repeatedly stated during the August 21, 2024 meeting that the bond measure and associated municipal projects have been foreseen and contemplated for several years, and that they are not the result of sudden or emergency circumstances. For example, Councilmember Nossek said

that the Resolution followed "over three years of open meetings, countless hours of study, discussion, and a great deal of citizen input. This decision is not being rushed into by any stretch of the imagination." ROA1 ep. 4 ¶ 24. Councilmember Flaherty likewise said: "What we're discussing is nothing new. It's not rushed. It's been out there on the table for a long time." *Id.*

Indeed, the preamble to the Resolution lists a variety of projects to be funded with municipal bonds, all of which were eminently foreseeable as part of routine municipal governance—not emergent or unforeseen needs that required immediate funding to preserve peace, health, or safety. *See* ROA1 ep. 10 ("WHEREAS the Mayor and Council … have determined to finance the construction of public safety facilities, streets improvements, paths and trails improvements, drainage improvements, parks and recreation facilities, an event center, an aquatic and recreation center, and additional related municipal facilities and capital improvement projects … .").

In fact, councilmembers' stated justifications for rushing the Resolution through on an "emergency" basis focused far more on political calculations than any purported threat to peace, health, or safety, and specifically, on finding a way to avoid a popular vote on the Resolution or allowing the new Town Council to affect the policy:

- "It may take years to recover the momentum if we don't pull the trigger." *Id.* ep. 4 ¶ 23 (Councilmember Schinstock).
- "I did not hear any vision from the incoming council. They focused on criticizing our decision, and I really have no idea how they plan to move Payson forward." *Id.*
- "Now we're making a third attempt to bring this community an indoor pool, and once again, the election results have put this project in jeopardy."). *Id.* ep. 4–5 ¶ 25 (Councilmember Schinstock).
- "We have endured too much political and personal criticism." ROA2 ep. 4.
- "It's been out there on the table for a long time, and a battle to get to this point." ROA1 ep. 4 ¶ 24 (Councilmember Flaherty).

Building an indoor pool is not akin to a riot or a pandemic, *cf.* *Shields*, 100 P. at 563–64, nor is it a "pressing necessity out of the ordinary state of things." *Haynes*, 164 S.W. at 84. Instead, while a pool (or a recreation center, or any of the other projects the Resolution listed) "may be very desirable," its absence "no more creates an emergency now than it has done at any time in the past." *Id.*

The reasons for enacting the Resolution were foreseeable for months, if not years, before the August 21, 2024 Town Council meeting, and nothing in the Resolution, staff reports, or the meeting itself suggests that any new information or

emergent development justifies bypassing the constitutional right of referendum. The Town's desire to time the bond market based on its own speculation about financial trends, and to advance political goals that were years in the making, was not "necessary for the immediate preservation of the peace, health or safety of" the Town. A.R.S. § 19-142(B). Thus, the Emergency Clause was invalid.

II. The Superior Court should have determined the Emergency Clause's validity without deferring to the Town Council.

The Superior Court did not simply hold that the Emergency Clause was valid. In fact, it never even addressed Rose's arguments that the Resolution was not immediately necessary to preserve peace, health, or safety. Rather, its decision from the bench indicated that it was declining to decide the issue *at all*, instead holding that the determination of those questions is a purely "legislative function," not a judicial one:

> [T]here are things, because we live in a democracy, that—that we can do if we don't like what a legislative body does. There's always another election. But it's the judge's job to call the balls and the strikes. … [I]t's not up to the judge to decide the merits of whether or not this——this bond issuance should move forward. That's a legislative function. That's a function of the town council.

Tr. at ep. 70:13–71:5. 72:18.

As the court went on to explain, it viewed its role in reviewing the Resolution's legality as simply ensuring that the Resolution was duly passed by a

supermajority—*not* determining whether its invocation of an "emergency" was appropriate or permissible under Section 19-142:

> [I]t's not for the court to decide whether this is a good idea or not. The ideas, or the requirement for the court is to decide whether or not this was legal for the town council to do what it did. These requirements of 19-142 require a supermajority in order to approve this measure. And that's exactly what they had. It was a 6-1 vote. And *this court finds that the court should give deference to that vote of the town council*, having considered the exhibits and attachments that were made to the pleadings here in this case.

Id. at ep. 72:15–73:3 (emphasis added); *see also, e.g.*, *id.* at ep. 71:19–72:6. This was error.

A. The Superior Court had a duty to decide whether the Emergency Clause complied with Section 19-142(B)'s requirements.

"The primary duty of [the] court is to interpret the laws of this state so that the people may know their rights." *White v. Bateman*, 89 Ariz. 110, 114 (1961). Arizona courts have repeatedly held that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 252 Ariz. 1, 5 ¶ 18 (2021) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), and that they may not abdicate that duty to other branches of the government by "deferr[ing] to [their] judgment" "as to issues of constitutional and statutory compliance." *Id.*; *see, e.g.*, *Johnson Utilities, L.L.C. v. Arizona Corp. Comm'n*, 249 Ariz. 215, 227 ¶ 52 (2020) ("Although we certainly recognize the constitutional authority of the Commission, it is our duty to interpret

the limit and extent of that authority, including whether the Commission's actions are authorized under section 3."); *Stambaugh v. Killian*, 242 Ariz. 508, 512 ¶ 21 (2017) ("The Department argues that we should defer to its interpretation of the statute based on its expertise. Because the legislature has directly and clearly spoken to the question at issue, this Court owes no deference to the Department's interpretation.").

The core question in this challenge—whether a municipality may lawfully bypass the right of referendum that is otherwise guaranteed to Arizonans as a constitutional right, based on a claim of "emergency"—is unquestionably a question "of constitutional and statutory compliance." *Sun City Home Owners Ass'n*, 252 Ariz. at 5 ¶ 18.

Moreover, it is a question that seriously and directly affects the constitutional rights of individual Arizonans, including Rose. *See Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir. 2003) ("It is a well established principle of constitutional law that the right to vote is fundamental, as it is preservative of all other rights."); *Ariz. All. for Retired Ams. v. Hobbs*, 630 F. Supp.3d 1180, 1198 (D. Ariz. 2022), *vacated on other grounds*, *Ariz. All. For Retired Ams. v. Mayes*, 117 F.4th 1165 (9th Cir. 2024) ("The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.").

Indeed, Arizona courts have decided questions under Section 19-142(B) without deferring to municipalities' own judgments regarding that law's meaning. In *Israel*, this Court held that an emergency clause was invalid as applied to a municipal annexation measure. 196 Ariz. at 154–55 ¶ 22. It explained: "The purpose of art. 4, pt. 1 is to reserve the power to the people to refer a legislative enactment to a popular vote. … *Its purpose is not to extend municipalities the unconstrained use of emergency declarations to insulate their ordinances from popular vote*." *Id.* (emphasis added); *see also Gieszl v. Town of Gilbert*, 529 P.2d 255, 258 (Ariz. App. 1974) (holding "that the emergency powers granted by A.R.S. § 19-142(B) to a municipality not having charter privileges are not effective as to an annexation ordinance passed pursuant to A.R.S. § 9-471").

Deference is *especially* inappropriate in a challenge like this one, because it concerns the voters' constitutional right to democratically control their government. As *Shields*, *supra*, observed, the Constitution's framers could not have intended "to institute … the doctrine of initiative and referendum, and to then place in the power of those who were chosen to make our laws the power to disobey and nullify it." 100 P. at 564. If the Town can "declare an emergency in

any event, whether it exists or not, then the doctrine of the initiative and referendum [is] simply a blindfold to deceive the people." *Id.*[7]

The Superior Court's observation that "there are things, because we live in a democracy, that … we can do if we don't like what a legislative body does," Tr. at ep. 70:13–14, was particularly ironic here, given that the Emergency Clause *restricts* precisely those "things" by insulating the Town Council's actions from the democratic process. Under Arizona's Constitution, if the people "don't like what a legislative body does," their proper recourse is *the referendum process*—which the Town Council sought to bypass precisely in order to prevent the democratic process from operating as it should.

It is true, as the Superior Court said, that "it's the judge's job to call the balls and strikes." Tr. 70:17. But it is also the court's job to call foul when the government violates the law. Judicial deference to the Town Council's decision in this case hindered the democratic process rather than facilitating it, and that deference was unjustified.

[7] Even the classic statement of judicial deference—footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), which this Court quoted in *Arizona Farmworkers Union v. Agricultural Employment Relations Bd.*, 148 Ariz. 47, 51 (App. 1985)—made clear that deference was *not* appropriate for cases involving "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," which is plainly true of the emergency clause challenged here.

B. Nothing in this case justifies deferring to the Town's judgment on a legal question.

In deferring to the Town's judgment regarding whether the Emergency Clause satisfied Section 19-142(B)'s requirements for an emergency, the Superior Court apparently found that the issue was a non-justiciable political question.[8] But the political question doctrine provides no basis for deference or abstention here. "Political questions" are matters that (1) "the constitution commits to one of the political branches of government" or (2) are "not susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 ¶ 7 (2006) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). This case involves neither situation.

First, nothing in Arizona's Constitution "commits" decisions regarding the legality of an emergency clause exclusively to legislative bodies like the Town Council. To be sure, it's up to the Council *whether* to include an emergency clause in a measure it passes (just as legislative bodies always have final say over what they put into the final text of bills or ordinances), but nothing in the Arizona Constitution implies that the *validity* of an emergency clause is a question reserved

[8] While the court did not specifically describe the issue as such, the parties' argumentation on this issue focused on the political question doctrine, Tr. at ep. 49:10, 50:15, 64:16–21, 66:1–5, and the court's reasoning drew from that doctrine. *See, e.g.*, *id.* at ep. 70:13–17 ("[T]here are things … that we can do if we don't like what a legislative body does. There's always another election. But it's the judge's job to call the balls and strikes.").

to the same legislative body. Indeed, as noted above, Arizona courts have reviewed the validity of municipal emergency clauses in the past. *See Israel*, 196 Ariz. at 155; *Gieszl*, 529 P.2d at 258. And rubber-stamp deference to an emergency clause would obviously render the referendum power an easily evaded formality.

Second, the question whether the Resolution is legitimately an "emergency measure"—that is, whether it is "necessary for the immediate preservation of the peace, health or safety of the city or town," A.R.S. § 19-142(B)—is "susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature*, 213 Ariz. at 485 ¶ 7 (citation omitted). As explained in the preceding section, the statute's plain language gives several objective criteria for courts to apply when evaluating an emergency clause: the emergency must be "unforeseen"; the action must be "necessary"; the need must be "immediate"; and it must be directed toward the "preservation" of peace, health, or safety.

Applying these standards is not subjective or discretionary. If, as here, the emergency clause is for a bond measure to fund expenses that by the Town's own admission have been foreseeable for months or years, then it is not *unforeseen*, and is not a valid reason to bypass the referendum process under Section 19-142(B). Likewise, if the measure funds new public works projects like a swimming pool or recreation center, then while it may well *advance* health or safety, it is not *necessary* and is not directed toward *preserving* health or safety.

The Supreme Court's recent decision in *Arizona School Boards Ass'n v. State* is instructive. 252 Ariz. 219 (2022). That case involved a single-subject challenge to four budget reconciliation bills. *Id.* at 220. The state argued that "whether the challenged bills comport with Arizona constitutional standards" was "a non-justiciable political question." *Id.* at 225 ¶ 21. The court "reject[ed] this untenable proposition," explaining that the "responsibility of determining whether the legislature has followed constitutional mandates that expressly govern its activities is given to the courts—not the legislature." *Id.* ¶¶ 21–22. It also reasoned that "manageable standards exist to resolve the question, as courts have enforced the title requirement and single subject rule for decades," and "[w]hether the legislature has complied" is simply a question of whether the bills' "language reflects a 'proper connection' to the budget as understood by an outside reader"—a task courts are eminently suited to carry out. *Id.* at 225–26 ¶ 23.

Likewise, here, determining whether the Emergency Clause complies with Section 19-142(B)'s requirements for "emergency measures" is the type of judicial review courts frequently engage in, and it involves an analysis courts are well equipped to undertake. There is no reason to abdicate that job to the legislative body that enacted the measure, particularly because doing so gives Arizonans like Rose no meaningful protection of their constitutional rights.

III. Rose did not need to file a referendum petition to challenge the Emergency Clause.

The Superior Court held that "even if [it were] wrong on whether or not the court should defer to the town on the issue of the emergency clause," Rose's lawsuit was "moot" because "there was no petition for referendum that was even attempted." Tr. at ep. 74:23–75:3. In holding Rose's challenge "moot" because she did not file a referendum petition, the Superior Court (1) misconstrued the mootness doctrine, (2) overlooked that filing a referendum petition would have been futile and unlawful, and (3) erroneously accepted two contradictory arguments from Defendants.

A. Rose's action was not moot because judicial relief was still available.

As an initial matter, in ruling that Rose's challenge was moot, the Superior Court misconstrued the doctrine of mootness. "A case becomes moot when an event occurs which would cause the outcome of the [case] to have no practical effect on the parties." *Sedona Private Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126, 127 ¶ 5 (App. 1998).

Here, however, the Superior Court *could* have provided relief: an injunction and declaration that the Resolution was invalid and unenforceable. That would have fully resolved her complaints. The fact that Rose did not file a referendum petition with the town clerk before filing this lawsuit did not render such relief

"impossible or without practical effect on the parties." *Sandblom v. Corbin*, 125 Ariz. 178, 182 (App. 1980).

In fact, the filing of a referendum petition had *nothing* to do with the efficacy of that relief. Rose simply claimed that the Resolution was invalid because an integral part of the Resolution (the Emergency Clause) unlawfully abridged the right of referendum. She asked the Superior Court to enjoin that Resolution and stop the bond sale that it authorized. That would have remedied Rose's claim, regardless of whether she filed a referendum petition.

B. Rose's failure to perform a futile, forbidden act did not bar her legal challenge.

Rose's filing a referendum petition could not have been a prerequisite to her right to bring and maintain this lawsuit, because the Resolution foreclosed the possibility of validly filing such a petition. It stated: "this Resolution will be in full force and effect from and after its passage … *and it is hereby excepted from the referendum provisions of the Constitution and laws of the State of Arizona*." ROA1 ep. 14 § 11 (emphasis added).

"The law does not require a futile act." *Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 140 (App. 1981). Attempting to file a referendum petition when the Resolution literally forbids doing so (and, as detailed below, when town officials told Rose such a petition would be "pointless") would have been futile. *Id.*; *see also Kammert Bros. Enters. v. Tanque Verde Plaza Co.*, 102

Ariz. 301, 306 (1967) (holding buyer was not "required to make a formal tender of the amounts due on [a] contract in order to recover damages for breach of contract" where seller already repudiated the agreement, because "an actual tender is unnecessary where it is clear that the other party will not accept it, rendering the act useless").

All the more so, the law cannot require an act that is *expressly forbidden*. Indeed, if the Superior Court were correct that Rose had to file a referendum petition before challenging the Resolution in court, that would create a dangerous and chaotic situation. It would mean that residents must file referendum petitions that have no legal effect, and must carry on sham referendum campaigns—circulating invalid petitions and asking for fellow citizens' signatures on purportedly official documents that in reality have no legal effect whatsoever—all simply for the sake of preserving their right to bring a court challenge. That cannot be right.

The referendum provisions in Arizona's Constitution and statutes were the only basis on which Rose could have lawfully filed a referendum petition. *Cf.* *Western Devcor, Inc.v. City of Scottsdale*, 168 Ariz. 426, 429 (1991) ("Because the referendum is an 'extraordinary' power … we require referendum proponents to comply strictly with applicable constitutional and statutory provisions." (citations omitted)). Because the Emergency Clause stated that the Resolution was "excepted

from th[ose] referendum provisions," she *could not* lawfully file a referendum petition as long as that provision was in force. Nor, for that matter, could she or any other resident have even *signed* such a petition, because electors may only sign referendum petitions that they are "legally entitled to vote upon." *See* A.R.S. § 19-115(A).[9]

The Superior Court's conclusion therefore contradicts not only the well-established rules of procedure—which do not require a futile act before a person can bring a lawsuit—but also the state's public policy of "ensur[ing] that petition signers are informed about the document they are signing and the measure being referred." *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 250 ¶ 13 (App. 2006); *see also* Ch. 82, Ariz. Sess. Laws[10] (H.B. 167, codified at A.R.S. § 19-112) (1953) (describing problems of "small pressure groups … attempt[ing], through fraudulent and corrupt practices in connection with the circulation of petitions, to appropriate this fundamental right of the people to their own selfish purposes," and expressing legislative intent "to prevent the recurrence

[9] Violating that statute is a class 1 misdemeanor. A.R.S. § 19-115(B).

[10] https://azmemory.azlibrary.gov/nodes/view/252936?keywords=1953&highlights=WyIxOTUzIl0%3D&lsk=01db7c9fd2fdf8d72f0cebbf145ccf2d

of such abuses and to safeguard to the people their right of initiative and referendum in its original concept").[11]

Referendum petitions are official documents whose form and content are closely regulated by state law. *See* A.R.S. tit. 19, ch. 1. It would make no sense for the law to carefully specify how to file a referendum petition, A.R.S. § 19-111, how to sign a petition, *id.* § 19-112(A), the oath a circulator must swear, *id.* § 19-112(C), the form of affidavit the petition must include, *id.* § 19-112(D)–(F), and other requirements, all in the name of "safeguarding the integrity and accuracy of the referendum process, *id.* § 19-101.01—only to *require* electors to file petitions that are *expressly prohibited and of no legal effect* as a prerequisite for challenging an ordinance's emergency clause in court.

Indeed, despite holding that Rose's failure to file a referendum petition rendered her legal challenge "moot," the Superior Court never squarely addressed one of Rose's key arguments to the contrary: that "a plaintiff can't be expected to

[11] "[P]rotection … from fraudulent referendum petitions" has been a fundamental concern of state courts and legislatures since the inception of direct democracy measures in state constitutions. *In re Initiative Petitions Nos. 112, 114, 117, 118*, 6 P.2d 703, 711 (Okla. 1931); *see, e.g.*, Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 Fordham Urban L.J. 889, 916–17 (2007) ("[B]ecause of the voters' ultimate reliance on the petitioner for information about the initiative petition she is circulating, the government bears some responsibility in protecting voters against fraud and deception and in protecting the overall integrity of the electoral process.").

circulate a sham referendum petition, to go and circulate … petitions and gain signatures for a measure that has no legal effect and that is expressly prohibited by law." Tr. at ep. 26:16–21. Its holding was erroneous, and this Court should reverse.

C. Defendants cannot have it both ways.

Even aside from all the above points, the Superior Court erred by accepting two mutually contradictory arguments: on one hand, that the Emergency Clause could validly *prohibit* Rose (or any other resident) from a referendum petition, and on the other hand, that Rose nevertheless *should have* filed a referendum petition.[12] *See State Farm Mut. Auto. Ins. Co. v. Frank*, 547 P.3d 374, 385 ¶ 49 (Ariz. App. 2024) ("[A] party should not be permitted to 'blow hot and cold' with reference to the same transaction or facts." (citation & quotation marks omitted))

Indeed, it is worth noting that as a practical matter, Rose was fully prepared to file a referendum petition and organize a referendum campaign. The only reason she did not was because the Resolution expressly prohibited doing so. Rose's counsel proffered testimony on this issue at the preliminary injunction hearing:

> [S]he's prepared to testify that she was ready and willing to do so, that she's been involved in town government before. She's even run for town council. She's participated in petition efforts before. She was prepared to do so, and the only reason she didn't is because the resolution here expressly prohibits a referendum petition.
> …

[12] Rose raised this point to the Superior Court. Tr. at ep. 23:20–24:6; The court, however, did not address it in its decision.

> Ms. Rose is also prepared to testify about a meeting she had with Ms. Bailey [the Town Clerk] … the day after the resolution passed, when she went to their office to get that referendum petition. And after several hours of going back and forth, as she'll testify, they eventually told her that it would be pointless to file this referendum petition because—and when she pressed them, initially, they wouldn't tell her why, but she'll testify that when she pressed them on why it would be pointless, Ms. Bailey said that it was because of the emergency clause.

Tr. at ep. 22:22–23:4; 42:10–21; *see also id.* at ep. 80:20–21.

Ms. Bailey was right: as long as the Resolution was in force, a referendum petition would have been prohibited—it would have been a nullity.[13] The bottom line is that referendum petitions were expressly prohibited as long as the Resolution was in effect, and the Superior Court erred in holding that Rose had to do something futile, and even forbidden, as a prerequisite to challenging that Resolution in court.

IV. This Court should decide the appeal.

The Town Council repealed the Resolution after Rose appealed. *See* Repeal Resolution.[14] Nevertheless, her claim for declaratory judgment still merits judicial

[13] While Ms. Bailey apparently did not say she would refuse to accept a referendum petition, this is no indication that such a petition would have been effective. A municipal "[c]lerk performs a ministerial role in accepting applications and issuing petition serial numbers. She must accept and process any application submitted on the required form without regard to its legal sufficiency." *Voice of Surprise v. Hall*, No. CV-23-0117-PR, 2023 WL 4228661, at *2 (Ariz. June 23, 2023).

[14] https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2931434/Res_3423_Repealing_Resolution_3409.pdf

review. This Court should decide Rose's appeal because (1) the Town's voluntary cessation in the face of Rose's legal challenge does not moot her lawsuit, (2) the issues presented are of exceptional public importance, and (3) the issues are capable of repetition while evading review.[15]

A. The repeal does not moot Rose's challenge.

"[V]oluntary cessation of the questioned practices will not automatically moot the injunctive remedy. This is especially so when the practices are discontinued subsequent, rather than prior, to the commencement of the litigation." *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486 (App. 1981); *see also Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 141 (1988) ("[U]sually a defendant cannot by its own voluntary conduct 'moot' a case and deprive a court of jurisdiction."). "'Mootness exists … only where events make it *absolutely clear* the alleged wrongful behavior could not reasonably be expected to recur.'" *Babbitt*, 128 Ariz. at 486 (citation omitted; emphasis added). "Factors which may point to the danger of future violations are [(1)] past violations, [(2)] the involuntary cessation of these violations, and [(3)] their continuance in disregard of the lawsuit." *Id.*

[15] To clarify, the mootness-on-appeal analysis addressed here is completely different from the Superior Court's erroneous ruling (addressed in the preceding section) that Rose's lawsuit was moot from the start.

Here, it is not "absolutely clear" that the Town won't illegally use an emergency clause to bypass the referendum process again. On the contrary, all three *Babbitt* factors indicate that this is a live controversy despite the Repeal Resolution.

First, the Town's history of "past violations" indicates a strong likelihood of recurrence. It has used emergency clauses at least five times in the past four years, and many more times before that. *See* ROA2 ep. 4.

Second, the repeal was not really a *voluntary* cessation at all. The government's cessation of illegal activity is not "voluntary" when it is thwarted by practical considerations unrelated to the actual legality of the conduct. *See Olagues v. Russoniello*, 770 F.2d 791, 794–95 (9th Cir. 1985) (holding government did not voluntarily cease where challenged investigation was terminated simply "because it failed to produce evidence supporting any further investigative activities"); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) (holding discontinuance of syphilis tests on employees "merely for reasons of 'cost-effectiveness'" did not moot challenge to mandatory testing policy).

Here, by the Town's own admission, it was essentially forced to repeal the Resolution simply because it was unable to close on the bond sale. The Repeal Resolution made clear that the Town was dropping the bond measure only because, "it cannot realistically sell bonds to fund numerous improvements desired by the

community." Repeal Resolution at 1. Neither the Repeal Resolution, the staff report, nor councilmembers' comments during the meeting give any indication of a principled motivation for the repeal, or that they'd hesitate to use an emergency clause again if circumstances change. *See id.*; Staff Report to Resolution No. 3423 (Oct. 23, 2024).

Third, the long history of efforts to pass a bond measure like the Resolution, the significant time and money the Town has spent on this project, and the political will to resume this project all indicate that it would continue its behavior in disregard of the lawsuit. Indeed, the Town gave no hint of even considering repeal, and repeatedly stated it was "really ready to move on issuing these bonds," before Rose appealed the Superior Court's ruling. *See, e.g.*, Tr. at ep. 21:24–25; *id.* at ep. 84:21–24 (defense counsel noting that "both the investment banker representatives and bond attorney" were present at the court hearing and "the town, obviously, based on the court's rulings, can sell the bonds tomorrow"). "[T]here is a *presumption of future injury* when the defendant has voluntarily ceased its illegal activity in response to litigation." *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 191 (2000) (citation omitted; emphasis added); *see also McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1138 (D. Idaho 2013) ("[A] party cannot conjure up mootness by ceasing the challenged conduct only for practical or strategic reasons—such as avoiding litigation.").

* * *

Even if the repeal did technically moot this case, this Court "may elect to consider issues that have become moot 'if there is either an issue of great public importance or an issue capable of repetition yet evading review.'" *Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, 193 ¶ 8 (App. 2014) (citation omitted). Both exceptions apply here, as discussed below.

B. Unlawful emergency clauses and the proper way to challenge them are issues of exceptional public importance.

The issues here are quintessential examples of "issue[s] of great public importance," *id.*, that this Court decides even when a case is technically mooted on appeal. *See, e.g.*, *City of Flagstaff v. Mangum*, 164 Ariz. 395, 400 (1990) ("Local elections and the rules governing them are of considerable public interest and justify departure from the usual mootness rule."). The Superior Court ruled on two issues that have broad implications for election law, municipal powers, and the constitutional right to referendum. Indeed, the Superior Court itself recognized the public importance of this case and took for granted that the legal issues herein could be reviewed by an appellate court. *See* Tr. 70:18-19 ("[T]here's nothing that I'm going to decide today that can't be appealed.").[16]

[16] The court also repeatedly noted the considerable interest and stake the public had in this case. *See, e.g.*, Tr. at 53:10–11 ("[T]his is something that people are … very concerned about both ways."); *id.* at 70:3–8 ("[I]n this situation … especially anytime there's an issue of bonds, which we all know … imply some sort of

First, the Superior Court's ruling that Rose could not challenge the Resolution without first filing a referendum petition *that the Resolution prohibited* would, as explained above, create perverse and dangerous incentives if left undisturbed.

Second, the Superior Court's ruling on the merits issue—that it must rubber-stamp a council's decision to include an emergency clause, no matter how tenuous the purported justification—affects the rights of every Arizonan and the powers of every municipality. That decision deserves appellate review.

C. The issues are capable of repetition while evading review.

Finally, the nature of this case is inherently transitory. Emergency clauses close a 30-day referendum window, allowing municipalities to take rapid, irreversible actions like bond sales. That means challenges like this will virtually *never* obtain appellate review before it's too late to undo the illegal action. The "capable of repetition yet evading review" exception to mootness was created precisely for this sort of situation. *See* *Ariz. Dep't of Econ. Sec. v. Superior Ct.*, 171 Ariz. 688, 690 (App. 1992) (ordering state to provide medical care to child adjudicated dependent even though state already provided such care because "the issue presented is a recurrent one, capable of repetition yet evading review");

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taxation, it becomes … a big deal with a lot of people and people can have very strong opinions both ways.").

Mangum, 164 Ariz. at 400 (deciding election issues even though "petitions" in question "were untimely filed and are now null and void," because "significant questions of public importance are presented and are likely to recur").

D. Rose's claim for attorney fees is still live.

Rose sought attorney fees in the court below, ROA1 ep. 8 at D, and has sought attorney fees in this appeal. Whether Appellant is "entitle[d] to attorney's fees is not an 'abstract' question, but rather one which involves existing rights." *Exodyne Props., Inc. v. City of Phoenix*, 165 Ariz. 373, 376 (App. 1990).

Fisher v. Maricopa County Stadium District is instructive on this point. 185 Ariz. 116 (App. 1995). In that case, the appellant sought statutory damages and attorney fees under the Open Meeting Law when the Maricopa County Stadium District closed several negotiation sessions pertaining to a sales tax to the public. The appellant lost on the merits in the trial court, and the tax was subsequently enacted. On appeal, the Stadium District argued that "because the sales tax has been enacted, the appeal no longer presents a controversy and is, therefore, moot." *Id.* at 119. But this Court rejected that argument, finding that "[t]he issues of statutory damages and attorney's fees are properly preserved on appeal; therefore, this appeal is not moot." *Id.*

In this case, because the trial court denied Appellant relief on the merits, it did not reach Appellant's request for fees. However, if this Court reverses the trial

court's judgment, it can do so with an order to award fees. *Allen R. Krauss Co. v. Fox*, 137 Ariz. 203, 203 (App. 1983) ("Upon the reversal of a judgment when a mandate issues directing the entry of judgment in favor of the other party, attorney fees, if otherwise allowable by contract or statute, and costs, may be awarded in addition to or as part of the new judgment."). Appellant's claim for attorney fees was properly pled, is preserved on appeal, and is still a live controversy for which Appellant may seek relief if this Court reverses the decision below.

CONCLUSION

For the foregoing reasons, this Court should vacate the Superior Court's order and direct the Superior Court to enter judgment declaring the Resolution unlawful and void.

NOTICE UNDER RULE 21(A)

Rose requests costs pursuant to A.R.S. Section 12-341, and attorney fees pursuant to the private attorney general doctrine.

Respectfully submitted January 28, 2025 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellant's Opening Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 9,602 words, excluding the table of contents and table of authorities.

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