

CITY ATTORNEY'S OFFICE
JUDITH R. BAUMANN #015012
SHELLEY D. CUTTS #019045
21 E. Sixth Street, Suite 201
P.O. Box 5002
Tempe, Arizona 85280
Phone: (480) 350-8227
Fax: (480) 350-8645
Cityattorney_administrator@tempe.gov

Attorneys for Amicus Curiae City of Tempe

IN THE UNITED STATES DISTRICT COURT

IN THE DISTRICT OF ARIZONA

Puppies ‘N Love, a d/b/a of CPI, Inc.;
Frank Mineo; Vicki Mineo,

Plaintiffs,

v.

City of Phoenix,

Defendant,

and,

The Humane Society of the United States,

Intervenor-Defendant.

Case No. CV 14-00073-PHX-DGC

**(PROPOSED) MEMORANDUM
OF AMICUS CURIAE
CITY OF TEMPE**

City Attorney's Office
21 East Sixth Street, Suite 201
P.O. Box 5002
Tempe, Arizona 85280

The City of Tempe (“Tempe”) respectfully submits the following Memorandum of *Amicus Curiae* in the above-captioned action.

Tempe’s Local Animal Control Efforts

Due to the lack of state funding and participation noted in the parties’ Stipulations on Remand, Tempe has long been responsible for animal control within its municipal

1 borders. Tempe contracts with Maricopa County to provide animal control services at a
2 cost of \$117,000 per year. *See* Exhibit 1. Tempe also contracts with the Arizona Humane
3 Society and, on an as-needed basis, the Lost Our Home Pet Foundation to provide
4 veterinary and shelter services for Tempe’s injured and abandoned animals. *See* Exhibits
5 2 and 3. The annual cost of the Arizona Humane Society contract to the taxpayers of
6 Tempe is \$35,000.

8
9 Always looking to do more to reduce the number of abandoned pets in the city and
10 lower the attendant costs of managing pet overpopulation, Tempe followed the passage of
11 Phoenix City Ordinance G-5873 and this subsequent litigation with great interest. In
12 reliance upon the court’s 2015 decision in this case, on February 11, 2016, Tempe passed
13 an ordinance similar to Phoenix City Ordinance G-5873. The goals of the Tempe
14 ordinance, codified at Sec. 6-54 of the Tempe City Code, were to reduce the number of
15 abandoned and endangered animals Tempe sent to local shelters and lower the cost to
16 Tempe residents for the treatment and shelter of abandoned and endangered animals. *See*
17 Exhibit 4. Tempe then watched as Plaintiffs hired a team of lawyers and lobbyists to draft
18 S.B. 1248, secure its passage in the legislature, and preserve their stream of pet trade
19 profits to the detriment of Tempe taxpayers, who would continue to shoulder the costs and
20 burdens of pet overpopulation with far fewer tools to manage the problem.

21
22
23 Following the passage of S.B. 1248 and S.B. 1487, a “super-preemption” bill that
24 purported to deprive Tempe of millions of dollars in state funding if it ever enforced its
25 pet sales ordinance, and Plaintiffs’ accompanying threat to sue the city, Tempe modified
26
27
28

1 Sec. 6-54 of the Tempe City Code to comport with S.B. 1248 effective August 18, 2016.
2 *See* Exhibits 5 and 6.

3
4 Despite S.B. 1248's generic pronouncement that "regulation of pet dealers is a
5 matter of statewide concern," the state's inaction proves otherwise. Not only does the
6 State of Arizona pay nothing to address the issues of pet abandonment and over-
7 population, it has not even bothered to comply with its own legislation. As the parties
8 noted in their Stipulations on Remand, in the more than 10 months since S.B. 1248
9 became law, the State of Arizona has failed to appoint any members to the dog and cat
10 breeder study established by S.B. 1248 and, consequently, the committee has not held any
11 meetings or submitted its required report. Although the state presumably added the
12 committee provisions to S.B. 1248 to bolster its contention that animal control is an issue
13 of statewide concern, the State of Arizona clearly is not even interested enough in the
14 issue to obey its own law. The state's failure to act proves that the true impetus for
15 passing S.B. 1248 is not any statewide interest in curbing pet overpopulation or animal
16 cruelty, but rather protecting Plaintiffs' corporation and thwarting the efforts of charter
17 cities like Tempe to solve local problems in accordance with the will of their voters.
18
19
20

21 **Tempe's Strong Opposition to Vacatur**

22 Even if this court determines that the passage of S.B. 1248 moots this litigation, the
23 Ninth Circuit has spoken unequivocally: Vacatur is only appropriate where mootness
24 occurs due to "happenstance" or "the vagaries of circumstance," not through a party's
25 voluntary action and concerted effort. *Chemical Producers & Distributors Ass'n v.*
26 *Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). After losing this case, Plaintiffs retained a
27
28

1 team of lawyers and lobbyists to draft and secure the passage of S.B. 1248 and
2 subsequently threaten Tempe with litigation if it enforced its ordinance. Absent Plaintiffs'
3 targeted campaign to make a legislative end-run around this court's 2015 decision, S.B.
4 1248 would not exist and Tempe could continue to honor the will of its voters to restrict
5 the sale of unaltered pets within its borders.
6

7 Tempe also strongly opposes vacatur due to the importance of preserving the
8 judicial record. If S.B. 1248 is ever amended, repealed, or overturned, then Tempe should
9 be entitled to rely on this court's 2015 opinion as *res judicata* and reinstate its prior
10 ordinance without the specter of litigation from Plaintiffs or others. If vacatur were
11 granted and changed circumstances later allowed Tempe to reinstate its ordinance, then
12 Tempe would likely face a costly lawsuit from Plaintiffs seeking a second bite at the apple
13 on an issue that this court has already soundly decided. Moreover, Tempe wishes to be
14 able to rely on the court's dormant commerce clause analysis when considering passage of
15 ordinances on other topics of significant municipal interest.
16
17

18 Plaintiffs contend that, without vacatur, they will be prejudiced by their inability to
19 appeal this court's 2015 ruling. In making this specious argument, Plaintiffs ignore that
20 this is a trouble entirely of their own making. Plaintiffs had every opportunity to see their
21 appeal of the court's 2015 ruling through to its conclusion. However, Plaintiffs instead
22

23 ///

24 ///

25 ///

1 made a calculated, strategic decision to circumvent the judicial process and pursue a
2 legislative remedy. Having made that choice, Plaintiffs now have no legitimate cause to
3 complain.
4

5 Dated this 28th day of June, 2017.
6

7 /s/ Shelley D. Cutts

8 Shelley D. Cutts

9 Judith R. Baumann

10 CITY ATTORNEY'S OFFICE

21 E. Sixth Street, Suite 201

P.O. Box 5002

Tempe, Arizona 85280

Attorneys for Amicus Curiae City of Tempe

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on June 28, 2017, I electronically transmitted the attached
15 document to the Clerk's Office using the CM/ECF System and a true and correct copy of
16 the foregoing was served via USPS and electronic mail to the following CM/ECF
17 registrants:
18

19 Robert G. Schaffer

20 Daniel A. Arellano

21 Lewis Roca Rothgerber Christie LLP

22 201 East Washington Street, Suite 1200

23 Phoenix, Arizona 85004-2595

Attorneys for Plaintiffs

24 Brad Holm

25 Thomas G. Stack

26 City of Phoenix

Office of the City Attorney

27 200 West Washington Street, Suite 1300

Phoenix, Arizona 85003-1611

28 *Attorneys for Defendant City of Phoenix*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Eric M. Fraser
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2782
*Attorneys for Defendant City of Phoenix and
Intervenor-Defendant Humane Society of the United States*

Maureen Beyers
Beyers Farrell PLLC
99 East Virginia Avenue, Suite 220
Phoenix, Arizona 85004-1195
Attorney for Intervenor-Defendant Humane Society of the United States

/s/ Brenda J. Peeler