

1 Roopali H. Desai (024295)
2 D. Andrew Gaona (028414)
3 Kristen Yost (034052)
4 **COPPERSMITH BROCKELMAN PLC**
5 2800 North Central Avenue, Suite 1900
6 Phoenix, Arizona 85004
7 T: (602) 381-5478
8 rdesai@cblawyers.com
9 agaona@cblawyers.com
10 kyost@cblawyers.com
11 *Attorneys for Plaintiff City of Flagstaff*

12
13 **ARIZONA SUPERIOR COURT**
14
15 **MARICOPA COUNTY**

16 CITY OF FLAGSTAFF, a political subdivision) No. **CV2021-011210**
17 of the State of Arizona,)
18)
19 Plaintiff,) **MOTION FOR PRELIMINARY**
20) **INJUNCTION**
21 v.)
22)
23 THE ARIZONA DEPARTMENT OF)
24 ADMINISTRATION, an agency of the State of)
25 Arizona; ANDY TOBIN, in his official)
26 capacity as the Director of the Arizona)
Department of Administration; KIMBERLY)
YEE, in her official capacity as the State)
Treasurer of Arizona; and STATE OF)
ARIZONA, a body politic.)
Defendants.)

27
28 **Introduction**

29 Arizona has a strong public policy favoring the initiative. Since statehood, “the people
30 themselves deliberately and intentionally announced that,” by adopting the Arizona Constitution,
31 “they meant to exercise their supreme sovereign power directly to a far greater extent than had
32 been done in the past, and that the legislative authority, acting in a representative capacity only,
33 was in all respects intended to be subordinate to direct action by the people.” *Whitman v. Moore*,

1 59 Ariz. 211, 218 (1942), *overruled on other grounds by Renck v. Superior Court*, 66 Ariz. 320,
2 327 (1947). To protect this fundamental right – and after decades of the Arizona Legislature
3 meddling with and undermining measures approved at the ballot box – Arizonans adopted the
4 Voter Protection Act (“VPA”) as a constitutional amendment to limit the Legislature’s power to
5 amend, supersede, or repeal voter-approved laws. Ariz. Const. art. 4, pt. 1, § 1(6)(B)-(C), (14).

6 Despite this clear limit on its power, the Legislature passed HB 2756 to interfere with the
7 voter’s intent in passing Proposition 202 (now codified as A.R.S. § 23-362 *et seq.*) in 2006.
8 Through Prop 202, Arizona’s voters raised the statewide minimum wage and granted counties,
9 cities, and towns the power to adopt a local minimum wage, subject to only one condition: the
10 local minimum wage cannot be lower than the State’s minimum wage. Based on this, the City
11 of Flagstaff (“City”) adopted a local minimum wage that exceeds the State’s minimum wage.
12 [*See* Compl. Ex. 1 (Flagstaff City Code [15-01-001-0003](#))]. In response – and after two prior
13 attempts to amend or supersede Prop 202 – the Legislature passed HB 2756, which creates a new
14 condition the Legislature may impose on a city that adopts a higher minimum wage: the city
15 must pay a penalty for any costs to the State “attributable to” the city’s higher minimum wage.
16 The Legislature’s attempt to add a condition the voters saw fit to exclude is an amendment of
17 Prop 202. And because HB 2756 passed with only a simple majority vote, it violates the VPA
18 and the Court should enjoin it.

19 **Factual Background**

20 **I. Arizona Voters Pass Prop 202 and the City Adopts a Higher Minimum Wage.**

21 In 2006, the People of Arizona passed Prop 202, known as the “Raise the Minimum Wage
22 for Working Arizonans Act.” As its name suggests, Prop 202’s purpose was to “increase[e]” the
23 minimum wage to ensure that “[a]ll working Arizonans [are] paid a minimum wage that is
24 sufficient to give them a fighting chance to provide for their families,” Prop 202 § 1, “to assure
25 ‘the maintenance of the minimum standard of living necessary for health, efficiency, and general
26 well-being of workers,’” and to make appropriate “cost of living adjustment[s].” Prop 202

1 Publicity Pamphlet, Arguments of the Arizona Minimum Wage Coalition.¹

2 In line with this purpose, Prop 202 also granted a “county, city, or town” the power to
3 “regulate minimum wages and benefits within its geographic boundaries,” as long as the county,
4 city, or town does not adopt a local minimum wage lower than the State’s minimum wage. A.R.S.
5 § 23-364(I). Section I also reaffirms that Prop 202 must “be liberally construed in favor of its
6 purposes” and does not “limit the authority of the legislature or any other body to adopt any law
7 or policy that requires payment of higher or supplemental wages or benefits[.]” *Id.* (Emphasis
8 added). In its brief analysis of Prop 202, the Legislative Council flagged this key provision,
9 noting that “[t]he Legislature, a county, a city or a town may enact a law providing for a higher
10 minimum wage than established by this proposition.” [Compl. Ex. 2 (emphasis added)].

11 As authorized by A.R.S. § 23-364(I), voters approved the passage of Proposition 414 in
12 2016 (now codified as Flagstaff City Code 15-01-001-0003), which adopted a local minimum
13 wage that exceeds the State’s minimum wage. [See Compl. Ex. 1]. In response, the Legislature
14 passed HB 2756, which (as detailed below) penalizes cities for exercising the right granted to
15 them by the People to adopt a higher local minimum wage.

16 **II. The Legislature Repeatedly Tries to Gut A.R.S. § 23-364(I).**

17 This isn’t the first time the Legislature has tried to undercut the voter’s grant of power to
18 cities and towns under A.R.S. § 23-364(I).

19 First, in 2013 the Legislature passed – and the Governor signed – HB 2280, which
20 provided that “[t]he regulation of employee benefits, including compensation, paid and unpaid
21 leave and other absences, meal breaks[,] and rest periods . . . is not subject to further regulation
22 by a city, town or other political subdivision of this state.” The Flagstaff Living Wage Coalition
23 challenged the constitutionality of HB 2280 under the VPA. *See Flagstaff Living Wage Coal. v.*

24
25 ¹ See 2006 General Election Information, Prop 202,
26 <https://apps.azsos.gov/election/2006/Info/PubPamphlet/english/Prop202.htm> (last visited July
14, 2021). [Compl. Ex. 2].

1 *Arizona*, Maricopa County Superior Court, Case No. CV2015-004240. The Attorney General
2 did not defend HB 2280’s constitutionality, and instead agreed to a stipulated judgment that
3 invalidated the law. *See Flagstaff coalition claims victory in living wage battle with state*, *Ariz.*
4 *Daily Sun* (June 30, 2015) [https://azdailysun.com/news/local/flagstaff-coalition-claims-victory-](https://azdailysun.com/news/local/flagstaff-coalition-claims-victory-in-living-wage-battle-with-state/article_d5a96e66-c544-57fc-8305-021d91de51e1.html)
5 [in-living-wage-battle-with-state/article_d5a96e66-c544-57fc-8305-021d91de51e1.html](https://azdailysun.com/news/local/flagstaff-coalition-claims-victory-in-living-wage-battle-with-state/article_d5a96e66-c544-57fc-8305-021d91de51e1.html).

6 Undeterred, the Legislature tried again in 2016. That year, the Legislature passed – and
7 the Governor signed – HB 2579, which stated that “[t]he regulation of employee benefits,
8 including nonwage compensation, paid and unpaid leave and other absences, meal breaks[,] and
9 rest periods . . . is not subject to further regulation by a city, town or other political subdivision
10 of this state.” A.R.S. § 23-204(A). State legislators, city council members, and a workers’ union
11 challenged the constitutionality of the law because it amended A.R.S. § 23-364(I) in violation of
12 the VPA. *See UFCW Local 99, et al. v. Arizona*, Maricopa County Superior Court, Case No.
13 CV2016-092409. The Superior Court invalidated the law, and the Court of Appeals affirmed,
14 holding that HB 2579 violated the VPA because it amended or repealed Prop 202’s provision
15 “grant[ing] counties, cities, and towns” the right to “further increase wages *and benefits*[.]”
16 *Meyer v. State*, 246 Ariz. 188, 194 ¶ 17 (App. 2019) (emphasis in original).

17 **III. The Legislature Tries Again Through HB 2756.**

18 HB 2756 is the Legislature’s third shot at amending A.R.S. § 23-364(I).² In 2019, the
19 Legislature passed – and the Governor signed – that legislation, which purports to allow the
20 Legislature to allocate, and if allocated, requires ADOA to assess and collect “an amount to
21 reimburse this state for the cost to this state in the next fiscal year attributable to the county’s,
22 city’s or town’s establishment of a minimum wage . . . that . . . exceeds the [State’s] minimum
23 wage[.]” A.R.S. § 35-121.01(A). Until this legislative session (as detailed below), the Legislature
24 had never allocated any amounts under A.R.S. § 35-121.01(A).

25 _____
26 ² The challenged provisions, A.R.S. §§ 35-121.01 and 35-113 (as amended), are referred to collectively herein as “HB 2756”.

1 If the Legislature allocates an amount under A.R.S. § 35-121.01(A), Section B provides
2 that ADOA “shall assess” that amount by July 31, and the amount is “payable immediately on
3 assessment.” A.R.S. § 35-121.01(B). If the county, city or town does not pay the assessment by
4 December 31, ADOA “shall notify the state treasurer, who shall subtract the amount owed by
5 the county, city or town from any payments required to be made by the state treasurer to that
6 county, city or town pursuant to section 42-5029, subsection D, plus interest[.]” *Id.* And if the
7 amount the Treasurer withholds is less than the unpaid assessment, the Treasurer “shall withhold
8 from any other monies payable to that county, city or town from whatever state funding source
9 is available an amount necessary to fulfill the requirement.” *Id.*

10 HB 2756 also amended A.R.S. § 35-113 to add a requirement that state “budget units”
11 include in their annual budget estimates that they submit to the Governor’s office of strategic
12 planning and budgeting “a detailed estimate of the cost to the budget unit in the next fiscal year
13 attributable to a county’s, city’s or town’s establishment of a minimum wage if that minimum
14 wage exceeds the minimum wage established by this state pursuant to section 23-363.”

15 When the House Appropriations Committee debated HB 2756, Representative Randall
16 Friese correctly recognized that the law implicated the VPA. May 22, 2019 H. Approp. Comm.
17 Mtg., <https://www.azleg.gov/videoplayer/?eventID=2019051332> (“Is this a [VPA] issue? I
18 mean [Prop 202] was voter-initiated.”). Yet the Legislature charged ahead.

19 **IV. The Legislature Allocates a \$1.1 Million Assessment Against the City.**

20 After HB 2756 passed, the Joint Legislative Budget Committee (“JLBC”) sent a
21 memorandum to various state agencies requesting that they include in their FY2021 budget
22 estimates any costs to the State attributable to the City’s minimum wage. [See Compl. Ex. 3]
23 Several State agencies and other entities submitted FY2021 budget estimates with an amount of
24 alleged costs attributable to the City’s minimum wage. Based on these estimates, the Legislature
25 introduced a budget bill directing ADOA to “assess and collect the amount of \$1,110,992 from
26 the City of Flagstaff in fiscal year 2021-2022 to reimburse this state for costs to this state

1 attributable to the establishment of a minimum wage that exceeds the minimum wage established
2 by this state[.]” SB 1827, 55th Leg., 1st Reg. Sess. § 12 (Ariz. 2021).

3 At a Senate Appropriations Committee meeting on May 26, legislators again correctly
4 questioned the constitutionality of this assessment under the VPA. Senator Martin Quezada
5 noted that the assessment is a “financial penalty against City of Flagstaff for exercising express
6 authority to raise its minimum wage” as granted to it by the People. *See* May 26, 2021 Sen.
7 Approp. Comm. Mtg., <https://www.azleg.gov/videoplayer/?eventID=2021051062> (last visited
8 July 14, 2021). On June 24, 2021, the Legislature passed SB 1827, and the Governor signed it
9 on June 30. [Compl. Ex. 5]

10 **Argument**

11 A party seeking a preliminary injunction must establish that (1) there is a strong
12 likelihood of success at trial on the merits, (2) the possibility of irreparable harm that is not
13 remedied by monetary damages, (3) the balance of hardships tips in its favor, and (4) public
14 policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Courts consider the
15 likelihood of success on the merits and the possibility of irreparable harm on a sliding scale, and
16 they will grant an injunction when the balance of hardships tips sharply in the movant’s favor
17 with less likelihood of success, and vice versa. *Smith v. Ariz. Citizens Clean Elections Comm’n*,
18 212 Ariz. 407, 411 ¶ 10 (2006). Under either formulation of the rule, the City is entitled to a
19 preliminary an injunction. The City has a strong likelihood of the success on its claims, and the
20 consequences of an unconstitutional \$1.1 million assessment will cause an irreparable hardship
21 that tips strongly in favor of the City.

22 **V. The City Is Likely to Succeed on Its Claim That HB 2756 Violates the VPA.**

23 **A. The VPA protects voter-approved laws from legislative changes.**

24 The framers of the Arizona Constitution were “advocates of th[e] method of popular
25 government” known as the initiative and referendum, “and the records of the constitutional
26 convention, together with the language of the [] constitution, show clearly that it was the opinion

1 of the delegates who adopted and signed it that its provisions setting forth these principles were
2 among the most important to be found therein.” *Whitman*, 59 Ariz. at 218. “When the
3 [constitution] was submitted to the voters for ratification, that issue was again the principal one
4 before them and the constitution was ratified by a very large percentage of the votes cast.” *Id.*
5 As a result, and since statehood, the People of Arizona have reserved to themselves the power
6 to “propose laws and amendments to the constitution and to enact or reject such laws and
7 amendments at the polls, independently of the legislature,” and “for use at their own option, the
8 power to approve or reject at the polls any act, or item, section, or part of any act, of the
9 legislature.” Ariz. Const. art. IV, § 1(1). As a function of this constitutional reservation, “the
10 power of the people to legislate is as great as the power of the legislature to legislate.” *Iman v.*
11 *Bolin*, 98 Ariz. 358, 364 (1965).

12 After decades of the Legislature undermining the will of Arizona voters, in 1998 the
13 People adopted the VPA as a constitutional amendment, limiting the legislature’s power to
14 meddle with laws adopted by the voters. Ariz. Const. art. 4, pt. 1, § 1(6)(B)-(C), (14). Under the
15 VPA, the Legislature cannot repeal voter-approved initiative measures, and it can amend or
16 supersede an initiative only if the amendment “furtheres the purposes” of the initiative and the
17 Legislature passes it with “at least three-fourths of the members of each house[.]” *Id.* The
18 purpose of the VPA is “to limit changes to voter-approved laws,” *Meyer*, 246 Ariz. at 192 ¶ 10,
19 and to prevent the legislature from “abusing its power to amend and repeal voter-endorsed
20 measures.” *Arizona Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7
21 (2009). The passage of the VPA thus “altered the balance of power between the electorate and
22 the legislature[.]” *Id.*

23 HB 2756 passed with only a simple majority vote.³ The only question, then, is whether
24 HB 2756 amends A.R.S. § 23-364(I). It does.

25 _____
26 ³ See Bill History for HB 2756, <https://apps.azleg.gov/BillStatus/BillOverview?Sessionid=121>
(last visited July 14, 2021).

1 **B. HB 2756 amends A.R.S. § 23-364(I) in violation of the VPA.**

2 Even if a law does not expressly purport to amend a voter-approved law, courts “must
3 consider its effect on the fundamental purposes underlying the VPA.” *Cave Creek Unified Sch.*
4 *Dist. v. Ducey*, 233 Ariz. 1, 7 ¶ 23 (2013) (“[T]he legislature may not do indirectly what it is
5 prohibited from doing directly.”) (quoting *Caldwell v. Bd. of Regents*, 54 Ariz. 404, 410, 96 P.2d
6 401, 403 (1939)). With that consideration in mind, the Legislature “amends” a voter-approved
7 law when it “in substance alters, modifies, or adds to” the law. *Meyer*, 246 Ariz. at 192 ¶ 11
8 (quoting *Cave Creek Unified Sch. Dist.*, 233 Ariz. at 7 ¶ 24).

9 In *State v. Maestas*, for example, the Arizona Supreme Court struck down a law because
10 it amended Arizona’s Medical Marijuana Act (“AMMA”) but did not further the purpose of
11 AMMA, as required by the VPA. 244 Ariz. 9, 13 ¶ 20 (2018). There, the challenged law added
12 college campuses to the list of places where possession of medical marijuana is illegal, despite
13 the already exhaustive list of places adopted by the voters in AMMA. *Id.* ¶ 16. Because the voters
14 prescribed a list of places where medical marijuana is illegal that did not include college
15 campuses, the voters did not intend to criminalize medical marijuana on college campuses, and
16 the Legislature’s attempt to do so improperly amended AMMA. *Id.* ¶ 15.

17 So too here. The voters specified in A.R.S. § 23-364(I) that a city has the right to adopt a
18 local minimum wage, subject only to the condition that the local minimum wage cannot be lower
19 than the State’s minimum wage. By its terms, HB 2756 adds a new condition that the Legislature
20 can impose on a city that adopts a higher local minimum wage: the city must reimburse the State
21 for any costs attributable to the city’s higher minimum wage. *See* A.R.S. § 35-121.01(A). The
22 voters mandated that Prop 202 “shall not limit” a city’s authority to adopt a higher minimum
23 wage. A.R.S. § 23-364(I).⁴ But HB 2756 does exactly that. It limits cities’ authority to adopt a
24

25 ⁴ The Legislative Council analysis included this key provision in its brief description of Prop
26 202. [Compl. Ex. 2 (“a county, a city or a town may enact a law providing for a higher minimum
wage than established by this proposition.”)]

1 higher minimum wage by adding a new condition that allows the Legislature – in its complete
2 discretion – to penalize them if they exercise that authority. HB 2756 purports to be an
3 independent budgeting statute, but it “in substance alters, modifies, or adds to” A.R.S. § 23-
4 364(I) in violation of the VPA. *Meyer*, 246 Ariz. at 192 ¶ 11.

5 If it weren’t already clear from the plain language, the voters’ intent in passing A.R.S. §
6 23-364(I) also reveals that HB 2756 amends it. *Ariz. Early Childhood Dev. & Health Bd. v.*
7 *Brewer*, 221 Ariz. 467, 470, 471 ¶¶ 10, 14 (2009) (“Our primary objective in construing statutes
8 adopted by initiative is to give effect to the intent of the electorate. . . . In determining the purpose
9 of an initiative, we consider such materials as statements of findings passed with the measure as
10 well as other materials in the Secretary of State’s publicity pamphlet[.]”) (quotations omitted).
11 The People passed Prop 202 to “increase[e]” the minimum wage for Arizona’s workers, “to
12 assure ‘the maintenance of the minimum standard of living necessary for health, efficiency, and
13 general well-being of workers,’” and to make appropriate “cost of living adjustment[s].” Prop
14 202 Publicity Pamphlet, Arguments of the Arizona Minimum Wage Coalition. [See Compl. Ex.
15 2]. To further this purpose, the voters granted cities the right to adopt higher minimum wages to
16 match local costs of living. Penalizing cities that exercise that right frustrates the voters’ intent
17 in passing Prop 202.

18 Beyond that, the Legislature’s record since Prop 202’s passage also supports a finding
19 that that the Legislature has improperly amended A.R.S. § 23-364(I). Since Prop 202 passed, the
20 Legislature has twice tried – and failed – to undercut the voters’ grant of power to cities and
21 towns under A.R.S. § 23-364(I). HB 2756 is yet another attempt to prevent cities from adopting
22 higher minimum wages.

23 In the end, HB 2756 is precisely the kind of legislative meddling the VPA is designed to
24 prevent. Allowing the Legislature to create and impose new burdens and restrictions on an
25 initiative measure would thwart the VPA’s purpose of stopping the Legislature from “abusing
26 its power” to change voter-approved laws. *Brewer*, 221 Ariz. at 469 ¶ 7. The Court should strike

1 down HB 2756 and enjoin the \$1.1 million assessment against the City.

2 **VI. The City Will Suffer Irreparable Harm Without an Injunction.**

3 To begin, a violation of the VPA constitutes irreparable harm, and an injunction is the
4 only available remedy to prevent enforcement of an unconstitutional law. *See, e.g., Goldie’s*
5 *Bookstore, Inc. v. Superior Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (“An alleged
6 constitutional infringement will often alone constitute irreparable harm.”) (citing Wright &
7 Miller, 11 Fed. Prac. and P. § 2948 at 440 (1973)).

8 What’s more, the City faces imminent irreparable harm to its budget and operations. If
9 the Court does not enjoin the State from enforcing HB 2756, ADOA will assess \$1.1 million
10 against the City by July 31. And if the City does not pay the entire assessment by December 31,
11 the Treasurer will withhold the City’s share of State revenue. If the City has to pay a \$1.1 million
12 assessment in the next six months and risks losing State revenue, the City will not be able to
13 fund critical infrastructure and services. [Compl. ¶¶ 67-70] The assessment in SB 1827 amounts
14 to approximately 13% of the City’s state shared sales taxes. [*Id.* ¶ 68] These revenues fund many
15 operations through the City’s General Fund, including, police, fire, parks and recreation,
16 facilities, fleet maintenance, administration, legal services, information technology, finance, and
17 human resources. [*Id.*] The unconstitutional assessment and resulting loss of revenues will likely
18 disrupt the City’s operations, cause the City to reduce its services, and create delays in the City’s
19 infrastructure and capital replacement. [*Id.* ¶ 69]

20 Indeed, the City’s FY2021-2022 budget already accounts for the assessment in SB 1827
21 and, as a result, the City is unable to fund critical infrastructure and equipment under this budget.
22 [*Id.* ¶ 70] For example, the City (1) does not have resources to upgrade its aging information
23 technology systems and advanced measures for cyber security, (2) does not have sufficient
24 funding to replace its aging body cameras for public safety, (3) lacks funding for overtime pay
25 for its public safety employees, and (4) has to defer maintenance of its facilities. [*Id.* ¶ 71] The
26 City lacks funding under the budget to replace its fire trucks, including a \$1.4 million ladder

1 truck that is the only one available in the City’s region. [*Id.* ¶ 72] The City must also extend the
2 replacement term for fire trucks to 25 years, instead of the industry standard of 20 years. [*Id.*]
3 Even more, the City anticipates that many other organizational needs will not be met under the
4 current budget because it accounts for the assessment in SB 1827. [*Id.* ¶ 74]

5 **VII. The Balance of Hardships and Public Interest Favor an Injunction.**

6 Lastly, the balance of hardships and public interest weigh heavily in the City’s favor.
7 Arizona has a strong public policy favoring the People’s fundamental right to legislate by
8 initiative. An injunction would safeguard that interest against unconstitutional interference by
9 the Legislature and preserve the will of the People. And because the \$1.1 million assessment
10 against the City violates the VPA, “public policy and the public interest are served by enjoining
11 [this] unlawful action.” *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58 ¶ 27 (2020). Beyond
12 that, the City faces grave hardships caused by the assessment. As detailed above, the
13 unconstitutional assessment and imminent risk of losing State revenues frustrates the City’s
14 ability to provide critical services to its residents. [Compl. ¶¶ 67-74]

15 **Conclusion**

16 The City, through its own voters, carried out the power granted to it by the People and
17 raised its minimum wage. The Legislature has tried for the third time to undermine that power
18 in violation of the VPA. For all the reasons above, the Court should grant a preliminary injunction
19 enjoining HB 2756 and Section 12 of SB 1827. The City also requests its attorneys’ fees and
20 costs under A.R.S. §§ 12-348.01, 12-341, and 12-1840.

21 RESPECTFULLY SUBMITTED this 15th day of July, 2021.

22 **COPPERSMITH BROCKELMAN PLC**

23 By /s/ Roopali H. Desai

24 Roopali H. Desai
25 D. Andrew Gaona
26 Kristen Yost

Attorneys for Plaintiff City of Flagstaff