IN THE SUPREME COURT

STATE OF ARIZONA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN Appellants/Petitioners, v. CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona, Appellees/Respondents.	Supreme Court No. CV-20-0027-PR Court of Appeals, Division Two Case No. 1 CA-CV 18-0379 Maricopa County Superior Court Case No. CV2016-013699

APPELLANTS/PETITIONERS' SUPPLEMENTAL BRIEF

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Christina Sandefur (027983)
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

Arizona's Gift Clause was written to ban exactly what the City of Peoria ("City") did in this case: subsidizing private businesses in hopes that by operating, those businesses would spur "economic development."

The constitutional prohibition against the City "mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation," Ariz. Const. art. IX § 7, stems from Arizona's "long history of direct involvement by [government] officials" in "railroad[s]...and other private ventures." Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 13 (1988). As this Court has observed, the Clause "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds" in the nineteenth century, "in aid of the construction of railways, canals, and other like undertakings," and "it was designed primarily to prevent the use of public funds...in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10 (2010) (citation omitted).

During Arizona's founding period, officials in this state generously subsidized railroads, banks, and other corporations with taxpayer money, believing these subsidies were "critical for economic development." Schaefer, *State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma*, 28 N.M. L. Rev. 303, 312 (1998); Libgober, *The Death of Public Purpose (And How to Prevent It)*, Olin Ctr. Discussion Paper No. 63 at 8 (Harvard Law School, 2016).

But spending taxpayer money to subsidize private entities in the name of economic development led to waste, corruption, overbuilding, and economic

crises. Pinsky, *State Constitutional Limitations on Public Industrial Financing*, 111 U. Pa. L. Rev. 265, 278 (1963); Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 912 (2003).

Consequently, many states amended their constitutions to include limitations such as the Gift Clause, which forbid public aid to private enterprises and assert that "government should not be engaged in economic pursuit of *any* kind." Libgober, *supra*, at 14 (citation omitted; emphasis added). This was the purpose behind Arizona's Gift Clause. Its authors sought to shift the "thrust of taxation" away "from a tool of capital enhancement and attraction." Leshy, *supra*, at 79.

In other words, the Gift Clause was written to prohibit the *exact justifications* the City has offered here (and that the court below accepted) for its subsidies to Huntington University ("Huntington") and Arrowhead Equities LLC ("Arrowhead"): that is, that government should give taxpayer money to private businesses in hopes that their private operation will benefit the public by improving the economy.

Although the Clause unambiguously prohibits cities from "mak[ing] any donation or grant, by subsidy or otherwise, to any…corporation," Ariz. Const. art. IX § 7, there are circumstances in which it is difficult to determine whether a particular expenditure constitutes a forbidden gift. For that reason, this Court adopted a two-prong test: an expenditure is unconstitutional if (1) it does not serve a public purpose, or (2) the consideration the government receives in exchange for the money is "grossly disproportionate to the amount paid to the private entity."

Turken, 223 Ariz. at 348 ¶ 21, 351 ¶ 41. An expenditure violates the Gift Clause if it fails either prong. Here, the challenged expenditures fail both.

ARGUMENT

The challenged contracts are unconstitutional because the City receives no consideration and because they do not serve a public purpose

I. The expenditures are unconstitutional because paying private businesses simply to operate themselves is a gratuitous expenditure for which no consideration is received.

"The [City] may not give away public property or funds; it must receive a *quid pro quo* which, simply stated, means that it can enter into contracts [with private parties] for goods, materials, property and services." *Yeazell v. Copins*, 98 Ariz. 109, 112 (1965). A private business's promise to operate within city boundaries, and a business's promise to renovate its own property for its own financial gain—without any promise to deliver goods, services, or other quantifiable benefits to the public—do not constitute a *quid pro quo*, and therefore fail the consideration prong of the Gift Clause test.

Neither Huntington nor Arrowhead has any binding obligation to provide *direct and quantifiable* benefits to the City under the agreements challenged here. Therefore, the City's payments to these private companies—totaling $2.6 million of taxpayer money—do not involve an exchange of adequate consideration as required by the Gift Clause.

A. Consideration must be tangible, quantifiable, and bargained-for.

This Court has said that "the most objective and reliable way to determine whether [a] private party has received a forbidden subsidy is to compare the public

expenditure to what the government receives under the contract." *Turken*, 223 Ariz. at 348 ¶ 22. To make that comparison, the Court must examine "the *objective fair market value* of what the private party has promised to provide in return for the public entity's payment." *Id.* at 350 ¶ 33 (emphasis added).

The italicized phrase is important because Gift Clause law differs from contract law in that courts must *compare* the value given up by the government with the value the government obtains—something courts "do not ordinarily" do under contract law. *Id.* at 349 ¶ 32. Because such a comparison requires weighing the objective fair market value of the good or service provided to the government against the amount of tax dollars paid for it, *id.* at 350 ¶ 33, there are some things that might be consideration under contract law that are not consideration for Gift Clause purposes. Under ordinary contract law, any promise to act or refrain to act is consideration—whereas under the Gift Clause, consideration must not be indirect, anticipated, or objectively unquantifiable. *Id.* As the dissent below put it, direct and tangible benefits have a market value, and are thus objectively quantifiable, which is what allows courts to "distinguish between permissible payments made by a government for goods and services...and impermissible donations and subsidies." *Schires v. Carlat*, No. 1 CA-CV 18-0379, 2020 WL 390671 *6 ¶ 29 (2020) (Morse, J., dissenting). But indirect, anticipated, hoped-for, attenuated benefits (such as secondary economic improvement) have no objective fair-market value, and cannot be consideration for Gift Clause purposes.

B. A private university's mere promise to invest in its own business, and a commercial real estate firm's renovation of its own property for its own private profit, are not adequate consideration under the Gift Clause.

Here, the City did not contract for *any* tangible or quantifiable benefits. Instead, it paid Huntington $1.875 million to operate its own business, APP.076 ¶ 30, and Arrowhead $737,596 to renovate its own property for its own private profit, APP.161–62, for a total of over $2.6 million in tax-funded payments to these two private firms. The agreements do not entitle the City to exercise ownership or control over these businesses. *Cf.* *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986) (public aid to a private entity serves a public purpose only if the private entity's "operations are…subject to the control and supervision of public officials."). Rather, the City merely *hoped*—but received no bargained-for guarantees—that the operation of these private businesses would benefit the local economy. In other words, the City did not contract for any direct, objectively quantifiable benefits from either Huntington or Arrowhead.

Huntington's operation of its own business in Peoria is not a constitutional *quid pro quo* for tax-funded payments of $1.875 million.[1] Unlike a contract for goods, materials, property, or services, the Huntington contract obtains no tangible value for the City or taxpayers.

[1] In addition to operating its campus, the majority below also counted as consideration the fact that Huntington must "forbear from engaging in a similar project with any other Arizona municipality for seven years." *Schires*, 2020 WL 390671, 5 ¶ 23. But this is not a direct benefit to Peoria. It has no "objective fair market value," and can count as a benefit only by preventing competition among private parties with, attenuated, hoped-for, economic consequences to the City. This is not Gift Clause consideration. *Turken*, 223 Ariz. at 350 ¶ 33.

The City does not own or control Huntington or Arrowhead. APP.075 ¶¶ 10–11, 118–121. *Cf.* *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971) (town owned and controlled the water line, so payment was not a gift); *Turken*, 223 Ariz. at 348 ¶ 20 (noting that in *Kromko*, the government retained "extensive control" over the private company, and the property reverted to the government upon corporate dissolution). Nor is Huntington University open to the public. If Peoria residents wish to attend, they must apply, be accepted, enroll, and pay tuition like anyone else. If they want to use the campus, they must pay to lease space or request Huntington's permission to use the property, and there is no guarantee Huntington will agree. APP.075 ¶¶ 12–14; APP.040–41. *Cf.* *Turken*, 223 Ariz. at 348 ¶ 20 (in *Kromko*, the hospital the government conveyed to a private company was "open to the public" and thus not a gift).

Nor does Huntington provide universal goods, materials, or services to the public. Unlike a public university, Huntington offers only one field of education (Digital Media Arts), and it is geared toward those seeking one specific sectarian religious perspective. APP.075–76 ¶¶ 15–26. Thus the City is not paying for something like free parking (*Turken*, 223 Ariz. at 348 ¶ 23), or police services (*Cheatham v. DiCiccio*, 240 Ariz. 314, 320 ¶ 23 (2016)), or even education services. Instead, this contract is more like paying McDonald's $1.875 million to sell hamburgers to the general public—with no discounts for Peoria residents or other public benefits—or giving Starbucks taxpayer money in exchange for a promise that it will sell coffee, with none of the "control and supervision [by] public officials" the Constitution requires. *Kromko*, 149 Ariz. at 321.

Like the Huntington contract, Arrowhead's renovation of its own property (for its own profit) is not proper and adequate consideration for a tax-funded payment of $738,000. Instead, Arrowhead's renovation of its own property, which it leases to Huntington for its own profit, inures to the benefit of Arrowhead and Huntington, not the City and taxpayers, APP.086 ¶¶ 130– 135. Thus, the City's expenditure of public money "on what, as a matter of law, is merely a private [building] and not a public [building]," violates the Gift Clause. *Graham Cnty. v. Dowell*, 50 Ariz. 221, 226 (1937).

Although Arrowhead's renovation is the *only* promise it made to the City in exchange for payment, the majority below apparently viewed the two contracts as a single contract when assessing the adequacy of consideration. This was legal error because "[c]onsideration is a performance or return promise that is bargained for in exchange for *the other party's* promise." *Cheatham*, 240 Ariz. at 321 ¶ 29 (emphasis added, citation omitted). In other words, only the parties to a contract can make contractual promises to each other, so Huntington's promise to operate its school under its own contract with the City cannot serve as *Arrowhead's* promise under *Arrowhead's* contract with the City. Additionally, *Turken* requires courts to "compare the public expenditure to what the government receives under *the* contract." 223 Ariz. at 348 ¶ 22 (emphasis added). But the City does not receive *Huntington's* operation of its own business under the *Arrowhead* Agreement. Each agreement must be assessed on its own terms.

Nevertheless, even if the City could use *Huntington's* performance to prove *Arrowhead's* consideration, Huntington's operation of its own campus in Peoria is

still not valuable consideration (as explained above), and fails to satisfy the Gift Clause's requirements.

On this issue, the Court of Appeals employed fallacious circular reasoning. The majority concluded that because Huntington would spend $2.5 million to open and operate its business, and Arrowhead renovated its property, the $2.6 million in total payments to both businesses was not a grossly disproportionate expenditure. *Schires*, 2020 WL 390671 *5 ¶ 23. But this begs the question. There is no dispute that Huntington and Arrowhead both promised to spend the funds they received from the City. The dispute, rather, is whether the promised expenditures are of the kind that the Constitution permits. Taxpayers do not deny that Arrowhead promised to renovate its property for Huntington, and that Huntington promised to open a campus. Rather, they assert that, as a matter of law, these firms' promises merely to open/operate their own private business (as opposed to providing goods, services or other direct and objectively quantifiable benefits *to the City*) do not count as consideration *at all* under the Gift Clause.

As the dissent put it, "the value" of Huntington's promise to open a new campus and Arrowhead's promise to improve its property "cannot be determined based on the amount *expended* by" those private businesses, because "the value of that consideration for Gift Clause purposes is what the *government receives* under the contract," not what the private party spends. *Id.* at *7 ¶ 32 (emphasis added). Otherwise, *any* subsidy of any amount for any reason would satisfy the Gift Clause, as long as the recipient of the funds promised to spend them.

Because neither Huntington nor Arrowhead promised to give the City any *direct* (bargained for) and tangible value in exchange for the public funds they received, there is no "objective fair market value of what the private party has promised to provide" to analyze here, as required by the Gift Clause. *Turken*, 223 Ariz. at 350 ¶ 33. The value of the Huntington and Arrowhead contracts is zero. And, of course, the gratuitous payment of public money to Huntington and Arrowhead, in exchange for no value, is by definition a gift—"giv[ing] away public…funds"—which is unconstitutional. *Yeazell*, 98 Ariz. at 112.

The court below failed to identify *anything* that the City gets from Huntington and Arrowhead in exchange for taxpayer money. Instead, it asserted, without explanation, that "the consideration Peoria received…was not indirect, nor was it grossly disproportionate." *Schires*, 2020 WL 390671 *5 ¶ 23. The court seems to have based this on its "deference to the decision of Peoria's elected officials" and the fact that "Peoria determined" that it would receive adequate consideration. *Id.* But however deferential courts must be in Gift Clause cases, they nevertheless must compare the expenditure of public funds with the objective market value of the direct benefits that the private recipient gives the City in return. If public funds are "expended for private purposes or in amounts grossly disproportionate to the benefits received," then the City has abused its discretion. *Cheatham*, 240 Ariz. at 320 ¶¶ 19, 21. That is happening here.

C. Anticipated, indirect economic impact of private activity is not consideration under the Gift Clause, nor is it the value of what the City received.

The City urges the Court to look beyond the text of the contracts and measure the consideration by anticipated indirect benefits, in the form of hoped-for "economic impact" that the City thinks Huntington's operation will generate. City's Resp. at 19. In other words, the City paid Huntington to run its own business, and Arrowhead to renovate its own property, in hopes that secondary, incidental economic consequences of those operations—indirect, speculative benefits—will improve the economy. This, it argues, was the value of the consideration in both contracts. The City's expert estimated that this "economic impact" would be $11.3 million.[2] *Id.*

But this Court values consideration by its objective fair market value, measured by the bargained-for benefits that the City actually receives under the contract. *Turken*, 223 Ariz. at 348 ¶ 22. "Economic impact" cannot be the objective fair market value of Huntington's operation because Huntington did not promise it, the City did not bargain for it, and the City does not receive it. That is why *Turken* said that such anticipated, indirect benefits "are not consideration" under the Gift Clause. *Id.* at 350 ¶ 33.

It is undisputed that Huntington did not promise to create an $11.3 million economic impact in its agreement with the City, and Huntington does not have to

[2] Notably, neither the Court of Appeals nor the Superior Court adopted the City's proffered $11.3 million value, nor did either hold that "economic impact" is a proper measure of consideration. *See* *Schires*, 2020 WL 390671 *5 ¶ 23; 4/26/18 Tr. Ct. M.E. at 6. And for good reason: if such measurements were sufficient consideration, the Gift Clause would be effectively neutered. See *infra*, Section II.

produce it to receive payment. APP.083 ¶¶ 101–102; APP.090–103. In fact, economic impact, by its nature, *cannot* be promised or guaranteed, as the City's own expert witness admitted. APP.085 ¶ 115. *See also* APP.058 ¶ 13. Nor can the City *receive* it, because economic impact is just a prediction of change in the economy. *Id.* Indeed, the City's own consultant for the Huntington deal explained to the City that economic impact "is based on…estimates and assumptions about long-term future development trends" that "are subject to *uncertainty and variation,*" such that he would "*not* represent them as results that will be achieved." APP.106 p. 47–48 (emphases added).

At best, the City's hoped-for $11.3 million economic impact is an "anticipated indirect benefit" of the contract that was "not bargained for as part of [Huntington's] promised performance"—and by its nature could not be—and is therefore "not consideration." *Turken*, 223 Ariz. at 350 ¶ 33. Thus, "economic impact" cannot be the *value* to the City of Huntington's operation of its business.

D. Fiscal impact is not consideration under the Gift Clause, but even if it were, it is grossly disproportionate to the expenditure.

Although the City receives no valuable, bargained-for consideration from Huntington or Arrowhead, should this Court nevertheless wish to assign a value, a better measure would be the *fiscal impact* of Huntington's operation in Peoria (as opposed to "economic impact"). Fiscal impact is an estimate of tax revenue the City is projected to receive from the Huntington deal. The City's consultant for the project estimated this at $206,630. APP.081 ¶ 77.

As with economic impact, Huntington did not *promise* this projected $206,630 fiscal impact, and the City did not bargain for it, so it cannot be consideration for Gift Clause purposes, *Turken*, 223 Ariz. at 351 ¶ 41, but this is the *only* number in the record that quantifies what the City *might* receive due to Huntington's operation in Peoria. APP.058 ¶ 16.

Yet even if $206,630 were a proper measure of the objective market value of Huntington's operation, it would violate the second prong of the Gift Clause test, because that number is grossly disproportionate to the City's total payments of $2.6 million. *See*, *e.g.*, *Turken*, 223 Ariz. at 351 ¶¶ 42–43 (public's nonexclusive use of 3,180 parking spots was disproportionate to the $97.4 million paid).

II. The expenditures are unconstitutional because paying private businesses to operate in hopes of stimulating "economic development" is not a valid public purpose under the Gift Clause.

The City's payments to Huntington and Arrowhead are best seen as *location subsidies*—that is, subsidies given in exchange for a business locating here instead of there. But such subsidies violate the Gift Clause because they do not serve a valid public purpose.

While this Court has held that "the *primary* determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government," *Cheatham*, 240 Ariz at 320 ¶ 21 (emphasis added), that does not mean *any* purpose satisfies the test, or that a purpose is public merely because the City Council says so. To hold otherwise would render the public purpose requirement meaningless.

A. A public purpose is one that primarily, tangibly, and directly benefits the public at large and involves a traditional government function.

Under this Court's Gift Clause precedent, a public purpose exists when the government spends money on something that primarily, tangibly, and directly benefits the public at large, and involves a traditional government function.

Although "[p]ublic purpose is a phrase perhaps incapable of definition, and better elucidated by examples," this Court articulated the "true test" for determining public purpose in *City of Tombstone v. Macia*, 30 Ariz. 218, 221–22, 224 (1926), the "seminal Tax Clause case" which was "approvingly cited in subsequent Gift Clause cases" for its elucidation-by-example method. *Turken*, 223 Ariz. at 346 ¶ 12. *Tombstone* says a purpose is public if it is for a "work [that is] *essentially* public," and "*primarily* [designed] to satisfy the need, or contribute to the convenience, of the people of the city at large." 30 Ariz. at 224. Examples include "maintenance of an adequate police department," "paving a system of public streets," and "providing a system for the disposal of sewage." *Id.* at 222.

Tombstone specifically held that "the manufacture and sale of ice *by a city* to its inhabitants," *id.* at 225 (emphasis added), served a public purpose because ice was a "necessity" in the "torrid climate" of Arizona, and it would be "offer[ed] to the *public* without discrimination." *Id.* at 228–29. In other words, everyone in town—the *public*—would have direct access to the ice, a tangible benefit provided by the city itself. This comports with the definition of the word "public": "1. Of, relating to, or involving *an entire community*…. 2. Open or *available for all* to use, share, or enjoy." *Public*, Black's Law Dictionary (11th ed. 2019).

Tombstone contrasted such a public undertaking with a *private* purpose. A private purpose, it said, means providing aid to private businesses to operate themselves for private profit—such as purchasing land "to aid a private enterprise in holding annual fairs" or "assisting a company to embark in the manufacture of linen fabrics." 30 Ariz. at 222–23 (citing cases).

Likewise, in *Turken*, a city's agreement with a private developer to secure free parking for the *public* served a public purpose. 223 Ariz. at 348 ¶ 23. In *City of Glendale v. White*, 67 Ariz. 231, 237, 240 (1948), the city's membership in a municipal league devoted to improving government administration served the public purpose of "improving the quality of service…[to] its own taxpayers." In *Humphrey v. City of Phoenix*, 55 Ariz. 374, 387 (1940), slum clearance to eradicate crime and disease served a public purpose. And in *Walled Lake Door*, supplying water for fire protection to protect lives and property served a public purpose and "provide[d] a direct benefit to the public at large." 107 Ariz. at 550.

In all these cases, expenditures were for traditional government functions, or for purchasing goods or services from private parties for use by the general public. Thus the expenditures were "*primarily* [designed] to satisfy the need, or contribute to the convenience" of the public, even if they *incidentally* benefited private parties. *Tombstone*, 30 Ariz. at 222, 224.

B. Payments to Huntington and Arrowhead to operate their own businesses do not serve a valid public purpose

But this case presents the opposite situation: the *primary* beneficiary of the agreements are private parties, and the *incidental and indirect* benefits are—or so

the City hopes—for the general public. But no Arizona court has ever held that incidental benefits to the public can render a transaction that primarily benefits a private entity constitutional under the Gift Clause.

Indeed, the economic development the City is pursuing here is qualitatively different from any purpose Arizona courts have deemed "public" under the Gift Clause. The City's theory is that because the operation of a private business could have an economic impact and indirectly improve the economy in a general way, its payments to Huntington and Arrowhead satisfy the public purpose requirement. But this would destroy the distinction between public and private, because *every* private business has *some* economic impact, with *some* indirect benefits. *Cf.* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004) ("incidental benefits to the economy [do] not justify the exercise of eminent domain for private [businesses on the theory that they]…will in some manner advance the public interest…[because] every lawful business does this." (citations omitted)).

The City relies upon *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368 (1973), to support its argument that "economic development spending" is an acceptable public purpose. City's Resp. at 14. But *Nelson* involved no such thing. In that case, the government paid to install air pollution control facilities in a smelter at a copper mine. *Id.* at 370-71. This Court found that "the obvious public purpose sought to be accomplished" was "the protection of the health of the citizens of this state by preventing or limiting air, water, and other forms of pollution." *Id.* at 374. Thus, the County was not paying a private business to operate for its own benefit; it was outsourcing pollution-control to protect citizens.

Paying Huntington and Arrowhead to operate as private businesses in hopes that this will spur development does not primarily, tangibly, and directly benefit the public. Instead, it *primarily* benefits Huntington and Arrowhead, which receive the payments, whereas the public receives nothing (such as free or reduced tuition for a general education, use of a public facility, or access to a traditional public function such as fire protection or pollution control). APP.058–59 ¶ 13, 22; APP.090–103; APP.120–57. Likewise, the payments to Huntington and Arrowhead *tangibly* benefit those private entities, which receive taxpayer dollars, whereas the public is not guaranteed to receive even *intangible* benefits from the deal. APP.058–59 ¶ 13, 22. And paying Huntington and Arrowhead to operate in anticipation of future economic development *directly* benefits Huntington and Arrowhead, which receive the money, whereas the public may only receive (potential) *indirect* benefits.

Unlike police services, fire protection, and free public parking, economic development is not directly accessible or "available for all *to use*, *share*, or *enjoy*." *Public*, Black's Law Dictionary (11th ed. 2019). Economic development is a "process in which an economy grows or changes and becomes more advanced." Cambridge Dictionary. Of course, *all* successful businesses presumably contribute to this "process" in *some* manner. Coffee shops and fast-food restaurants presumably help the economy grow—and do so *without* subsidies of tax dollars. Yet the City's theory would mean that the government could give tax dollars to Starbucks or McDonald's to operate, on the theory that they contribute to the economy and serve a public purpose. This is exactly what the framers of the

Arizona Constitution rejected by prohibiting "any donation or grant, by subsidy or otherwise," to private businesses (Ariz. Const. art IX § 7)—even though "railways, canals, and other like undertakings" were viewed as important for economic development. *Turken*, 223 Ariz. at 346 ¶ 10; Schaefer, *supra*, at 312.

C. Payments to Huntington and Arrowhead do not "promote educational opportunities" for Peoria residents or serve a valid public purpose.

The court below also erred by deferring to the City's assertion that the Huntington and Arrowhead expenditures serve the public purpose of "promoting educational opportunities in the STEM field." *Schires*, 2020 WL 390671 * 4 ¶ 17. Regardless of whether that is a public purpose, the City has not bargained for that. Huntington only teaches Digital Media Arts, and does so through the "lens of the Christian worldview"—a "niche market," according to the City's consultant, APP.075–76 ¶¶ 17, 23—meaning it will likely enroll most of its students from outside of Peoria. *Id.* ¶ 18. Huntington does not promise to hire any local residents for jobs; Peoria residents do not receive any admission preference or reduced tuition to this private school. *Id.* ¶¶ 12–14. And because Huntington is privately owned, Peoria officials exercise no control over its operations; rather, its Board of Trustees in Indiana makes decisions for its Peoria campus. *Id.* ¶¶ 10–11, 27–29.

Thus to say that the City's subsidies to private entities serve a public purpose by promoting educational opportunities is precisely analogous to saying that paying taxpayer dollars to McDonald's to sell hamburgers serves a public purpose by increasing food options for the local community. Once again, such a theory would permit any and all subsidies to private business: it would allow the City to

subsidize any business selling any product or service, since that increases the availability of those products or services.

Courts in Gift Clause cases look beyond the "surface indicia of public purpose" and consider the "reality of the transaction." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). The reality of the transaction here is that the contracts were not entered into for the purpose of promoting—and in fact do not promote—educational opportunities in the STEM field. Instead, it is undisputed that the City is paying Huntington and Arrowhead to engage in their private business. APP.075–76 ¶¶ 20–26; APP.085 116–119; APP.90–103; APP.120–157. The expenditures provide no tangible benefits to the public, nor do they even guarantee *indirect* benefits—as the City unfortunately learned when its similar arrangement with Trine University failed in 2017, without generating the economic impact the City hoped for. APP.057 ¶ 12.

The Gift Clause was written to prohibit the pursuit of economic development with public aid. Reading the Gift Clause in this context, the Huntington and Arrowhead expenditures do not serve a *public* purpose.

D. The legislature did not (and cannot) supersede the Gift Clause's public purpose requirement.

The City is not saved by the fact that A.R.S. § 9-500.11(A) "permits municipalities to spend public monies 'for and in connection with economic development activities.'" *Schires*, 2020 WL 390671 *4 ¶ 17.[3] After all, "statutory

[3] There are two versions of the statute. The City and Taxpayers refer to the shorter version, entitled "Expenditures for Economic Development; Definitions," because the other version does not apply to this case.

compliance does not automatically establish constitutional compliance." *Turken*, 223 Ariz. at 351 ¶ 41.

There are plentiful ways the City can exercise its statutory authority to promote "economic development" without running afoul of the Gift Clause. It could, for example, revise its zoning laws and simplify its permitting process to encourage businesses to locate there. Currently, most businesses in Peoria must pay for this privilege, whereas targeted industries like Huntington and Arrowhead receive "priority permitting" for free. The City could also focus on improving public services such as road maintenance, public safety, and providing recreational spaces. These things do not target or benefit specific businesses, but facilitate development by creating an attractive environment for all prospective businesses, and do so through traditional government functions. But pursuing economic development by paying private companies to do nothing more than operate themselves is not a traditional government function, nor does it serve the public.

CONCLUSION

The Gift Clause prohibits *all* donative forms of "capital enhancement" Leshy, *supra*, at 79, by *any* government body to *any* private party for *any* purpose, including by subsidy." Ariz. Const. art. IX, § 7 (emphasis added). The edition of *Black's Law Dictionary* published the year the Arizona Constitution was written defines "subsidy" as "[a] grant of money made by government in aid of the promoters of any enterprise … which is considered a proper subject for state aid,

because likely to be of benefit to the public."[4] *Subsidy*, Black's Law Dictionary 1117 (2d ed. 1910). Thus, the framers intentionally crafted a provision that would ban *all* manner of government aid to private entities—even those with "great potential for public benefit." Houpt, *Shopping for State Constitutions*, 36 Colum. J. Envt'l. L. 359, 381 (2011).

Peoria's arrangement with Huntington and Arrowhead are indistinguishable in principle from the subsidies for railroads and other corporations—designed to encourage railroads to locate in one municipality rather than another—that Arizona's framers expressly sought to forbid. Like those arrangements, these contracts primarily benefit a private enterprise, in hopes of indirect, future economic improvement. Like those arrangements, these contracts are not for a public purpose, and are not the equivalent of a purchase of public services; rather, they are a subsidy to a private entity. Like those arrangements, therefore, these contracts are unconstitutional.

The judgment of the Court of Appeals should be *reversed* and judgment entered for Plaintiffs/Appellants.

Respectfully submitted this 7th day of October 2020 by:

/s/ *Christina Sandfur*
Christina Sandefur (027983)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

[4] *See also* *City of Tempe v. Pilot Prop., Inc.*, 22 Ariz. App. 356, 362 (1974) ("Subsidy has been defined as: a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public." (citation omitted))

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Christina Sandefur (027983)
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Petitioners

IN THE SUPREME COURT

STATE OF ARIZONA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN

Appellants,

v.

CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona,

Appellees.

Supreme Court
No. CV-20-0027-PR

Court of Appeals, Division One
Case No. 1 CA-CV 18-0379

Maricopa County Superior Court
Case No. CV2016-013699

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 23(k) of the Ariz. R. Civ. App. P. and this Court's September 17, 2020 Order Granting Petition for Review, I certify that the body of the attached Appellants/Petitioners' Supplemental Brief appears in proportionally spaced type of 14 points, is double spaced using a Roman font, and does not exceed 20 pages.

/s/ *Christina Sandfur*
Christina Sandefur (027983)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Christina Sandefur (027983)
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Petitioners

IN THE SUPREME COURT

STATE OF ARIZONA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN

Appellants,

v.

CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona,

Appellees.

Supreme Court
No. CV-20-0027-PR

Court of Appeals, Division One
Case No. 1 CA-CV 18-0379

Maricopa County Superior Court
Case No. CV2016-013699

CERTIFICATE OF SERVICE

The undersigned certifies that on October 7, 2020, she caused the attached Appellants/Petitioners' Supplemental Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

Mary O'Grady
OSBORN MALEDON, PA
2929 N. Central Ave., 21st Floor
Phoenix AZ 85012-2973
mogrady@omlaw.com
Attorneys for Appellees

Vanessa Hickman
Office of the City Attorney
City of Peoria
Melinda A. Bird, Assist. City Attorney
8401 W. Monroe St.
Peoria, AZ 85345
PO Box 4038
Peoria AZ 85380-4038
caofiling@peoriaaz.com
Attorneys for Appellees

Christina Estes-Werther
General Counsel
League of Arizona Cities and Towns
1820 W. Washington St.
Phoenix, AZ 85007
cwerther@azleague.org
Attorney for Amici Curiae

Mark Brnovich, Attorney General
Brunn W. Roysden III
Oramel H. (O.H.) Skinner
Dustin D. Romney
2005 North Central Avenue
Phoenix, Arizona 85004
beau.roysden@azag.gov
Attorneys for Amicus Curiae State of Arizona

Kory Langhofer
Thomas Basile
Statecraft
649 North Fourth Avenue, 1st Fl.
Phoenix, Arizona 85003
kory@statecraftlaw.com
tom@statecraftlaw.com
Attorneys for Amicus Curiae
Public Integrity Alliance

Aditya Dynar
Dynar Law, PLC
2300 W. San Angelo, St. 1112
Gilbert, Arizona 85233
aditya.dynar@gmail.com
Attorney for Amicus Curiae
Americans for Prosperity Foundation - Arizona

/s/ *Kris Schlott*