

No. 21-16031

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARIA ADAME, et. al.,

Plaintiffs-Appellees,

v.

CITY OF SURPRISE,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
D.C. No. 2:17-cv-03200-GMS

**MOTION OF PROSPECTIVE AMICUS CURIAE
LEAGUE OF ARIZONA CITIES AND TOWNS
FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF
DEFENDANT-APPELLANT'S OPENING BRIEF**

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Dated: October 27, 2021

Pursuant to Federal Rule of Appellate Procedure 29 (“Fed. R. App. P.”), the League of Arizona Cities and Towns (“League”) respectfully moves this Court for leave to file the attached brief as amicus curiae in support of Defendant-Appellant City of Surprise. Counsel for the League represents that she endeavored to obtain the consent of all parties to the filing of the brief before moving this Court for permission to file the proposed brief in accordance with Fed. R. App. P. 29(a)(2) and Circuit Rule 29-3.

The League is a voluntary association consisting of the 91 incorporated member cities and towns in Arizona. The League advances the collective interests of these members in promoting the general welfare of municipalities and their citizens. The League also monitors appellate litigation affecting municipalities and identifies cases of statewide significance such as this case.

REASONS FOR GRANTING THE MOTION

The Court should grant leave to file the proposed Amicus Curiae Brief in Support of the Defendant-Appellant for two reasons.

First, the League has a significant interest in the outcome of this case. Interlocutory review of an erroneous denial of state-law immunity is of vital importance to the League’s 91 member municipalities. When state-law immunity under A.R.S. § 12–820.05 is wrongfully denied – like in this case – it results in irreparable harms to a municipality that cannot be re-immunized from suit after the

fact. The League has an interest in protecting against these irreparable harms and ensuring they have access to immediate and meaningful interlocutory review to correct a wrongful denial of state-law immunity.

Second, the League can provide its unique perspectives about the statute at issue (A.R.S. § 12–820.05) and the important immunity it provides to Arizona cities and towns.

CONCLUSION

For the foregoing reasons, the League respectfully requests this Court to accept the attached Amicus Curiae Brief in Support of the Defendant-Appellant.

Dated: October 27, 2021

Nancy L. Davidson
/s/ Nancy L. Davidson
Attorney for Amicus Curiae
League of Arizona Cities and Towns

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF
DEFENDANT-APPELLANT'S OPENING BRIEF

Signature /s/Nancy L. Davidson **Date** October 27, 2021
(*use "s/[typed name]" to sign electronically-filed documents*)

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**AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANT-APPELLANT CITY OF SURPRISE
AND REVERSAL**

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Dated: October 27, 2021

DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, amicus curiae League of Arizona Cities and Towns (“**League**”) avers the League is an instrumentality of the State of Arizona and is neither a corporation that issues stock nor a subsidiary or affiliate of any publicly-owned corporation.

No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

This amicus brief is being lodged with a motion for leave to file an amicus curiae brief in accordance with Fed. R. App. P. 29.¹

Dated: October 27, 2021

Nancy L. Davidson
/s/ Nancy L. Davidson]
Attorney for League

¹ In accordance with Fed. R. App. P. 29(a)(2) and Circuit Rule 29-3, counsel for Amicus Curiae represents that she endeavored to obtain the consent of all parties to the filing of the brief before moving this Court for permission to file the proposed brief.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the League of Arizona Cities and Towns (“**League**”) respectfully submits this amicus brief in support of the City of Surprise (“**City**”). The League is a voluntary association consisting of the 91 incorporated cities and towns in Arizona. The League advances the collective interests of its municipal members at the State Legislature and provides advocacy, education, training, technical assistance, and information for and amongst its municipal members. These cities and towns comprise approximately 79% of Arizona’s total population.

A right to state-law immunity is exceptionally important to Arizona cities and towns, and likely all public entities across Arizona, the Ninth Circuit, and the nation. Moreover, the ability of Arizona municipalities to obtain immediate and meaningful interlocutory review of erroneous denials of state-law immunity is of statewide importance and is fundamental to a fair and efficient civil justice system.

STATEMENT OF SUPPORT

The League has reviewed the docket in this case, including the Defendant-Appellant’s Opening Brief. (DktEntry 14) (“**City’s Opening Brief**”).

INTRODUCTION AND SUMMARY OF ARGUMENT

“If men were angels, no government would be necessary.” The Federalist No. 51, Feb. 6, 1788, *Founders Online*, National Archives (James Madison). The very existence of our governments thus attests that local governments - like the citizens they serve - are not always perfect. They make mistakes. Recognizing that governments make mistakes and not all mistakes are created equal, Arizona’s legislature codified certain immunities for public entities and their employees. *See* A.R.S. §§ 12-820.01–.05 (the Actions Against Public Entities or Public Employees Act or “Act”); *Glazer v. State*, 237 Ariz. 160, 163 ¶ 11, 347 P.3d 1141, 1144 (2015). In enacting these immunity statutes, the legislature “recognized that sovereign immunity is sometimes necessary given the breadth of the government’s exercise of power.” *Walls v. Ariz. Dep’t of Public Safety*, 170 Ariz. 591, 594, 826 P.2d 1217, 1220 (App. 1991). The immunity provisions’ “legislative purpose and intent” expressly states that the government does “not have a duty to do everything that might be done.” *Hogue v. City of Phoenix*, 240 Ariz. 277, 282, ¶ 17, 378 P.3d 720, 725 (App. 2016) (citing 1984 Ariz. Sess. Laws (2nd Reg. Sess.), Ch. 285, § 1)).

At issue here is one of the immunity statutes in the Act, A.R.S. § 12-820.05, which plainly immunizes a public entity from suit if the claimed losses arise out of and are directly attributable to a felonious act of its employee unless the public

entity knew of the employee's propensity to commit the felonious act or the acts or omissions arose out of the employee's operation or use of a motor vehicle. A.R.S. § 12-820.05(B). The district court in this case refused to apply this statutory immunity based on its own novel and incorrect interpretation of the motor vehicle exception. Specifically, the district court held that the motor vehicle exception precludes any immunity if the use of a motor vehicle by a private citizen – in this case decedent Adame – was in any way connected to the chain of events leading up to the shooting. *Adame v. City of Surprise*, CV-17-03200-PHX-GMS, 2021 WL 2416802, at *3 (D. Ariz. June 11, 2021). This misapplication of the motor vehicle exception has no support in the language of the statute or its case precedent.

The League respectfully urges this Court to grant the City's request for interlocutory review and reverse the district court's erroneous application of A.R.S. § 12-820.05(B) if the dispositive questions are not otherwise certified to the Arizona Supreme Court. While the League understands the importance of dispute resolution in an organized society, the gravity of the harms to the City resulting from the erroneous denial of immunity should not be lost. Litigation, even if righteously brought, should not last one minute longer than required for appropriate case disposition. Allowing interlocutory review to avoid an unnecessary discovery and a trial when the City is in fact statutorily immune from suit will help safeguard important public and judicial interests, obviate (or at least

diminish) unnecessary financial expenditures, foster efficiency, and conserve judicial resources.

ARGUMENT

I. A.R.S. § 12-820.05 Functions as Immunity from Suit.

As demonstrated in the City’s Opening Brief,² this Court has interlocutory jurisdiction because A.R.S. § 12-820.05(B) functions as immunity from suit. *See also, Tuuamalemalō v. Greene*, 946 F.3d 471, 476 (9th Cir. 2019) (emphasis in original) (citing *Liberal v. Estrada*, 632 F.3d 1064, 1074 (9th Cir. 2011)).

In particular, § 12-820.05(B) immunizes a public entity for losses that arise out of and are directly attributable to a felonious act of its employee unless the public entity knew of the employee's propensity to commit the felonious act or this act arose out of the employee’s operation or use of a motor vehicle. A.R.S. § 12-820.05(B). The statute also provides that “[e]xcept as specifically provided in this article, this article shall not be construed to affect, alter or otherwise modify *any other rules of tort immunity* regarding public entities ... as developed at common

² The League fully supports and joins in the arguments and undisputed facts presented in the City’s Opening Brief. The League writes separately to further discuss A.R.S. § 12-820.05, the public policies served by the statute, and the potential impacts on local governments in Arizona should the ruling of the district court stand.

law.” A.R.S. § 12–820.05(A) (emphasis added); see also, *Larson v. Berumen*, 187 F.3d 647, 647 (9th Cir. 1999) (summarizing A.R.S. § 12–820.05).

The title and provisions of A.R.S. § 12–820.05 were not slapped together thoughtlessly. The Arizona Legislature adopted A.R.S. § 12-820.05 as part of the “Actions Against Public Entities or Public Employees Act” (the “Act”) to specifically define a range of circumstances in which a public entity in Arizona maintains its sovereign immunity. A.R.S. §§ 12-820.01–.05³ The title of A.R.S. § 12-820.05, “Other Immunities,” labels the statute as one offering immunity and its provisions were crafted based on a report of the Governor’s Commission on Governmental Tort Liability. *See City of Tucson v. Fahringer*, 795 P.2d 819, 820 (1990) (discussing the report).

The League and others supported A.R.S. § 12-820.05 and the Act at the time of its adoption because it provides guideposts to cities and towns regarding the circumstances when they have a right *not* to stand trial. The Chairman of the State Supervisors’ Association and the Association of Counties emphasized that the Act “would allow all elected officials to know exactly where they stand and how they can proceed in good faith with the people they are serving and to get their job done.” *Minutes of Ariz. S. Judiciary Comm.*, Ariz. 36th Leg., 2nd Reg. Sess., pp. 2-

³ The Act applies to political subdivisions, A.R.S. § 12–820(6); *City of Tucson v. Fleischman*, 152 Ariz. 269, 272, 731 P.2d 634, 637 (App. 1986).

3 (Feb. 13, 1984). A representative of the Governor's Commission on Governmental Tort Liability also commented there was a “bone of contention” about whether the Act should grant qualified immunity or absolute immunity. *Id.*

Following the Act’s adoption, Arizona courts stated that “§ 12-820.05(B)’s immunity is ‘intended to protect a public entity from suit, not just liability, [and] it should be resolved by the court at the earliest possible stage in the litigation.’” *Cameron v. Gila County*, No. CV11-80-PHX-JAT, 2011 WL 2115657, at *5 (D. Ariz. May 26, 2011); *see also, Larson*, 187 F.3d at 647 (“At issue in this appeal is whether Gila County is immune from damages suit under Ariz. Rev. Stat. § 12-820.05(B)”); *Garcia v. Garibay*, No. CIV 12-929 TUC FRZ, 2013 WL 1442505, at *4 (D. Ariz. Apr. 9, 2013) (finding that pursuant to § 12-820.05(B), “[the defendant] is statutorily immune from suit unless [the plaintiff] can show it knew of the public employee’s propensity for that action”); *Al-Asadi v. City of Phoenix*, No. CV-09-47-PHX-DGC, 2010 WL 3419728, at *6 (D. Ariz. Aug. 27, 2010) (stating “because the immunity provided by A.R.S. § 12-820.05(B) is intended to protect a public entity ‘from suit, not just liability, [it] should be resolved by the court ‘at the earliest possible stage in litigation.’”) (citing *Link v. Pima County*, 193 Ariz. 336, 339 (App. 1998)).

Here, the parties do not dispute that the claimed loss was the result of a fatal shooting by a City police officer, which would constitute a felony. (City’s Opening

Br., p. 23). Additionally, there was no alleged propensity knowledge. (City’s Opening Br., p. 1). Accordingly, the district court erred by failing to grant A.R.S. § 12-820.05 (B) immunity to the City under these undisputed facts.

II. The Vehicle Exception Does Not Apply.

No Arizona Court has interpreted the vehicle exception, but federal courts have read the law to require a causal connection between the harm at issue and the public employee’s use or operation of the vehicle. *See Garcia*, 2013 WL 1442505, at *4; *Lyons v. Mesa Pub. Sch. Dist.*, CV-19-05880-PHX-GMS, 2021 WL 4478398, at *5 (D. Ariz. Sept. 30, 2021). Such a construction is further supported by Arizona law interpreting the phrase “operation or use of” to define the scope of vehicle insurance policies. *See Lyons*, 2021 WL 4478398, at *5; *Love v. Farmers Ins. Grp.*, 121 Ariz. 71, 74, 588 P.2d 364, 367 (Ct. App. 1978); *see also Ruiz v. Farmers Ins. Co. of Ariz.*, 177 Ariz. 101, 103–04, 865 P.2d 762, 764–65 (1993).

Here, it is undisputed that the decedent was the *only* person operating a motor vehicle at the time of the fatal shooting (City’s Opening Br., p. 22). In other words, the claimed loss did not arise out of the *police officer’s* operation or use of a motor vehicle, and thus, the motor vehicle exception cannot apply. “That a vehicle was the location of some of the acts does not render it the cause of the victim’s injuries.” *Lyons*, 2021 WL 4478398, at *5; *see also, Love*, 121 Ariz. at 73-74, 588 P.2d at 367 (finding, when construing a similar insurance provision, no “use” of a

car when the victim was kidnapped in the vehicle and beaten with a candelabrum found in the car); *Larson*, 187 F.3d 647 (construing A.R.S. § 12-820.05(B)'s vehicle exception in light of similar language in Arizona insurance statutes to require a causal connection between the vehicle and injury at issue); *Garcia*, 2013 WL 1442505, at *4 (same).

Should this Court determines that the motor vehicle exception requires a causal connection between the motor vehicle and the claimed loss – or that it is limited to the operation or use of a motor vehicle *by the public employee* – then upon remand, A.R.S. § 12-820.05(B) immunity must be applied under the district court's summary judgment order, and the City will not stand trial.

III. Interlocutory Review Can Help Prevent Irreparable Harms.

The U.S. Supreme Court has emphasized the importance of resolving immunity questions at the earliest possible stage to shield public entities from the disruptive effects of broad-ranging discovery and effects of litigation. *Anderson v. Creighton*, 483 U.S. 635 (1987). When a district court erroneously denies statutory immunity under A.R.S. § 12-820.05(B), the denial has significant consequences.

First, the erroneous denial of statutory immunity improperly invades the legislature's authority. *See Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 16 P.3d 757 (2001) (“[W]e recognize nothing more than the express authority the Arizona Constitution confers upon the legislature to define those instances in which public

entities and employees are entitled to immunity. The legislature possesses this authority not because we say so, but because our Constitution so directs.”). Statutory immunity is meaningless if a district court erroneously denies the immunity to a party entitled to it. Here, the district court’s erroneous application of A.R.S. § 12–820.05 functionally bars the City from an early and conclusive determination of whether it is entitled to the immunity protections the statute is intended to afford. If erroneous denials of state-law immunity are not subject to interlocutory review, the immunity granted by statute is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Second, an erroneous denial of state-law immunity has significant financial impacts to local governments that are forced to defend claims beyond the point at which it could be concluded that the immunity applies. “Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.” *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). Often, governments must retain costly, specialized outside counsel to handle these cases, especially if the case proceeds

through discovery and trial. Arizona taxpayers are ultimately stuck paying for these litigation costs, attorney fees, and insurance premiums.⁴

Third, the harmful consequences of allowing an improper claim to proceed against a public official are not limited to financial burdens, but also include “the general costs of subjecting officials to the risks of trial - distractions of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also, Ashcroft*, 556 U.S. at 685 (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”). When faced with claims, local governments are forced to divert limited staff resources and time to the litigation, effectively impeding their ability to provide a multitude of services to the public.

Fourth, the inability to expeditiously appeal an adverse ruling on statutory immunity can also distort a government’s decision-making process and hinder its ability to act in the public interest. Immunity guards against untoward disruption of

⁴ The costs must be considered by state and local governments when proposing, adopting, and abiding by a budget, which relies on predictability and certainty of revenues and expenditures. *See generally*, A.R.S. § 42-17101 (outlining requirements for local governments to adopt a budget that includes estimates of projected revenues and anticipated expenditures for each fiscal year).

governmental functions and allows policymakers to exercise their regulatory discretion un-chilled by the threat of litigation. *See, e.g., Mitchell*, 472 U.S. at 525-26. Different from private-party disputes, the public interest is sacrificed when a public entity is required to litigate a tort case to a final judgment before an erroneous denial of state-law immunity may be appealed. The mere threat of a lawsuit can push many local governments to settle, contrary to the public interest. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings”). A settlement agreement may include the payments of a large sums of money to the plaintiff or a stipulated injunction prohibiting the enforcement of a challenged ordinance, policy, or action at issue.

IV. Interlocutory Review Does Not Create an Undue Burden on this Court.

Tort cases are complex and can easily consume judicial time and resources. Fully resolving a narrow, outcome-determinative legal issue regarding immunity on the front-end can prevent the waste of judicial resources expended in a trial that may ultimately prove to be unwarranted. Courts thus have a vested interest in early-stage dismissal of tort claims that cannot lead to redress.

The U.S. Supreme Court has reiterated that a court may exercise its discretion to rule on cases like this one where there is no undue burden on the court because the immunity question turns on an issue of law. *Plumhoff v. Richard*, 572

U.S. 765, 772-73 (2014). “This is so because such orders conclusively determine whether the defendant is entitled to immunity from suit, this immunity is both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost.” *Id.* at 772 (citation omitted). “Deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues *is not an undue burden.*” *Id.* at 773 (emphasis added).

Here, the City’s immunity claim “raise[s] legal issues quite different from any purely factual issues that might be confronted at trial.” *Id.* at 772. In particular, the City is raising the following *legal* issues:

- Whether § 12-820.05(B)’s motor vehicle exception applies only to the public employee’s use or operation of a motor vehicle (City’s Opening Br., p. 6); and
- If not, whether the decedent’s use of his own vehicle must relate to the claimed loss in order to invoke the stator exception (City’s Opening Br., p. 7).

Put another way, the City is not seeking interlocutory review based on a disagreement with the district court’s factual analysis. Rather, the City seeks an interlocutory appeal based on the statutory interpretation of A.R.S. § 12–820.05.

See generally, City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503 (2019) (holding the court must explain how the case law prohibited the officer's actions and set forth its analysis as to entitlement to qualified immunity).

In sum, the City properly raises *legal* questions about the district court's failure to properly apply well-settled law and the Plaintiff-Appellee has not set forth any compelling reasons to decline interlocutory review. Any concern that interlocutory review would present a peculiarly undue burden on this Court seems exaggerated, especially when weighed against the irreparable harms caused by the erroneous denial of state-law immunity.

CONCLUSION

For the foregoing reasons, the League urges the Court to grant the City's request for interlocutory review to correct the district court' erroneous denial of immunity.

Date: October 27, 2021

Nancy L. Davidson

/s/ Nancy L. Davidson]

Attorney for League

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Amicus Curiae, League of Arizona Cities and Towns, states that it is not aware of any related cases pending in this Court.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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9th Cir. Case Number(s) No. 21-16031

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Description of Document(s) (*required for all documents*):

1. AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT CITY OF SURPRISE AND REVERSAL

Signature /s/Nancy L. Davidson **Date** October 27, 2021
(*use "s/[typed name]" to sign electronically-filed documents*)