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 REPLY BRIEF

Jonathan Riches (025712)
John Thorpe (034901)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Plaintiff / Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

INTRODUCTION

The Answering Brief includes little discussion of the fundamental issue in Rose's challenge: whether the Resolution was "necessary for the immediate preservation of the peace, health or safety of the … town," as A.R.S. Section 19-142 requires of a municipality that wishes to deprive its residents of their constitutional right to organize and vote in a referendum. Instead, the Answering Brief offers a slew of procedural arguments why this Court (like the Superior Court) should not even reach that issue: it asserts that the Superior Court made factual findings entitled to deferential review; that the Emergency Clause is not subject to judicial review at all; that the Resolution is an administrative act, not a legislative one, and was thus exempt from referendum *regardless* of the Emergency Clause; that Rose cannot challenge the Emergency Clause because she did not form a PAC and take other steps toward mounting a sham referendum campaign; and that this appeal is moot. All those arguments fail, however, and the Court should reach the merits issue and hold that the Emergency Clause was invalid.

DISCUSSION

I. This Court's review is de novo.

The Town asserts that the questions on appeal regarding mootness and whether the Resolution is judicially reviewable "involve findings of fact and are reviewed under the clearly erroneous standard." Ans. Br. at 27. It is mistaken. Rose is not challenging any of the Superior Courts' factual findings on these issues; just its conclusions of law. "Because the material facts in this case are undisputed, [this Court] determine[s] *de novo* whether the trial court correctly applied the substantive law to those facts." *Voland v. Farmers Ins. Co. of Ariz.*, 189 Ariz. 448, 450–51 (App. 1997).

Likewise, the question whether the Resolution "is an administrative act and not referable to the voters" is a quintessentially legal issue, not a factual one. *See, e.g.*, *Voice of Surprise v. Skip Hall*, 257 Ariz. 101 ¶ 18 (App. 2024) ("We review de novo the superior court's determination that adoption of ordinance 2022-18 was not legislative and thus non-referable."); *Maricopa Citizens Protecting Taxpayers v. Price*, 244 Ariz. 330, 333 ¶ 7 (App. 2017) (reviewing "de novo" "whether the trial court erred by concluding the City's decision to grant the use permit was a legislative rather than administrative act and therefore subject to referendum").

On a related note, the Town faults Rose's Opening Brief for its "failure to discuss the detailed history behind these necessary public projects" funded by the

Resolution. Ans. Br. at 45. On the contrary, an exhaustive history of municipal planning meetings, local politics, and the rest of the years-long process leading up to the Resolution is irrelevant to the purely *legal* issues this appeal presents.

The text of the Resolution is undisputed; the issue here is simply whether the Emergency Clause validly exempted the Resolution from the referendum process—and whether that question is judicially reviewable. Likewise, Rose does not dispute that she did not file a referendum application or gather petition signatures; the question on appeal is simply whether, as a matter of law, she had to go through the motions of the referendum process to challenge the very Emergency Clause that prohibited any such process. Finally, it is undisputed that the Town repealed the Resolution after Rose filed this appeal; the question iswhether this Court should decide the case anyway, given the issues' likelihood of recurrence, great public importance, and tendency to evade appellate review.

None of these questions depends on the detailed factual history the Town recounts, nor do they involve disputed questions of fact. They are purely legal questions based on an undisputed factual record, and this Court should review them de novo.

II. The emergency clause was unlawful.

As Rose's Opening Brief details, Section 19-142(B) establishes three substantive requirements for an emergency clause: (1) it must be "necessary," (2)

the need must be "immediate," and (3) it must be directed toward the "preservation of the peace, health or safety of the city or town." *See* Op. Br. at 18–22. The Resolution's Emergency Clause fails on all three counts. Nothing in the Resolution, the record below, or the Answering Brief explains why it was *necessary* to authorize a $70 million bond sale in September 2024, even assuming *some* of the items that bond sale was intended to fund may have been necessary.[1]

Moreover, the need was not *immediate*: as the Town itself illustrates with its detailed account of the years-long history leading up to the Resolution's passage, the Resolution's purpose was long foreseen and far from urgent. *See, e.g.*, Ans. Br. at 7 ("[D]ue to limited resources over many years, the Town has not been able to fund needed community projects identified in the Town's Corporate Strategic Plan … ."); *id.* at 8 ("The decision to create and appoint this Citizen-based Committee came following three years of focused, strategic planning by the Council. After months of public meetings and community input, the CIPCAC made recommendations … ."); *id.* at 16 (citing staff report stating "that Resolution 3409 is the final step in a series of CIPCAC and Council discussions and actions that began about three years ago and spanned roughly 20 meetings/work sessions, [and] community outreach opportunities.").

[1] Many, such as a new recreation center and public pool, were patently not necessary.

Finally, the Resolution is not directed toward the *preservation* of the Town's "peace, health or safety." Instead, it authorizes a large bond sale as a means of funding a variety of *new* projects.

In sum, the Emergency Clause is invalid under Section 19-142's plain requirements, and the Town has identified no emergency to justify bypassing the constitutional referendum process as contemplated by statute.

III. The Emergency Clause is subject to judicial review.

The Town cites one 70-year-old decision, *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382 (1951), for its claim that "[a] determination by the legislative body of a city that an emergency exists, is an exercise of legislative discretion not reviewable by [the] judiciary." Ans. Br. at 40. But *Landrum* is inapposite, as it does not construe (or even cite) Section 19-142, which is the sole basis for the Town's claimed authority to enact the Emergency Clause, and which limits such authority to "emergency measures necessary for the immediate preservation of the peace, health or safety of the city or town." A.R.S. § 19-142(B). As Rose's Opening Brief details, the Legislature provided specific and manageable judicial standards for reviewing emergency clauses in cases like this when it enacted that measure.[2] Op. Br. at 18–22. Accordingly, this Court has reviewed the

[2] The Town fails to address this key point. It asserts that emergency clauses are unreviewable "[a]bsent express limitation of the emergency powers by the State Legislature," Ans. Br. at 42, but overlooks that Section 19-142 *is just that*: an

validity of emergency clauses under Section 19-142 at least twice since *Landrum*. *See* *Israel v. Town of Cave Creek*, 196 Ariz. 150, 154–55 ¶ 22 (App. 1999); *Gieszl v. Town of Gilbert*, 529 P.2d 255, 258 (Ariz. App. 1974). The Town's observation that *Israel* and *Gieszl* involved "annexation issues" implicating additional statutory provisions misses the point. *Israel* and *Gieszl* raised distinct issues, but they demonstrate that emergency clauses in municipal legislation *are reviewable* under Section 19-142, notwithstanding the political question doctrine.

Even if this Court afforded some deference to good-faith legislative determinations regarding *actual* emergencies—rapidly-evolving situations involving uncertainty and complex factual or technical determinations, like a pandemic or a natural disaster—it could do so without giving *carte blanche* to the Town's actions here. Just as "'deference does not imply abandonment or abdication of judicial review,'" *State v. Reaves*, 252 Ariz. 553, 560 ¶ 12 (App. 2022) (citation omitted), so deference does not mean completely turning a blind eye to abuse, particularly when, as here, that abuse is specifically designed to also foreclose political, indeed *constitutional*, remedies (i.e., a popular vote) for the Town's actions.

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express limitation on municipalities' power to bypass the constitutional referendum process using emergency clauses.

A fundamental assumption of the political question doctrine is that while the courts may refrain from reviewing "a political process," those in power are still subject to constitutional checks through "election[s], the ultimate weapon of democracy." *Ingram v. Shumway*, 164 Ariz. 514, 519 (1990); *see id.* ("On political matters, the will of the majority is determinative."). Refusing judicial review of an emergency clause that short-circuits that very "electoral process," *id.*, leaves affected Arizonans *no* meaningful recourse, judicial *or* political, and is inconsistent with the political question doctrine's core justification. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" may deserve "more exacting judicial scrutiny").

IV. The Resolution was legislative, not administrative.

The Town argues that the Resolution "is an administrative act and not referable to the voters." Ans. Br. at 37. As an initial note, if the Town Council had actually intended the Resolution to be an administrative act, then it is unclear why it included the Emergency Clause at all. The administrative/legislative distinction is well established, and the Council would presumably have stated that the Resolution was exempt from referendum because it was administrative—there would have been no need to add an emergency clause and invoke Section 19-142.

But more to the point, the Resolution is not an administrative act at all. An administrative act simply "carr[ies] out the policy or purpose" that a legislative body has already authorized. *Workers for Responsible Dev. v. City of Tempe*, 254 Ariz. 505, 513 ¶ 35 (App. 2023) (citation omitted). By contrast, "an act that declares a public purpose and provides for the ways and means of its accomplishment is legislative." *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 489 (1991). The Resolution is a broad authorization of an irrevocable $70 million bond transaction and it articulates purposes for the funds to be raised. That is a legislative act, not an administrative one. That means it is subject to referendum.

"Under the *Wennerstrom* analysis, [courts] must consider whether the action is (1) permanent or temporary, (2) of general or specific (limited) application, and (3) a matter of policy creation or a form of policy implementation." *Workers for Responsible Dev.*, 254 Ariz. at 513 ¶ 35 (citing *Redelsperger v. City of Avondale*, 207 Ariz. 430, 433 (App. 2004)). All three *Wennerstrom* factors make this point clear.

First, the Resolution was permanent, not temporary. While the Town argues that the Resolution was "temporary" in the sense that it "set[] a not more than 25-year [bond] term," Ans. Br. at 39, that is not what the first *Wennerstrom* factor means by "permanence." The mere fact that the bond obligations would (presumably) be satisfied does not mean that the bond sale was revocable or

reversible; by its own terms, once the bond transaction closed the Resolution would "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. The Resolution was therefore permanent.

Second, the Resolution provides general, but definite authority. It gives a broad authorization to Town officials to sell bonds within certain specific guidelines (e.g. up to $70 million; yield not to exceed 6.5%; term not to exceed 25 years). *See id.* ep.12 § 1. And, as detailed below, it articulates a list of purposes for those funds.

Finally, even if the Resolution followed on the heels of other Town actions that generally promoted similar goals (i.e., raising funds for a range of municipal budget items and improvements), it created new policy. It was not "merely an administrative manner or method in which to achieve the goals and objectives of the Council." Ans. Br. at 39. Rather, it authorized the Town and its representatives to take significant new action (i.e., incurring $70 million of municipal debt) that the Town lacked authority to do before the Resolution's passage. ROA1 ep. 12 § 1 (authorizing Mayor, bond trustee, and other Town officials to execute and deliver bonds for up to $70 million and to determine the terms of those bonds, within specified guidelines). Notably, these terms are permissive, not mandatory: they *authorize* the Town's representatives to sell bonds within certain broad constraints,

but leave those representatives considerable discretion over the precise terms of the bond sale. "'[D]iscretion is a factor of consideration when distinguishing between policy implementation and policy creation,' and in general, the greater the amount of discretion enjoyed by the body making the decision, 'the more likely the act is legislative.'" *Price*, 244 Ariz. at 335 ¶ 13 (citing *Redelsperger*, 207 Ariz. at 430 ¶ 16).

Authorizing a bond sale is "prescrib[ing] a new policy or plan." *Wennerstrom*, 169 Ariz. at 489; *see id.* at 490 (finding that ballot measure "authoriz[ing] $30 million worth of street improvement bonds" was a "legislative action taken by the qualified electors of Mesa"). The Resolution also declares the "purpose" of its new policy authorizing the bond sale: "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, including interests in real property, pertaining to the foregoing." ROA1 ep. 10.

V. The right of referendum belongs to individuals, not just PACs.

The Town argues that "only a political action committee ("PAC") may apply for and obtain a referendum serial number," and because "Rose failed to form a PAC," "she does not have standing in this action." Ans. Br. at 31. Not only does

this argument misconstrue the plain language of Article 19; it has nothing to do with Rose's standing.[3]

To begin with, the Town misconstrues Section 19-111, which establishes procedures for "[a] person *or* organization" to file "an application for initiative or referendum." A.R.S. § 19-111(A) (emphasis added). While the statute instructs that "[t]he secretary of state shall not accept an application for initiative or referendum without an accompanying statement of organization" (a term the statute does not define), neither Section 19-111 nor any other authority supports the Town's assertion that "only a [PAC] may apply for and obtain a referendum serial number." Ans. Br. at 31. Indeed, both the Arizona Constitution and statute make clear that the right of referendum belongs to Arizona voters, not just PACs. *See* Ariz. Const. art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature …, but the people reserve the power to propose laws and amendments … and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any

[3] It's also factually incorrect, as undisputed record evidence shows Rose *was* involved with multiple PACs, has long been politically active, and could have filed a petition through a PAC had the Resolution allowed her to do so.

act, of the legislature.");[4] A.R.S. § 19-142(C) (establishing procedure for "a person or organization" to file a referendum petition).

More fundamentally, however, the Town misunderstands Rose's argument. She's not trying to file a referendum application; she's challenging the Town's denial of her right to organize or vote in a referendum in the first place. Her injury, then, is not the Town's failure to process a referendum application, assign her a referendum serial number, or comply with other procedural minutiae of the referendum process. It is, rather, the denial of the right to organize, vote in, and otherwise participate in the referendum process *at all*. She is challenging the Town's abridgement, via the Resolution's Emergency Clause, of her constitutional right to referendum—a core aspect of "the right to vote," *Kromko v. Superior Court*, 168 Ariz. 51, 53 n.1 (1991), and a fundamental right that belongs to Rose (along with every other Payson voter) individually. *See* Op. Br. at 29 (collecting cases). Whether she "form[ed] a PAC" or was a member of a PAC is irrelevant. Ans. Br. at 31.

[4] To the extent a statute *did* purport to reserve the right of referendum to PACs and deny individual voters like Rose the right to vindicate that right personally, that would be unconstitutional because it would encroach on the people's reserved legislative powers. Thus, even setting aside the arguments above, this Court should construe the relevant statutes as implementing individual voters' rights to organize and participate in referenda. *See State v. Gomez*, 212 Ariz. 55, 60 ¶ 28 (2006) ("We also construe statutes, when possible, to avoid constitutional difficulties. Accepting the State's interpretation … would raise serious constitutional questions." (citation omitted)).

VI. Challenging the emergency clause did not require Rose to file a futile referendum petition.

The Emergency Clause injured Rose by depriving her of the constitutional right to organize and vote in a referendum. That injury became ripe when the Town declared that the Resolution was "hereby excepted from the referendum provisions of the Constitution and laws of the State of Arizona." ROA1 ep. 14 § 11. It makes no difference to Rose's standing that she "failed to complete and submit the Referendum Application," "failed to obtain a Serial Number," or "failed to turn in the requisite signatures." Ans. Br. at 31.

Indeed, Rose *could not do* any of those things precisely *because* of the Emergency Clause, which expressly foreclosed the possibility of organizing a referendum.[5] In other words, it was impossible to "comply strictly with applicable constitutional and statutory provisions" on the referendum process, Ans. Br. at 32 (quoting *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5 (1972)), because those provisions *did not apply*: they were rendered inapplicable by operation of law the moment the Town exempted the Resolution from the referendum process.

It is well established that "[t]he law does not require a futile act." *Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 140 (App. 1981). As long as the

[5] As Rose details in her Opening Brief, Town staff recognized this when they told her it would be "pointless" to file an application "because of the emergency clause." Tr. at ep. 42:11–21.

Resolution (including its Emergency Clause) was in effect, no *valid* referendum was possible. The Town argues that Rose nevertheless should have gone through the motions—submitting a referendum application, gathering signatures, submitting the petitions for verification, and so on—of an *invalid* referendum process, simply to preserve her right to challenge the Emergency Clause that (as long as it was in effect) prohibited holding a referendum.

But requiring electors to file unauthorized referendum petitions is not a prerequisite to challenging an emergency clause in court. Indeed, it would be atrocious policy to make electors mount sham referendum campaigns, filing official documents and gathering voters' signatures with full knowledge that those actions have no legal effect, simply to preserve their right to later bring a judicial challenge. It would encourage deception, waste resources, and create chaos.[6]

The better approach is what the law has always allowed, and what Rose in fact did—to seek recourse from the only entity capable of declaring an unconstitutional ordinance invalid *before* doing what that ordinance prohibits: the judiciary. *See* *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022) (noting that an election "regulation that contradicts statutory requirements does not have the force

[6] In fact, it is a criminal act for a voter to knowingly sign a petition that he or she is not "legally entitled to vote upon." A.R.S. §§ 19-115; *see* Op. Br. at 37.

of law," and that "it is this Court's role, not the [Secretary of State's], to interpret" those statutory requirements).

VII. The Court should decide this appeal despite the Town Council's repeal of the Resolution.

The Town argues that the Court should dismiss this appeal because the Resolution was repealed and the case is therefore "moot." But Rose has never disputed that the Town Council repealed the Resolution after she filed her notice of appeal. Instead, she argues the Court should decide the substantive issues here nevertheless, because this appeal presents several issues of exceptional public importance that are likely to recur, and that, by their nature, tend to evade appellate review. Notably, the Town never responds to any of these arguments, apart from stating that "[t]he supporting background for a Resolution is fact-intensive." Ans. Br. at 29. But as detailed elsewhere in this brief and the Opening Brief, the issues are *not* fact-intensive: the material facts are undisputed and the pure legal issues (many of them issues of first impression) merit resolution by an appellate court to provide guidance to Arizona voters and municipalities. Indeed, if this Court does not resolve the critical legal questions raised in this appeal regarding abuse of the emergency clause power, they can never practically be resolved. In other words, this is precisely the set of circumstances for which Arizona courts' well-established exceptions to the mootness doctrine exist.

The Court should reverse the Superior Court's erroneous decisions on these issues notwithstanding the Town's practical decision to repeal the bond measure after Rose filed her appeal.

CONCLUSION

The Court should reverse.

RESPECTFULLY SUBMITTED this 24th day of April 2025,

/s/ *John Thorpe*
Jonathan Riches (025712)
John Thorpe (034901)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Plaintiff / Appellant

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 Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 3,545 words, excluding the table of contents and table of authorities.

/s/ *John Thorpe*
Jonathan Riches (025712)
John Thorpe (034901)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Plaintiff / Appellant

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 24th day of April 2025, with a copy delivered via the ECF system to:

Larry J. Crown
Elan S. Mizrahi
BRUECKNER SPITLER SHELTS PLC
8355 East Hartford Dr., Ste. 200
Scottsdale, Arizona 85255
lcrown@bss.law
elan@bss.law

Jon M. Paladini
PIERCE COLEMAN PLLC
7730 E. Greenway Rd., Ste. 105
Scottsdale, Arizona 85260
jon@piercecoleman.com

/s/ *Kris Schlott*
Kris Schlott, Paralegal