Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

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IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION ONE

ALAN KORWIN, et al.,

Plaintiffs,

VS.

DEBBIE COTTON, et al.,

Defendant.

Court of Appeals, Division One Case No. 1 CA-CV 12-0878

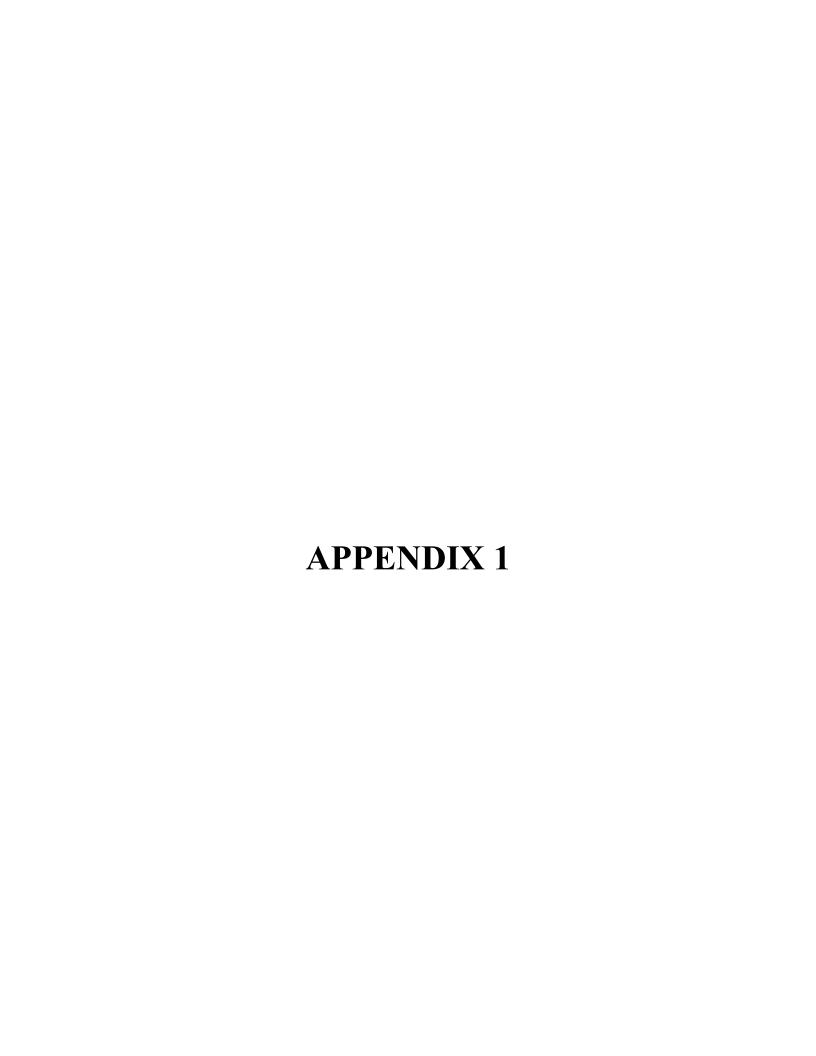
Maricopa County Superior Court Case No. <u>CV2011-009838</u>

APPENDIX IN SUPPORT OF APPELLANTS' OPENING BRIEF

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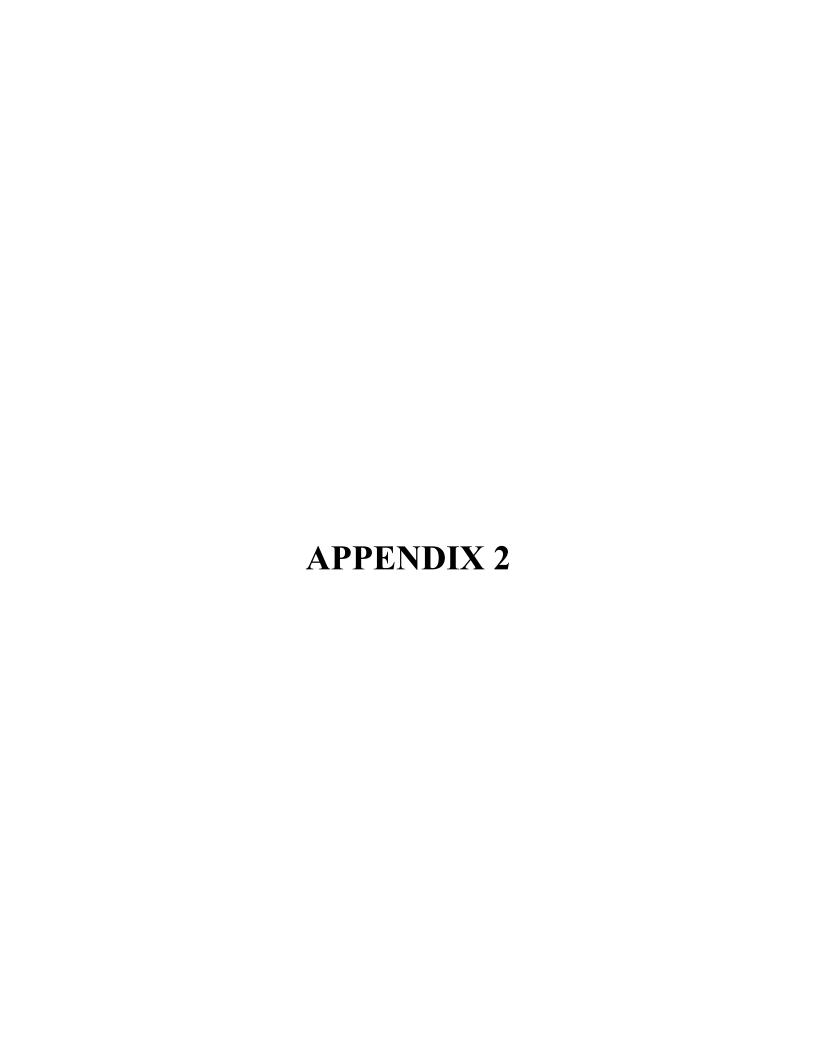
Appendix List

- 1. TrainMeAZ original ad (rejected by City)
- **2.** TrainMeAZ alternative ad (approved by City)
- **3.** 2009 City of Phoenix Transit Advertising Standards
- **4.** 2011 City of Phoenix Transit Advertising Guidelines
- 5. United States and Arizona State Constitutional Provisions
- **6.** August 23, 2012 Hearing Transcript (excerpts)
- 7. Approved and Rejected Ads





ARIZONA SAYS: EDUCATE YOUR KIDS TrainMeAZ.com



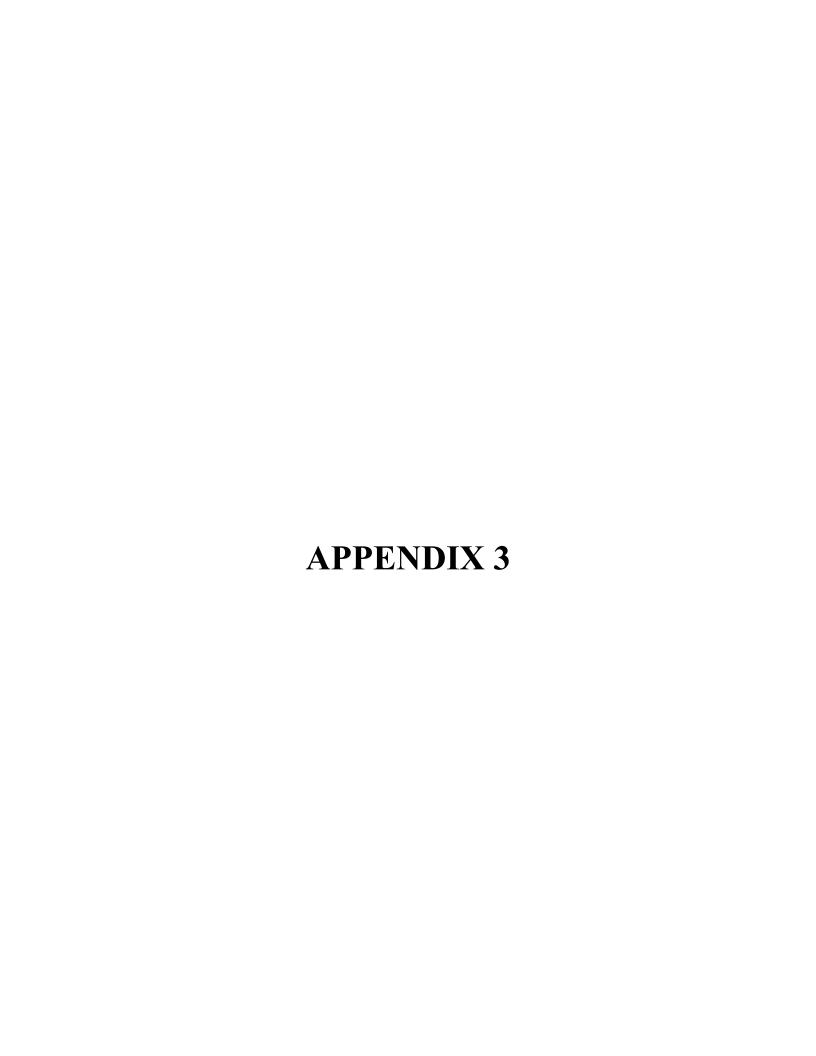


EDUCATE YOUR KIDS ON HOW



go to TrainMeAZ.com

	Transit S	helter
	Mechanical ((HxW) Actual (HxW)
Saftey:	13.2" x 9.0"	66.0" x 45.0"
Trim:	14.0" x 9.6"	70.0" x 48.0"
8leed:	14.1" x 9.7"	70.5" x 48.5"
Scale:	5:1 - 500% Enlargement	

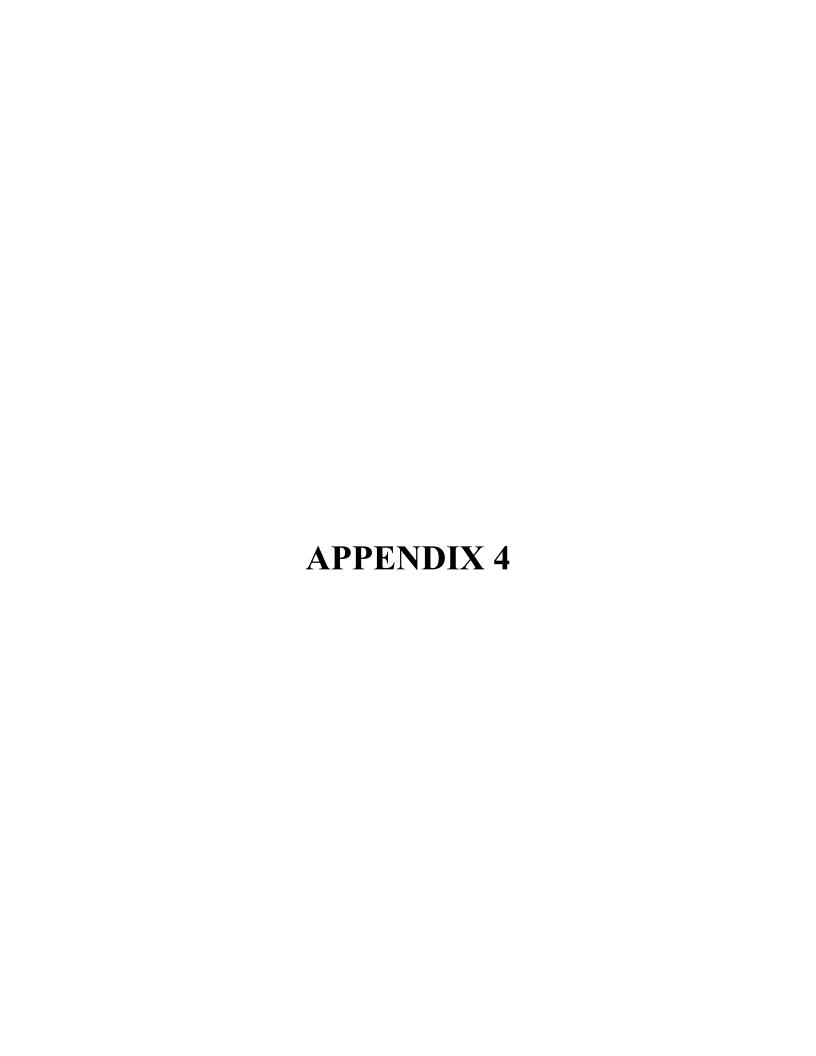




TRANSIT ADVERTISING STANDARDS

12/08/2009

- A) The Public Transit Director, or his/her designee, shall reject advertising that does not comply with the standards set forth in subparagraph C).
- B) The subject matter of transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction.
- C) The following standards for advertising have been adopted and advertising copy may not be displayed which:
 - 1) Is false, misleading or deceptive
 - 2) Relates to an illegal activity
 - 3) Is explicit sexual material, obscene material, or material harmful to minors as these terms are defined in Title 13, Chapter 35, A.R.S.
 - 4) Advertises tobacco products
 - 5) Advertises beer, wine and/or alcohol products: on the exterior or interior of Phoenix Neighborhood Circulator vehicles; on the interior of any transit vehicle; or in instances in which transit furniture is located less than 600 feet near a school or church
 - 6) Depicts violence and/or anti-social behavior
 - 7) Includes language which is obscene, vulgar, profane or scatological
 - 8) Relates to instruments, devices, items, products or paraphernalia which are designed for use in connection with "specified sexual activities" as defined in the City of Phoenix Zoning Ordinance



Public Transit Department

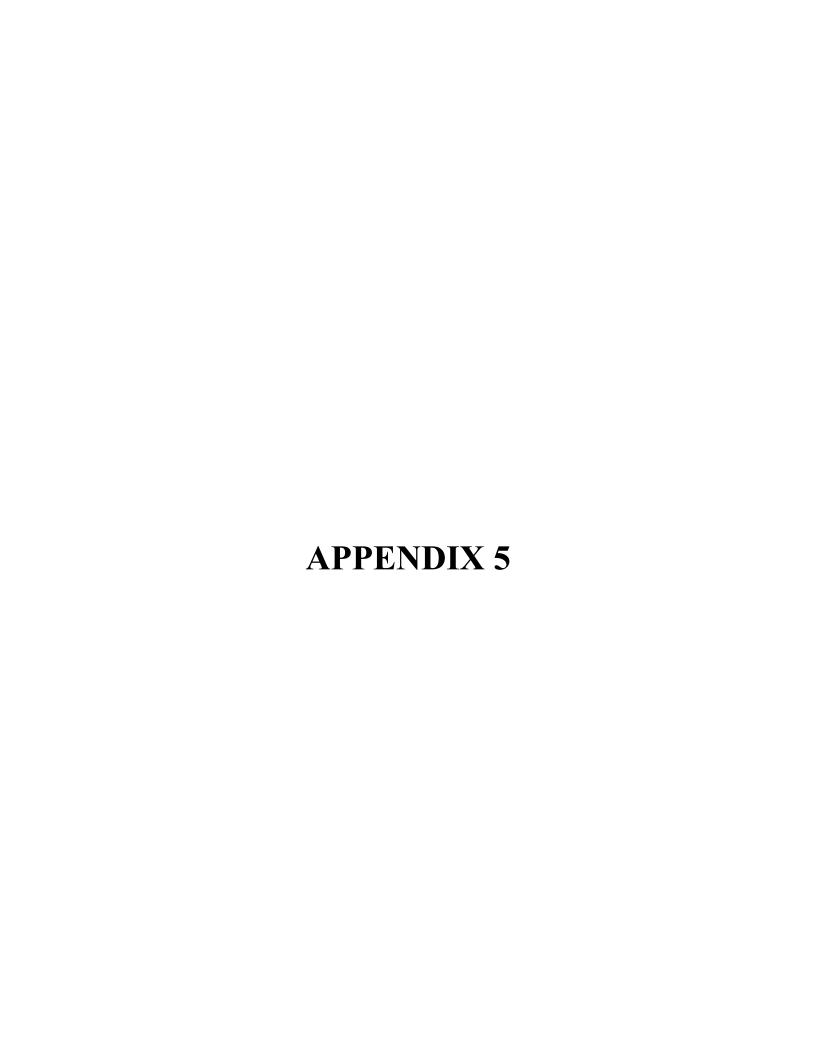
TRANSIT ADVERTISING STANDARDS

March 7, 2011

- A. It is the intent of the City that all transit advertising panels on city buses and on transit furniture are non-public forums and are to be set aside for commercial advertisements or for transit information as provided by the City. The City's primary purpose for the transit advertising panel is generating revenue.
- B. It is a guideline of the City of Phoenix Public Transit Department that no advertising will be accepted for use on any city bus or transit furniture that does not comply with the following standards:
- 1. A commercial transaction must be proposed and must be adequately displayed on the transit advertising panel.
 - 2. The advertising may not:
 - a. Be false, misleading, or deceptive.
 - b. Relate to an illegal activity.
 - c. Advertise or depict the use of tobacco or smoking products.
 - d. Advertise or depict the use of *spirituous liquor* as that term is defined in Section 4-101, Arizona Revised Statutes:
 - On the exterior or interior of Phoenix Neighborhood Circulator and Reserve-a-Ride vehicles.
 - ii. On the interior of any transit vehicle.
 - iii. On transit furniture that is located less than 600 feet from a church or similar structure of worship, or school building.
 - e. Represent, by language or graphics, violence or antisocial behavior.

- f. Advertise or depict language, gestures, conduct, or graphical representations that are obscene, pornographic, vulgar, profane, or scatological.
- g. Represent, by language or graphics, a *nude* or *seminude* person, as those terms are defined in Section 11-821, Arizona Revised Statutes, or the exposed buttocks of any person.
- h. Depict, relate to, or reference a website or other medium that relates to *specified sexual activities* or *specified anatomical areas* as those terms are defined in Section 11-821, Arizona Revised Statutes.

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United States Code Annotated Constitution of the United States Annotated

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances (Refs & Annos)

U.S.C.A. Const. Amend. I-Full Text

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. I-Full Text, USCA CONST Amend. I-Full Text

Current through P.L. 112-207 approved 12-7-12End of Document

United States Code Annotated Constitution of the United States Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text

Current through P.L. 112-207 approved 12-7-12End of Document

Arizona Revised Statutes Annotated Constitution of the State of Arizona (Refs & Annos) Article II. Declaration of Rights

A.R.S. Const. Art. 2 § 4

§ 4. Due process of law

Section 4. No person shall be deprived of life, liberty, or property without due process of law.

A. R. S. Const Art. 2 § 4, AZ CONST Art. 2 § 4

Current through the Second Regular Session of the Fiftieth Legislature (2012), also includes election results from the November 6, 2012 general electionEnd of Document

Arizona Revised Statutes Annotated Constitution of the State of Arizona (Refs & Annos) Article II. Declaration of Rights

A.R.S. Const. Art. 2§6

§ 6. Freedom of speech and press

Section 6. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

A. R. S. Const Art. 2 § 6, AZ CONST Art. 2 § 6

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Arizona Revised Statutes Annotated Constitution of the State of Arizona (Refs & Annos) Article II. Declaration of Rights

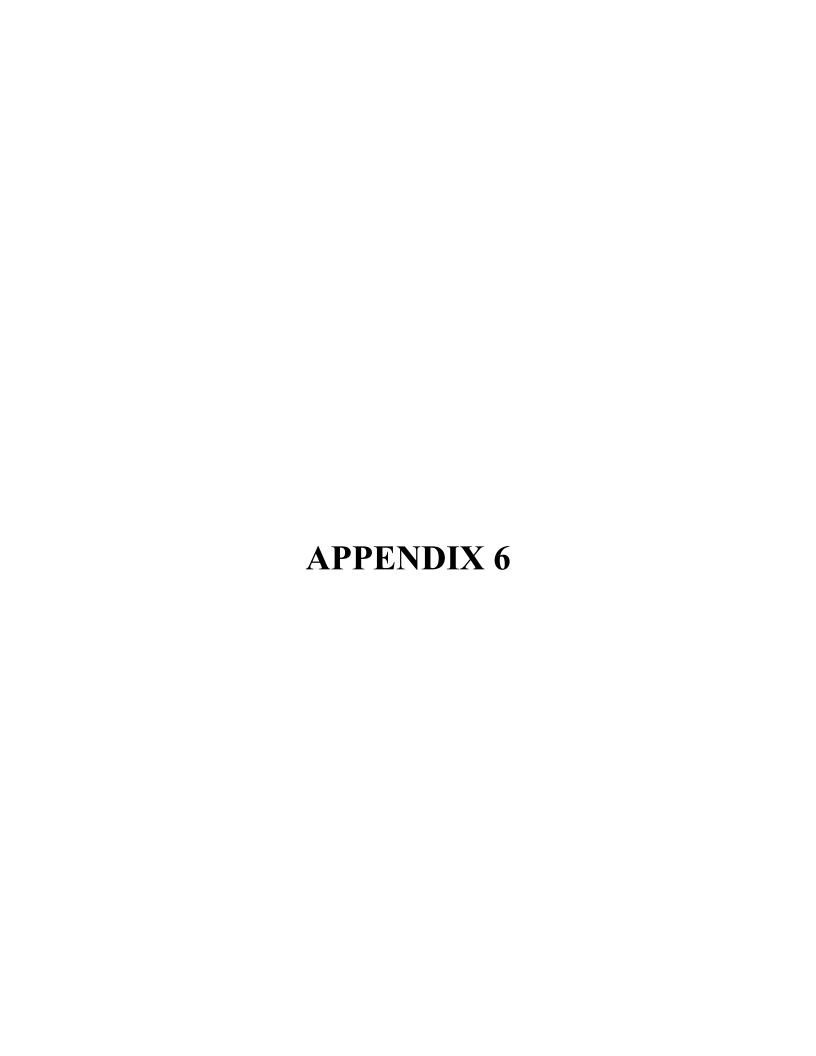
A.R.S. Const. Art. 2 § 13

§ 13. Equal privileges and immunities

Section 13. No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

A. R. S. Const Art. 2 § 13, AZ CONST Art. 2 § 13

Current through the Second Regular Session of the Fiftieth Legislature (2012), also includes election results from the November 6, 2012 general electionEnd of Document



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

ALAN KORWIN, ET AL,)
Plaintiff,	, ,
VS.) CV 2011-009838
DEBBIE COTTON, ET AL,)
Defendant.)

Phoenix, Arizona August 23, 2012

BEFORE THE HONORABLE MARK H. BRAIN REPORTER'S TRANSCRIPT OF PROCEEDINGS

Lisa A. Bradley, RPR, CSR 9938 Certified Court Reporter Certificate Number 50442

PREPARED FOR:

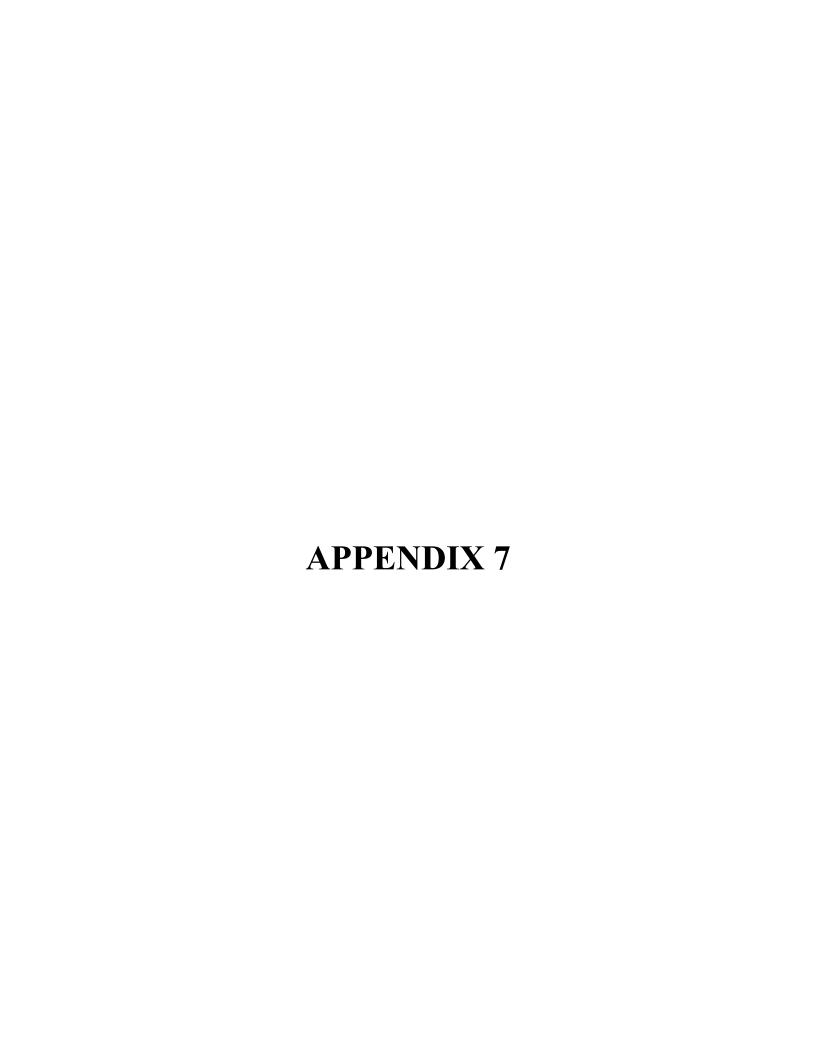
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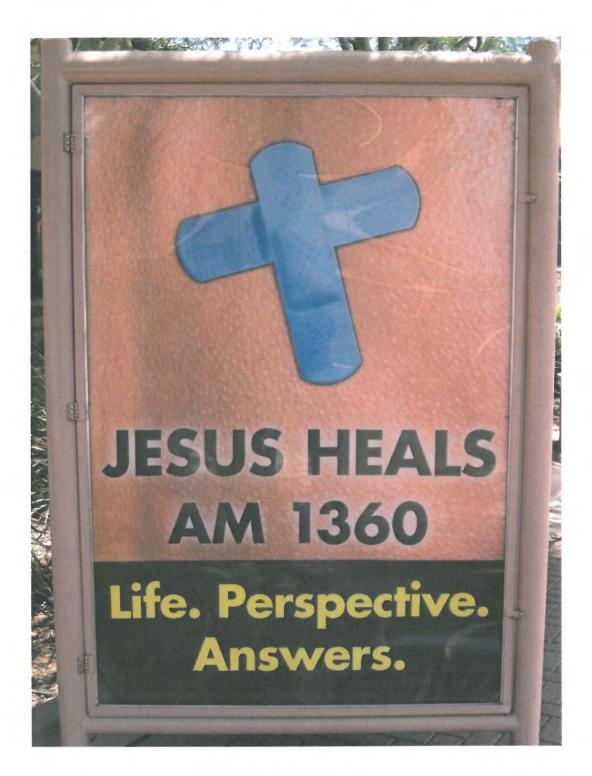
- 1 We just don't want controversial art. That's its sole
- 2 criteria, and it's in writing. It's in a letter from the
- 3 City to the arts council. It's in the proposal from the
- 4 arts council to the city. They say fine.
- 5 The Court says, what's controversial? That's
- 6 unclear. It's unfettered discretion. It's kind of like the
- 7 Lewis versus Wilson case dealing with the Aryan One Montana
- 8 license plate, contrary to public policy. What the heck is
- 9 that? That is not common parlance.
- 10 So they found that the criteria itself was
- 11 unconstitutionally vague and that invited discrimination.
- 12 That's not the case here. The sole challenge is adequately
 - 13 displayed in a context of a commercial proposal.
- 14 It's not vague. It's understandable. So
 - 15 that case doesn't apply. Next, even if it did apply, what
- 16 happened in that case is the Court said, you don't prescreen
- 17 at all. You don't look at any art.
 - The only time you ever banned anything, City
 - 19 of Pasco, was this particular plaintiff. That's not the
 - 20 case here. We have submitted to you, about 15 other ads
- 21 that were rejected by The City, were asked to be modified,
- 22 like this one was asked to be modified. This is not the
 - 23 only time we have rejected ads for not being commercial.
- 24 Further, let's move on. The other thing is
 - 25 that was important in Hopper that's not in this case, is

- MR. SCHWARTZ: I will just be very brief.
- THE COURT: Yeah. Can I ask you this one with all
 - 3 the little handwriting, is that going to pass muster under
 - 4 the March?
 - 5 MR. SCHWARTZ: This one, is the original ad.
 - 6 THE COURT: Yeah, under the March 7, 2011?
 - 7 MR. SCHWARTZ: We don't believe it would.
 - 8 THE COURT: And it is --
 - 9 MR. SCHWARTZ: Even though it has not been
- 10 submitted to us, we don't believe it would, otherwise we
- 11 wouldn't be here.
- 12 THE COURT: Well, I understand and what is it
 - 13 about that that doesn't get you there under the March 7,
- 14 2011 submitted --
- MR. SCHWARTZ: It's the same problem as the
- 16 blending. The problem with, and I am --
 - 17 THE COURT: -- commercial transaction.
- 18 MR. SCHWARTZ: I am going to get closer to the
 - 19 microscope, so it can be picked up. It is the blending
 - 20 problem, that it's true, the original ad does include some
 - 21 aspects of a commercial transaction. That's why it's
- 22 included in the proposed alternative ad we were willing to
- 23 accept.
 - It is also true, as Mr. Bolick pointed out,
 - 25 there is certain language in the smaller subscript, which SUPERIOR COURT

- 1 transaction being proposed without any website, without
- 2 phone numbers.
- It's not our job to take away the creativity
- 4 of advertisers. What we want is advertisers commercial
- 5 products that do not get into ideological, political debates
- 6 as part of the proposed ad. That's the Children of Rosary
- 7 issue. It's the same issue with their ad.
- 8 Mr. Bolick started his remarks with he
- 9 disagrees that the 2009 standards, he thinks are somehow at
- 10 issue. But if you listen to what he said, he said there are
- 11 three issues, the factual challenge to the commercial
- 12 proposal being adequately displayed.
- 13 That language only appears on the 2011
- 14 standards, not the 2009. There's no reference to adequately
- 15 display. He said vague is applied because of the adequately
- 16 displayed, again, 2011.
 - Again, the third thing, inconsistent
 - 18 application, same problem. The only thing we are here to
- 19 talk about today is the 2011 standards, so we can ignore,
- 20 frankly, everything that happened in 2009 and 2010, so some
- 21 of the ads he points to are, in fact, 2009, like the free
- 22 pregnancy test. I think it happens to be commercial and
- 23 Mr. Bolick, I agree with him. It is a commercial ad.
 - The difference between the Korwin, the
- 25 original ad here and every other ad, is the political

- 1 diatribe extolling the great virtues.
- 2 And I am not saying there aren't virtues for
- 3 guns. And the great virtues of constitutional carry, and
- 4 all of the good things that they point out, as what they
- 5 want to promote, that political ideology has no place in an
- 6 ad going on the City's buses or transit.
- 7 He can place it anywhere else he wants. It's
- 8 not like this is going chill anybody. This is not going to
- 9 stop him from putting the ad if he wants, anywhere else.
- The only question is why there is a much more
- 11 limited test when dealing with this and dealing with a
 - 12 government acting as a proprietor of a business, a bus
 - 13 system that has to compete with other means of
- 14 transportation is we shouldn't have to be tarnished by
- 15 allowing unfettered political advertisements in the guise
- 16 of, gee, it also includes a commercial transaction.
 - 17 Children of Rosary bumper sticker included a
 - 18 commercial transaction. But its intent, we knew that in
 - 19 more explicitly in Children of Rosary. I grant you, what,
 - 20 because in there they put the proposed ad. It was rejected
- 21 and then they said, oh, and now if you want a bumper
 - 22 sticker.
- But the Court made it very clear, that what
- 24 is impermissible was the blending of the proposed commercial
- 25 transaction, and the political -- in that case anti-abortion









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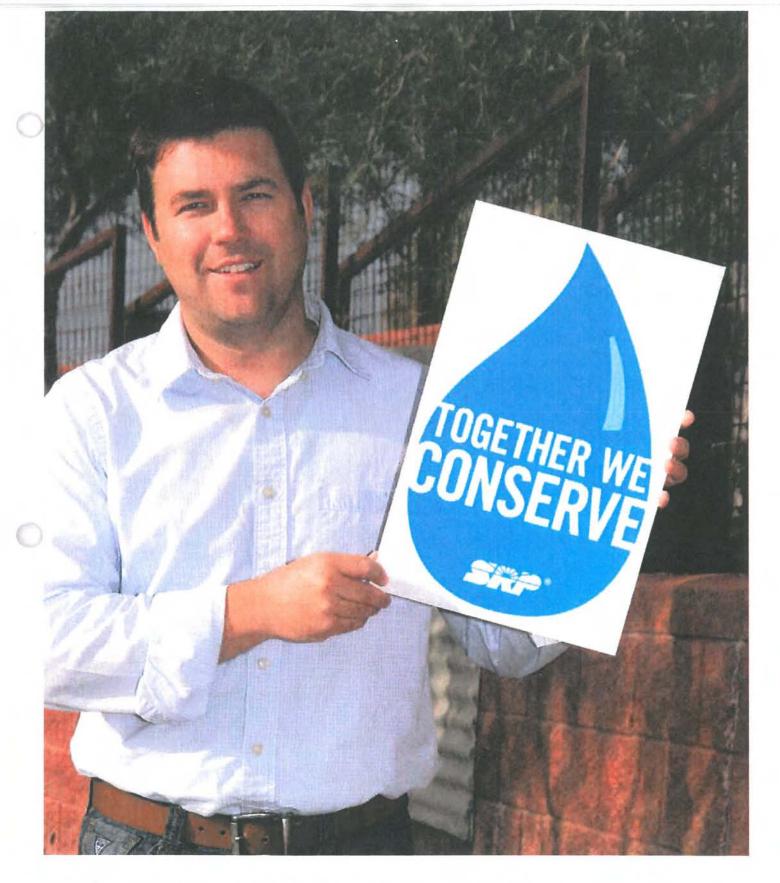


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If we each do a little, we can conserve a lot. SRP has been delivering and conserving the Valley's water through a system of rivers, lakes, dams and canals for more than 100 years. Together, we can ensure there's enough water for today and tomorrow.

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GARDEN HOSE. If we each do a little, we'll save a lot. Did you know that about 70% of total water use occurs outdoors? Here's a simple fix. An unrestricted garden hose can flow at a rate of 12 gallons of water per minute. Add a nozzle and save.

Find more water-saving tips at togetherweconserve.com.





