

No.

22-415

FILED

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ORIGINAL

**In The
Supreme Court of the United States**

Mark Stuart ,

Petitioner,

v.

**State of Arizona , Scottsdale City Prosecutor, et
al.,**

Respondents

**On Petition For a Writ of Certiorari
To The Arizona Court of Appeals, Div. One
No. 1 CA-CR 20-0620**

PETITION FOR A WRIT OF CERTIORARI

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" The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987)

"He does not have the right based on his beliefs about the 1st Amendment to simply refuse orders from police officers.... There is no prerequisite that the State show in advance somehow that a directive to the defendant is something that is lawful. It has to be an order in furtherance of the discharge of the officer's duty... It is not the lawfulness of the order that matters." Scottsdale prosecutor, Feb. 10, 2020

QUESTIONS PRESENTED

- (1) Whether Scottsdale Revised Code 19-13 is overbroad and violates the First Amendment?
- (2) Whether Scottsdale Revised Code 19-13 is unconstitutionally vague and violates the Fourteenth Amendment?

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**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

Petitioner, who was a Defendant- Appellant below, is Mark Stuart, a citizen of Scottsdale, Arizona. ("Stuart") This Court denied Stuart's petition for certiorari on Oct. 17, 2022 in case number 22-164. That petition did not raise overbreadth and vagueness of Scottsdale Revised Code 19-13.

Respondents are the State of Arizona acting through the Scottsdale city prosecutor's office, and the Hon. Sarbanes of Phoenix city court (sitting by special appointment), the Hon. Douglas Gerlach of the lower court of appeals of Maricopa County, and the Arizona Court of Appeals, Div. One.

State v. Stuart , case number M-0751-SC-2017003568 ,Scottsdale city court, Judge Sampanes presiding, entered judgment convicting Stuart of Refusal to Obey police on Feb. 10, 2020, and denied a post judgment constitutional challenge for vagueness and overbreadth on April 22, 2020

State v. Stuart (appeal to Maricopa County superior court), case number LC2020-00239-001 , Judge Gerlach presiding, judgment entered on Nov. 17, 2020, upholding constitutionality of SRC 19-13.

The Arizona Court of Appeals , Division One, ruled that Scottsdale Revised Code 19-13 was not overbroad or vague, No. 1 -CA-CR 20-0620, judgment entered on Nov. 30, 2021.

The Arizona Supreme Court, No. CR-21-0389-PR, denied discretionary review on June 3, 2022

Because no Petitioner is a non-governmental corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Stuart respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals, division one.

OPINIONS BELOW

The Arizona Supreme Court ruling declining to review these issues is in **App. : 1A** The Arizona Court of Appeals ruling upholding SRC 19-13 as not being overbroad or vague is reproduced in **App. : 2A** The Maricopa County Superior Court ruling, declining to invalidate SRC 19-13 on overbreadth and vagueness grounds is reproduced in **App.: 5A – 13A**. The Scottsdale city court ruling, declining to vacate the conviction on the basis of overbreadth and vagueness is reproduced in **App. : 14A**

JURISDICTION

The Arizona Supreme Court's order declining review was issued on June 3, 2022. On August 19, 2022, the Honorable Elena Kagan extended the time to file a petition for writ of certiorari until and including October 31, 2022. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS, AND CITY ORDINANCES

The First Amendment states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment, § 1, states in pertinent part:

.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Scottsdale Revised Code 19-13 states,

No person shall refuse to obey a peace officer engaged in the discharge of his duty, or any other person authorized to aid in quelling any riot, rout or affray.

INTRODUCTION

This case involves a facial First Amendment challenge to a municipal ordinance, as well as a vagueness challenge under the Fourteenth Amendment.

This case is about free speech, and whether individuals have a First Amendment right to challenge and defy police orders without risking arrest and prosecution for refusing to obey unlawful orders from police.

This case is about Fourteenth Amendment limitations on police and prosecutors when they cite and prosecute someone for refusing to obey a policeman's order. Can the state cite, prosecute and convict someone for refusing to obey an unlawful police order?

Through his own words and explanations to the trial judge, the prosecutor explained that a person can be charged with violating SRC 19-13 for any refusal of any order of a police officer on duty. **App.:76a-77a;79a,83a,85a-86a, 87a** There are no limitations on enforcement. There are no ascertainable guidelines for enforcement. A citizen is not given fair notice that refusing to obey any order of a Scottsdale police officer, even an obviously unconstitutional or otherwise unlawful order, can lead to being charged with a violation of SRC 19-13. According to the prosecutor, Scottsdale courts are supposed to sort things out, after the fact. **App. 86a**

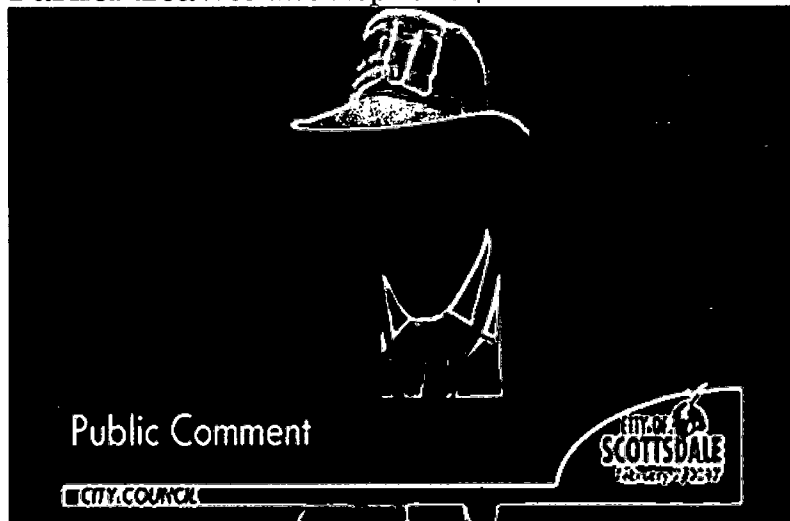
This Court should grant certiorari and invalidate SRC 19-13 for both overbreadth and vagueness, based on this Court's long established precedents.

STATEMENT OF THE CASE

Scottsdale activist arrested at council meeting after free-speech showdown

Mark Stuart, a leader in the movement against plans for a Desert Discovery Center, was escorted from City Hall by police.

Parker Leavitt The Republic | azcentral.com



A Scottsdale activist and vocal opponent of the city's plan to build a multimillion-dollar desert attraction in the McDowell Sonoran Preserve was arrested at a City Council meeting Tuesday after he tried to give an update on a petition drive against the project.¹

The following exchange occurred after Stuart was called to speak by the Mayor **App.100a-101a** :

¹ This was the headline in the local paper two days after Stuart's arrest. <https://www.azcentral.com/story/news/local/scottsdale/2017/02/09/97663354/>

[Time: 00:22:59]

Mayor Lane: Thank you, Mr. Leeder. Next will be Mark Stuart.

.....
Mayor Lane: I'm not here to debate --

Mark Stuart: Free speech is an integral part of the U.S. and Arizona Constitutions. It's automatically within the jurisdiction of the city council--

Mayor Lane: You are disrupting the public meeting. We are not here to debate this topic. If you want to speak about something --

Mark Stuart: **I'm here at public comment and you're preventing me from speaking freely and publishing freely**

Mayor Lane: No, we're not here to debate this topic, if you want to speak about something other than ...

Mark Stuart: Okay, will you start the clock over and let me do my presentation and then -- you can sue me and get a temporary restraining order or do whatever you think is appropriate. But you cannot prevent me from speaking.

Mayor Lane: Yes, I can.

Mark Stuart: Go right ahead.....

.....
Mayor Lane: No neither, side. Any citizen on either side.

Mark Stuart: **If you can cite some controlling legal authority right now, I will stop.**

.....
Mayor Lane: I will ask you to simply remove yourself then from the podium.

Mark Stuart: **I'm not willing to do that. I would like to give my full public comment.**

Mayor Lane: I gonna ask that we turn off the microphone and officers, if you would please escort Mr. Stuart, from the Thank you, officers.

A. The Scottsdale Prosecutor's Enforcement of SRC 19-13-- Refusal to Obey Police

Trial established that Stuart was charged. by Officer Cleary, with violating SRC 19-13--refusal to obey police-- for five or six separate refusals in a Scottsdale city council meeting on Feb. 7, 2017, and outside. **App.:74a,77a ,79a** The prosecutor described these acts to the trial judge as follows **App.: 74a- 80a**

The Court : Please. Mr. Flint, your closing argument. And your theory of the case regarding the failure to obey.....

Mr. Flint: Judge, my -- my theory is this. The defendant was given commands by Officer Glenn when he approached. He was told by Officer Glenn you need to leave the podium; said no, he wouldn't do it. Then he was told you need to leave the podium and exit the building; he said no, I won't do it. Then Officer Cleary comes up. And if you listen to the Jeff Abst video, you can hear Officer Cleary, just as he testified, trying to negotiate with the defendant and giving him an off-ramp. And if you sit down now, you can address agenda item whatever later on, Agenda Item 6, and if you don't, you're under arrest for trespass. And you can hear the defendant, if you listen to it, and I -- I would urge the Court, take it back and listen to it. Listen to the -- listen to Jeff Abst cell phone video. You can hear the defendant clearly saying I'm not willing to do that. So there's yet another, a third refusal by the defendant to sit

down. He's given the opportunity to leave the podium and walk away. He doesn't. He stands there and he holds his ground, even as the officers have been given -- given a clear directive to remove him from the podium.

Now, the defendant just said a moment ago something which is his theory of the case, but it's not -- it doesn't comport with the actual language of -- of the statute. He said it was not lawful or -- but if you look at 19-13 **Well, it doesn't talk about lawful, it talks about the officers engaged in the discharge of their duties.** Recall that they were told by the mayor to remove the defendant from the podium. They were there as security. The defendant understood their role. They were clearly in uniform, they were clearly acting as security, they were acting in conformance with the discharge of their duties.

The defendant is trying to get the Court to say, well, this isn't a lawful order, therefore, that he cannot be found guilty of 19-13. The officers, as Officer Glenn reiterated this morning, he's not up there doing a bar exam every time somebody asks him to make a legal decision. He's operating on the authority of the mayor, at that point, asking the defendant be removed from the podium.

The Court: Well, shouldn't there have been two counts of failure to obey the police officer?

Mr. Flint: There could have been multiple. And then we would've had either a multiplicity or a duplicity issue. That the -- We could have -- I could have added on extra charges. I could have done it for every time

he refused a command, Judge, or I could have done what I did, which was the defendant said earlier we were being vindictive. The State didn't act vindictively, we simply let the charges stand as they were. I didn't add anything. Or when I recharged it, **I could have added on charges**, I suppose, or done something that was in addition, I didn't do that, because it's not necessary. It's not necessary. **Every time the defendant refused an order, it's a violation of 19-13.** I could have charged him with one for the first time Cleary said to him leave and he said no. One for the second time Cleary said leave and leave the building and he said no. I could have charged him again for the time that he said no to Officer Cleary, and I could have said we're going to add an additional charge for the two refusals that took place outside after Officer Cleary asked the defendant take -- **I could have charged five or six different counts, but I didn't.** I charged the one, and I thought that was reasonable and fair, because he did violate multiple orders from the police.

So that's the State's theory in the case. **That every single one of these is a violation. You can pick which one you want.** If the Court wants to say each one of them took place, it can. But collectively and individually **the defendant defied the orders of the police to leave the podium** and then to sit down outside. And it doesn't matter which event the Court feels is convincing, beyond a reasonable doubt. I would assert that taken as a continuum of action, there were multiple refusals and the Court should find the defendant guilty of the 19-13 for defying the lawful or -- the orders of the police officer that

were in furtherance of the discharge of their duties.

App: 83a..... Again, it is not a lawful order. This is not an -- the defendant is adding language into the -- into 19-13. **19-13, itself, does not have in there lawful order. There is no prerequisite that the State show in advance somehow that a directive to the defendant is something that is lawful.** It has to be an order in furtherance of the discharge of the officer's duty. It's not simply that the defendant didn't comply. It's not that he stood there silent. **He affirmatively stated I'm not willing to do that. He stood his ground and he stated over and over again I'm not going to do that.** Both the officers testified to the same thing, that the defendant was given multiple options, opportunities to stop refusing and to leave the podium.

So, going back to what took place inside, his argument to the Court is this. I have a 1st Amendment right to say and do what I want, I've researched it. So when I go in, when they tell me to leave the podium, I don't have to do it. The fact that the officers are engaging in the discharge of their duties when they tell me to leave the podium at the mayor's directive, means nothing. **They can't do it, because he's incorporated the lawful order, the lawful order,.....** And, again, I would ask the Court to look at Paragraph 19 in Kaiser, a lawful order. **App.: 85a -86a** He keeps incorporating that. **He says it again and again in his statement to the Court just a moment ago, a lawful order. It is not the lawfulness of the order that matters. What**

matters is that it's in the furtherance of the discharge of the officer's duty, and nobody is disputing that. It is not for the defendant to quibble with the officers about the order, itself, and say, well, the 1st Amendment allows me to continue to do this, so I don't have to obey. 19-13 doesn't apply to me because I've got a 1st Amendment right. And so that 1st Amendment right overcomes the authority of the officers to actually control the situation when they're placed in charge of security. This is why we have courts..... He's saying that if he's standing on the 1st Amendment as he describes it and as he believes it empowers him, he doesn't have to obey 19-13, because he's doing something lawful. Those are false concepts, and they're false statements.

He has an obligation to obey, just like anybody else. And a court of law is where we decide whether somebody has a 1st Amendment right, and that's where that decision is made. It is not made on the street telling the officers I refuse to do what you say, because I have a 1st Amendment right and you're getting in the way. Or I have a right to maintain the podium, and you're getting in the way. Those are decisions that are made someplace else. But the defendant is not authorized to simply decide that he's going to opt himself out of 19-13

App.: 87a-88a He does not have the right based on his beliefs about the 1st Amendment to simply refuse orders from police officers. He does not have the right to

rewrite the statute by taking language from Shuttlesworth, the lawful aspect and incorporating that into the statute.

Judge, regardless of how the Court finds on the -- on the trespass, the defendant is guilty on the issue of failing to obey the lawful -- well, I just did it myself. It's not a lawful order. You know, look at the language itself, discharge of duties. And so the officer gave multiple -- both of the officers gave multiple commands to the defendant to do certain things in the furtherance of their duties, and the defendant refused. And so on the final analysis, the defendant's belief as to his 1st Amendment rights does not trump, does not obliterate his need to follow the commands of police officers acting on security at Kiva Hall. We'd ask you to find the defendant guilty on both the offenses based on the evidence that's been presented. Thank you.

B. Factual Background

This case is about free speech and whether a person has a First Amendment right to challenge or defy a police order, without risking arrest and prosecution. **App.: 17a-18a** This case is about due process. **App.: 20a-23a** In Scottsdale the police can give a person an unlawful order and then cite and prosecute him for refusing to obey that order. The underlying prosecution for allegedly violating SRC 19-13 shows how the police and prosecutors use SRC 19-13 to chill and punish those who refuse to cease their peaceful free speech activities, after being ordered to stop engaging in free speech by Scottsdale police.

Scottsdale city council meetings have an open call to the public and citizen petitioning time at every meeting. ("Open Public Comment") There are no content based rules or guidelines on permissible topics. **App.: 93a- 98a** Open Public Comment is video recorded and broadcast live to the public . Open Public Comment is also the time reserved for presenting citizen petitions to the city council. The Scottsdale city charter, Article II section 15 allows any citizen of Scottsdale to appear before the city council with a written petition. **App.:58a**

About Jan. 26, 2017, the Scottsdale city attorney Bruce Washburn sent Stuart a letter in response to his comments at open public comment in the meeting of Jan. 24, 2017. **App.:52a** Washburn told Stuart that speaking about the SOP Initiative at open public comment was prohibited. Stuart responded to Washburn, and indicated that Washburn was violating his First Amendment rights, and that Stuart would sue Washburn and the City if they prevented Stuart from speaking at open public comment, about the SOP Initiative, or anything else. **App.: 53a**

On Feb. 7, 2017 Stuart appeared at the city council meeting with a written petition, signed up to speak at Open Public Comment, and was called to speak by the Mayor. (the "Meeting") **App.:54a-58a;88a-89a;99a**

Prior to the meeting, Scottsdale police told Stuart that he would have to leave the podium without speaking if he was ordered not to speak by the Mayor. **App.: 60a-62a** Stuart explained to the police that they were violating his First Amendment rights by threatening him, and that he would sue them if they prevented him from speaking. **App.: 90a;**

Stuart's petition contained an update to the public and city council about the progress of the SOP Initiative, and quotations of this Court's decisions about free speech in public forums in the context of a ballot initiative. **App.:55a-58a** Stuart intended to inform the city council about the City's unconstitutional speech practices and ask the Council to stop these practices. **App.: 88a-89a** Stuart intended to ask the Council to send the SOP Initiative directly to the voters for approval. **App.:89a** Stuart was prevented from giving his petition to the council. **App.:99a-101a;63a-64a** The Mayor called Stuart to speak. When Stuart tried to give his petition, the Mayor told him he was prohibited from speaking about it at open public comment. Stuart asked to be allowed to speak for three minutes and to give his entire petition to the council. The Mayor denied this request and ordered Stuart to leave the podium without speaking. Stuart stated that he would leave after he spoke for three minutes. The Mayor then ordered police to remove Stuart from the podium. The police ordered Stuart to leave the podium. Stuart explained to the police that he would leave after speaking for three minutes. **App.:69a; 90a** The police then arrested Stuart and forced him to leave the podium and escorted him outside the building. Most of the sequence of events was recorded on the city of Scottsdale's video at (<https://scottsdale.granicus.com/player/clip/7853?Viewid=106&redirect=true> 22:45 to 26:11) A city of Scottsdale transcript is included in the Appendix at **App. 98a-101a**.

Stuart was cited for trespassing and refusal to obey police under Scottsdale Revised Code 19-13 ("SRC 19-13") As the prosecutor explained in his closing arguments, the basis for charging Stuart with

refusal to obey police , was Stuart's refusal to leave the podium without speaking for three minutes. **App.: 84a;87a**

Stuart was acquitted of trespassing , but convicted of refusal to obey police for refusing to sit on a bench after he was arrested inside the building.

Stuart's defense was based entirely on the First Amendment and the Fourteenth Amendment. **App. 80a-82a** Stuart argued that he had a guaranteed right to speak at open public comment, because he was following the rules and that state open meeting law and the city charter's citizen petitioning clause guaranteed his right to speak. Stuart showed that the police and Mayor's orders to leave the podium without speaking were unlawful, and could not provide a basis for a valid conviction under SRC 19-13. **App:65a-68a;71a-73a;94a-98a**

C. Stuart's Constitutional Challenge to SRC 19-13 in Scottsdale City Court.

Stuart filed a post judgment motion to vacate his conviction for refusal to obey police, based on overbreadth in violation of the First Amendment and vagueness in violation of the Fourteenth Amendment. The Trial Court denied it. **App.:14a**

C. The Appeal to Superior Court

Stuart asked the Superior Court to invalidate SRC 19-13 based on overbreadth and vagueness. The Superior Court denied this motion. **App. : 43a-49a;8a-9a**

D. The Appeal to Arizona Court of Appeals Division One.

Stuart was represented by an attorney , and asked the Court of Appeals to invalidate SRC 19-13 for overbreadth under the First Amendment and vagueness under the Fourteenth Amendment. **App.: 16a- 42a** Relying on *State v. Kaiser*, 204 Ariz. 514 (App. 2003), the Court of Appeals declined to overturn *Kaiser*, writing that "Stuart provides no compelling reason for us to depart from our holding in *Kaiser*. **App.:2a-4a**

REASONS FOR GRANTING THE WRIT

I. Free Speech and Due Process Are Important Legal Issues of National Importance in Need of This Court's Protection.

Free speech and due process are inherently issues of national importance deserving this Court's protection. In the past one hundred twenty years, this Court has invalidated about thirty-seven municipal ordinances as violative of the Fourteenth Amendment. In that time span, this Court has invalidated about forty-two ordinances as violative of the First Amendment. This Court has not hesitated to strike down municipal ordinances which chill and infringe on the peaceful exercise of First Amendment rights. This Court has not hesitated to strike down municipal ordinances that allow municipalities to seek to punish innocent behavior, or ordinances that have no ascertainable standards for enforcement, and

allow police and prosecutors unfettered discretion to pursue prosecutions.

The facts surrounding the enforcement of SRC 19-13 in this case are very similar to the facts of *City of Houston v. Hill*, 482 U.S. 451(1987). Just like the ordinance in *Houston*, the enforceable portion of SRC 19-13 deals with speech, not core criminal conduct. As the prosecutor explained in closing arguments, "He does not have the right based on his beliefs about the 1st Amendment to simply refuse orders from police officers..." **App.:87a** As the state explained in closing arguments , there are no limitations on police enforcement, or explicit guidelines to limit police and prosecutor discretion in pursuing prosecutions. Scottsdale prosecutors believe that they can pursue convictions under SRC 19-13, even when a police officer gives an unlawful order to a person, and the person refuses to obey the officer's commands. **App.:83a; 85a-86a** The prosecutor can pursue prosecutions under SRC 19-13 based on any theory it chooses, and has no obligation to show that the police orders are lawful.

" **Mr. Flint:** There is no prerequisite that the State show in advance somehow that a directive to the defendant is something that is lawful. It has to be an order in furtherance of the discharge of the officer's duty... **It is not the lawfulness of the order that matters.**" **App. :83a**

This Court can judicially notice that the Goldwater Institute has reported about cases in Scottsdale city court, where the city judge has ruled that a conviction under SRC 19-13 can result when a

defendant does not obey an unlawful order from a police officer. **App.: 112a** Goldwater reported that defense attorneys widely report that Scottsdale police cite for violations of SRC 19-13 as retaliation for free speech activities that police do not like. ²

SRC 19-13 shares many of the same defects of ordinances that have been invalidated on First Amendment and Due Process grounds, by this Court. For these same reasons, this Court should invalidate SRC 19-13.

Scottsdale Revised Code 19-13 states,

No person shall refuse to obey a peace officer engaged in the discharge of his duty, or any other person authorized to aid in quelling any riot, rout or affray.

A. The *Kaiser* Opinion is Wrong Because it Directly Conflicts with *City of Houston v. Hill*, 482 U.S. 451(1987), and other precedent, and Should be Reversed by this Court.

In declining to reverse *Kaiser*, the Court of Appeals ignored the undisputed facts of this case and the manner in which the prosecutor enforces SRC 19-13. It was undisputed that Stuart was peacefully and lawfully engaged in core First Amendment activities, and that he was charged with violating SRC 19-13 because he refused to cease attempting to engage in free speech. **App.:74a; 77a-80a; 25a-29a** It is

² See City Court: Outrageous Police Conduct Not a Concern for Scottsdale Judge ; Mark Flatten, Jan. 24, 2018

undisputed that the prosecutor argued that no person has a First Amendment right to refuse to obey any order of a Scottsdale police officer on duty. **App.:83a;85a-86a;87a** The prosecutor's own words are the strongest evidence of how he enforces SRC 19-13. It is undisputed that there are no limitations or explicit guidelines limiting prosecutions under SRC 19-13. If a person must obey every order of a police officer on duty, then that officer automatically has unlimited discretion to issue citations for alleged violations of SRC 19-13. No person could have fair notice that refusing to obey any type of order from an officer on duty could be illegal. Refusing to obey police is oftentimes normal, everyday, innocent behavior, especially when a person is peacefully engaging in free speech.

In *Kaiser*, the police were investigating drunk driving, not arresting someone in a public meeting to prevent them from speaking. **App.:28a;30a** The *Kaiser* court concluded that SRC 19-13 "provides sufficient standards for one charged with its enforcement to know what conduct is unlawful," and that "the ordinance does not encourage arbitrary enforcement." *Kaiser* did not identify any standards or limitations on enforcement. *Kaiser* rejected an overbreadth challenge, because defendant *Kaiser* could not show how SRC 19-13 could be applied to infringe on free speech. *Kaiser*, 204 Ariz. 519 Stuart explained clearly to the Court of Appeals how SRC 19-13 is used to punish lawful free speech. **App.:31a-35a** The appeals court was not persuaded.

In this case, unlike in *Kaiser*, Stuart was engaged in core First Amendment activities. It is undisputed that Stuart was charged with violating SRC 19-13, solely because he insisted on speaking for

three minutes at open public comment. **App.:74a -75a**
 The officers testified that Stuart refused to leave the podium after they ordered him to leave without speaking. **App.: 63a-65a;68a-69a;79a-80a**

The prosecutor presented no evidence that Stuart was doing anything unlawful. The prosecutor argued that he did not need to show that a police order was lawful, to prosecute under SRC 19-13. Refusing any order, according to the prosecutor is a violation of SRC 19-13. **App. 83a; 85a-86a;87a**

Every time Stuart tried to solicit testimony from the police officers about the lawfulness of their orders to Stuart, the prosecutor objected on relevance , and other grounds. **App.: 65a-66a;68a,70a,71a,72a**
 These objections show that the prosecutor does not believe that the lawfulness of a policeman's orders is a proper road of inquiry, and that the officer does not need to know whether he gave a lawful order , in order to issue a citation for violating SRC 19-13.

This Court has invalidated laws and ordinances when a state court's interpretation of the statute is unworkable, or when the prosecutors and lower courts simply don't enforce statutory interpretation in a manner that protects due process and free speech rights. In *Gooding v. Wilson*, 405 U.S. 518, 524 (1972), this Court invalidated Georgia code § 26-6303, because the Georgia courts interpretation of the code did not prevent the police from using it on protected free speech;" no meaningful attempt has been made to limit or properly define these terms." Like the Georgia statute , no meaningful attempt has been made to define the limits of police power in issuing citations for alleged violations of SRC 19-13. The standard articulated in *Kaiser* effectively licenses every judge "to create its own standard in every case." "[t]he fault

of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." 405 U.S. 528.

In *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974), this Court invalidated a Louisiana law that had been found constitutional by Louisiana courts, because "we find nothing in the opinion of the Louisiana Supreme Court that makes any meaningful attempt to limit or properly define — as limited by *Chaplinsky* and *Gooding* — "opprobrious," or indeed any other term in § 49-7." The *Kaiser* opinion doesn't provide explicit limitations, or any type of boundaries or guidance to lower courts and prosecutors.

This Court should reverse the Court of Appeals and the *Kaiser* decision and invalidate SRC 19-13 for vagueness and overbreadth. *Kaiser* does not provide any meaningful limiting construction of SRC 19-13. Prosecutors enforce SRC 19-13 without any meaningful limitations on its applications, and routinely apply it to protected free speech.

B. SRC 19-13 is Overbroad and Violates the First Amendment

".. a law imposing criminal penalties on protected speech is a stark example of speech suppression." Scottsdale Revised Code 19-13 ("SRC 19-13") is "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) Scottsdale Revised Code 19-13 is overbroad and unconstitutional on its face, because it prohibits any refusal of any order of a Scottsdale police officer on duty, without any explicit or actual limitations. **App. 83a;85a-87a** An overbroad statute infringes on a

substantial amount of constitutionally protected speech when there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, (1984), or when the statute is "susceptible of regular application to protected expression," *City of Houston v. Hill*, 482 U.S. 451, 467, (1987). "Criminal statutes that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application."

SRC 19-13 makes unlawful a substantial amount of constitutionally protected expression and conduct. Namely, any refusal of any order by a police officer on duty. The prosecutor explained that all refusals are subject to prosecution, no exceptions. "Every time the defendant refused an order, it's a violation of 19-13.... I could have charged five or six different counts.." **App.:77a** "The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." A refusal to obey a police officer is a challenge to a police officer's orders. In many cases, as here, a refusal is a legitimate exercise of First Amendment rights.

The Goldwater Institute reports that Scottsdale police routinely use SRC 19-13 in retaliation for protected speech, when the police have no lawful basis to order a person to do anything. **App.: 102a-112a**

This case and the cases reported on by the Goldwater Institute, show how SRC 19-13 is routinely applied to protected expression. This Court can realistically envision similar unconstitutional applications of SRC 19-13, based on similar historical

fact patterns. For example, if *Brown v. Louisiana*, 383 U.S. 131, 137 (1966) occurred in Scottsdale, the peaceful protesters could have been charged with violating SRC 19-13. "The sheriff asked the Negroes to leave. They said they would not. The sheriff then arrested them" The sheriff "testified that he arrested them "for not leaving a public building when asked to do so by an officer."

If *Wright v. Georgia*, 373 U.S. 284, 286 (1963) occurred in Scottsdale, Wright could have been charged with violating SRC 19-13 for refusing to obey the officers orders to leave the park. "the officers ordered the petitioners to leave the park. One petitioner asked one of the officers "by what authority" he asked them to leave; the officer responded that he "didn't need any orders to come out there" Wright refused the police order to leave the park, so he was arrested.

If *Cox v. Louisiana*, 379 U.S. 536, (1965), occurred in Scottsdale, Cox could have been charged with violating SRC 19-13, because he refused to leave a peaceful protest after having been ordered to disburse by the sheriff.

If *Bouie v. City of Columbia*, 378 U.S. 347 (1964), occurred in Scottsdale, Bouie could have been charged with violating SRC 19-13. "The Assistant Chief of Police then asked them to leave. When petitioner Bouie asked "For what?" the Assistant Chief replied: "Because it's a breach of the peace" Petitioners still refused to leave, and were then arrested."

In *Houston v. Hill*, 482 U.S. 451 (1987), "Hill was arrested under Houston Code of Ordinances, § 34-11(a), for "wilfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation." If Hill's situation had occurred in

Scottsdale, Hill could have been charged with violating SRC 19-13, for refusing to obey the officers orders not to interrupt him, or for challenging them " The ordinance has been "employed to make arrests for, inter alia, "arguing," "[t]alking," "[i]nterfering," "[f]ailing to remain quiet," "[r]efusing to remain silent," "[v]erbal abuse," "[c]ursing," "[v]erbally yelling," and "[t]alking loudly, [w]alking through scene." *Houston*, 482 U.S. 457 Hill could have been charged with violating SRC 19-13 for arguing and talking with the officers, like Stuart did. SRC 19-13 is much more sweeping than the ordinance struck down in *Hill*, or *Lewis*. Refusal to obey any order by any officer on duty is a violation of SRC 19-13.

" Every time the defendant refused an order, it's a violation of 19-13. So that's the State's theory in the case. That every single one of these is a violation. " **App.:77a-78a** He's saying that if he's standing on the 1st Amendment as he describes it and as he believes it empowers him, **he doesn't have to obey 19-13, because he's doing something lawful. Those are false concepts, and they're false statements. He has an obligation to obey, just like anybody else. ... He does not have the right based on his beliefs about the 1st Amendment to simply refuse orders from police officers."** **App. :86a-87a**

If *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015), occurred in Scottsdale, Patel could have been charged with violating SRC 19-13, for refusing to allow the police to inspect his hotel guest books without a warrant. "A hotel owner who refuses to give an officer access to his or her registry can be arrested

on the spot.... the operator can only refuse to comply with an officer's demand to turn over the registry at his or her own peril."

If *Camara v. Municipal Court*, 387 U.S. 523 (1967) occurred in Scottsdale, *Camara* could have been arrested and cited for violating SRC 19-13, for refusing to allow police to inspect his apartment without a warrant.

These cases are real life examples of everyday behavior, which would lead to a citation and an arrest under SRC 19-13. These examples show that the potential application of SRC 19-13 to constitutionally protected speech is almost unbounded. This type of broad reach is the hallmark of a facially unconstitutional statute.

In *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965), this Court recognized that the threat of enforcement of an overbroad statute against free speech requires that the statute be invalidated. The mere fact that one must risk a prosecution and bear the costs of a prosecution, chills free speech. "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

"So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski*, 380 U.S. 494

SRC 19-13 penalizes a person for peacefully and lawfully exercising free speech rights in at least two ways. The police can immediately arrest you, if

you refuse their order. This arrest stops free speech immediately, as happened with Stuart. A person cited under SRC 19-13 must bear the costs and burdens of defending the prosecution. These costs are a substantial burden on the right of free speech. "Defense of a criminal prosecution will not generally assure ample vindication of First Amendment rights." *Dombroski*, Id. The costs and burdens of defending a prosecution will deter most people from peacefully exercising free speech rights in Scottsdale. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP v. Button*, 371 U.S. 415, 433.(1963)

First Amendment freedoms need breathing space to survive and prosper. Because SRC 19-13 makes it unlawful to engage in constitutionally protected expression, and is used by police and prosecutors to punish protected expression, this Court should declare that SRC 19-13 is facially overbroad and violates the First Amendment. "The Constitution does not allow such speech to be made a crime. " *Houston*, 482 U.S. 461

C. SRC 19-13 is Unconstitutionally Vague and Violates the Fourteenth Amendment.

"a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." *Wright v. Georgia*, 373 U.S. 284, 292 (1963)." *Chicago v. Morales*, 527 U.S. 41, 59 note 30 (1999)

A statute is unconstitutionally vague if it fails to give fair notice to the public of what conduct is prohibited, or if it fails to provide explicit standards for enforcement , thus inviting arbitrary and discriminatory enforcement. *U.S. v. Johnson*, 135 S. Ct. 2251, 2556 (2015) A statute that vests complete discretion in the hands of the police to determine whether the suspect has violated the statute is unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) “when a statute “interferes with the right of free speech or of association, a more stringent vagueness test should apply.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010)

This Court should declare SRC 19-13 void for vagueness under the Fourteenth Amendment. SRC 19-13 does not provide fair notice to the public of what conduct it proscribes. SRC 19-13 has no ascertainable standards and limitations on enforcement, and invites arbitrary and discriminatory enforcement. SRC 19-13 directly conflicts with well recognized First Amendment freedoms-- the right to defy or disobey an unlawful order of a police officer.

We consider whether a statute is vague as applied to the particular facts at issue. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010)

The facts are undisputed. The prosecutor asked the judge to pick between any of Stuart's five to seven refusals of orders from the police officers, to find a conviction. **App.: 78a;**

"I could have charged five or six different counts, but I didn't. I charged the one, and I thought that was reasonable and fair, because he did violate multiple orders from the police.

So that's the State's theory in the case. That every single one of these is a violation. You can pick which one you want."

"An enactment may be attacked on its face as impermissibly vague if, inter alia, it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty." *Morales*, 527 U.S. 42

As shown below, there are no standards that limit the enforcement of SRC 19-13. Even refusing to obey an unlawful order, can lead to a prosecution and a conviction.

1. SRC 19-13 Does Not Give People Fair Notice of What Conduct it Proscribes.

The prosecutor's closing arguments are the best evidence of how SRC 19-13 is enforced. Refusing to obey any order of a police officer on duty, even an unlawful order, will lead to a citation and prosecution.

"Again, it is not a lawful order. This is not an -- the defendant is adding language into the -- into 19-13. 19-13, itself, does not have in there lawful order. **There is no prerequisite that the State show in advance somehow that a directive to the defendant is something that is lawful.**" **App.:83a** They can't do it, because he's incorporated the lawful order, the lawful order,.... He keeps incorporating that. He says it again and again in his statement to the Court just a moment ago, a lawful order. **It is not the lawfulness of the order that matters.**" **App. :85a**

A person of ordinary intelligence could not have fair notice that refusing to obey any order of a Scottsdale police officer could be unlawful. After all, Scottsdale is not a police state. This Court has stated more than once, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Houston*, 482 U.S. 463. Because most Americans understand that they have a right to refuse unconstitutional orders from police officers, SRC 19-13 does not provide them with fair notice that such a refusal is unlawful in Scottsdale.

Because SRC 19-13 does not give persons of ordinary intelligence fair notice of what is prohibited, this Court should declare it void for vagueness under the Fourteenth Amendment.

2. There Are No Limitations on Enforcement of SRC 19-13

When the state is not required to prove that a police officer's order is lawful, when the order is challenged by a defendant as unlawful, there are no limitations on enforcement. How could there be?

The Goldwater Institute reported that a Scottsdale judge enforced SRC 19-13 on the basis that police orders do not need to be lawful to find a defendant guilty of violating SRC 19-13. **App. :112a**

"Defense lawyers argued Ricky Miller was not the subject of any investigation during the incident, and that police had no authority to order him to be quiet and remain seated. Therefore, it was not a lawful order he was required to comply with.

Judge Morgan rejected the argument.... Ricky Miller was charged under the Scottsdale city ordinance, which does not require the order to be a lawful one, and therefore he was guilty, Morgan ruled."

Any order, lawful or unlawful, which is refused can lead to a conviction under SRC 19-13. Judge Morgan reached the same conclusion as the prosecutor at Stuart's trial.

Failure of persistent efforts to establish a standard can provide evidence of vagueness. *Johnson v. United States*, 576 U.S. 591, 598 (2015) The prosecutor's only standard is that the officer be on duty when he gives the order that is refused. This evidence of refusal to establish a lawful standard of enforcement, is strong evidence of vagueness.

There are no boundaries between permissible and impermissible applications of SRC 19-13. Therefore, SRC 19-13 is unconstitutionally vague under the standard set forth in *Wright v. Georgia*, 373 U.S. 284, 292 (1963).

3. SRC 19-13 Invites Arbitrary and Discriminatory Enforcement

Officer Cleary issued Stuart a citation for trespassing and refusal to obey police-- SRC 19-13. Both officers Cleary and Glenn were asked repeatedly, how they determined that their orders to Stuart to leave the podium without speaking were lawful. Both officers admitted that the lawfulness of their orders to Stuart to leave the podium without speaking was not a relevant consideration.

App..67a-69a; 71a-73a The excerpts from the trial

transcripts show that the officers blindly follow orders, without regard to the unconstitutionality of those orders. In other words, the officers believe that they can enforce SRC 19-13 in any manner that suits them at the moment.

(Portions of testimony of Officer Cleary) **App 59a-68a**

Q. BY MR. STUART: Did Mr. Stuart ever indicate to you that he believed he had a lawful right to make his presentation to the city council?

A. Yes.

Q. Okay. Why do you believe you gave Stuart a lawful order? App. 64a

A. Based on the circumstances of the mayor, the parliamentarian of the -- of the city council meeting, asking you to step away from the podium, you were disrupting the meeting. Officer Glenn's statement for you to step away from the podium, my orders for you to step away from the podium would result in a trespass.....

Q. BY MR. STUART: Why do you believe the mayor gave Mr. Stuart a lawful order to leave the podium?

MR. FLINT: Speculation, Judge, and --

THE COURT: It's --

MR. FLINT: -- calls for a legal conclusion.

THE COURT: It's overruled as to -- Okay. So why don't you restate the question, Mr. Stuart.

Q. BY MR. STUART: Why do you believe that the mayor gave Mr. Stuart a lawful order to leave the podium? App. 65a

A. The mayor's the parliamenta --

THE COURT: I'll allow that -- I'll allow that

answer.

THE WITNESS: The mayor is the parliamentarian of the meeting. He gives direction on how the meeting is to be conducted. And he gave you specific directions to step away from the podium.

Q. BY MR. STUART: **Why do you believe that those specific directions were lawful?**

MR. FLINT: Judge, objection. That's asked and answered.

THE COURT: No, you can answer the question, if you can.

THE WITNESS: **I don't know how I can answer it any more clear, Your Honor.**

THE COURT: Okay.

Q. BY MR. STUART: Did Mr. Stuart go to the podium to speak about issues of public importance on February 7th? **App. 66a**

MR. FLINT: Judge, again, calls for speculation.

THE COURT: It's over -- overruled. You can answer the question, if you can, Officer Cleary.

THE WITNESS: **My understanding was you were going to address your -- your petition and your organization.**

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Q. **Is it unlawful for Mr. Stuart to go to a city council meeting and ask the city council to - to - to have a discussion of a ballot initiative to go to the voters? App. 67a**

MR. FLINT: Judge, that calls for a legal conclusion, also relevance.

THE COURT:It's -- objection's overruled. You can answer the question, if you can, Officer, but --

THE WITNESS: **I don't know.**

Q. BY MR. STUART: Is it unlawful for Mr. Stuart to speak about Supreme Court decisions at city council meetings?

A. I don't know. App. 67a

Q. BY MR. STUART: Is it unlawful for Mr. Stuart to speak about Arizona Supreme Court decisions at a city council meeting?

A. I don't know.

Q. Then how do you know whether the mayor's order to -- to leave the podium is lawful?

A. The mayor's the parliamentarian of the city council meetings. He runs the mu -- meeting from start to finish, gavel to gavel. He gave direction to the police officers on duty to es -- have you escorted away from the podium.

Q. So you were acting entirely on the mayor's orders; is that correct?

A. Yes.

Q. And you had no independent understanding that Mr. Stuart was doing anything unlawful.

MR. FLINT: Judge, objection on relevance, argumentative, calls for legal conclusions.

THE COURT: That's overruled. You can answer the question, if you can.

THE WITNESS: I know that you were on a course of illegality by refusing to step away from the podium. You had been told to leave the podium by the mayor several times. Officer Glenn told you to leave the -- the podium several times. I, myself, told you to leave the podium several times. **App. 68a**

68a

Q. Did -- did Mr. Stuart indicate to you at the

podium that he'd like to stay and give his three-minute public comment?

A. If you did, I don't recall you saying it, and it was irrelevant to the matter at hand it wouldn't make any difference to the -- the outcome. App. 68a

(testimony of Officer Glenn, excerpts, App.: 69a-72a)

Q. BY MR. STUART: So, Officer, Glenn, before you follow an order from the mayor, do you have to make sure that it's a lawful order? App. 70a

MR. FLINT: Judge --

THE WITNESS: I --

MR. FLINT: -- objection.

THE COURT: You can answer the question, if you can, Officer Glenn.

THE WITNESS: I -- I understand that, uh, the city attorney of Scottsdale has that expertise, and I was following the order of the mayor of the City of Scottsdale.

Q. BY MR. STUART: But before you follow an order of the mayor of the City of Scottsdale, do you have to determine whether that's lawful or not?

A. I would have --

MR. FLINT: Judge, there's --

THE WITNESS: -- no reason not to.

MR. FLINT: I'm sorry. **Objection on relevance**, calls for a legal conclusion, foundation.

THE COURT: I'll overrule. You can finish your answer, Officer Glenn.

THE WITNESS: I was just saying I would have no reason to believe that it would not be legal, especially coming from the City of Scottsdale head attorney.

Q. BY MR. STUART: But that's not the question that I asked you. Do you have an obligation to determine whether that order is lawful before you follow it?

MR. FLINT: Judge, asked and answered.

THE COURT: It's overruled. You can answer the question, if you can.

THE WITNESS: Yeah. That was my answer.

.....

MR. STUART: I'm getting – I'm trying to get him to admit that he gave an unlawful order.

THE COURT: Okay.

MR. STUART: If he read the statute, he would know.

THE COURT: Are you going to admit that on the stand, Officer Glenn?

THE WITNESS: No, sir. App. 72a

These excerpts from the transcripts show that Scottsdale police officers cite a person for allegedly violating SRC 19-13, without regard to the lawfulness of the order that was refused. In other words, police officers cite persons for violating SRC 19-13 based on their personal preferences and predilections, not based on any verifiable set of rules or standards. This type of enforcement of a city ordinance is the hallmark of a vague law. Citations for violating SRC 19-13 can vary widely from officer to officer, depending on their personal whims. Convictions can vary widely from judge to judge, based on whether the order that is

refused is lawful or unlawful. Some judges convict for any refusal of any order. Others convict only when the order is lawful.

A statute that vests complete discretion in the hands of the police to determine whether the suspect has violated the statute is unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) The testimony above shows that the officers and prosecutors believe that they have unlimited discretion to issue citations for alleged violations of SRC 19-13, without any consideration of the lawfulness of the underlying order. SRC 19-13 encourages arbitrary and erratic arrests and convictions, and criminalizes constitutionally protected free speech.

As this Court has noted many times when it invalidates laws for vagueness,

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972)

This Court struck down the Jacksonville vagrancy ordinance because it allowed police to charge persons for engaging in innocent or constitutionally protected behavior, and because it encouraged arbitrary and discriminatory enforcement. Like the void Jacksonville ordinance, SRC 19-13 "furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."

This Court should invalidate SRC 19-13 for vagueness, because its enforcement cannot be

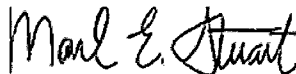
reconciled with our settled notions of due process. After all, as the prosecutor argued vociferously, "There is no prerequisite that the State show in advance somehow that a directive to the defendant is something that is lawful... **It is not the lawfulness of the order that matters**" App. :83a; 85a

The Scottsdale prosecutor's version of due process when prosecuting SRC 19-13 is frightening, dangerous, unamerican and unconstitutional. Accordingly, this Court should invalidate SRC 19-13 as void for vagueness under the Fourteenth amendment.

CONCLUSION

This Court should grant this petition, as it has in many similar cases in the past, and invalidate SRC 19-13 to protect the free speech and due process rights of people who interact with Scottsdale police.

Respectfully submitted,



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