PERKINSCOIE

2901 North Central Avenue
Suite 2000
Phoenix, AZ 85012-2788

+1.602.351.8000
+1.602.648.7000
PerkinsCoie.com

January 7, 2020

Jean-Jacques Cabou
JCabou@perkinscoie.com
D. +1.602.351.8003
F. +1.602.648.7003

VIA E-MAIL

Mark Brnovich
Attorney General
Office of the Arizona Attorney General
2005 N. Central Ave
Phoenix, AZ 85004-2926

Linley S. Wilson
Deputy Solicitor General
2005 N. Central Ave
Phoenix, AZ 85004-2926
linley.wilson@azag.gov

Re: Response to Representative Barto's Request for Investigation Pursuant to A.R.S. § 41-194.01.

Dear Attorney General Brnovich and Deputy Solicitor General Wilson:

I. Introduction.

On behalf of the City of Phoenix (the "City"), we respond to your letter transmitting Representative Nancy Barto's Request for Investigation (the "Complaint" or "Request") as to "[w]hether City of Phoenix Ordinance G-6650 violates article IX, section 25 of the Arizona Constitution." [Ex. 1 (Request) at 1]

Specifically, Representative Barto claims that the City of Phoenix Ordinance G-6650 (the "Ordinance") conflicts with article IX, section 25 of the Arizona Constitution ("article IX, § 25") because it "imposes new fees and increases existing fees on ride-sharing services to and from" Phoenix Sky Harbor International Airport (the "Airport").[1] [Ex. 1 at 3]

[1] Any alleged or identified violation under A.R.S. § 41-194.01 must be specific as to the particular provision of the Ordinance that conflicts with a particular provision of state law. *See, e.g., State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 592, ¶ 6, 399 P.3d 663, 667 (2017) (among other things, describing provisions of A.R.S. § 41-194.01 as requiring

It does not. The Ordinance sets fees for ridesharing companies to access and use the City-owned, City-managed Airport. The trip fees are a charge for the use of specific City-owned property—the roadway system and other infrastructure at the Airport—for profit-making commercial purposes.

Article IX, § 25 prohibits certain new taxes. It does not, however, bar municipalities from conditioning access to their property on the payment of such fees.

That the Ordinance and article IX, § 25 do not conflict is evident from the plain language of both provisions. But it is especially clear considering the history and purpose of article IX, § 25, which was never intended to bar municipalities from collecting reasonable charges for the use of government property. It is also clear considering other provisions of Arizona and federal law, which permit (and, in some cases, require) city-run enterprises to be able to operate on equal terms with other enterprises and businesses.

Accordingly, we respectfully ask that you report that the Ordinance "[d]oes not violate any provision of state law or the Constitution of Arizona, [and that you] take no further action . . . ." A.R.S. § 41-194.01(B)(3).[2]

II. Legal and Factual Background.

Especially when considered in light of the relevant legal and factual background, it is clear the Complaint is meritless.

A. Arizona's Constitution Has Long Protected the Rights of Municipal Corporations to Own and Manage Property and Businesses.

Since Arizona became a state, its Constitution has made clear that "[e]very municipal corporation within this state shall have the right to engage in any business or enterprise

---

specific notice of alleged violations and an opportunity to cure any violations before sanctions are imposed).

[2] We do not waive, and to the contrary at any subsequent stage intend to raise, challenges to the constitutionality of A.R.S. § 41-194.01, which was enacted as Senate Bill 1487, including its application to the business of a charter city, which is supposed to be "as nearly independent of state legislation as [] possible." *City of Tucson*, 242 Ariz. at ¶ 40, 399 P.3d at 673.

which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation." ARIZ. CONST. art. XIII, § 5.

Cities in Arizona thus operate many enterprises, small and large, from swimming pools and libraries to convention centers and airports. Some cities offer some access to their properties and enterprises for free. *See, e.g.*, *Parks and Recreation*, CITY OF PHOENIX, https://www.phoenix.gov/parks (last visited Jan. 7, 2020); *Parks and Recreation*, GLENDALE, ARIZONA, https://www.glendaleaz.com/play/parks_and_recreation (last visited Jan. 7, 2020) (listing parks and other facilities, some of which can be accessed without charge).

Cities also condition access to certain properties and facilities upon the payment of an additional fee. *See, e.g.*, Tucson City Code ch. 21, art. II (establishing fees related to golf courses owned by the City of Tucson); *see also, e.g.*, *ParkFlag*, THE CITY OF FLAGSTAFF ARIZONA, https://flagstaff.az.gov/3499/ParkFlag (last visited Jan. 7, 2020) (establishing fees for permits to park in various parking lots and structures owned by the City of Flagstaff, ranging from hourly fees to annual fees); *About*, TUCSON CONVENTION CENTER, https://tucsonconventioncenter.com/about/ (last visited Jan. 7, 2020) (City of Tucson rents its Convention Center out for meetings, trade shows, sporting events, ice shows, and concerts).

This variety of approaches to the management of City property is possible because, among other things, article XIII, section 5 ("article XIII, § 5") gives cities wide latitude in operating their properties just as a private business would. *See, e.g.*, *City of Tombstone v. Macia*, 30 Ariz. 218, 233, 245 P. 677, 683 (1926); *Sumid v. City of Prescott*, 27 Ariz. 111, 116, 230 P. 1103, 1105 (1924) (noting that article XIII, § 5 gives cities "a free hand to operate where any person, firm, or corporation may"); *see also* ARIZ. CONST. art. II, § 34 (empowering municipal corporations "to engage in industrial pursuits").

B. Proposition 126 Was Not Intended to Disadvantage Municipal Corporations When They Act as Owners and Operators of Businesses and Property.

On November 6, 2018, Arizona voters passed Proposition ("Prop.") 126, the "Protect Arizona Taxpayers Act" (the "Act"). According to its proponents, Prop. 126 was "designed to prohibit the state from implementing a new sales tax on services that Arizonans use

every day." [Ex. 2 (11/6/2018 General Election Publicity Pamphlet ("Publicity Pamphlet")) at 27]

Prop. 126, among other things, added article IX, § 25 to the Arizona Constitution. The provision prohibits cities from imposing or increasing (1) "any sales tax," (2) "transaction privilege tax," (3) "luxury tax," (4) "excise tax," and (5) "use tax." It also states that cities "shall not impose or increase any . . . other transaction-based tax" or "fee . . . on the privilege to engage in . . . any service performed in this state."[3] ARIZ. CONST. art. IX, § 25.

In particular, the Publicity Pamphlet emphasized that Prop. 126 aimed to "prohibit the state from implementing a new sales tax on services that Arizonans use every day," including "[f]amily services" (like "health care" and "childcare"), "[p]ersonal services" (like "haircuts, manicures," and "car repairs,"), and "[h]ome services" (like "plumbing, lawn care," and "heating and air conditioning"). [Ex. 2 at 27]

Nothing in Prop. 126 discussed, or even mentioned, a desire or an intent to alter the protections that municipal corporations have enjoyed, since statehood, to manage their property and their enterprises just as any other property or business owner would. Nowhere, in either the Publicity Pamphlet or in the text of the initiative itself, did Prop. 126 even hint at an attempt to force cities out of the many and diverse businesses they have engaged in since Arizona became a state.

[3] The full text of article IX, § 25 provides:

> The state, any county, city, town, municipal corporation, or other political subdivision of the state, or any district created by law with authority to impose any tax, fee, stamp requirement, or other assessment, shall not impose or increase any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other transaction-based tax, fee, stamp requirement or assessment on the privilege to engage in, or the gross receipts of sales or gross income derived from, any service performed in this state. This section does not repeal or nullify any tax, fee, stamp requirement, or other assessment in effect on December 31, 2017.

C. The City of Phoenix Has Owned and Operated the Airport as a Self-Supporting Enterprise Since 1967.

The City, through its Aviation Department, has been operating the Airport as a self-supporting enterprise since 1967. The Airport is the largest economic engine in the state of Arizona, contributing more than $38 billion to the local economy every year. *See Airport Development & Planning*, PHOENIX SKY HARBOR INTERNATIONAL AIRPORT, http://www.skyharbor.com/about/development (last visited Jan. 7, 2020).

The Aviation Department has outstanding debt backed solely by the revenues of the Airport. No City tax revenues are used to pay Aviation Department obligations. *See Airport Funding*, PHOENIX SKY HARBOR INTERNATIONAL AIRPORT, https://www.skyharbor.com/about/Information/AirportFacts/AirportFunding (last visited Jan. 7, 2020). In operating this self-sustaining enterprise, the Airport charges fees to businesses and others that use its space and facilities. *See, e.g.*, Phoenix City Code §§ 4-58 (parking fees); 4-179 (aircraft landing and parking fees).

This is consistent with the Airport's rights and obligations under state and federal law. *See* 49 U.S.C. § 47107(a)(13) (requiring airport to "maintain a schedule of charges for use of facilities and services at the airport . . . that will make the airport as self-sustaining as possible under the circumstances existing at the airport"); *see also* A.R.S. § 28-8419 (specifically authorizing cities operating airports to "establish fees and charges" for use of an airport).

D. All Businesses That Access and Use Airport Property Must Pay for Such Access and Use.

No business is permitted to access or use the Airport for commercial purposes without applying for, and paying for, a lease, permit, or license to do so. *See* Phoenix City Code § 4-4 ("The use of any portion of the airport for revenue-producing commercial activities or to solicit business or funds is prohibited unless authorized by the Aviation Director by lease, permit or license agreement . . . .").

Once a business is permitted to conduct business at the Airport, the business must pay fees commensurate with how often and how much it uses Airport facilities. For example, airlines are charged a fee each time they land on an Airport runway and each time they use

Airport cargo areas, passenger ramps, and parking space. *See* Phoenix City Code § 4-9 ("No person shall land or take off an aircraft on or from a landing area, or use a landing area, ramp and apron area, passenger ramp and apron area, cargo ramp and apron area, or an aircraft parking and storage area, except upon the payment of such fees and charges. . . ."). The City also charges rent to concessionaires and vendors for the fair market value of the space they use in the Airport, rent to companies that place news vending machines in the terminals, a per-gallon fuel flowage fee, and a fee to rental car companies that lease space at the Airport. *See, e.g.*, *id.* §§ 4-138 (requiring news companies to obtain permits and pay annual rental fees, which are subject to adjustment, to place "newsrack vending machines" in Airport terminals), 4-79 (rental car fees), 4-114 (fuel flowage fees).

Ground transportation companies are no exception to this rule. The City requires all ground transportation providers to apply for permits before entering the Airport to conduct business. *Id.* § 4-68. For years, all ground transportation providers—from taxicabs to shuttles to limousines—have been required to pay a fee every time they access the Airport and use the Airport ground transportation system. *Id.* § 4-78 ("[A]ll authorized providers shall pay the trip fees set forth below.").

E. Ridesharing Services Pay Fees for Use of Airport Property.

1. Ridesharing Services Have Paid Fees Since 2016.

Ridesharing services or transportation network companies ("TNCs") started operating at the Airport in June 2016. TNCs represent a significant and increasing amount of ground transportation traffic. Currently, TNCs account for two-thirds of all ground transportation pick-ups at the Airport.

TNCs present operational and facility challenges for the Airport, as they do for all airports across the country. They strain Airport infrastructure and congest Airport roadways, especially at the designated locations for pick-up and drop-off. *See* Patrick McGroarty, *Airports Tame the Ride-Sharing Rodeo*, WALL ST. J. (Nov. 12, 2019), https://www.wsj.com/articles/airports-tame-the-ridesharing-rodeo-11573468232.

Like all ground transportation providers, TNCs are required to have permits to operate at the Airport. *See* Phoenix City Code § 4-68 ("No person may engage in commercial ground transportation . . . without a valid commercial ground transportation permit . . . ."). In their

permits, the TNCs expressly agreed to pay the trip fees in accordance with Phoenix City Code § 4-78. [*See* Ex. 3 (7/16/18 Uber Ground Transportation Permit); Ex. 4 (6/15/18 Lyft Ground Transportation Permit)]

Since TNCs have started operating at the Airport, the City has maintained a trip fee structure under which fees were collected from TNCs. [*See* Ex. 5 (Ordinance G-6164)] That ordinance sets forth a schedule of fees for TNCs and others, the amount of which was to be adjusted based on a variety of factors. *Id.* Presently, the standard trip fee for TNCs is $2.66 for pick-ups only.

2. The Airport Carefully Studied the Fees Other Airports Charge TNCs.

As required by the City Code, from 2018 to 2019, the City conducted a comprehensive study of ground transportation trip fees charged at the Airport compared to those charged at peer airports across the country. *See* Phoenix City Code § 4-78. During this process, the City retained an outside expert, selected by ground transportation providers, and held monthly meetings to consult with stakeholders in the ground transportation business. Ultimately, the study found that the Airport collects less ground transportation revenue than its peers. [Ex. 6 (7/30/2019 Ground Transportation Fees Benchmarking Study Final Report)]

Further, the Airport consistently takes a financial loss on ground transportation costs, and TNCs specifically were not covering a proportionate amount of fees compared to their use of the Airport's ground transportation infrastructure. Based on a detailed financial analysis and projections for future usage of the Airport, increased trip fees were proposed for TNCs.

3. The City Council Adopted an Ordinance That Updated the Fee Schedule.

On December 18, 2019, the City Council adopted the Ordinance, which becomes effective February 1, 2020. Under the Ordinance, TNCs are required to pay $4.00 for both drop-off and pick-up, with these fees increasing over time (the "Fees"). [*See* Ex. 7 (12/18/2019 Ordinance G-6650)].

As presented to the City Council, the Fees "are calculated to recover [the Airport's] costs for the [ground transportation] providers' proportionate share of existing and future

ground-transportation infrastructure, improvements, and operation/maintenance of [Airport] infrastructure, including maintenance of the PHX Sky Train." [4] [Ex. 8 (12/18/2019 City Council Report) at 1]

Put another way, the Fees paid by TNCs help to fund the maintenance and improvement of the Airport's valuable roadways, curbsides, and other infrastructure, which the TNCs use to conduct their business. These Fees are necessary to maintain the Airport's economic self-sufficiency, as required by federal law. *See* 49 U.S.C. § 47107(a)(13).

4. The Fees Are Assessed Only When Airport Property Is Used for a Profit-Making Purpose.

Under the Ordinance, the Fees are calculated and assessed as follows. For TNCs, which are "authorized providers using global positioning (GPS) trip tracking, trip fees apply each time a driver enters a geofence,[5] makes one or more stops, and completes a pick-up" or drop-off of one or more passengers. [Ex. 7 at 27] "For all other authorized providers, trip fees apply each time a driver enters or exits an airport and stops at one or more designated passenger pick-up or drop-off locations." *Id.* (alterations omitted). All fees are assessed on a monthly basis. *Id.* at 28.

III. The Ordinance Does Not Conflict with the Constitution.

Considering the facts set forth above, it is clear that the Ordinance in no way conflicts with the Constitution.

[4] The PHX Sky Train® ("Sky Train") is "an automated train that transports travelers between Valley Metro Rail at 44th and Washington streets, the East Economy Parking area and airport terminals." PHX Sky Train, https://www.skyharbor.com/PHXSkyTrain. Operation of the Sky Train is critical for the continued operations of TNCs at the terminal curbs, which are prime Airport real estate, because the Sky Train decreases the overall number of vehicles on the roadways and curbsides at the Airport. This creates space for TNCs to operate curbside.

[5] A geofence is "an electronic perimeter, designated by the Aviation Director, of airport property and sub-perimeters within airport property." [Ex. 7 at 3].

A. The Plain Language of the Constitution Makes Clear That the Ordinance Is Not in Conflict with It.

The plain language of both the Ordinance and article IX, § 25 demonstrates that there is no conflict between them. *See Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89, 95, 434 P.3d 1168, 1174 (2019) ("If we can discern the provision's meaning from its language alone, we will apply it without further analysis."); *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 448 P.3d 275, 279 (2019) (interpreting city ordinances by their plain meaning).

In arguing for a contrary conclusion, the Complaint seizes on certain selected words in article IX, § 25 and wholly ignores others. The Complaint emphasizes that the Ordinance involves "fees" and that rideshare companies offer a "service." True. Focusing on these words only, the Complaint then argues that article IX, § 25 prohibits imposing or increasing any "fee . . . on . . . any service performed in this state." [Ex. 1 at 3] Not true.

The Complaint ignores critical constitutional text to reach the Complainant's preferred, though incorrect, interpretation of article IX, § 25. *See Home Depot USA, Inc. v. Ariz. Dep't of Revenue*, 230 Ariz. 498, 501, 287 P.3d 97, 100 (App. 2012) (noting that in interpreting statutes, Arizona courts "give effect to each sentence and word so that provisions are not rendered meaningless") (quoting *Powers v. Carpenter*, 203 Ariz. 116, 118, 51 P.3d 338, 340 (2002))). What article IX, § 25 actually prohibits, among other things, is: "*impos[ing]*" or increasing any "*transaction-based* . . . fee . . . on *the privilege to engage in* . . . . any service performed in this state." ARIZ. CONST. art. IX, § 25 (emphasis added).

The language the Complaint ignores is fatal to its argument for at least three reasons. Under the plain language of article IX, § 25, the Fees are (1) not on "the privilege to engage in" services, (2) not "transaction-based," and (3) not "imposed" on TNCs.

1. The Fees Are Not on "the Privilege to Engage in" Services.

First, article IX, § 25 prohibits only certain fees "on the privilege to engage in . . . any service performed in this state." ARIZ. CONST. art. IX, § 25. The Fees are not covered by the plain meaning of this language because the Fees are not "on the privilege to engage in" a "service performed in this state." *Id.*

"A privilege grants someone the legal freedom to do . . . a given act." *Privilege*, BLACK'S LAW DICTIONARY (11th ed. 2019). More broadly, the plain meaning of the phrase "privilege to engage in . . . [a] service" refers to the right or license to operate a business offering that service. *See Ariz. State Liquor Bd. v. Poulos*, 112 Ariz. 119, 121, 538 P.2d 393, 395 (1975) ("[A] liquor license is . . . a privilege to engage in a business subject to the regulation of the state."); *see also Orbitz Worldwide Inc.*, 247 Ariz. 234, 448 P.3d at 279 (holding measure was "a transaction privilege tax because it levies 'an excise tax on the privilege or right to engage in an occupation or business'" (quoting *Ariz. Dep't of Revenue v. Action Marine, Inc.*, 218 Ariz. 141, 142 ¶ 6, 181 P.3d 188, 189 (2008))).

The Ordinance does not require payment of the Fees in exchange for the right or license to operate a rideshare business. No Fees apply to any ride that does not begin or end at the Airport. Rather, Fees are charged to TNCs only when they use the Airport to conduct their business. Put differently, the Fees are a charge for the use of specific City-owned property—the roadway system and other infrastructure at the Airport—for profit-making commercial purposes.

Again, the Fees are no different than the fees the City charges to other commercial entities that conduct business at the Airport. No one would argue that a restaurant's rent payments to the City for the space it uses at the Airport are fees for the "privilege" to engage in the fast-food service industry at the Airport, or that an airline's landing fees to the City are fees for the "privilege" of operating a commercial airline. *See* Phoenix City Code § 4-9. The payments are fees for the use of the City-owned, City-managed Airport for commercial activity. These types of fees are not within the prohibitions of article IX, § 25 because they are not charged to TNCs for the "privilege" of conducting their business.[6]

[6] Further confirming this plain meaning is the fact that article IX, § 25 itself specifically limits its focus to fees that are on the privilege to engage in services "in this state." In other words, it is concerned with fees that are broadly applicable within a taxing jurisdiction. *See US W. Commc'ns, Inc. v. City of Tucson*, 198 Ariz. 515, 523, 11 P.3d 1054, 1062 (App. 2000) (a transaction privilege tax is "an excise on the privilege or right to engage in particular businesses within the taxing jurisdiction."). The Ordinance only requires payment of the Fees at the Airport.

2. The Fees Are Not "Transaction-Based Fees."

Second, the Fees are not "transaction-based." ARIZ. CONST. article IX, § 25.

Based on the plain meaning of this term, a fee is "transaction-based" when the basis of the "fee" is a particular transaction. *See Based*, https://www.merriam-webster.com/ ("having a specified type of base or basis"); *see also id. Basis* ("something on which something else is established"); *see also, e.g.*, *Mago v. Mercedes-Benz, U.S.A., Inc.*, 213 Ariz. 404, 411, 142 P.3d 712, 719 (App. 2006) (holding that where a word is not defined, courts "look to the plain meaning of the word as defined by widely accepted dictionaries").

Further, a "transaction" generally means "a business agreement or exchange." *Transaction*, BLACK'S LAW DICTIONARY (11th ed. 2019); *accord* A.R.S. § 44-7002 ("'Transaction' means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.").

Therefore, within the meaning of article IX, § 25, a fee is "transaction-based" only when it is levied or applied based on a business exchange, whether on the basis of an individual exchange or profits from such exchanges. *See, e.g.*, *Brin v. Stutzman*, 89 Wash. App. 809, 834, 951 P.2d 291, 305 (Wash. Ct. App. 1998) ("[T]ransaction-based compensation" is a "fee relating to the total services rendered, commissions, or some combination of the foregoing."); *see also Pozez v. Ethanol Capital Mgmt., L.L.C.*, No. 07-CV-00319-TUC-CKJ, 2009 WL 2176574 (D. Ariz. July 21, 2009), at *5 (individuals received "transaction-based compensation" because they were paid every time customers used their advice).

In this case, the Fees are not based on a transaction occurring. Specifically, the Fees are not triggered every time a TNC transacts business, nor are they applied to the total revenues collected from all TNC transactions. Rather, the Fees are triggered only when a TNC vehicle enters the Airport and stops at valuable, limited Airport curb space to drop off or pick up customers. These specific uses of Airport property are the "basis" for the Fees.

This conclusion follows naturally from the plain text of the Ordinance. Under the Ordinance, Fees "apply" only when three conditions are satisfied: an authorized provider (1) "enters" the Airport "geofence," (2) "makes one or more stops," and (3) "completes a pick-up or drop-off of one or more passengers." [Ex. 7 at 27] Each of these conditions is

based on the use of Airport property, regardless of whether a business transaction actually occurs in connection with that use.

To be sure, many TNCs actually conduct a transaction when they use Airport property, such that Fees correlate with the number of TNC transactions conducted. But it does not follow that Fees are transaction-based instead of use-based. This critical distinction becomes apparent when considering how Fees are levied when multiple passengers or stops (*i.e.*, multiple "transactions") occur. In those situations, only one Fee is assessed regardless of whether a driver has multiple Airport-based transactions associated with a pick-up or a drop-off. For instance, if customers decided to split the cost of the ride, or multiple, separately paying customers were picked up or dropped off at the same time, only one Fee would apply.

Put simply, the Fees are not "transaction-based" because they do not apply to all rideshare transactions. They apply only when a TNCs' vehicle enters and uses valuable, scarce property for profit. Even then, they apply irrespective of how many transactions are associated with the trip. In the end, the Fees are no different from any government fee on a concessionaire, airline, or commercial-use provider, who offers services on the property the government owns and manages. And so, the Fees are not "transaction-based" and thus not in conflict with article IX, § 25.

3. The Fees Are Not "Imposed."

The new Fees also are not "impose[d]," as the term is used in article IX, § 25. "Impose" means "to establish or apply by authority" or to "establish or bring about as if by force." *Impose*, https://www.merriam-webster.com; *see Orbitz Worldwide Inc.*, 247 Ariz. 234, 448 P.3d at 281 (employing dictionary definition). A fee that is voluntarily paid is not "imposed."

TNCs have no legal or statutory obligation to pay the Fees to provide rideshare services within the City. Rather, if TNCs choose to provide a ride that starts or ends at the Airport, they must pay the Fee charged by the City, which owns and manages that property which the TNC seeks to access on that particular ride. The plain meaning of "impose" requires an element of compulsion or coercion, which simply does not exist with respect to the Fees.

TNCs must affirmatively choose to do business at the Airport by applying for a permit. The Airport has not "coerced" rideshare companies to use the Airport or pay any fees. TNCs have control over that choice and have affirmatively chosen to subject themselves to Airport regulations in exchange for the benefit of using the Airport's ground-transportation system.

B. This Reading Is Consistent with The Text of Article IX, § 25 Viewed as a Whole.

Moreover, that article IX, § 25 does not prohibit municipalities from charging fees for the use of specific government property, even if that property is used in connection with a "service," is further confirmed by examining the text of article IX, § 25 as a whole. Consideration of the full text of article IX, § 25 reveals that it is aimed only at prohibiting taxes or tax-like assessments on services.

Article IX, § 25 prohibits the imposition or increase of five specific types of taxes: (1) "sales tax[es]"; (2) "transaction privilege tax[es]"; (3) "luxury tax[es]; (4) "excise tax[es]"; and (5) "use tax[es]." ARIZ. CONST. art. IX, § 25. Representative Barto has not argued that the Fees are barred by any of these five specific prohibitions.

Instead, she argues they are barred under the sixth, catch-all provision contained in article IX, § 25. This catch-all provision prohibits the imposition or increase of "any *other* transaction-based tax, fee, stamp requirement or assessment." *Id.* (emphasis added).

As the Arizona Supreme Court has made clear, though, when "general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose." *Ariz. Pub. Serv. Co. v. Town of Paradise Valley*, 125 Ariz. 447, 450, 610 P.2d 449, 452 (1980) (quoting 39 A.L.R. 1404 (Originally published in 1925)); *see also Wilderness World, Inc. v. Dep't of Revenue State of Ariz.*, 182 Ariz. 196, 199, 895 P.2d 108, 111 (1995) ("Under the doctrine of *ejusdem generis*, where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class of those enumerated." (internal quotation omitted)).

Further, as Justice Scalia explained, considering that same principle, the catch-all phrase "any other . . . implies the addition of *similar* after the word *other*." JUSTICE ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012). Therefore where, as here, "the initial terms all belong to an obvious and readily identifiable genus, one presumes the . . . writer has that category in mind for the entire passage." *Id*.

Article IX, § 25 expressly prohibits five types of taxes. *See, e.g.*, *People of Faith Inc. v. Ariz. Dep't of Revenue*, 161 Ariz. 514, 517, 779 P.2d 829, 832 (Ariz. Tax Ct. 1989) ("The sales tax is a transaction tax on the sale."); *US W. Commc'ns., Inc. v. City of Tucson*, 198 Ariz. at 523, ¶ 24, 11 P.3d at 1062 (holding that transaction privilege taxes are "an excise on the privilege or right to engage in particular businesses within the taxing jurisdiction"); *Watkins Cigarette Serv., Inc. v. Ariz. State Tax Comm'n*, 111 Ariz. 169, 171, 526 P.2d 708, 710 (1974) ("The luxury privilege tax is an excise tax on the privilege of selling particular luxury items to customers for consumption."); *Roseland v. City of Phoenix*, 14 Ariz. App. 117, 119–20, 481 P.2d 288, 290–91 (1971) ("Excise has come to include every form of taxation which is not a burden laid directly on persons or property.") (internal quotation omitted)); A.R.S. § 42-5155 ("There is levied and imposed an excise tax on the storage, use or consumption in this state of tangible personal property purchased from a retailer or utility business, as a percentage of the sales price.").

Thus, the catch-all provision only prohibits other types of taxes. *See Wildnerness World*, 182 Ariz. at 199, 895 P.2d at 111 (holding that enumerated list of taxable activities followed by catch-all provision limited taxable activities to those "of the same kind or nature as the activities" enumerated in the list). The Fees are not taxes.[7]

[7] Representative Barto has not argued that the Fees are "taxes." Rightly so. "Whether an assessment should be categorized as a tax or a fee generally is determined by examining three factors: '(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.'" *May v. McNally*, 203 Ariz. 425, 430–31, 5 P.3d 768, 773–74 (2002) (quoting *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)). Among other things, as to the second factor, the Fees apply to a limited class of providers under limited circumstances: rideshare companies when they voluntarily use the City's Airport. *See May*,

But even if article IX, § 25 prohibits things other than taxes, none of the specifically prohibited provisions involve the imposition of fees for the use of government property. And as explained by the Supreme Court, it cannot be that this general catch-all provision captures and prohibits fees that are of an entirely different "kind, class, or nature as" those sales and other taxes enumerated in the provision. *Ariz. Pub. Serv. Co.*, 125 Ariz. at 450, 610 P.2d at 452.

C. That There Is No Conflict Is Further Supported by the History and Purpose of Prop. 126.

For the reasons explained above, the plain language of article IX, § 25 does not prohibit the Fees, and the Complaint should be closed without further action. But even if the Attorney General were to determine that the language of article IX, § 25 is ambiguous, the "history and purpose" of article IX, § 25 resolves any ambiguity, making doubly clear that there is no conflict between it and the Ordinance.

Where courts cannot discern the meaning of a constitutional provision on its face, they "consider its text in conjunction with the history and purpose of the provision." *Saban Rent-a-Car LLC*, 246 Ariz. at 96, 434 P.3d at 1175. Indeed, "[w]hen interpreting the scope and meaning of a constitutional provision," the decisionmaker's "primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994).

The Publicity Pamphlet, the text of the Act, and the language of the ballot measure make clear that Prop. 126 was not intended to reach fees charged for the use of City-owned

---

203 Ariz. at 431, 55 P.3d at 774 (noting that taxes are generally imposed on a "broad range of payers for a public purpose"). And as to the third factor, unlike general sales tax revenues that go into the City's common fund, the rideshare trip fees can only be used for Airport purposes. *See Jachimek v. Arizona*, 205 Ariz. 632, 637, 74 P.3d 944, 949 (App. 2004) ("[T]he amount paid per transaction 'bear[s] some reasonable relation to the service to be performed' on the payer's behalf."). As such, the Fees are not a "tax." *See id.* at 635, 74 P.3d at 947 ("[A] fee is a voluntary charge paid in return for a public service that bestows a particular benefit on the recipient, 'while a tax is a forced contribution of wealth to meet the public needs of the government.'" (quotation omitted)).

property for commercial purposes, especially when such a fee is tied to the costs incurred by the property owner to make the property available for that commercial enterprise.

1. The Publicity Pamphlet Makes Clear that Article IX, § 25 Was Not Intended to Prohibit the Fees.

First, the Publicity Pamphlet makes clear that the measure was not intended to prohibit the Fees. *See Jett*, 180 Ariz. at 119, 882 P.2d at 430 (considering statements in publicity pamphlet in interpreting the intent of constitutional provision).

The Publicity Pamphlet never suggested to voters that Prop. 126 would prevent the State and municipalities throughout Arizona from charging private businesses that seek to profit from their use of government-owned, government-managed property.

Instead, the Pamphlet confirms that Prop. 126 was aimed at prohibiting sales taxes on everyday services. Proponents of Prop. 126 supported the measure "to protect taxpayers from state and local governments imposing any new sales tax or use tax on services." [Ex. 2 at 27]

The Fees are nothing like a sales tax on services provided by a daycare center, a hairdresser, auto mechanic, or plumber of the sort that were the focus of the proponents of Prop. 126.

2. The Act's Title and Stated Intent Make Clear that Article IX, § 25 Was Not Intended to Prohibit the Fees.

Second, the text of the Act makes clear that Prop. 126 was intended to prevent lawmakers from imposing taxes on everyday services.

Again, the title of the Act is the "Protect Arizona Taxpayers Act." And the enumerated findings in the Act are only related to preventing lawmakers from imposing taxes on everyday services. [Ex. 2 at 24 ("In their unending quest to extract more money from citizens, politicians in other states have started taxing . . . vital everyday services . . . . These taxes are not only unfair to hardworking citizens, but they also impose a crippling burden on small businesses . . . . To protect Arizonans from these regressive and inequitable taxes, this initiative measure amends the Arizona Constitution to prohibit the state and its political subdivisions from imposing any new taxes on services.")]

Again, the Fees are not the type of taxes on services that prompted the enactment of article IX, § 25. The Fees are not taxes at all. [*See supra* n.7] The Fees are a direct charge to businesses for their use of the Airport. They are necessary to compensate the Airport for costs it has incurred and continues to incur to the benefit of TNCs.

3. The Ballot Text Makes Clear that Article IX, § 25 Was Not Intended to Prohibit the Fees.

Finally, the text of the ballot makes clear that Prop. 126 was not intended to prohibit the Fees. [*See* Ex. 9 (Prop. 126 - Sample Ballot/Ballot Format)] The ballot stated that a "Yes" vote "will prohibit the State and local governments from enacting any new or increased tax on services that was not already in effect on December 31, 2017." The ballot itself said nothing about "fees" at all and nothing about charges for the use of publicly owned property for commercial purposes.

Thus, the history and purpose of § 25 further reinforce the plain meaning explained above. Article IX, § 25 was not intended to, and does not, prohibit the Fees.

D. Additional Interpretive Principles Support the Conclusion that the Ordinance Does Not Violate the Constitution.

1. Article IX, § 25 Should Be Construed Consistent with Other Provisions of the Arizona Constitution.

Construing article IX, § 25 to prohibit the Fees would also conflict with other provisions of the Arizona Constitution. The Arizona Constitution should be interpreted as a "consistent workable whole." *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196, 450 P.2d 383, 386 (1969); *see id.* ("[W]here, as here, separate parts of a constitution are seemingly in conflict, it is the duty of the court to harmonize both so that the constitution is a consistent workable whole.").

Article IX, § 25 should be interpreted consistent with article XIII, § 5, which, as discussed above, provides that "every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation." ARIZ. CONST. art. XIII, § 5; *see also* ARIZ. CONST. art. II, § 34 (empowering municipal corporations "to engage in industrial pursuits").

For the City and its Airport to conduct business activities—as they have a constitutional right to—they must be able to charge reasonable fees for the use of their property. *See Vilas v. City of Manila*, 220 U.S. 345, 356–58 (1911) (noting "dual character of municipal corporations" in exercise of "governmental" powers on one hand, and "powers which are of a private or business character," like the power of property ownership, on the other); *see also Local 266, Int'l Bhd. of Elec. Workers, A. F. of L. v. Salt River Project Agr. Imp. & Power Dist.*, 78 Ariz. 30, 39, 275 P.2d 393, 399 (1954) (where "governmental entity functions in a proprietary nature . . . it should be permitted to perform it in a manner as efficiently as would a private person").

Just as any private landowner could require commercial enterprises to pay for their use of their property, so too can the City mandate that commercial enterprises, including TNCs, pay fees for the use of the Airport.

2. Article IX, § 25 Should Be Construed Consistent with Federal Law.

Further, construing article IX, § 25 to prohibit the Fees would directly conflict with federal law. "Whenever possible," Arizona courts "construe the Arizona Constitution to avoid conflict with the United States Constitution and federal statutes." *US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 201 Ariz. 242, 246, 34 P.3d 351, 355 (2001).

Under federal law, the City is required to "maintain a schedule of charges for facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport . . . ." 49 U.S.C. § 47107(a)(13)(A). In enacting the Ordinance, and in charging commercial enterprises reasonable ground access fees for their use of airport property, the City is fulfilling this important federal obligation. *See, e.g.*, *Park Shuttle N Fly, Inc. v. Norfolk Airport Auth.*, 352 F. Supp. 2d 688, 693–94 (E.D. Va. 2004).

Were the Attorney General to construe article IX, § 25 to prohibit the Fees, the Airport would be unable to comply with this federal mandate. The Attorney General should construe article IX, § 25 to avoid this direct conflict. *See US W. Commc'ns, Inc.*, 201 Ariz. at 246, 34 P.3d at 355.

IV. Conclusion.

For the reasons outlined above, no part of the Ordinance conflicts with article IX, § 25. We respectfully ask that your Office "take no further action" on the Complaint. A.R.S. § 41-194.01(B)(3).

Sincerely,

Jean-Jacques Cabou

JC:if
Enclosures