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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

KARL HIRSHMAN; RICHARD RODGERS; and BRUCE ASH,

Plaintiffs,

vs.

JONATHAN ROTHSCHILD, in his official capacity as Mayor of the City of Tucson; REGINA ROMERO, in her official capacity as member of the Tucson City Council; PAUL CUNNINGHAM, in his official capacity as member of the Tucson City Council; KARIN UHLICH, in her official capacity as member of the Tucson City Council; SHIRLEY SCOTT, in her official capacity as member of the Tucson City Council; RICHARD FIMBRES, in his official capacity as member of the Tucson City Council; STEVE KOZACHIK; RICHARD MIRANDA, in his official capacity as City Manager of the City of Tucson; and CITY OF TUCSON,

Defendants.

Case No.: C2014-0690

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Gus Aragon)

Pursuant to Rule 56, Ariz. R. Civ. P., Plaintiffs Karl Hirshman, Richard Rodgers, and Bruce Ash, who are Tucson taxpayers ("Taxpayers"), move this Court for an order granting summary judgment in their favor, declaring Tucson Procurement Code art. III, Section 28-39 ("TC § 28-39") unconstitutional, and enjoining its further effect. There is no genuine issue as to any material fact and Taxpayers are entitled to judgment as a matter of law.

PRELIMINARY STATEMENT

This action involves an attempt by Defendant City of Tucson ("City") to manipulate the historically open and fair public procurement process for political ends. The City putatively enacted a local price preference ("Local Preference") program under TC § 28-39 to promote local economic growth. Both the crafting and implementation of TC § 28-39, however, ensures that the ordinance does no such thing, and, in fact, is designed in a manner that produces arbitrary and unreasonable results that violate long-standing Equal Privileges and Immunities and Special Law precedent under the Arizona Constitution. *See Big D Const. Corp v. Ct. App. for State of Ariz., Div. One*, 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990). Additionally, the ordinance grants a direct taxpayer subsidy to a favored class of business interests for which the City receives no direct consideration in violation of the Gift Clause. *See Turken v. Gordon*, 223 Ariz. 342, 347-348, 224 P.3d 158, 163-164 (2010). TC § 28-39 also fails under the U.S. Constitution. The discrimination TC 28-39(c) affects between residents and non-residents is not a legitimate state purpose under the Equal Protection Clause, and likewise cannot be sustained under the Privileges and Immunities Clause of Art. IV. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *United Bldg. and Const. Trades Council of Camden Cnty. v. City of Camden*, 465 U.S. 208 (1984). For these reasons, TC § 28-39 is unconstitutional, and must be enjoined to prevent the ongoing unlawful expenditure of Taxpayer funds.

BACKGROUND

The relevant facts are undisputed.

Responding to a lagging economy in the twilight of the Great Recession, the Tucson City Council enacted TC § 28-39 with the stated purpose of stimulating the local economy. SOF ¶¶ 6-7, 53.

TC § 28-39 creates a "tiered" percentage price preference for certain corporate entities bidding

on City contracts for goods and services with a projected value between $50,000 and $1,000,000. SOF ¶ 14. Namely, "Type A" corporate entities whose "principal place of business" is located within Pima County receive a bid preference subsidy of 5 percent. *Id*. "Type B" entities whose "principal place of business" is located outside of Pima County but within Arizona receive a bid preference subsidy of 3 percent. *Id*. And "Type C" franchises located within Pima County that are "locally owned" receive a 1.5 percent preference. *Id*.

On its face, therefore, the ordinance discriminates against two classes of contractors – those that qualify for the preference and those that do not. The stated purpose of this discrimination is to promote economic growth in favor of purportedly "local" businesses as against "non-local" businesses and "local" residents as against "non-local" residents. SOF ¶ 53.

The ordinance does not further define its material terms to classify what qualifies as a "local" company and who qualifies as a "local" resident. Instead, the City Procurement Department has professed discretion to define criteria regarding implementation and application of TC § 28-39.[1] SOF ¶ 22.

In exercising this discretion, the City Procurement Department developed an Affidavit ("Bidder's Affidavit") for each bidder to submit claiming, under penalty of perjury, the preference, if any, for which the bidder qualifies. SOF ¶¶ 20-21. In developing the Bidder's Affidavit, the Tucson Procurement Department "has decided to use the bidder's address as listed by the Arizona Corporation Commission as the basis for determining the principal place of business in applying Section 28-39." SOF ¶ 20. The Bidder's Affidavit reflects this determination by defining "principal place of business" as "the domestic address on record with the Arizona Corporation Commission."[2] SOF ¶ 24. Therefore, in order to qualify for the preference under TC § 28-39, a corporate entity need only have a domestic address on record with the Arizona Corporation Commission ("ACC") that is physical located in Pima

[1] Indeed, the Procurement Director for the City has interpreted the language of TC § 28-39 to afford her or her designee complete discretion to refuse to apply the local preference even if the bidder meets the stated criteria if there is a "valid reason" to do so. SOF ¶ 22.

[2] According to the City Procurement Director "on record" with the ACC means the address listed on the ACC's public website. SOF ¶ 24.

County.

However, the *only* criterion that the ACC uses for a business entity's "domestic address" is that it be a physical address in Arizona, rather than a post office or commercial mailbox. SOF ¶ 27. As a result, for purposes of ACC records, the "domestic address" of a business entity may or may not be the actual business location for the company. SOF ¶ 29. In other words, the "domestic address" of an entity may have nothing whatsoever to do with where an entity actually conducts business or employs employees.

Moreover, in the records of the ACC, the term "domestic address" is synonymous with "known place of business" address under state statute. A.R.S. §§ 10-202(6); 10-1503; 29-604. SOF ¶ 25. The "known place of business" address may also be that of a statutory agent. A.R.S. §§ 10-501; 10-507; 29-604. SOF ¶ 28. Therefore, any domestic or foreign company that has a statutory agent in Pima County would qualify for the Local Preference under TC § 28-39, regardless of where the company was actually located. Conversely, a company that was actually located within Pima County, but maintained a statutory agent outside Pima County would not qualify for a Local Preference under TC § 28-39.

What's more, the ACC does not regulate either sole proprietorships or partnerships. SOF ¶ 32. Because the City defines Type A and Type B businesses eligible for the preference as those business with domestic addresses *on record with the ACC*, presumably sole proprietorships and partnerships would *not* be eligible for the preference because those business entities maintain no such records with the ACC.

In order for a franchise to qualify for a preference under § 28-39(c), the franchise must be operated within Pima County and be "locally owned." SOF ¶ 14. The City admits to having no established criteria for determining what constitutes a "locally owned" franchise under TC § 28-39(c). SOF ¶ 35. The Bidder's Affidavit, however, defines "locally owned" as majority share owned by a resident of Pima County. SOF ¶ 36.

When an entity submits a bid that qualifies for a Local Preference under TC § 28-39, the price of the bid is reduced by the percentage of the preference. SOF ¶ 16. The adjustment is made solely for evaluation purposes. *Id*. The amount paid on the contract award by the City is full dollar amount of the

actual offer submitted by the bidder. *Id.* As a result, when a Local Preference under § 28-39 is exercised, it results in the award of a contract to an entity other than the lowest actual bidder. SOF ¶ 17.

The difference between the actual amount paid on the contract and the lowest bidder before the Local Preference is applied results in higher costs to the City and constitutes a direct subsidy of taxpayer funds. SOF ¶¶ 51-52. The City receives no direct consideration for the subsidy to entities that qualify for a Local Preference under TC § 28-39. SOF ¶ 18.

ARGUMENT

I. THE LOCAL PREFERENCES UNDER SECTION 28-39 VIOLATE THE EQUAL PRIVILEGES AND IMMUNITIES AND SPECIAL LAW CLAUSES OF THE ARIZONA CONSTITUTION.

A. The Constitutional Tests.

The Local Preferences under § 28-39 violate the Equal Privileges and Immunities Clause and the prohibition against special and local laws in the Arizona Constitution because the ordinance improperly discriminates against two classes of contractors – those that qualify for the preference and those that do not. ARIZ. CONST. art. II, § 13; art. IV, part 2, § 19.

The Equal Privileges and Immunities Clause of the Arizona Constitution provides that: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." ARIZ. CONST. art. II, § 13. In order to survive scrutiny under the Equal Privileges and Immunities Clause, there must be a legitimate state interest that is rationally and reasonably furthered by the legislative classification. *Kenyon v. Hammer*, 142 Ariz. 69, 78, 688 P.2d 961, 970 (1984). If there is not a legitimate basis for the classification, or the classification does not further the goal it was intended to achieve, it will be found unconstitutional. *See State Comp. Fund v. Symington*, 174 Ariz. 188, 194, 848 P.2d 273, 279 (1993). The constitutionality of a challenged provision under the Equal Privileges and Immunities Clause will depend on "the character of the classification in question; the individual interests affected by the classification; and the government interest asserted in support of the classification." *State v. Kelly*, 111 Ariz. 181, 184, 526 P.2d 720, 723 (1974). To be upheld, "the statute must not be

arbitrary or irrational, and must be reasonably related to furthering a legitimate state purpose." *Big D*, 163 Ariz. at 566, 789 P.2d at 1067.

The test under the Local or Special Law Clause is similar. The Arizona Constitution provides, "No local or special laws shall be enacted…[g]ranting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises." ARIZ. CONST. art. IV, part 2, § 19. An unconstitutional special law "applies only to certain members of a class or to an arbitrarily defined class which is not rationally related to a legitimate legislative purpose." *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006). A law may violate both the Special Law Clause and the Equal Privileges and Immunities Clause if "it preferentially and arbitrarily includes a class . . . to the exclusion of all others, or improperly denies a benefit to a class." *Big D*, 163 Ariz. at 566, 789 P.2d at 1067 (*quoting Ariz. Downs v. Ariz. Horsemen's Found*., 130 Ariz. 550, 557, 637 P.2d 1053, 1060 (1981)).

In this case, there is a legislative classification between contractors that qualify for the Local Preference under TC § 28-39 and contractors that do not. Because the ordinance creating that classification is arbitrary and irrational, and does not advance a legitimate state interest, TC § 28-39 is unconstitutional.

B. The Stated Purpose of TC § 28-39 – Economic Protectionism – is Not a Legitimate Government Purpose.

The principal purpose in enacting TC § 28-39 was to promote the local economy during a time of economic downturn. SOF ¶¶ 6-7, 53. The measure was intended to benefit purportedly "local" businesses at the expense of their "non-local" competitors. *Id.* The City appears to offer no additional justifications for the ordinance. *Id*. And based on the manner in which the measure was designed and adopted, none can be conceived by Taxpayers.

As described, in Section III, *infra*, pure economic protectionism is not a legitimate government purpose under Equal Protection analysis. *See also Kenyon v. Hammer*, 142 Ariz. 69, 84, 688 P.2d 961, 976 (1984) (There is no legitimate state interest in providing economic relief to one segment of society by depriving access to the judicial system by another segment of society).

Moreover, the stated interest of promoting local economic growth is too amorphous and arbitrary to be legitimate under the Equal Privileges and Immunities Clause and Special Law provisions of the Arizona Constitution. In the context of bid preferences specifically, the courts have found legitimate state interests, but only when tethered to more specific government objectives. *See Big D*, 163 Ariz. at 567, 789 P.2d at 1068 (*citing Western Sun Contractors Co. v. Superior Court*, 159 Ariz. 223, 228, 766 P.2d 96, 101 (1988) (granting a preference to contractors who incur direct tax liability through ownership of property in the state and thus contribute to state funds); *Mardian Construction Co. v. Superior Court*, 113 Ariz. 489, 492, 557 P.2d 526, 529 (1976) (providing continuous work for Arizona businesses); *Tanner Cos. V. Superior Court*, 144 Ariz. 141, 145, 696 P.2d 693, 697 (1985) (aiding in the collection of taxes)). No such state interests exist here. Instead, there is an irrational assertion and blind hope that granting one arbitrarily defined class of city contractors a subsidy preference over another will somehow promote the City's economy. That is not enough to justify discriminatory treatment. *See Tucson Elec. Power Co. v. Apache Cnty.*, 185 Ariz. 5, 14, 912 P.2d 9, 18 (App. 1995) (No rational basis for favoring similarly situated non-utility and non-mining property owners for tax classification purposes).

Even assuming, *arguendo*, that economic protectionism is a legitimate interest, as described, *infra*, the design and implementation of TC § 29-39 is so arbitrary and irrational that any legitimate interest that may have been intended at the time the ordinance was enacted was not realized, and is clearly not advanced by the law.

C. TC § 28-39 is Not Rationally Related to the Ordinance's Legislative Objective, and is Counterproductive to Its Objective.

The stated purpose of TC § 28-39 to provide economic protection for local companies is not advanced, and in many circumstances is directly undermined, by the discriminatory classifications of the law. The Local Preferences under TC § 28-39 does not assist local companies, or impact the local economy, because the definition of what constitutes a "local" enterprise may or may not have anything to do with the actual business location of the company. Consequently, TC § 28-39 both excludes companies that may advance the ordinance's purported purpose, and includes companies that may

undermine its stated objectives. This leads to arbitrary and whimsical results and negative consequences that undermine the very purpose of the legislation. For all of these reasons, TC § 28-39 violates the basic concepts of Equal Protection and the prohibition against local and special laws under the Arizona Constitution.

The issues presented in this case were litigated and resolved by the Arizona Supreme Court nearly 25 years ago in *Big D*, 163 Ariz. 560, 789 P.2d 1061. On the questions of Equal Privileges and Immunities and Special Law provisions of the Arizona Constitution, *Big D* is dispositive.

At issue in *Big D* was the constitutionality of a state bid preference ordinance enacted during the Great Depression in 1933 and later codified at A.R.S. § 34-241. *Id.* at 563, 789 P.2d. at 1064. A.R.S. § 34-241 provided a five percent (5%) preference to contractors bidding on public contracts. *Id.* at 564, 789 P.2d at 1065. In order to qualify for the preference, the bidding contractor: (1) had to be licensed in Arizona, (2) have successfully completed prior public contracts, and (3) have paid Arizona state and county taxes in an amount of at least $200.00 per year on plant or equipment materials of the type used for the performance of the contract for at least two consecutive years prior to making the bid. *Id.* A unanimous Supreme Court struck the statute down under the Privileges and Immunities and Special Law provisions of the Arizona Constitution. *Id.* at 570, 789 P.2d at 1071. The Court wrote that the state bid preference law is "arbitrary, encourages subterfuge, is expensive to the public entities that must comply with it, and simply wastes taxpayers' money." *Id.* The similarities between A.R.S. § 34-241 and TC § 28-39 are salient and the rationale finding the former unconstitutional applies with equal force to the latter.

The stated purpose of A.R.S. § 34-241 was to encourage state economic growth by providing employment to Arizona residents and contractors and aiding in the collection of taxes. *Id.* at 566, 789 P.2d at 1067. The purpose of TC § 28-39, as stated by the former Tucson Procurement Director and one of the ordinance's chief authors is strikingly similar: to promote the local economy by increasing local employment, and aiding in the collection of tax revenue. SOF ¶¶ 19, 53. Just as the classifications of A.R.S. § 34-241 advanced none of those interests, neither does TC § 28-39.

The Supreme Court in *Big D* found that the criteria necessary to qualify for a preference under A.R.S. § 34-241 were so insignificant that a contractor can qualify "almost instantly for the preference." *Big D*, 163 Ariz. at 568, 789 P.2d at 1069. The Court wrote, "For example, an ingenious bidder can potentially qualify for the preference by moving a trailer into the state a few days before bid submission…" *Id.* The state bid preference statute did nothing to aid the state economy, promote resident employment, or assist in the collection of taxes. *Id.* at 569, 789 P.2d at 1070.

Similarly, TC § 28-39 cannot rationally promote local businesses, improve local employment, or aid in the collection of taxes when the definition of "local" enterprise has nothing whatever to do with the actual business location of the company seeking the preference. Specifically, TC § 28-39 provides a preference to presumptively "local" companies as defined by the company's "domestic address" on record with the ACC. SOF ¶¶ 14, 24. This is the *only* criterion the City has used to determine whether a company qualifies for a Local Preference. SOF ¶ 30. However, the ACC's *only* criterion for a company's "domestic address" or "known place of business" is that it be a physical address rather than a Post Office or commercial mailbox. SOF ¶ 27. Moreover, a company may list the address of its statutory agent as its known place of business address for purposes of ACC recordkeeping. SOF ¶ 28. As a result, just like an "ingenious bidder" in *Big D*, a company can qualify for a local preference under TC § 28-39 regardless of where the company actually conducts business if it has a "known place of business address" within Pima County.

For example, a company can maintain its business address, the majority of its employees, its primary papers and executives not only outside the TMSA, but outside of Arizona entirely, and still qualify for a 5 percent preference under TC § 28-39(a) if it has a statutory agent within Pima County. Conversely, a company that by any other definition is "local" may not qualify for a preference, or qualify for a lesser preference, if it does extensive business in Tucson, but registered its "known place of business address" elsewhere. SOF ¶ 59. That is precisely the type of discrimination that "produces whimsical, arbitrary, and capricious results" that were struck down in *Big D*. 163 Ariz. at 568, 789 P.2d at 1069.

The arbitrariness of TC 28-39 does not end there. It appears the City did not and does not know what criteria it intended to capture when using the "domestic address" on record with the ACC as the criterion for defining "local" companies. SOF ¶ 30. The City also did not know the criterion the ACC uses to define "domestic address" or "known place of business" address. Until they were deposed, neither the former nor the current City Procurement Directors knew that the ACC required only a physical address in Arizona as the "known place of business" address. SOF ¶ 31. It is difficult to imagine how the ordinance or its implementation can be rationally related to its stated objective when its chief drafter and the department responsible for its implementation had no idea what criteria they wanted to use or ended up actually using as the basis for awarding preferences. Moreover, since the time TC § 28-39 was enacted, the City has made no attempt whatsoever to determine if the criterion the City has elected to use for bidders to qualify for a Local Preference actually advances the ordinance's purpose. Additionally, as another example of arbitrary enforcement, the City Procurement Director construes the language of § 28-39 to permit her discretion "to refuse to apply the Local Preference" in situations where "a bidder meets the stated criteria if I determine there is a valid reason to deny the Local Preference." SOF ¶ 22. Finally, based on the City's Bidder's Affidavit, certain business entities, including sole proprietorships and partnerships appear to be excluded entirely from eligibility for a Local Preference under TC § 28-39 based on their business form. SOF ¶ 33. *Blair v. Stump*, 127 Ariz. 7, 11, 617 P.2d 791, 795 (App. 1980) (If discrimination is arbitrary and irrational it will violate the Equal Privileges and Immunities Clause of the Arizona Constitution).

The arbitrary and irrational criterion necessary to qualify for a Local Preference under TC § 28-39 in subsections, (a) and (b), is perhaps only rivaled by the lack of any criteria whatsoever in subsection (c). TC § 28-39(c) permits a 1.5 percent preference for "a locally-owned franchise" bidding on a public contract. The City, however, has established no criteria for determining or defining "locally owned franchise." SOF ¶¶ 34-35. Of course, it is axiomatic that a law cannot rationally advance its stated purpose if there is no rubric to determine what does or does not fall within the language of the law. More specifically, how can an ordinance rationally advance a purported interest in promoting local franchises if there is no definition of what qualifies as a local franchise? Although it directly contradicts

the City's Response to Taxpayers' Request for Admissions, the Bidder's Affidavit appears to define a "locally-owned franchise" as one that is "majority owned" by a "local resident." SOF ¶ 36. Setting aside the fact that this offers little help when it comes to determining who a local resident is, if this criteria is correct, it likewise fails as an improper discriminatory classification, as described in Sections III and IV, *infra*.

Finally, not only does TC § 28-39 fail to advance the purpose for which it was purportedly enacted, but it likely directly undermines that purpose. *See Tucson Elec. Power Co.*, 185 Ariz. at 15, 912 P.2d at 19 (statute imposing a special tax solely on mining and utility property is an invalid special law because it "does not rationally further the state's tax equalization purpose. It actually hinders that purpose"). According to Taxpayers' expert, Mike Purdy, a 30 year public procurement professional and former Contracting Manager for the City of Seattle:

> Local preference laws are often touted by political leaders as a way to keep public dollars local. However, such laws are short-sighted and do not consider a host of critical public policy, financial costs, and implementation issues that end up actually being counter-productive to the stated aims of local preference laws, and which, in reality, end up costing the government and taxpayers more money.

(SOF ¶ 54.)

Specifically, TC § 28-39 directly raises costs in the amount of the preference by awarding contracts to entities other than the lowest bidder. SOF ¶ 55. It is one thing for a government agency to rationally choose among different expenditures or priorities. For purposes of Equal Protection and Special Law analysis, it is an entirely different thing to pay more than is offered for the same exact product or service, particularly when those subsidies may reach firms that do not actually do business in Tucson. *See Big D*, 163 Ariz. at 569, 789 P.2d at 1070 ("We are mindful, also, that the statute places a burden on Arizona taxpayers, who must pay up to five percent over low bid . . . whenever the statutory preference comes into play, even when the preference benefits non-Arizona firms employing non-Arizona labor. This harmful effect on the public as a whole goes to the very heart of the prohibition against special legislation….").

Local preference laws, including TC § 28-39, also discourage bidders from outside the protected area from submitting bids, making contracts less competitive and further increasing the cost to the City and Taxpayers. SOF ¶ 56. Additionally, the adoption of local price preferences often encourages neighboring municipalities or public agencies to adopt retaliatory preferences. SOF ¶ 61. This has the effect of putting Tucson businesses at a competitive disadvantage when competing on contracts with agencies that have adopted reciprocal preferences. *Id.* Of course, this disadvantages the very businesses intended to be assisted by TC § 28-39 – not only failing to advance the purpose of the ordinance, but directly hindering it. Perhaps as a result of these consequences, and others, leading public procurement organizations, including those of which the City and its procurement director are members, oppose local price preferences. SOF ¶¶ 68-69.

Accordingly, § TC 28-39 is not rationally related to its stated purpose and is, therefore, unconstitutional under the Equal Privileges and Immunities Clause and Special Law provision of the Arizona Constitution. *Big D* is dispositive. TC § 28-39 must be struck down.

II. THE LOCAL PREFERENCES UNDER SECTION 28-39 ARE UNCONSTITUTIONAL GIFTS.

The subsidies provided under TC § 28-39 clearly violate the Arizona Constitution's Gift Clause because the government expenditures are not made for a public purpose and no direct consideration is received for the expenditures. The Gift Clause forbids the State and its subdivisions from making "any donation or grant, by subsidy or otherwise, to any individual, association, or corporation. . . ." ARIZ. CONST. Art. IX, § 7. The "constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests." *Wistuber v. Paradise Valley Unif. Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984). Moreover, it is a "core Gift Clause principle" that "'[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual.'" *Turken v. Gordon*, 223 Ariz. 342, 347-48, 224 P.3d 158, 163-64 (2010) (quoting *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321, 718 P.2d 478, 480 (1986)). A government expenditure will violate the Gift Clause if (1) the expenditure is not made for a public purpose, or (2) the expenditure is grossly disproportionate to the

benefits received in return. *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357; *Turken*, 223 Ariz. at 348, 224 P.3d at 164.

The subsidies provided to private contractors under TC § 28-39 violate both prongs of the Gift Clause test under *Wistuber* and *Turken*. As a threshold matter, TC § 28-39 mandates that certain private contractors receive a price preference over other private contractors when submitting bids on municipal contracts for identical or similar products and services. When a Local Preference is exercised under TC § 28-39, the amount of the preference is a direct subsidy to the bidder receiving it. While there may be a public purpose in awarding the contract, no such public purpose extends to the Local Preference itself when the City expends public funds mandated by TC § 28-39. The only beneficiaries of those expenditures are the private companies that qualify for them – precisely the circumstance the Gift Clause was intended to prevent. *See Wistuber*, 141 Ariz. at 349, 687 P.2d at 357; *Turken* at 223 Ariz. at 347-48, 224 P.3d at 163-64. Therefore, there is no public purpose to public payments required by TC § 28-39.

Moreover, as our Supreme Court recently made clear, "although anticipated indirect benefits may well be relevant in evaluating whether spending serves a public purpose, when not bargained for as part of the contracting party's promised performance, such benefits are not consideration [for purposes of Gift Clause analysis]." *Turken*, 223 Ariz. at 350, 224 P.3d at 164. By the City's own admission, the *only* benefits derived from the public expenditures mandated by TC § 28-39 are *indirect* benefits. And indirect benefits are not consideration under the Gift Clause. *Id.* When asked what the City receives in return for the subsidies provided under TC § 28-39, former City Procurement Director and chief drafter of the ordinance, Mark Neihart, stated that although there "were [*sic*] not anything immediate, the spirit and intent of the ordinance was to stimulate the local economy." SOF ¶ 7. Mr. Neihart went on to assert that "it was the hope that there would be greater tax revenues, there would be some relief on the unemployment." *Id.* The Supreme Court in *Turken* made absolutely clear that "employment opportunities" and "sales tax revenue" are indirect benefits and are not consideration under the Gift Clause. *Turken*, 223 Ariz. at 348, 350, 224 at 164, 166. Mr. Neihart added that there were no additional benefits and no promises of any kind for direct benefits in exchange for the Local Preferences. SOF ¶

18. Consequently, because there is no consideration received for the Local Preference subsidies under TC § 28-39, the ordinance fails *as a matter of law*, and cannot be upheld under the Arizona Constitution's Gift Clause.

III. TC § 28-39 VIOLATES THE U.S. CONSTITUTION'S EQUAL PROTECTION CLAUSE.

TC § 28-39 violates the U.S. Constitution's Equal Protection Clause because it does not serve a legitimate government purpose, nor is it rationally related to the ordinance's stated purpose. The Fourteenth Amendment to the U.S. Constitution commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. This mandate "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Like Arizona's Equal Protection Clause, in order to be upheld under the federal Equal Protection Clause, there must be a legitimate government purpose for the legislation that is rationally advanced by the legislative classification. *Id.* at 440.

The U.S. Supreme Court has squarely held that promotion of domestic business by discriminating against non-residents is not a legitimate state purpose. *Metro. Life Ins. Co.*, 470 U.S. at 878. In striking down an Alabama tax that blatantly discriminated against out-of-state insurance companies, the Court wrote:

> The crucial distinction … lies in the fact that Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose … constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.

Id. See also WHYY, Inc. v. Glassboro, 393 U.S. 117, 120 (1968) (holding that failing to apply a New Jersey statutory exemption for nonprofit corporations to a foreign corporation solely based upon the foreign residence of the corporation violates the Equal Protection Clause); *Wheeling Steel Corp. v. Glander*, 337 U.S 562, 572 (1949) (holding that Ohio's unequal application of an ad valorum tax to nonresident corporations violated the Equal Protection Clause because the inequality was based solely upon the different residence of the owner); *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008)

(reiterating the Equal Protection Clause analysis that "similarly situated persons must be treated equally").

The Local Preferences under TC § 28-39 are plainly and expressly intended to promote "local," businesses at the expense of "non-local" businesses. This intended end is impermissible under the Equal Protection Clause of the U.S. Constitution.

Additionally, although specific criteria for a local franchise preference under TC § 28-39(c) appears to be lacking, the City's Local Preference Eligibility Affidavit permits the preference only for a "local resident." SOF ¶¶ 35-36. This residential discrimination is precisely what was deemed an impermissible state purpose in *Metro. Life*. 470 U.S. at 878 ("[T]his Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation'") (citing *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 533 (1959)). TC § 28-39 favors municipal businesses and residents at the expense of out-of-state businesses and residents. This is not a legitimate purpose under the Equal Protection Clause; as a result, the ordinance cannot stand.

IV. TC § 28-39(C) IS UNCONSTITUTIONAL UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

TC § 28-39(c) violates plain and longstanding precedent under the U.S. Constitution's Article IV Privileges and Immunities Clause because residential discrimination is not a legitimate justification for discriminatory treatment. The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. The U.S. Supreme Court has held that employment on public works projects falls within the protection of the Clause. *United Bldg. and Const. Trades of Camden v. City of Camden*, 465 U.S. 208, 221-22 (1984). In order to survive scrutiny under the Privileges and Immunities, there must be a "substantial reason" for disparate treatment between residents and non-residents, and nonresidents must be shown to "constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 222 (*quoting Toomer v. Witsell*, 334 U.S. 385, 398 (1948)); *see also Hicklin v. Orbeck*, 437 U.S. 518, 526-28 (1978).

In this case, TC § 28-39(c) plainly discriminates against "non-local" residents seeking a franchise preference based solely on their non-residency. The City has made no showing that non-residents "constitute a peculiar source of evil" the ordinance is attempting to remedy. On the contrary, the evidence in this case establishes that the ordinance was enacted at a time when the large majority of City contracts were already going to businesses based in Tucson and Arizona: 55 percent and 81 percent in Fiscal Year 2011, respectively. SOF ¶ 9. Therefore, rather than an attempt to remedy some inherent disadvantage faced by Tucson businesses as a result of being located in Tucson, TC § 28-39 was quite simply a solution in search of a problem that did not exist. The Privileges and Immunities Clause does not permit this form of residential discrimination.

V. CONCLUSION

Based on the foregoing, Taxpayers respectfully request that their Motion for Summary Judgment be GRANTED, that Defendant City's Motion for Summary Judgment be DENIED, and that the Court declare TC § 28-39 unconstitutional and permanently enjoin its further effect.

RESPECTFULLY SUBMITTED this 26th day of September, 2014 by:

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