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IN THE UNIVERSITY LAKES JUSTICE COURT

STATE OF ARIZONA, COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff/Appellee, v. TIMOTHY GUILLERMO TIZON, Defendant/Appellant.	Case No. JC2022-109663 **APPELLANT'S MEMORANDUM** (Oral Argument Requested) (Assigned to the Honorable Tyler Kissell)

Respectfully submitted this 26th day of January, 2023.

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I. Introduction

Timothy Guillermo Tizon was arrested and charged with criminal Trespass in the Third Degree for distributing copies of the United States Constitution outside the ASU Memorial Union. Arizona's trespass statute requires the State to prove that Tim entered or remained "unlawfully on any real property after a reasonable request to leave by a law enforcement officer, the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry." A.R.S. § 13-1502(A)(1). Another statute, the Arizona Forum Act,[1] defines all "public areas" of Arizona's state universities as "public forums." A.R.S. § 15-1864(D). Moreover, the Forum Act states that any time, place, and manner restrictions enacted by a university must be "necessary to achieve a compelling governmental interest" and "the least restrictive means to further that compelling government interest." A.R.S. § 15-1864(B)(3)–(4). Under the Forum Act, ASU's campus is a public forum. And based on longstanding precedent under the Forum Act or the First Amendment, public forums are open to exactly the kind of speech at issue here. Thus, the State could not prove one of the necessary elements of criminal trespass—that he "unlawfully" remained on the property. Tim's conviction should be reversed.

II. Statement of Facts

A. Tim sets up a table and hands out copies of the U.S. Constitution.

At all relevant times, Tim was a student at ASU and a member of ASU's Young Americans for Liberty ("YAL") student organization. Tran. of October 14, 2022 Motion Hearing and Trial ("Tran."), 72:15–73:2. On March 3, 2022, Tim went to the North Plaza of the ASU Memorial Union to distribute copies of the Constitution. Tran., 74:11–12. The Memorial Union, which ASU calls "the living room of the campus," exists "to provide [students] with the best

[1] The Arizona Forum Act refers to A.R.S. §§ 15-1861 *et seq*., and is so called because it is modeled on the American Legislative Exchange Council's "Forming Open and Robust University Minds (FORUM) Act."

possible experience—whether joining a student organization, participating in a day of community service, planning an event or enjoying a meal."[2] It is an open, dynamic hub for student life on campus.

The North Plaza extends between the Memorial Union and Hayden Library, and that is where Tim set up a table to distribute the Constitution, as depicted at trial. Tran., 75:4–17.

FIG. 1: TIM (R) SPEAKING TO A STUDENT

All the witnesses who testified confirmed that Tim's table displayed the YAL logo, was not blocking any pedestrian walkways, and was not taking any other group's reserved space—indeed, no one had reserved space that day and no other groups had set up tables.[3] *See* Tran., 75:4–17. University officials approached Tim, told him that he was standing in a "reservable area," and explained that he must vacate it because he did not have a reservation. Tran., 25:6–25.

According to the ASU official's testimony at trial, the table made all the difference: "We were willing to allow people to walk around and hand out flyers in that area, but once they set up a table, it becomes a display, and it requires the reservation." Tran., 32:21–24. This same official noted that "[w]e even gave them the option of tearing down the table itself and just walking around and handing out flyers, that that did not require a reservation in that specific area." Tran.,

[2] Arizona State University, Educational Outreach and Student Services – Memorial Union, https://eoss.asu.edu/mu.
[3] The State does not contest that no one had reserved the space where Tim set up his table, yet the Trespass Notice entered as an exhibit at trial stated that Tim was being trespassed for "REFUSING TO LEAVE A RESERVED SPACE AT THE MEMORIAL UNION." Witnesses testified during trial that the space was "reserv*able*" but had not actually been "reserved." *See* Tran. at 31:2-6, 40:6-10 (Program Manager for Memorial Union and Student Pavilion); 50:16-19 (Officer Mackinnon); 75:4-17 (Tim Tizon).

25:20–23. Setting up a table in "reservable space" triggered a bright-line rule under the ASU policy although students could meet friends, talk with each other, pass out literature, and do any number of free-speech activities so long as they did not erect a table in the area. Tran., 34:19–23.

But ASU's own policy says otherwise. ASU's Student Service Manual ("SSM") 801-04, "Petitioning, Distributing, and Posting Literature In and Near Student Unions and Centers Buildings,"[4] requires a reservation to petition and distribute literature in "reservable areas surrounding the exterior of Student Unions and Centers Buildings, including the 'North Plaza of the Memorial Union.'" "To permit the free flow of traffic in and around Student Unions and Centers buildings," the policy continues, "those distributing authorized material are required to remain in assigned locations and may not circulate through other areas." *Id.*; *contra* Tran., 34:19–23. Regardless, the parties agree that Tim's table was not blocking pedestrian traffic, he was not causing a disturbance, he was not littering, and his table was not in a spot reserved by someone else—he was handing out the Constitution near a table. Tran., 40:11–20.

To reserve a spot according to SSM 802-01, "Scheduling Outdoor Campus Activities Areas,"[5] an applicant must fill out the "Outdoor Event Request Form,"[6] in which the applicant—who has to be an "officer" of the organization—must provide his or her name, email, phone number, sponsoring organization, a description of the planned event, answer a variety of other questions, and agree to follow the "terms and conditions for use of space." Those terms and conditions[7] note that an applicant may be required to sign an "Assumption of Risk, Waiver and Release of Liability." The terms and conditions caution that "[t]he sponsoring organization is responsible for cleanup of the space they have reserved." The form also notes that "[r]equests

[4] https://www.asu.edu/aad/manuals/ssm/ssm801-04.html.
[5] https://www.asu.edu/aad/manuals/ssm/ssm802-01.html.
[6] https://eoss-forms.asu.edu/outdoor_event.
[7] https://eoss.asu.edu/sites/default/files/2021-12/memorial_union_student_pavilion_procedures_-outdoor_mall_2021.pdf.

must be submitted 2 full working days in advance." The website states that requests should be submitted a week before the event and reiterates that "forms will not be accepted with less than two full working days[']notice." At trial, an official testified that ASU would help to process a permit submitted by a student organization only thirty minutes in advance. Tran., 37:20–38:1.

B. Tim is charged with criminal trespass and proceeds to trial.

The State charged Tim under A.R.S. § 13-1502(A)(1) for criminal trespass in the third degree. That statute criminalizes "[k]nowingly entering or remaining unlawfully on any real property after a reasonable request to leave by a law enforcement officer, the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry." *Id*.

Tim moved to dismiss the charges based on the Arizona Forum Act, the Arizona Constitution, and the First Amendment. Tran., 6:6–8, 9:22–25; 18:23–19:3; *see generally* Sept. 21, 2022 Motion to Dismiss. The State argued against the Motion to Dismiss, in part, by stating that Tim had "civil remedies. He could go to the civil court." Tran., 12:7–8. The State also argued that it was inappropriate to consider arguments about Tim's free-speech rights and whether the area was a public forum because "the victim here is Arizona State University" and "it's not really an appropriate place to analyze that here in this court. We're analyzing what happened in the criminal case, not of—that ASU is a public forum." Tran., 13:6–11. Then the State responded affirmatively when the Court asked: "And I presume, then, the State hasn't engaged in that level analyzation solely because the State doesn't believe that's the issue before the Court; is that correct?"

In denying the Motion to Dismiss, the trial court divided its ruling into two rationales:

> My ruling will have two parts.
> Fundamentally, I believe the State is correct in ultimately that this forum isn't the correct venue by which your client would prosecute his First Amendment rights. But having said that, in the event that this was the correct venue, I am finding that the State of Arizona had – had met their obligation with regards to providing your client an area in which

> he could engage with regards to his rights.
>
> More importantly, gave him the means by which he could subsequently apply to exercise his constitutional rights in the area he previously wanted to do so. And then the State had not provided an undue burden in doing so to your client.
>
> Okay.·So I believe that gave you the broad structure you would need for [indiscernible] rights to appeal.

Tran., 15:13–16:4.

After trial, the court issued its ruling and stated: "First off, let me reiterate, I, again, do not necessarily believe that this would have been the correct forum by which to evaluate the defendant's constitutional rights with regards to freedom of speech as it relates to this case." Tran., 90:4–8. The trial court added,

> As to ASU's policy, in the event that I am the appropriate venue to determine whether or not they're reasonable, I am finding that they are reasonable. The very fact that they would have let him hand out flyers without a table, while he absolutely has a constitutional right to engage in speech with others, the question is whether or not he had a constitutional right to set up his table there and use that for purposes [indiscernible.] And I don't believe the Constitution would conceive ASU policies as unreasonable as they were articulated to this Court.

Tran., 90:19–91:4. The trial court sentenced Tim to pay a $300 fine and perform 15 hours of community service. Tran., 92:10–12.

III. Legal Argument

Tim was lawfully present outside the Memorial Union because his free-speech rights are protected by the Arizona Forum Act, A.R.S. §§ 15-1861 *et seq*., the Arizona Constitution, and the U.S. Constitution. Each of these authorities is independently sufficient to overturn Tim's conviction, for two separate reasons. First, the criminal trespass statute requires that Tim be "unlawfully present" on property. Each of those three authorities make clear that Tim was lawfully present, because all three of them are higher authorities than an ASU policy. Second, a constitutional right is a complete defense to a criminal charge. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (reversing criminal convictions of religious objectors who invoked First

Amendment defense to prosecution under state compulsory school-attendance law). Similarly, certain statutes provide a complete defense to a criminal charge. *See, e.g.*, *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996) (vacating convictions to allow defendants to raise a defense under the Religious Freedom Restoration Act for having possessed marijuana in violation of the Controlled Substances Act). The Forum Act is one such statute—it commands that a university "shall not restrict a student's right to speak, including verbal speech, holding a sign or distributing fliers or other materials, in a public forum . . . ." A.R.S. § 15-1864(A); *see* A.R.S. § 15-1866(A)(3) (protecting speech "activities are not unlawful and do not materially and substantially disrupt the functioning of the university"). Here, it was an ASU police officer who arrested Tim and ASU that chose to press charges. Invoking the police power of the state by arrest and prosecution is clearly a restriction on a student's right to speak—as such, the Forum Act should be a defense to such charges.

Under either method of analysis, the trial court erred by failing to take into account the dispositive effect of the Arizona Forum Act, the Arizona Constitution, and the U.S. Constitution on the charges against Tim. Each authority provides a complete defense to Tim's conviction.

A. The Arizona Forum Act protects Tim's speech.

In 2018, the Arizona Legislature enacted HB 2563[8], which substantially amended A.R.S. § 15-1864 and codified broad free-speech protections for students.

"A university or community college shall not restrict a student's right to speak, including verbal speech, holding a sign or distributing fliers or other materials, in a public forum, but may impose reasonable time, place and manner restrictions as permitted below." A.R.S. § 15-1864(A). Here, the North Plaza is a public forum, a term defined earlier in the Act to include "any open, outdoor area on the campus of a university." A.R.S. § 15-1861(3). A time, place, and

[8] https://www.azleg.gov/legtext/53leg/2R/laws/0267.pdf.

manner restriction is permissible only when it meets all six criteria set forth in the act; failing one is sufficient to strike any regulation under the act. These criteria are that any restrictions imposed on speech must be "[r]easonable," "justified without reference to the content of the regulated speech," "necessary to achieve a compelling governmental interest," "the least restrictive means to further that compelling government interest," must "[l]eave open ample alternative channels for communication of the information," and must "[a]llow spontaneous assembly and distribution of literature." A.R.S. § 15-1864(B)(1-6). ASU's policy is content neutral, but it fails everything after that. "Necessary to achieve a compelling government interest" and "the least restrictive means to further that compelling government interest" are, of course, the two familiar prongs of strict scrutiny. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 417 (2020) (defining strict scrutiny). In other words, even if a university space may otherwise have less protection under the federal constitution, the Legislature (as the owner of Arizona's public universities) voluntarily assumes the responsibility of meeting strict scrutiny with any restrictions imposed (much like Congress has acted to grant more protection to religious liberty than the Free Exercise Clause of the First Amendment might otherwise require). *See* 42 U.S.C. §§ 2000cc, *et seq*. "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). "Restrictions on speech rarely withstand strict scrutiny." *Willey v. Harris Cty. DA*, 27 F.4th 1125, 1130 (5th Cir. 2022). ASU's action fails at least four criteria.

First, applying the trespass statute to Tim's speech is not necessary to achieve a compelling governmental interest. ASU has an interest in "permit[ting] the free flow of traffic in and around Student Unions and Centers buildings," as outlined in the ASU Student Service Manual ("SSM") 801-04. It also has an interest in allocating scarce space to competing groups

and ensuring they can manage the area if a large crowd gathers. Yet neither of these interests, or any other interests ASU has expressed, are "compelling." *Berger v. City of Seattle*, 569 F.3d 1029, 1052 (9th Cir. 2009) (en banc). Such interests "pale in comparison to those interests the Supreme Court has found compelling in a First Amendment context." *Id.* (cleaned up). Actual "compelling" interests include "reducing voter intimidation and election fraud," "protecting 'the integrity of the electoral process,'" and "safeguarding 'the basic human rights of members of groups that have historically been subjected to discrimination.'" *Id.* (collecting cases). Also rising to that level are "the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980). Preventing the minimal congestion that could occur from a single student standing next to a table handing out copies of the Constitution does not rise to this level. Moreover, there were no other students who had set up tables in the area, so Tim had not taken a reserved space or competed with others for space.

Moreover, ASU cannot simply "assert" a compelling interest in pedestrian safety and traffic congestion—it must prove it with evidence. A rule "must be premised on a strong basis in evidence under strict scrutiny review." *Mark One Elec. Co. v. City of Kan. City*, 44 F.4th 1061, 1066 (8th Cir. 2022). "Under the strict scrutiny test, governmental specificity and precision are demanded. The mere recitation of a benign or legitimate purpose is entitled to little or no weight." *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 36 (2001). Yet that is at most what ASU has offered here—generalized assertions of broad purposes without real evidence anywhere near sufficient to demonstrate a compelling interest.

Second, even if the State's interests here were "compelling," permitting is not the least restrictive means to accomplish them. "A permitting requirement is a prior restraint on speech and therefore bears a 'heavy presumption' against its constitutionality." *Berger*, 569 F.3d. at

1037. "Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers." *Id.* "Registration requirements also dissuade potential speakers by eliminating the possibility of anonymous speech." *Id.* at 1038. Also such "notification requirements eliminate 'spontaneous speech,'" which is specifically protected under the Arizona Forum Act. *Id.*; A.R.S. § 15-1864(B).

ASU had several less-restrictive means to advance its interests. It could have given Tim a permit on the spot since he was a member of a student organization and the University said it would be able to assist others in a shorter timeframe than the policy required. Tran., 37:20–38:1. It could have removed the "officer" requirement from its policy and allowed any member of a recognized student organization to reserve space. Or it could have simply allowed anyone to set up a table in an unreserved space, as Tim did, since that would not cause a conflict with other student groups and would not disrupt pedestrian traffic in the area. Any of these options—and more besides—would have allowed the University to maintain a system that manages competing demands for the North Plaza, while respecting the rights guaranteed to Tizon under Arizona law.

Third, ASU did not offer Tim a sufficient alternative channel. A.R.S. § 15-1864(B)(5). The officer told Tim he could go to a side space off the beaten path without a permit. Tran., 62:10–13. But an area away from the student audience Tim was trying to reach is not a viable alternative for him to achieve his goal of distributing literature by hand to passers-by. *See* Tran., 78:9–21. "The key for purposes of the adequate-alternatives analysis is whether the proffered alternatives allow the speaker to reach its intended audience." *Harrington v. City of Brentwood*, 726 F.3d 861, 865 (6th Cir. 2013). In this instance, Tim's intended audience was his fellow students. Exiling him to the far corner of campus away from the "living room" where students hang out, right by the union and the library, would prevent him from reaching that audience.

Fourth and finally, ASU's policy does not permit "spontaneous assembly and distribution

of literature." A.R.S. § 15-1864(B)(6). The entire point of ASU's policy is to ensure at least two business days' notice for multiple layers of bureaucrats to have time to review and approve a student's speech. Spontaneity is outlawed by the policy. Permit requirements and other forms of prior restraints on speech like these are against the very essence of a public forum: "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). In speaking of the "presumptive invalidity and offensiveness of advance notice and permitting requirements," courts have warned that such prior restraints place a "significant burden . . . on free speech." *Berger*, 569 F.3d at 1037. That burden includes "[b]oth the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted." *Id.* at 1037–38 (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir.1994)). The Forum Act distains such prior restraint, but ASU insists on it with its permitting policy.

Because ASU's policy fails at least four of the six criteria, when failing on any one is sufficient to strike a restriction, the ASU policy as applied to Tim clearly violates the Forum Act.

B. Tim's arrest and conviction violated his rights under the First Amendment.

The First Amendment protects against government infringement on speech, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), and "[t]he government bears the burden of justifying the regulation of expressive activity in a public forum." *Berger*, 569 F.3d at 1035. "Once a plaintiff shows that the First Amendment applies to a challenged time, place, and manner restriction, the government then bears the burden of demonstrating that the restriction is constitutionally permissible." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984).

While the Forum Act recognizes only one category of spaces—public forum—the First Amendment divides the concept into three types of fora, each with a different level of scrutiny appropriate to its purpose or function: a traditional public forum, a designated or limited public forum, and a nonpublic forum. *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 654 (9th Cir. 1992)

"A university campus will surely contain a wide variety of fora on its grounds." *Id.* In determining the type of forum, "government intent is the essential question." *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001). Thus, courts look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). *See OSU Student All. v. Ray*, 699 F.3d 1053, 1062 (9th Cir. 2012). Here, the policy of the Arizona Legislature, which sets the policy for the grounds of ASU, is that the North Plaza is a traditional public forum. The Forum Act, which embodies the government's policy, defines a "traditional public forum" as an "open, outdoor area on the campus of a university." A.R.S. § 15-1861(3). This is in contrast to a "designated public forum, which is any facility, building or part of a building that the university or community college has opened to students or student organizations for expression." *Id*. Because the North Plaza is an "open, outdoor area" rather than inside a "facility or building," it is a traditional forum.

"An individual's freedom of speech is at its zenith when sought to be exercised in a traditional public forum." *Fighting Finest v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996). Put differently, "[t]he government's ability to regulate speech in a traditional public forum, such as a street, sidewalk, or park, is sharply circumscribed." *Askins v. United States Dep't of Homeland Sec*., 899 F.3d 1035, 1044 (9th Cir. 2018). In a traditional public forum, a restriction on speech must be "justified without reference to the content of the regulated speech;" "narrowly tailored to serve a significant governmental interest;" and must "leave open ample alternative channels for

communication of the information." *Kaahumanu v. Hawaii*, 682 F.3d 789, 803 (9th Cir. 2012). As discussed above, ASU's policy fails this test. Though it is viewpoint neutral, it is not narrowly tailored, does not serve a significant governmental interest, and does not give Tim an adequate alternative channel of communication.

Admittedly, under the First Amendment, as opposed to the Forum Act, the restriction must only serve "significant governmental interest," not a compelling one, and must be "narrowly tailored," but "need not be the least restrictive or least intrusive means." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Yet even "constitutionally permissible restrictions on First Amendment rights must be drawn with narrow specificity." *New Times, Inc. v. Arizona Board of Regents*, 110 Ariz. 367, 371 (1974).

ASU fails both prongs of this test. First, ASU's interests in pedestrian traffic and providing a forum for student organizations were not harmed by Tim's distribution of the Constitution. And ASU officials testified that he would have been allowed to walk through the area passing out the Constitution. But the permit policy does not address crowd control because many students could individually distribute literature without permits even if that led to congestion around the Memorial Union. Additionally, because there were no other groups attempting to use the space at the time, the policy imposed a needless restriction on Tim without furthering ASU's goal of providing a forum to student organizations. *See Young Ams. for Liberty v. St. John IV*, No. 1210309, 2022 Ala. LEXIS 113, at *12-13 (Nov. 18, 2022).

Doubtless the State will respond that "tabling is just different" from individual leafletting because of the increased potential for traffic congestion. Indeed, at trial ASU said that it would permit spontaneous individual leafletting in the North Plaza, but that Tim crossed a line when he erected a small table. This is a totally unsatisfactory answer. The Ninth Circuit has squarely held that "the erection of tables in a public forum is expressive activity protected by our Constitution

to the extent that the tables facilitate the dissemination of First Amendment speech." *ACLU v. City of Las Vegas*, 466 F.3d 784, 799 (9th Cir. 2006). Tables serve important practical purposes for speakers—"tables often are used in association with core expressive activities, such as gathering signatures, distributing informational leaflets, proselytizing, or selling message-bearing merchandise." *ACLU of Nev*., 333 F.3d at 1108 n.15. Tables serve a valuable communicative purpose: "the use of a table may convey a message by giving an organization the appearance of greater stability and resources than that projected by a lone, roaming leafleteer." *Id.*

Second, under *Berger,* ASU's permitting requirements are simply not narrowly tailored. In that case, the city had imposed a permit requirement for street performers. *Id.* at 1035. The permits were valid for one year "to perform 'at designated locations'" within a park, but did not "assign particular performers to specific venues or performance times." *Id.* The court held that the permitting requirement failed First Amendment scrutiny. *Id.* at 1042. It reasoned that the Supreme Court "has consistently struck down permitting systems that apply to individual speakers—as opposed to large groups." *Id.* at 1038 (citing *Watchtower*, 536 U.S. at 166–67). The Ninth Circuit and "almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum." *Id.* at 1039 (collecting cases). The court explained that "under appropriate circumstances, a permitting requirement governing the use of a public open space can further a legitimate interest in the regulation of competing uses of that space." *Id.* at 1041. But the court held that the permit requirements were both over- and under-inclusive and did not advance the city's interest in managing competing uses of the park. *Id.* at 1042, 1043, 1046.

Watchtower also emphasized the restrictiveness of permit requirements under both intermediate and strict scrutiny. 536 U.S. at 167. ASU's permit requirement imposes prior restraints that are disfavored because they eliminate anonymity, burden speech with paperwork,

and undermine "spontaneous speech." *Id.*

In sum, ASU's policy fails federal constitutional scrutiny. Though it is content neutral, it is does not advance a sufficiently important governmental interest—the Ninth Circuit has recognized in *ACLU of Nevada* that tabling is a valuable expressive activity even in the face of potential pedestrian congestion. And ASU's policy is not narrowly tailored under *Berger.*

C. Tim's speech was protected by the Arizona Constitution.

Article 2, Section 6 of the Arizona Constitution states that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." As a positive endorsement of free speech, "[t]he right to free speech is granted directly to every Arizonan and is not merely a protection against government action, as is the First Amendment to the United States Constitution." *Sign Here Petitions v. Chavez*, 402 P.3d 457 ¶ 10 (Ariz. App. 2017); *State ex rel. Corbin v. Tolleson*, 160 Ariz. 385, 389 (App. 1989) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)) ("Freedom of speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'").

As a general rule, "governmental convenience and certainty cannot prevail over constitutionally guaranteed rights." *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 358 (1989); *id.* at 357 ("[W]e avoid, where possible, attempts to erode constitutional rights by balancing them against regulations serving governmental interests. Instead, we opt for a more literal application of art. 2, § 6."). Particularly when the government seeks to restrain speech—through a permit requirement or prior government approval of speech—the Arizona Constitution provides additional protection to speakers. *Phx. Newspapers v. Superior Court*, 101 Ariz. 257, 259 (1966) ("There can be no censor appointed to whom the press must apply for prior permission to publish for . . . 'It is patent that this right to speak, write, and publish cannot be abused until it is exercised.'") (quoting *Daily v. Superior Court*, 44 P. 458, 459 (Cal. 1896)).

The guarantee of free speech in the Arizona Constitution "is majestic in its sweep, and we have consistently found that it provides greater protection for speech than the First Amendment." *Brush & Nib Studios, LC v. City of Phx.*, 247 Ariz. 269, 346, 448 P.3d 890, 927 (2019) (Bolick, J., concurring). The Arizona Constitution constrains government action against speakers because of the "broader freedom of speech clause of the Arizona Constitution". *Mountain States Telephone & Telegraph*, 160 Ariz. at 356; *id.* at 357 ("The Arizona Constitution does not speak of major or minor impediments but guarantees the right to 'freely speak.'"). In all contexts, "given Arizona's constitutional protections, when dealing with regulations that affect speech, the [government] must regulate with narrow specificity so as to affect as little as possible the ability of the sender and receiver to communicate." *Id.* at 358; *see also Stummer*, 217 Ariz. 188 ¶ 10 ("time, place, and manner restrictions must be crafted 'with narrow specificity so as to affect *as little as possible* the ability of the sender and receiver to communicate'").

ASU was wrong to arrest Tim for trespass for freely speaking on campus—a fundamental right guaranteed to him under the Arizona Constitution. Instead of infringing his speech "as little as possible," ASU arrested him for speaking and forcibly removed him from the area. Such draconian actions are prohibited by the Arizona Constitution and, as a result, the entire basis for the conviction is contradicted by Tim's rights to free speech. The conviction should be reversed.

CONCLUSION

The trial court convicted Tim, an ASU student, for distributing copies of the U.S. Constitution in a public forum on ASU's campus. ASU violated Tim's free-speech rights under the Arizona Forum Act, the Arizona Constitution, and the U.S. Constitution because the permit policy imposed a prior restraint on speech, burdened Tim's speech far more than was necessary, and offered no compelling interest for the regulations. Tim was lawfully present, and his speech rights are a complete defense. This Court should reverse and vacate Tim's conviction.

Respectfully submitted this 26th day of January, 2023.

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