Bruce Washburn (015346)
6033 E. Wilshire Drive
Scottsdale, AZ 85257
(602) 350-7884
rbwashburn@gmail.com
Attorney for Amicus Curiae
League of Arizona Cities and Towns

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ex rel. MARK BRNOVICH, Attorney General, Petitioner, v. CITY OF TUCSON, Arizona, Respondent.	Supreme Court No. CV-20-0244-SA

BRIEF OF AMICUS CURIAE OF THE LEAGUE OF ARIZONA CITIES AND TOWNS
(With Written Consent of the Parties)

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INTRODUCTION

Amicus urges this Court to deny the State's efforts to further diminish Article XIII, ¶ 2 of the Arizona Constitution (hereinafter also referred to as the "Home Rule provision"). As this Court is well aware, it has been asked on many occasions to rule on how the Home Rule provision should be applied when there is a clear conflict between an ordinance adopted by a charter city and a statute enacted by the State Legislature. As this Court observed in *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 599 ¶42, 339 P.3d 663, 674 (2017), the extensive case law in this area is "muddled." The Court noted that the case law had settled on the "pivotal inquiry" in these cases being whether the subject matter is characterized as of statewide or purely local interest, *id.* at 603 ¶60, 339 P.3d at 667, but also went on to make clear its disapproval of two of the analytical approaches that had been brought forward in previous cases as a means of answering this inquiry.

First the Court addressed the distinction referenced in both *Luhrs v. City of Phoenix,* 52 Ariz. 438, 443, 83 P.2d 283, 285 (1938) and *City of Tucson v. Tucson Sunshine Climate Club,* 64 Ariz. 1, 8, 164 P.2d 598, 602 (1945) between charter city activities undertaken in a proprietary capacity and those done as an agent of the state in a governmental capacity. The Court found this analytical approach to

be "murky and unhelpful" and thus not an appropriate factor to be used in resolving such cases. *Brnovich, supra*, at 603 ¶61, 339 P.3d at 678.

The second approach disavowed by the Court was a balancing test between the interests of the City and the State that had been used by the Court of Appeals in *City of Tucson v. State*, 191 Ariz. 436, 439, 957 P.2d 341, 344 (App 1997). The Court said it was "neither helpful nor appropriate" and would potentially cause "confusion and inconsistent results", and specifically disapproved its use. *Brnovich, supra,* at 604 ¶64, 339 P.2d at 679.

Another approach to the Home Rule provision was also addressed by the Court in *State ex rel. Brnovich v. City of Tucson.* Justice Bolick in his concurrence took the position that the Home Rule provision meant only that as long as the State had not addressed an issue a charter city could, consistent with its charter and the Arizona Constitution, adopt whatever regulations it chose. However, regardless of whether the matter was of statewide or purely local concern, once the State had acted any charter city ordinance would be preempted. *Brnovich, supra,* at 605 ¶¶ 68-69, 339 P.2d at 680. In response, the majority opinion declined to reconsider the Court's long-standing and extensive adherence to the principle that charter cities are free from legislative control when acting in matters of purely local concern. *Id.* at 599 ¶43, 339 P.2d at 674.

The Court has, therefore, made it clear that the question of how to determine whether a charter city has acted in a matter of purely local concern still must be answered in each case. It has also made it clear that, because deciding what is a matter of statewide concern is a question of constitutional interpretation, it is solely the responsibility of the court, not the Legislature, to make that determination, even though the Legislature may have made specific findings that a statewide issue exists. *Brnovich, supra,* at 673 ¶37, 339 P.2d at 598.

How, then, should the Court proceed with what it has acknowledged is an *ad hoc* undertaking that involves "case-specific line drawing" in most, if not all, instances? *City of Tucson v. State*, 229 Ariz. 172,176 ¶20, 273 P.2d 624, 628 (2012). For the reasons set forth below, Amicus believes that the Court's focus should be on implementing the framers' intent that the rights granted to charter cities act as a check on the State Legislature so that those cities would always be immune from legislative interference in dealing with matters that truly affect only their citizens.

IDENTITY AND INTEREST OF AMICUS CURIAE

The League of Arizona Cities and Towns is a voluntary association comprised of the 91 incorporated cities and towns of Arizona. It advocates for local control and represents the interests of Arizona cities and towns by acting as their collective voice in the Legislature, agencies and courts. Amicus has a strong

interest in this matter as it touches on the ability of Arizona's charter cities to fully exercise the powers granted to them under Article XIII, § 2 of the Arizona Constitution. All parties have consented to the filing of this brief. No persons or entities other than Amicus have provided financial resources for the brief's preparation.

ARGUMENT

I. THE FRAMERS OF ARIZONA'S CONSTITUTION INTENDED THE HOME RULE PROVISION TO ACT AS A CHECK ON THE STATE LEGISLATURE.

The Arizona constitution was a product of the Progressive era in which it was written.[1] The delegates, many of whom were favorable to the Progressive movement, were both informed and motivated in their actions by the tenets of that movement, but also by the bitter experience they had had during Arizona's time as a territory.[2] At that time the citizens had no say in choosing their federally-appointed Governor and other chief officials, and their locally elected legislature had only limited authority, with the laws it did enact being subject to congressional approval.[3] The result was governance that was weak, ineffective and largely

[1] Toni McClory, *Understanding the Arizona Constitution* 11 (2nd ed. 2010).
[2] *Id.* at 17-18, 24.
[3] *Id.* at 17-18.

unaccountable, so many Arizonans looked to statehood, and a constitution of their own design, as the best means of rectifying the situation.[4]

Given this context, it is not surprising that at the 1910 constitutional convention the framers manifested " . . . more distrust than confidence in the uses of authority."[5] They saw a need for a "careful arrangement of the machinery of government", and including suffusing it with checks and balances " . . . to forestall excessive concentrations of power".[6] As noted by Professor John D. Leshy, who in 1998 was described by this Court as the most prominent historian of the Arizona Constitution,[7] " . . . the Arizona Constitution fairly bristles with limitations on the legislature . . ."[8]

Because Arizona's founders valued local autonomy, included in those constitutional limits on the Legislature were ones restricting its ability to interfere with cities and towns, such as by prohibiting the enactment of special laws that treated communities differently.[9] However, "Even more importantly, the Progressives encouraged municipal home rule."[10] In fact, one of the most

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[4] *Id.* at 20.
[5] John D. Leshy, *The Arizona State Constitution* 14 (2nd ed. 2013).
[6] *Id.*
[7] *Valencia Energy Co. v. Arizona Department of Revenue*, 191 Ariz. 565, 572 ¶20, 959 P.2d 1256, 1263 (1998).
[8] Leshy at 17.
[9] McClory at 155.
[10] *Id.*

vigorously debated Propositions at the constitutional convention was No. 52, which provided for cities to adopt their own home rule charters.[11] During the debate on that Proposition delegate James E. Crutchfield sought to strike from the Proposition the procedure for having cities adopt their own charters.[12] This proposal received a strong negative reaction from several of the delegates when it was understood to be an attempt to make the obtaining of the charter dependent on the will of the legislature.[13] Delegate Baker stated, "I will state that the purpose of the measure is home government and this authorizes a charter government for the people in order that they do not have to go to the legislature for a charter . . . and it is intended to provide self government."[14] Delegate Ellinwood joined in, asserting, "Once more I protest that if this section is abolished it destroys the right of self government in the cities and towns and leaves them without a means of charter government until they appeal to a legislature."[15] And, of course, if a legislature has the right to control whether or when a charter is to be granted, or the procedure by which it is to be constructed, it has the power to control what is to be in it.[16]

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[11] Leshy at 12.
[12] John S. Goff, The Records of the Arizona Constitutional Convention of 1910 514 (1991)
[13] *Id.* at 515.
[14] *Id.* at 514-15.
[15] *Id.* at 515.
[16] *See City of Portland v. Welch*, 154 Or. 286, 295, 59 P.2d 228, 232 (1936)(when cities had to petition the legislature to obtain a charter those charters frequently

Delegate Crutchfield's motion failed to pass on a vote of 28 to 19. A clear majority of the convention delegates wanted home rule cities, and they wanted them to be as free from any sort of control by the State Legislature as possible.[17] As Professor Leshy has said, the very purpose of Article XIII, § 2 of the Arizona Constitution is nothing more nor less than to "render cities independent of the legislature with respect to matters strictly of local concern."[18]

II. IN IMPLEMENTING THE HOME RULE PROVISION THE FOCUS SHOULD BE ON WHETHER THE STATE'S LEGISLATION DEPRIVES THE CHARTER CITY'S CITIZENS OF CONTROL OVER A MATTER THAT MATERIALLY AFFECTS ONLY THEM.

This Court has recognized that constitutional interpretation should be done so as not to reach "results quite different from the objectives which the framers intended to accomplish." *U.S. v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 275-76, 697 P.2d 658, 668-69(1985). "Constitutions, meant to endure, must be interpreted with an eye to syntax, history, initial principle, and extension of fundamental purpose." *Id.* As noted above, the syntax and history of the Home Rule provision show that it was meant to act as a protection of charter cities against interference in their internal affairs by the Legislature.

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contained provisions "wholly at variance with the will of the people governed thereby.")

[17] Goff at 515.

[18] Leshy at 333.

An early case, and one that may well have been known to the Arizona constitutional convention delegates, addresses the fundamental, underlying principle of why the regulation of purely local matters should be the responsibility of the charter cities and not the state legislatures. *Morrow v. Kansas City*, 85 S.W. 572 (Mo. 1905) involved the question of whether a city could adopt a replacement charter, a matter not at issue here, but the statement of the Missouri Supreme Court regarding what the rationale for home rule charters was understood to be at that time provides a telling historical context:

> With us the motive of the people in conferring this privilege upon such cities has been held to be to prevent "the officious intermeddling with the charters of our cities without the knowledge of those whose rights are affected," and was aimed at the recognized frequent interference by the Legislature with city charters; and consequently **our people thought best to confer that right upon the people who were to be affected, which it has been declared was entirely in accord with the genius of our institutions, being the regulation and government of local affairs within the observation and control of those who are to be affected thereby**. . . The policy of our people was to trust the people of the city to make a change in their charter when they deemed it necessary . . . The purpose was to trust them to do this, rather than some interested intermeddlers, who might procure changes in their charter by imposing upon the Legislature . . .

Id. at 575(emphasis supplied; internal citations omitted).

Other cases of this era are to the same effect that the purpose of home rule is to have, to the fullest extent possible, the regulation of local affairs "within the observation and control of those who are to be affected thereby." *See State ex rel.*

Ryan v. District Court of Ramsey County, 91 N.W. 300, 302 (Minn. 1902); *Lackey v. State ex rel. Grant*, 116 P. 913, 916 (Mo. 1911).

Given this historical context, if the judicial branch's interpretation of Article XIII, § 2, is going to achieve "the objectives which the framers intended to accomplish," then the focus must be on maintaining the autonomy of the charter cities so that their governance is "within the observation and control of those who are to be affected thereby". It is clear that when the Home Rule provision was made part of the Constitution and approved by the voters the intent was not to protect the powers of the Legislature. Rather it was to protect from the Legislature the citizens who, through the adoption of a city charter, had said that they wanted to have control through their own elected representatives of their own local affairs. Amicus believes that in order to accomplish that goal, and to acknowledge the intent of the framers of the Home Rule provision, the starting point of the analysis needs to be on the rights of the citizens of the charter cities to the protections afforded them by the Arizona Constitution rather than on the acts of the Legislature.

This Court has previously recognized that what impact, if any, a charter city's action might have on those outside the city to be an important factor in determining whether a matter was purely of local concern. In *City of Tucson v.*

Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 336,195 P.2d 562, 565 (1948)(emphasis supplied) the Court noted:

> We believe in view of our constitution and the code sections involved that the manner and method of disposal of real estate of a city is not a matter of state-wide public concern. **It is of no interest to the cities of Phoenix, Yuma, or any other city or town in the State of Arizona, what the provisions of the charter of the City of Tucson provide in this respect.** The people of Arizona, through their duly elected representatives, should not be concerned with legislation looking to the intricacies of management of a large city. Its problems are myriad and personal. It is for this reason that the constitution authorized cities of a certain size to enact charters for their self-government, within the limitations of the constitution.

Similarly, in *Strode v. Sullivan*, 72 Ariz. 360, 368, 236 P.2d 48, 54(1951) this Court stated it could "conceive of no essentials more inherently of local interest or concern to the electors of a city than who shall be its governing officers and how they shall be selected." And in *City of Tucson v. State*, 235 Ariz. 434, 440 ¶19, 333 P.3d 761, 767 (App 2014), the Court of Appeals noted, "If only city costs are implicated, then the Arizona Constitution delegates to the city's voters to determine whether its costs actually would decrease, and, if so, whether the decrease is worth the trade-off in loss of off-cycle election benefits."

An initial examination of whether an action of a charter city will really have any impact outside of the city is the appropriate place to start the determination of whether under Arizona's Constitution that action is protected from interference by the Legislature. If such an impact cannot be discerned then that should resolve the matter in favor of the charter city unless there is a real and substantial reason the

Legislature should be able to override the wishes of the local citizens and their elected representatives.

In making this further inquiry several factors should be kept in mind. First, there is absolutely no reason for there to be any presumption in favor of the Legislature's exercise of power. As noted above, the grant of power to the charter cities was intended as a check on the power of the Legislature so that local citizens could control local matters without any "officious intermeddling".[19] Both the charter cities and the Legislature are created by, and obtain their powers from, the State Constitution. They are equals within the areas of control allotted to them by that Constitution, and there is certainly no reason for the Court to ignore the Home Rule provision of the Constitution and to give deference to the Legislature when applying a constitutional provision intended to prevent the Legislature from overreaching in dealing with the charter cities.

Second, the Legislature should not be able to make local matters into matters of statewide concern simply by enacting a law imposing uniformity on all cities. *State ex rel. Heinig v. City of Milwaukie*, 373 P.2d 680, 684 (Or. 1962)("But uniformity itself is no virtue, and a municipality is entitled to shape its local law as it sees fit if there is no discernible pervading state interest involved.") Under the State's view a simple declaration of statewide interest by the Legislature negates a

[19] *Morrow, supra,* 85 S.W. at 575.

city's charter authority under any circumstances, which would contradict the reason why the Home Rule provision was placed in the Constitution to begin with, to allow the citizens to govern themselves when a matter affects only their city.

Third, while this Court has, as noted above, eschewed any balancing test between the interests of the Legislature and the charter cities, that should not mean that any conceivable interest of the Legislature, no matter how remote or fanciful, should suffice to deprive the charter cities and their citizens of their constitutional right to home rule. As the Oregon Supreme Court stated in *Heinig, supra,* 373 P.2d at 684, in dealing with the question of whether any imaginable interest of the state could overcome the rights of a home rule city, "[I]n a sense all events in life are related – but the question requiring our answer is whether the extramural effect is substantial or insignificant." It would entirely defeat the original intent of the Home Rule provision if the substantial and important rights it allocates to the charter cities could be so easily dispersed.

CONCLUSION

The right of the charter cities and their citizens to be able to control their local affairs as free from interference by the Legislature as possible should not be treated lightly, and it should not be unnecessarily circumscribed. When the framers of Arizona's Constitution provided for Home Rule they recognized that conflicts would, of course, arise, and because those conflicts have to be resolved

by this Court on a line-drawing, case-by-case basis, Amicus earnestly asks that this Court always keep foremost in the analysis the purpose of the Home Rule provision, which is to prevent any sort of interference by the Legislature that would deprive the citizens of their right to self-rule.

The parties to the case presently before the Court have detailed the long and convoluted history of the Legislature's unceasing attempts to dictate to the citizens of Tucson how they are to conduct their municipal elections. Amicus firmly believes that, when the matter is looked at in the light of the standards discussed above, there is no reason to find that the State has shown that there is any real statewide concern that needs to take precedence over how the citizens of Tucson have repeatedly affirmed they want to conduct their municipal elections – a purely local matter that does not affect any other city, town, county or the State. In fact, the Legislature's unflagging efforts to wrest control of the elections from Tucson's citizens show this case to be exactly the type of situation the framers had in mind when they added Home Rule to Arizona's Constitution.

This Court noted in *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 602 ¶ 56, 399 P.3d 663, 677 (2017), that it has "narrowly limited the concept of 'purely municipal affairs,' or 'local interest or concern'" to the extent that there are now two areas recognized where city ordinances prevail over state laws, those being local elections and the disposition of real property. One can only wonder

why such narrowing has occurred when the inclusion of Home Rule in the State Constitution was deemed at the time to be an important part of accomplishing the goal of the framers to devolve more power to the citizens and to protect that power from the Legislature. Amicus urges this Court to apply equal weight to the Home Rule provision of the Arizona Constitution and hopes that this limiting approach sought by the Legislature will have run its course. If the Court adopts the State's argument and removes elections of local officials from the scope of charter authority we will all be pondering the question articulated by Vice Chief Justice Pelander in *State ex rel. Brnovich, supra*, 242 Ariz. at 599 ¶ 44, 399 P.2d at 674 of " . . . what is left of charter cities' authority under Article 13, § 2?"

Dated this 30th day of October, 2020

Respectfully submitted,

/s/ Bruce Washburn
Bruce Washburn (015346)
6033 E. Wilshire Drive
Scottsdale, AZ 85257
(602) 350-7884
rbwashburn@gmail.com
Attorney for Amicus Curiae
League of Arizona Cities and Towns