COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellants, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellees.	No. 2 CA-CV 2018-0161 Pima County Superior Court Case No. C20161761

APPELLANTS' COMBINED CROSS-ANSWERING BRIEF AND REPLY BRIEF

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INTRODUCTION

The taxpayers in this case have standing under long-recognized Arizona law to challenge the unlawful expenditure of funds in which they have an equitable interest. The County's argument—that the procurement statute forbids the County from taking price into account when making these procurements, and therefore that the taxpayers have no legally cognizable interest here—is false, unsupported by law, and would create an unprecedented new rule barring taxpayer suits in Arizona. It's false because even the laws on which the County relied when it acted (A.R.S. § 34-606 and Pima County Procurement Code § 11.12.060(A)(1)) require the County to employ "such *competition* as is practicable," and the County made no effort to comply with this. Since the competition requirement is, of course, intended to ensure that taxpayers get the best value for their dollars—which is a legally cognizable interest—the taxpayers would still have standing even if the County's standing argument had merit.

But it does not. The taxpayers have an equitable interest in the expenditure of their tax funds, and that gives them standing to ensure that such expenditures are lawful. *Dail v. City of Phoenix*, 128 Ariz. 199, 201–2 (App. 1980). That is sufficient.

As to the Attorney General's authority, the fact that the legislature allowed the Attorney General to punish agents who violate the procurement statutes is not

the kind of "*complete* and valid remedy for the right created" that would bar taxpayer standing. *Valley Drive-In Theatre Corp. v. Super. Ct.*, 79 Ariz. 396, 400 (1955) (emphasis added). For one thing, it would provide no remedy in cases such as this one—in which *non*-agents violate the procurement laws. It does not therefore revoke these Appellants' right to sue.

The case is not moot—at a minimum, because the County has still not paid Swaim and Barker for the pre-contract services that it's required to pay for under A.R.S. § 34-605(B). Thus, even if everything else the County argued were correct, this case would still present a live controversy over the lawfulness of the County's procurement of those services. Also, the case is not moot because Barker and Swaim are *currently* subject to obligations and benefits under the contracts that are the subject of this case. They are required, for instance, to fix construction flaws that might be discovered even after completion of construction. That means that this challenge to the legal *validity* of those contracts remains live.

But even if this case were moot, it raises questions of extraordinary statewide importance, as the Superior Court recognized. The County's illegal conduct here is highly likely to recur—since the architect, the contractor, and the County all regard the manner in which they acted as the normal way of doing business. The County invoked the "emergency" exceptions to the procurement statutes *seventy nine times* in the past five years, ROA 90 ep 3 ¶¶ 4–5. So it *will* do

again what it did here: illegally procure services by obtaining them through a non-agent before the Board of Supervisors approves the project, and then use those preexisting services as justification for awarding the contract to the firms that got the special head-start. It will then complete such projects prior to final court review. In circumstances like these, it's proper for the court to decide the case even if technically moot. *Fraternal Order of Police Lodge 2 v. Phx. Emp. Relations Bd.*, 133 Ariz. 126, 127 (1982).

On the merits, the County tries to make this case sound complex and confusing, but it's not. As the Superior Court found (ROA 116 ep 3–4), the County started obtaining preconstruction design services[1] from Swaim and Barker in August 2015. It continued doing so until January 2016. *Id.* At that point, the Board decided that because Swaim and Barker had been given this five-month head start, and had completed a third of the planning already (ROA 112 ep 8 ¶ 2), they were the proper firms to be awarded the contract. Those are the facts. The primary *legal* question is: did that qualify as "procurement"? Arizona law defines

[1] The term "preconstruction services" means "services and other activities during the design phase" of a project. A.R.S. § 41-2503(31). "Design services" means "architect services, engineer services or landscape architect services." A.R.S. § 41-2503(16). "Services" is defined as "the furnishing of labor, time or effort by a contractor or subcontractor that does not involve the delivery of a specific end product other than required reports and performance." A.R.S. § 41-2503(35)(a). Counties are required under A.R.S. § 34-604, 605, and 606 to comply with the specified procurement procedures when they procure such services.

procurement as "buying … or otherwise acquiring any … services, construction or construction services … [and] all functions that pertain to obtaining any … services … including description of requirements." A.R.S. § 41-2503(32). The law requires the County to follow certain steps when obtaining such services. The County did not follow those steps. Therefore, its acts were unlawful.

The Superior Court, however, ruled that the County didn't have to follow those steps. It reached this conclusion because Mr. Huckelberry and his staff are not "agents," and because the law only allows agents to procure, therefore what they did in obtaining Swaim's and Barker's services cannot have been "procurement." ROA 116 ep 4. That holding is illogical, *see* Appellants' Opening Br. ("AOB") ep 19–23,[2] and it's remarkable that the County makes no effort to defend it.

Instead, it tries to portray its five months of procuring pre-contract services as merely a few brainstorming meetings at which they just speculated about whether the World View project was feasible. That characterization is contradicted by the record and contrary to the trial court's factual findings—findings to which this Court must defer. *John C. Lincoln Hosp. & Health Corp. v.*

[2] *Cf. Achen-Gardner, Inc. v. Super. Ct.*, 173 Ariz. 48, 53 (1992) ("The gist of Jeri–Co's argument is that a municipality can avoid the competitive bidding requirements … [on the theory that] because the private party is not an 'agent,' the bidding laws do not apply at all. We do not believe the legislature intended the bidding laws to be so easily avoided.").

Maricopa Cnty., 208 Ariz. 532, 537 ¶ 10 (App. 2004). In reality, Barker and Swaim provided extensive pre-project planning to the County. Their head start was one of the deciding factors in the Board's decision to award them the contract. That is favoritism of the "unequal access to information" variety—and therefore an abuse of discretion. *Cf.* *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1377 (Fed. Cir. 2009); *ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196, 202–03 (2007).

The County insists that it did not do "anything nefarious." Appellees' Br. ep 39. Fair enough. But "the fact that there is no evidence of fraud or corruption" does not "cure the evil complained of, i.e., favoritism." *Brown v. City of Phoenix*, 77 Ariz. 368, 376 (1954). Regardless of good intentions, the point is that "[t]he letting of contracts for public business should be above suspicion of favoritism," *id.* at 377, and here, favoritism plainly occurred.

ARGUMENT

I. The taxpayers have standing.

A. The taxpayers have standing to challenge the illegal expenditure of funds in which they have an equitable interest—regardless of whether the illegal expenditures were "qualitative" or "quantitative."

Taxpayer standing is based on taxpayers' equitable interest in public funds that they must replenish when the government makes an unlawful expenditure. *Dail*, 128 Ariz. at 201–2. That test is easily satisfied here. The County has spent

$15 million of taxpayer money on the World View project, which, among other things, included selecting the contractor (Barker) and the architect (Swaim) to build the project. ROA 106 ep 43. The taxpayers, of course, will be required to foot the bill for this, including the payments already made to Swaim and Barker, and therefore they have standing to challenge those illegal expenditures. *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432–33 (App. 1979).

Taxpayers have the right not only to challenge expenditures that aim at illegitimate or unconstitutional purposes, but also those that are undertaken in violation of legally required procedures. As the Arizona Supreme Court has noted, "Arizona taxpayers … are the indirect purchasers of goods and services through public procurement contracts," and the purpose of rules governing procurement is "to protect" those taxpayers. *Bunker's Glass Co. v. Pilkington PLC*, 206 Ariz. 9, 13 ¶ 12 (2003). In *Secrist v. Diedrich*, 6 Ariz. App. 102 (1967), and *Smith* , 123 Ariz. 431, taxpayers had standing to challenge expenditures that violated the competitive bidding requirements, even though nobody disputed that the broader purposes of those expenditures (improvements to school facilities in *Secrist* and improvements to a college campus in *Smith*) were legitimate. The taxpayers in this case therefore also have standing.

The County asks this Court to fashion a new rule to distinguish *Secrist* and *Smith*—a rule not found in any Arizona case law, or the law of any state of which

Appellants are aware. The County contends that because the competitive bidding statutes in *Secrist* and *Smith* were intended to save the government money, taxpayers had standing in those cases, but they don't in this case because the procurement statutes at issue here were not intended to save taxpayers money—meaning that taxpayers have no legally protected interest. Appellees' Br. ep 34. That new rule is unprecedented, contrary to existing law, illogical, and unworkable in practice. And even if it *were* the law, it would not deprive the Appellants of standing in this case.

The County's new rule would be illogical and unworkable because *all* procurement laws—whether competitive bidding statutes or other types of procurement requirements—blend both "qualitative" and "quantitative" considerations.[3] The word *value* means getting the best quality for the price, and the procurement statutes exist to ensure that taxpayers get value for their money. For example, under A.R.S. § 34-603(E)(2), after a county makes a "final list" of qualified contractors it must "negotiat[e]" with the firms on that final list, and those negotiations "shall include consideration of compensation … [and] the

[3] The reason for considering qualifications and skills in bid solicitations is because an incompetently built project will have to be rebuilt, which will cost taxpayers money. The converse is also true: the competitive bidding statutes require not just low prices but also qualified contractors—which is why the government can reject low bids as not being "responsible bidders" *See, e.g.*, *Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 592 (App. 1991).

estimated value … [of the] services." Also, under A.R.S. § 34-603(F)—which is the statutory mechanism that the County should have followed here, but didn't—an agent for a County may award a contract only after considering, among other things, the "budget" for the project and the firm's "price." In other words, the procurement statutes at issue in this case—Sections 34-606 and 34-603—not only do *not* prohibit, but actually *require*, considerations of price, and do so in order to ensure that taxpayers get the best value. So the County's effort to fashion a new rule distinguishing "quality" from "quantity" is untenable. Even the statute on which the County relies in this case, A.R.S. § 34-606, expressly says that even when an impracticability exists, the County must *still* make its procurements "with such *competition* as is practicable under the circumstances." Competition in government contracting, as the County admits, is intended to save taxpayers money and to ensure that the taxpayers receive the best value. *See* Appellees' Br. ep 34 (acknowledging that procedural requirements that are meant to prevent "the government" from "paying more than it otherwise would"—do give rise to taxpayer standing). So when the County says "[c]onsideration of price" under the statutes applicable here "is statutorily *prohibited*," *id.* at 35, it says what is not true. Section 34-606 inherently *requires* consideration of price along with other factors—by mandating that the County determine how much "competition" is "practicable under the circumstances" and then employ that competition.

Requiring competition for value saves taxpayers money by ensuring that highways and buildings don't need to be repaired or replaced later on. So even if the County were correct that taxpayers can only sue over statutes that are intended to save them money, these Appellants would *still* have standing, given that the County did not make these *value* determinations, and value determinations necessarily affect the taxpayers' bottom line.

The County's argument that taxpayers lack standing to argue that the County should have paid Swaim and Barker for their preconstruction services must fail for the same reason. Appellees' Br. ep 41. The law requires payment for these services in order to prevent "loss leaders" which in the long run encourage favoritism and harm taxpayers by reducing open competition. *See* AOB ep 34–36. Such practices harm the taxpayers' interest in obtaining the highest quality services for the lowest quality prices. Therefore, again, even if the County were right that taxpayers can only sue over laws that protect their pecuniary interests, they would still have standing with regard to this issue.

There is no case, either in Arizona or apparently any other state, that recognizes the "quality"/"quantity" distinction the County proposes, and the County cites none. That is because the two cannot be distinguished, as explained above. What's more, that distinction contradicts both *Smith* and *Secrist*, which held that taxpayers have standing to enforce laws that regulate *how* the government

spends money. While those cases and *Dail* spoke of the importance of procurement rules to keeping prices down, none of them limited taxpayer standing to that consideration only. On the contrary, *Dail* recognized that taxpayer standing goes further, when it said that the "nature and purpose of a taxpayer's action" is "that the illegal [expenditure] is in some way *injurious to municipal and public interests*, and that, if permitted to continue, it will in some manner result in increased burdens upon, *and dangers and disadvantages* to, the municipality and … taxpayers." 128 Ariz. at 202 (citation and quotations omitted; emphasis added).[4] *Dail* acknowledged that taxpayers may challenge expenditures that are "calculated to work public injury or produce some public mischief," if they can show that the expenditure "result[s] in a pecuniary loss," which is undisputed here. *Id.* at 202-03 (citation and quotations omitted).

In fact, *Smith* expressly rejected the argument the County makes, by overruling an earlier decision, *Varga v. Valdez*, 121 Ariz. 233, 234-35 (App. 1978), which had held that taxpayers could not sue without showing *pecuniary* damage resulting from the unlawful expenditure. The *Smith* court ruled that this was incorrect and that "'a taxpayer's action will lie to test the legality of the action of a

[4] For example, taxpayers would presumably have standing to challenge the spending of taxpayer money pursuant to a racially discriminatory procurement process, *even if* that process somehow saved the government money. *Cf.* *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 17–18 (App. 2001).

municipal governing body, *irrespective* of pecuniary loss,'" as a result of "'the generally accepted rule that a taxpayer may enjoin the unlawful payment of public money.'" 123 Ariz. at 433 (citation omitted; emphasis added).

If that were not enough, the County's argument must fail because the Appellants *do* contend that the hiring of the contractor and the architect was for an unlawful purpose. They allege in the complaint that the *entire* World View project is unconstitutional and unlawful as a violation of the Gift Clause of the Arizona Constitution. *Rodgers v. Huckelberry*, 243 Ariz. 427, 429 ¶ 3, n.1 (App. 2017). The Gift Clause cause of action has yet to be litigated, so Appellants will not belabor it here, except to say that it is simply *not* true that taxpayers "have never contended … that it is unconstitutional or illegal for Pima County to hire an architect to design and a [contractor] to build [the World View] building[s]." Appellees' Br. ep 33. Appellants *do* contend that the World View project is an illegal expenditure of their funds, and, consequently, that the expenditure of their funds to procure services from the architect and contractor are unlawful. On the *merits*, the Court might find some parts of the project lawful and others unlawful, but as far as *standing* is concerned, this is sufficient to show that the Appellants have standing to bring this case.

B. The Attorney General's power to seek penalties against agents in some circumstances does not deprive the taxpayers of standing to sue.

The County argues that, because the legislature amended the procurement laws in 1985 to give the Attorney General power to fine agents who violate those statutes, the taxpayers have been deprived of their standing to sue. Indeed, the County even argues that "[i]t may well be" that this "effectively overruled *Smith* and *Secrist*." Appellees' Br. ep 30. But this is incorrect. Both *Smith* and *Secrist* remain good law, and Arizona courts have relied on them many times in the years since 1985.

To begin with, the County's argument confuses *standing* with the existence of a *cause of action*. Taxpayer standing is governed by a lenient, prudential analysis in Arizona. *Dobson v. State ex rel., Comm'n on Appellate Ct. Appointments*, 233 Ariz. 119, 122 ¶ 9 (2013). Taxpayers have standing to seek not only injunctive relief, but also declaratory relief if (as in this case) they show the existence of a cognizable harm to them as taxpayers. *See, e.g.*, *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 479 ¶ 4 (2018) (taxpayer action for declaratory relief). Arizona courts can even waive standing requirements where sufficient public interests justify doing so. *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 217 n. 1 (1986).

Here, the taxpayers are harmed because taxpayer funds have been spent and are being used for an unlawful purpose—funds they are liable to replenish. That is sufficient to justify their standing. *Dail*, 128 Ariz. at 201–02 (citation omitted). Just as in *Secrist* and *Smith*, the Appellants here have standing to sue.

As to their private cause of action, that is rooted in longstanding legal principles that apply with equal strength here. Compare *Lancaster v. Arizona Board of Regents*, 143 Ariz. 451 (App. 1984), in which this Court found that there was no private right of action available, with *Chavez v. Brewer*, 222 Ariz. 309 (App. 2009), which found that a private right of action was available. *Lancaster* involved a law that required the Board of Regents to submit a report to the legislature about wages and salaries. The "sole and exclusive purpose" of that law was to require the Board to prepare the report, this Court said, and the statute both "restrict[ed] the duty" it imposed and "devis[ed] a plan for legislative implementation." 143 Ariz. at 457. The statute therefore "create[d] only a right, vested in the legislature alone, to receive [the] report," *id.*, and gave the legislature "a correlative right to approve or reject such a report." *Id.* at 458. That meant a private right of action was barred by the statute's self-contained nature. It created no interests in others and had only one possible enforcement mechanism. But in *Chavez*, by contrast, the court found that voters had a private right of action to enforce statutes protecting the electoral process, because "the context, language,

subject matter, effects, and purpose of the statutory scheme" showed that they were "members of 'the class for whose especial benefit' the statutes were adopted." 222 Ariz. at 318 ¶¶ 24, 28 (citation omitted).

In the same way, the taxpayers here are (among) the intended beneficiaries of the procurement statutes, and the law does not create a single, self-contained enforcement mechanism. That distinguishes this case from situations like *Lancaster*. Just as the election laws in *Chavez* existed to protect voters, so the procurement laws here exist to protect taxpayers (and firms that would like to compete fairly for government contracts) by establishing a fair, open, regular process, free of favoritism, by which counties must procure goods and services. *Cf. Rollo v. City of Tempe*, 120 Ariz. 473, 474 (1978). The procurement rules, like the competitive bidding statutes in *Smith* and *Secrist*, therefore give rise to a cause of action by taxpayers when the procurement requirements are violated. *See also State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 29 A.3d 400, 468–69 (Md. App. 2014) (taxpayers have standing to challenge violation of procurement requirements); *Sloan v. Greenville Cnty.*, 590 S.E.2d 338, 347–49 (S.C. App. 2003) (same). Taxpayer standing to challenge illegal expenditures was recognized as the "almost universal rule" as long ago as 1948, *Ethington v. Wright*, 66 Ariz. 382, 386 (1948), and the County has given no reason to reconsider that rule.

As to the question of whether Section 34-613—which allows the Attorney General to bring an action seeking monetary penalties against "agents" who violate the procurement laws, and to enjoin prospective violations—implicitly repealed the right to sue that *Secrist* and *Smith* recognized, the answer must be no.

First, "[r]epeals by inference are not favored." *Walters v. Maricopa Cnty.*, 195 Ariz. 476, 481 ¶ 25 (App. 1999). Courts presume against inferring that the subsequent enactment of a statutory remedy provision extinguishes an existing private cause of action, unless the legislature expressly declares that intent. "It is, after all, easy enough for the legislature to state that a certain statute does or does not create, preempt, or abrogate a private right of action." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273 (1994).[5] In fact, when the legislature has chosen to eliminate an existing private cause of action, it has done so expressly. It did so, to cite some examples, in A.R.S. §§ 3-367, 12-1363(L), 17-255.04(C), 44-1376.01(B). All of those laws explicitly eliminated private rights to sue. But A.R.S. § 34-613 contains no such language.

Second, the Court must harmonize existing laws whenever possible. That's easy to do here, because there's no conflict between a taxpayer's private right to

[5] In fact, where a statute is silent as to whether it creates a private right of action, Arizona courts "broadly impl[y] such a right when consistent with 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.'" *Chavez*, 222 Ariz. at 317-18 ¶ 24 (citation omitted).

sue and the Attorney General's authority under Section 34-613. The two are supplementary, not contradictory, so both remain intact. *Tucson Elec. Power Co. v. Swengel-Robbins Const. Co.*, 153 Ariz. 486, 488–89 (App. 1987) (where no conflict existed between private right of action and statutory remedy procedure, private right of action was preserved).

Third, courts examine the "'totality of [a statute's] provisions'" to decide whether a subsequent amendment creating a new method of enforcement was intended to eliminate the existing means of enforcement. *Hayes*, 178 Ariz. at 272 (citation omitted). Only where the later-enacted remedy is "so comprehensive, that the legislature must have intended for [it] to provide the sole remedy for, or deterrent to, the serious abuses that the common law [previously] addresse[d]," is the later statute viewed as eliminating preexisting causes of action. *Id.* at 271. To put it another way, a private cause of action is only revoked if the amendment creates "a *complete* and valid remedy for the right created." *Valley Drive-In*, 79 Ariz. at 400 (citation omitted, emphasis added). Where the statutory remedy is not comprehensive or complete, it cannot be the exclusive and sole remedy and cannot deprive taxpayers of the right to sue. *Cf. Broomfield v. Lundell*, 159 Ariz. 349, 357 (App. 1988) (addition of civil rights law barring discriminatory termination supplemented and did not supersede private right of action for wrongful discharge).

The Attorney General's authority in Section 34-613 does not create a comprehensive or complete remedy. It contains no language to indicate that the Legislature intended to eliminate the longstanding taxpayers' right to sue or to overturn *Smith* and *Secrist*. And that statute does not create a comprehensive or complete remedy. For one thing, it only applies to "agents" who violate the procurement statutes, which means it would not extend to circumstances *such as this case*, in which the procurement statutes are violated by a *non*-agent. If the legislature had meant Section 34-613 to be exclusive, it would at least have applied that remedy against all *persons* who could violate the statute, instead of limiting it to *agents*, thereby creating an obvious loophole for non-agents. *Cf. Pacion v. Thomas*, 225 Ariz. 168, 169 ¶ 11 (2010) (where statutory remedy was available against all "person[s] who violate[]" the statute, it was the exclusive remedy); *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 196 ¶ 12 (App. 2014) (statutory remedy applicable to any "person … violating any provision of this title" was exclusive remedy). The County's argument would render both taxpayers and the Attorney General powerless in cases where—as here—non-agents violate the procurement laws. That indicates that Section 34-613 is not a comprehensive or complete remedy.

Another indication that Section 34-613 is not a complete remedy is that it makes no provision for declaratory relief. Yet the procurement statutes plainly

anticipate that declaratory relief will be available to private parties. For example, A.R.S. § 34-608(C) and (D) require that certain surety bonds be executed by companies certified to transact business in Arizona and specify the form of those bonds. Presumably, a bond that does not comply would be void—yet that could only be determined through a declaratory relief action brought by bondholders or taxpayers. But A.R.S. § 34-613 does not provide for such a circumstance. Likewise, A.R.S. § 34-610(G) provides conditions required of performance bonds for certain contractors—and specifies that attorney fees shall be available to "[t]he prevailing party in a suit on this bond." These and other provisions indicate that the procurement statutes *expressly contemplate* lawsuits by private parties to enforce its provisions—lawsuits other than those specified in A.R.S. § 34-613.

In any event, these examples show that Section 34-613 was not intended to be the sole and complete remedy for violations of the procurement laws. A better interpretation of Section 34-613 is that it adds *additional* remedies for certain *kinds* of violations of the procurement statutes, but "these remedies may, at times, prove to be inadequate" and therefore do not exclude a private cause of action. *Broomfield*, 159 Ariz. at 357.

That was the reasoning the court used in *Transamerica Financial Corp. v. Superior Court*, 158 Ariz. 115 (1988), when it rejected the idea that the existence of an administrative enforcement mechanism barred a private right of action to

enforce certain consumer protection statutes. The laws existed "to protect borrowers," *id.* at 116, who therefore had a private cause of action.[6] And although the legislature had repeatedly amended the statutes, it never "expressly prohibit[ed] a private right of action." *Id.* at 117. That "indicate[d] a legislative intent to preserve the private right judicially recognized by the court," *in addition to* the authority that the statute gave to a state agency to enforce those statutes. *Id.* In other words, the "sections of the Act [that] provide for administrative action for enforcement" did not interfere with or abrogate the private right of action, but supplemented them, instead. *Id.* The same is true here: the Attorney General's authority under Section 34-613 to penalize agents who violate the procurement statutes does not eliminate the long-standing taxpayer right to seek enforcement of those laws—because it is not a complete or comprehensive remedy; because the procurement laws contemplate other enforcement mechanisms; and because that Section does not expressly revoke the private right to sue. Instead, Section 34-613 supplements, without replacing, the existing taxpayer right to sue.

Broomfield and *Hayes* follow the same reasoning. *Broomfield* found that the enactment of a statutory prohibition against employment discrimination did not preempt the common law tort of wrongful discharge, even though the statute

[6] The private right of action at issue in *Transamerica* was, like taxpayer standing, a creature of common law, not of express statutory authorization. That made no difference. *See id.* at 117–18.

"provide[d] administrative and judicial remedies"—because those remedies "may, at times, prove to be inadequate." 159 Ariz. at 357. And *Hayes*, 178 Ariz. at 272, found that the enactment of a worker compensation law, with its own enforcement mechanism, did not displace preexisting tort causes of action but was intended to "supplement" those pre-existing remedies. Courts, said the justices, "will not interpret a law to deny, preempt, or abrogate common-law damage actions unless the statute's text or history shows an explicit legislative intent to reach so severe a result." *Id.* at 273. There was no such legislative intent, and the court refused to infer such an intent. Indeed, it emphasized the need to "avoid … afford[ing] unintended immunit[ies]" to lawbreakers—immunities that would result if the only remedy for violating the law were the limited enforcement provision at issue there. *Id.*

The same reasoning applies here. If the only enforcement mechanism for the procurement laws were the Section 34-613 provision, that would create an "unintended immunity," because that Section applies only to agents, not to non-agents like Huckelberry and his staff, and such an interpretation would then give them power to evade the procurement rules in a way the legislature cannot have intended. *Achen-Gardner*, 173 Ariz. at 53.

This case is like *Transamerica*, *Broomfield*, and *Hayes* because, while A.R.S. § 34-613 may add an additional enforcement mechanism, as was true of the

statutes in those cases, there is no indication that the legislature intended to eliminate existing private causes of action. And the authority given the Attorney General in Section 34-613 is not complete or comprehensive; it would, "at times, prove to be inadequate." *Broomfield*, 159 Ariz. at 357. Therefore, Section 34-613 does not deprive the Appellants of their preexisting right to sue.

Finally, the cases on which the County relies are easily distinguishable. *Valley-Drive-In* was not about standing, or about whether a statute giving the government power to enforce a law implicitly repealed a pre-existing private right of enforcement. It was about whether the plaintiff could obtain a new equitable remedy where he already had a full and complete statutory remedy available. Here, Section 34-613 would not afford the Appellants *any* remedy and would not provide a complete enforcement mechanism. *State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358 (2012), and *Hunnicut Constr. Inc. v. Stewart Title & Trust of Tucson*, 187 Ariz. 301 (App. 1996), also dealt solely with the question of equitable remedies where statutory remedies were comprehensive and complete—which is not the question here and is not true in this case.

C. The taxpayers also have standing to sue under the County Procurement Code.

The County argues that the taxpayers are barred from challenging its violation of the County Procurement Code because that Code creates an exclusive

remedy in the form of its bid-protest provision (Pima County Code § 11.20.010(A)). But for the same reasons given above, this argument is untenable.

For a statutory remedy to qualify as the exclusive remedy, barring a private right action, it must be expressly made exclusive or must be "a *complete* and valid remedy for the right created." *Valley Drive-In*, 79 Ariz. at 400 (emphasis added). But the bid-protest provisions of the County Code contain no language to indicate that they are the sole and exclusive remedy for violations of the Code. And they provide no remedy for aggrieved taxpayers—only for disappointed bidders, who "may" (not "shall" or "must") file protests with the county (not with a court). Pima County Code § 11.20.010(A). Moreover, there is no conflict between a taxpayer's private right of action on one hand and a disappointed bidder's right to protest on the other—they can coexist, *cf. Swengel-Robbins Const. Co.*, 153 Ariz. at 488–89, and the Court must harmonize the two whenever possible.

The protest procedure in the County Code is not a comprehensive or complete remedy. As the County concedes, those provisions are limited to "actual or prospective bidder[s]," (Appellees' Br. ep 37, quoting Pima County Code § 11.04.030(K)), and those provisions provide no complete remedy for a case such as this, in which a non-agent has violated the procurement statutes by procuring preconstruction services for half a year before the Board of Supervisors even approves the project.

Given that the protest procedure applies only to disappointed bidders, not taxpayers, and is not complete or comprehensive, it also cannot preempt the taxpayers' existing right to challenge expenditures that violate local ordinances. And Arizona courts have repeatedly held that taxpayers may sue over violations of local procurement laws as well as state procurement laws. *See, e.g.*, *Rollo*, 120 Ariz. at 474 (taxpayer had standing to enforce city procurement ordinance); *John E. Shaffer Enters. v. City of Yuma*, 183 Ariz. 428, 430 (App. 1995) (same); *Ethington*, 66 Ariz. at 386 (same).

Although there is no Arizona case directly on point—and the County cites no precedent to support its argument—almost the identical question was presented in *GTECH Corp. v. Commonwealth, Department of Revenue*, 965 A.2d 1276 (Pa. Commw. Ct. 2009). There, taxpayers challenged the award of a contract for violating the state procurement code. The state argued that the taxpayers lacked standing because the code provided a remedy for disappointed bidders. The court rejected that argument, because there was no reason to believe the enactment of the procurement code was intended to "take[] away the right of taxpayers to bring an action in equity" to challenge an illegal procurement. *Id.* at 1286 n.19. Instead, it was intended to give firms whose bids were rejected a remedy *in addition* to the existing equitable remedy that taxpayers already had.

The same is true here. As with the state procurement code, the County Procurement Code exists to protect taxpayers' interests in ensuring the fair, efficient, and lawful use of taxpayer money—and taxpayers have the same "equitable ownership of the fund[s]" and the same "liability to replenish the public treasury for an insufficiency caused by misappropriation" that they have when government violates *state* procurement laws. *Smith*, 123 Ariz. at 433. The County Code gives disappointed bidders an *additional* remedy, but, as in *GTECH Corp.*, that does not deprive taxpayers of their "almost universal[ly]" recognized right to challenge the illegal expenditure of County funds. *Ethington*, 66 Ariz. at 386. Taxpayers therefore have standing to challenge violations of the County procurement laws just as they do for violations of state procurement laws.

II. The case is not moot.

The County argues that because it has completed and paid for the World View facilities, this case is now moot. This is incorrect.

First, the case cannot be moot because the County's violation of the procurement statutes is still ongoing. Appellants argue, among other things, that the County is currently in violation of A.R.S. § 34-605(B), which requires the County to "pay the contractor[s] a fee for preconstruction services." Since the County has not paid Swaim or Barker for the preconstruction services they provided between August 2015 and January 2016—and does not intend to do so,

ROA 106 ep 6 ¶ 17—this remains a live controversy which the Court can resolve. That alone makes this case, by definition, not moot.

Secondly, the case is not moot because the County's contracts with Swaim and Barker remain in effect and currently impose ongoing obligations on the parties. For example, Article 8 of the Swaim contract requires Swaim to "correct or revise any errors, omissions, or other deficiencies in all products of its efforts … This includes resolving any deficiencies arising out of the acts or omissions of [Swaim] found during *or after* the course of services performed … regardless of COUNTY having knowledge of or condoning or accepting the products or services." ROA 14 ep 5 (italics added). Article 5 requires Swaim to indemnify the County if an injury occurs in the future as a consequence of any negligence or wrongful act or omission by Swaim; it specifies that this obligation and other obligations "survive expiration or termination of the Contract." *Id.* Article 22 also requires Swaim to retain records for several years after completion of the contract. *Id.* ep 9. Identical provisions exist in the Barker contract. ROA 16 at 6–8 (articles 9, 10(C), and 11). Since these contracts continue to impose duties on the parties at this moment, their *validity* remains a live issue today, and the case is therefore not moot.

But even if it were moot, this is plainly a case of major public importance, raising issues that are almost certain to recur. *Cf. Fraternal Order of Police Lodge*

2, 133 Ariz. at 127. The undisputed record evidence shows that Huckelberry, his staff, Swaim, and Barker, all regard the manner in which they procured preconstruction services in this case as the ordinary method of dealing. ROA 106 ep 7 ¶¶ 26, 27. In just the five years before this case was filed, the County invoked the "emergency" exceptions to the procurement statutes *seventy nine times*, for the same reasons it invoked them in this case (allegedly compressed timelines, a contractor's convenient familiarity with a project, or speculation the competitive bidding would not be useful). ROA 90 ep 3 ¶¶ 4–5. This will almost certainly happen again.

Swaim and Barker provided preconstruction services to the County for five months because they hoped the County would award them the contract in return, ROA 106 ep 7 ¶ 26, which is what happened. In the words of Huckelberry's deputy, Dr. Moffatt, this is a typical method of "marketing" for these firms. *Id.* ¶ 27. Barker testified that "more than 50 percent" of his company's County projects are done this way—with a "loss leader" given to the County in hopes of getting the contract in return, *id.* ep 20 at 52:22, and that this pays off about half of the time. *Id.* at 53:23–24. Therefore it is likely that the County will engage in precisely the same unlawful procurement practices in the future.

"Mootness," says the Arizona Supreme Court, is "founded in part on policy considerations," and those considerations counsel against allowing a defendant,

"by its own voluntary conduct [to] 'moot' a case and deprive a court of jurisdiction." *Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 141 (1988). *Culbertson* challenged the legality of a development project, but by the time the case reached the Arizona Supreme Court, the transaction was finished and the golf course was built. *Id.* at 140. The court nevertheless found the case was not moot, in part because of those public policy considerations. Here, too, the County pushed forward to complete the project prior to full resolution of this case, of which it was well aware throughout. Given the importance of the legal issues here, the Court should decide the case in any event.

This case raises questions of great public importance. The amount of taxpayer resources involved—$15 million—is quite large, and it involves the County's mortgaging of County-owned property. ROA 37 ep 5–7 ¶¶17-22. The World View project has generated significant attention in Pima County and Arizona generally as a model for the County's vision of ideal economic development.[7] And this appears to be the first appellate case to interpret the state and county laws at issue.

[7] *See, e.g.*, Memorandum of Chuck Huckelberry to Pima County Board of Supervisors, "World View Balloon Rupture on December 19, 2017," Feb. 8, 2018 (stating, "We very much appreciate having an innovative aerospace company such as World View call Tucson home."); David Wichner, *Tucson-Based Space-Balloon Firm World View Lays Off 10*, Tucson.com, Feb. 15, 2019 (World View "will ... be hiring new staff in many key roles").

Perhaps most significantly, this is the first case to address a situation in which a non-agent has procured services for the County in violation of those statutes. That is significant because the decision below creates a loophole through which counties can evade the procurement laws. The trial court itself said so. "Procurement requirements," it said, "'are of great importance to the taxpayers,'" and the decision below "provide[s] a means for Pima County to evade or circumvent the typical procurement requirements." (ROA 116 ep 4, quoting *Secrist*, 6. Ariz. App. at 106.) Therefore this case presents questions "of great importance to the hundreds of thousands of people living or working in [Pima County]," questions that are likely to recur—thus qualifying for the exception to the mootness doctrine. *Fraternal Order of Police Lodge 2*, 133 Ariz. at 127.[8]

III. The County did not just brainstorm with Barker and Swaim—it unlawfully procured preconstruction services.

A. The favoritism the County showed to Barker and Swaim had *everything* to do with the Board's awarding them the contracts.

The County's brief tries to make Appellants' argument sound complicated, but it's simple. In August 2015, the County began procuring pre-construction services from Swaim and Barker—specifically, the design and planning of the

[8] This case is also particularly apt for application of this mootness exception, given that the case as a whole is indisputably not moot. One cause of action—the constitutionality of the World View project under the Arizona Gift Clause—remains live in the trial court. Since the case as a whole is not moot, determination of the questions presented here would conserve judicial resources.

World View buildings—and it continued procuring those services until January 2016. By January, the planning for the facility was about 30 percent complete, ROA 112 ep 8 ¶ 2, and the Board of Supervisors then officially selected Swaim and Barker to complete the project because they had such a big head start already that they alone could finish the project in time.

Appellants contend that this was unlawful because the procurement laws require the County to follow certain procedures when procuring preconstruction services, which it did not follow. Among other things, the law requires the County to procure preconstruction services through an "agent." A.R.S. § 34-604(B). It did not do so, because it procured the services through non-agents (Huckelberry and his staff). The law also requires the County to pay for these services. A.R.S. § 34-605(B). It did not do so. Also, the law requires the County, in the event of an emergency procurement, to procure services in as competitive a method as possible under the circumstances, A.R.S. § 34-606, and to formulate a limited procurement process rather than hiring directly. Pima County Procurement Code § 11.12.060(A)(1). It did not follow these rules, because it made no effort to determine how much competition was practicable, and because it directly awarded the contract to Swaim and Barker without formulating a limited procurement process. ROA 106 ep 7 ¶ 25.

Instead, the County procured Swaim's and Barker's services between August 2015 and January 2016 without paying for them or entering into a written contract or allowing other firms to participate. Five months later, when the preconstruction work was 30 percent complete, ROA 112 ep 8 ¶ 2, the Board of Supervisors officially approved the project and used this "five month 'head start,'" ROA 116 ep 4, as a reason for awarding Swaim and Barker the contract. This is not a complicated "looping around" argument, as the County tries to portray it. Appellees' Br. ep 39. It's a simple case of unlawful procurement—specifically, it's an "unequal access to information" case. *Axiom Res. Mgmt.*, 564 F.3d at 1377; *ARINC Eng'g Servs.*, 77 Fed. Cl. at 202–03.[9]

The Superior Court agreed with all of this but held nonetheless that the County's acts were lawful because the state procurement laws only apply to "agents," and since Mr. Huckelberry and his staff aren't "agents," their acquisition of Swaim's and Barker's services was lawful. ROA 116 ep 4. Appellant argues this is legal error, because (*inter alia*) if Huckelberry was not an "agent," then that

[9] The County distinguishes these cases because they're federal and because the County thinks federal regulations would have allowed the kind of procedure that occurred here. Appellees' Br. ep 55. But that misses the point. The point is that these cases explain what "unequal access to information" favoritism is, and whatever the outcome of those cases may have been, that is the type of favoritism that occurred here. The County gave Swaim and Barker a special head start in planning the project, and then used that head start as the reason for awarding them the project, which is recognized in procurement law as the "unequal access to information" version of favoritism.

proves *all the more* that his procurement of services from Swaim and Barker was unlawful, because *only agents are legally allowed to procure.* A.R.S. § 34-604(B). Huckelberry's acquisition of services from Swaim and Barker between August 2015 and January 2016 certainly falls within the statutory definition of procurement. A.R.S. § 41-2503(32). Therefore, the Superior Court should have ruled in Appellants' favor.

The County does not address this argument at all. Instead, it tries to downplay the significance of the preconstruction services that it procured from Swaim and Barker. It uses euphemistic language to make it seem that all Swaim and Barker did was engage in brainstorming sessions—mere "feasibility" talks, or "preliminary" speculation, about the World View project. Appellees' Br. ep 40. But this is contrary to the evidence in the record as determined by the Superior Court—and this Court must defer to those findings. *John C. Lincoln Hosp.*, 208 Ariz. at 537 ¶ 10.

Swaim and Barker spent five months providing the County with preconstruction services for the World View project—services that were specific, highly detailed, and so in-depth that by January 2016, the County believed it would be impossible for any other contractor or architect to complete the project in time. By the County's own estimation, the planning was 30 percent done by then, ROA 112 ep 8 ¶ 2, and the plans were highly detailed. They consisted of specific,

thoroughly considered, heavily revised construction estimates, drawings, and design specifications. *Id.* ep 8–9, ¶¶ 1–7 Barker's construction estimates were so detailed that, at one point, Barker revised its plans to scale down the super-flat floor in the construction facility to a merely flat floor, and modified the bay spacing to reduce the number of columns inside, *id.* ¶ 6. At another point, Barker estimated that the chip seal on AB would cost $277,115—a highly specific figure. *Id.* ¶ 7. And Swaim testified that the plans were so close to completion by January 2016 that his firm was able to proceed at a record-setting pace: "We put the bid package out for the steel three weeks after the contract started," he testified, which "is probably one of the fastest project schedules I've ever seen. ... [W]e worked with [Barker] to create—to provide the drawings for [the] bid packages. ... [The steel and the elevator] were long-lead items. That was the only way to really get the project done." ROA 106 ep 68–69 at 59:14-60:11.

When asked, "So it's accurate then to say that ... these post-January bids and things ... you were able to do that promptly because you had this information that you had been working with in these preliminary drawings and estimates; right?" Swaim answered, "That certainly helped." *Id.* ep 69 at 60:19–24. Although there were some modifications to the plans after January 2016, Swaim testified that those modifications were minor. *Id.* ep 68–69 at 59:14–61:4.

In other words, Swaim and Barker were not engaged in some vague bull session during those five months. They were engaged in providing sophisticated and detailed preconstruction services to the County as defined in Arizona law—specifically, "professional architect services … within the scope of architectural practice as provided in title 32, chapter 1," A.R.S. § 41-2503(1) and "[a] combination of construction and … design services and preconstruction services, as those services are authorized in the definitions of construction-manager-at-risk, design-build or job-order-contracting in this section." *Id.* § 41-2503(6)(b). *See also* A.R.S. § 34-605 (referring to "[c]onstruction-manager-at-risk construction services," "[d]esign-build construction services," "architect services" and "[e]ngineer services."). The law requires the County to procure those services through the procedures specified in the statute. It did not do so. It therefore violated the law.

That unlawful procurement means the County's January 2016 decision to hire Barker and Swaim was an abuse of discretion. The County's unlawful procurement of preconstruction services from them was the very reason why the County found it impracticable to hire anyone else in January 2016. As the Superior Court put it: "by selecting Swaim and Barker Morrissey in August 2015, Mr. Huckelberry received their services and gave them a five month 'head start' over any other potential bidders." ROA 116 ep 4. That head start was then the

deciding factor in the Board's decision in January 2016 to hire Swaim and Barker. That is unlawful favoritism, *Brown*, 77 Ariz. at 376—specifically, it is "unequal access to information," *ARINC Eng'g Servs.*, 77 Fed. Cl. at 202—and that is an abuse of discretion.

It's actually the County that is caught in a self-contradiction. On one hand, it argues that Swaim and Barker were only engaged in vague brainstorming sessions between August 2015 and January 2016—they were just providing "input" on "feasibility." Appellees' Br. ep 41. But if that were true, then there would have been no reason in January 2016 for the County not to invite other firms to bid on the project. Doing so would not have been "impracticable" under A.R.S. § 34-606. But on the other hand, the County argues that Swaim and Barker were so far along in their planning by January 2016 that it was impracticable for the Board to consider hiring other firms. Yet if *that's* true, then the preconstruction work Swaim and Barker provided for those five months must have been extensive and in depth, not just vague, general input—which means the County should have followed the legal procedures to procure those services. The County cannot have it both ways.

Nor can it claim on one hand that "the two things"—i.e., Swaim and Barker's preconstruction services and the Board's selection of them to build the project—"are independent of one another," Appellees' Br. ep 41, and on the other

hand admit that the Board awarded them the contract "because they had *done it*"—i.e., because they "had 'provided months of substantial services without compensation to provide the necessary architectural program and design and costs models.'" *Id.* ep 53–54 (quoting Huckelberry's memo to the Board). That is a self-contradiction.

The County's only real answer to all this is to say that it would be absurd to expect counties to go through an open, transparent, unbiased procurement process to hire consultants to provide "preliminary work necessary to inform … negotiations" in development projects. *Id.* ep 40. But there's nothing absurd about that. Counties often hire consultants to design projects that, in the end, might never be built. That's just what the procurement statutes for preconstruction design services anticipate.

Still, this case was unusual because the County began with the determination to build structures tailor-made for World View, and it selected Swaim and Barker to design those structures in August 2015. ROA 116 ep 3–4. They got about a third of it done by the time January 2016 rolled around, and the County decided that their "head start" made them the only firms that could finish the project in time. The County then officially ratified the project and awarded it to Swaim and Barker, for that reason—as the County admits. Appellees' Br. ep 53–54.

The bottom line is simple: the County's effort to portray the extensive meetings and planning that took place between August 2015 and January 2016 as a mere brainstorming exercise is contrary to the Superior Court's findings and to the undisputed evidence in the record. The Superior Court was right: the County "select[ed]" these two firms and then "received their services and gave them a five month 'head start' over any other potential bidders." ROA 116 ep 4. The only question is whether that qualifies as "procurement" or not. It does. A.R.S. § 41-2503(32).

B. The County's failure to pay Swaim and Barker for preconstruction services is unlawful.

The County offers no legal argument that its failure to pay Barker or Swaim for their preconstruction services—in violation of A.R.S. § 34-605(B)—was lawful.

Instead, it engages in the fallacy of the "appeal to ridicule." *See* Ruggero J. Aldisert, *Logic for Lawyers* 181 (1989). For example, the County says it's "odd" that the taxpayers would seek enforcement of A.R.S. § 34-605(B) along with other statutory procurement requirements. Appellees' Br. ep 41. But as explained in Appellants' Opening Brief (at 28-30), there's nothing odd about it. That legal mandate serves the interests of taxpayers as well as the general public and competing contracting firms.

If a contractor becomes known in the community as willing to provide free services to the County on the understanding that it will receive a benefit in return (such as special consideration in the procurement process or in a subsequent procurement process), the result would be to undermine the procurement laws—which exist "to promote competition, to guard against favoritism, fraud and

corruption, and to secure the best work or supplies at the lowest price practicable." *Rollo*, 120 Ariz. at 474.[10] A firm would provide free services on one project, knowing it could make up the loss by being awarded a later project at a higher rate. Or it could use these loss leaders to obtain political influence which it could use to bar lesser-known but equally competent competitors from government contracts. Such actions "waste taxpayer money" and are an abuse of the contracting process. *See* Adam Cate, *Chapter 490: Spreading the Word on "Loss Leaders,"* 41 McGeorge L. Rev. 741, 746 (2010). That is why they are unlawful.

In *Interstate Engineering Corp. v. City of Fitchburg*, 329 N.E.2d 128 (Mass. 1975), the Massachusetts Supreme Judicial Court ruled that a city violated the state's procurement laws by selecting a plumber who offered to work for below cost, because such an arrangement encouraged favoritism which harmed taxpayers and competing firms. The plumber, it found, "bid the *exterior* piping work well below cost as an inducement to [the City] to select it as the subcontractor for the *interior* piping work." *Id.* at 130 (emphasis added). But the law prohibited such arrangements in order to "facilitate[] the elimination of favoritism and corruption as factors in the awarding of public contracts." *Id.* at 132. The prohibition on loss leaders to the government "fosters competition … and helps assure that no general contractor will receive an advantage over its competitors." *Id.*

[10] That's why guidebooks for procurement officers often warn against such arrangements. For example, the state of Montana's *Project Administration Manual* at 3-11 (1994) warns that"[i]n some cases, a community may receive a proposal for what is called a 'loss leader' arrangement where the consultant offers to prepare or assist with a grant application at cut rates or for no cost in return for favorable consideration in the selection process … . Professional organizations consider this practice unethical because it deprives the client of the benefits that result from competition among competent professional consultants.")

The same principles apply here. Loss leaders to the government undermine the laws that ensure fair and efficient public contracting and increase the likelihood that the government will select firms not because they're the cheapest or best qualified, but as a reward for loyalty—which is an abuse of discretion. *Brown*, 77 Ariz. at 375-76. That is at least part of what happened here. In his January 2016 memo to the Board, Huckelberry identified Swaim's and Barker's willingness to provide "months of substantial services [to the County] without compensation" as one of the three reasons for selecting them (the others being the construction deadline and Swaim and Barker's five month head start). Appellees' Br. ep 53 (quoting Huckelberry memo).[11] This creates more than just a "suspicion of favoritism." *Brown*, 77 Ariz. at 377.[12]

Even if it were "odd" for Taxpayers to make this argument, Appellees' Br. ep 41, that wouldn't weigh against the argument's merits. But there's actually nothing "odd" about taxpayers "stern[ly] insist[ing] upon positive obedience" to the procurement laws. *Secrist*, 6 Ariz. App. at 106 (citation omitted). Those laws

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[11] The County says that if Swaim and Barker had been lawfully hired to provide the preconstruction services "it wouldn't have changed anything for the Board in January." Appellees' Br. ep 41. That is contrary to the undisputed record evidence and the findings of the Superior Court, which concluded that Swaim and Barker were selected in January 2016 precisely because of their five month head start. Had the County followed the procurement laws in seeking preconstruction services, it's possible that different firms would have participated in August 2015 and would have been eligible for the project in January 2016. We will never know, because the County loaded the dice when "Huckelberry selected Swaim and Barker Morrissey … in August 2015." ROA 116 ep 3–4.

[12] The County claims that there is "no implication" that Swaim and Barker were chosen "based on the prior work being done for free," Appellees' Br. ep 53, but it then quotes the evidence: Huckelberry's memo urging the Board to hire these firms due to their past provision of free services. *Id.*

"are based upon public economy and are of great importance to the taxpayers," and must be scrupulously enforced to "avoid the likelihood of their being circumvented, evaded, or defeated," *id.*, and to prevent even the "suspicion of favoritism." *Brown*, 77 Ariz. at 377.

IV. The Board's actions were an abuse of discretion.

A. The County's selection of Swaim and Barker was a function of unlawful County practices and therefore an abuse of discretion.

Appellants' Opening Brief (ep 27–33) explains why the Board of Supervisors' decision to award the contract to Swaim and Barker, being based on the County's previous unlawful procurement of Swaim and Barker's services, was consequently an abuse of discretion. An abuse of discretion occurs when the government awards a contract on the basis of improper criteria, such as favoritism, *Brown*, 77 Ariz. at 372, or where its decision is "tainted" with "inequitable and unreasonable" considerations, *Sulphur Springs Valley Electric Cooperative, Inc. v. City of Tombstone*, 1 Ariz. App. 268, 272 (1965), or where the government uses "unannounced criteria in selecting" a contractor. *State ex rel. Executone of Nw. Ohio, Inc. v. Comm'rs of Lucas Cnty.*, 465 N.E.2d 416, 417 (Ohio 1984). "The awarding of a contract … pursuant to specifications which are illegal and invalid and which fail to provide for full and fair [procedures], is, we think an abuse of discretion." *Baldwin-Lima-Hamilton Corp. v. Super. Ct.*, 25 Cal. Rptr. 798, 811 (App. 1962). That happened here because the five-month head start that the

County gave to Swaim and Barker was the *express basis* for the County's decision in January 2016 to award them the contract.

The County's response to this is to argue that the five-month head start "ha[d] nothing to do with the Board's later award of the Contracts." Appellees' Br. ep 39. That assertion is contrary to the undisputed evidence in the record and the finding of the Superior Court. And even if it were true, it would *still* mean that the County acted unlawfully.

First, it is untrue. In January 2016, the County gave three reasons for awarding the contract to Swaim and Barker: (1) the completion deadline, (2) the fact that Swaim and Barker had been providing free services to the County for five months, and (3) the fact that those months of services meant that Swaim and Barker were so familiar with the project that they alone could finish the project by the completion deadline. ROA 106 ep 102–3. In other words, the Board decided that since Swaim and Barker had finished about a third of the planning for the project already, thanks to their five month head start, it was impracticable to hire anyone else. The County admits as much in its brief. For instance, it says on pages 53 and 54 that the Board chose Swaim and Barker "simply because they had *done* it"—and by "it," the County means "the preliminary work"—i.e., the pre-project planning which was a third of the way finished by January 2016.

Obviously the County must admit this, because—even aside from Huckelberry's memo saying that that was why Swaim and Barker were selected, ROA 106 ep 102–3—*all* the witnesses testified to the same thing. *See*, *e.g*, ROA 112 ep 8 ¶¶ 1–3; ROA 106 ep 8–9 ¶¶ 28–29, ROA 106 ep 68–69 at 59:14–61:4. Swaim's and Barker's five month head start was the *sine qua non* of their being awarded the contract. The Superior Court found that the head start was determinative, because the Board "belie[ved] [in January] that there simply was not enough time for any *other* architect and any *other* construction manager to deliver occupancy by [the deadline]." ROA 116 ep 3 (emphasis added).

The County's argument that Swaim's and Barker's head start "ha[d] nothing to do with the Board's later award of the Contracts" to them is therefore risible. Appellees' Br. ep 39. But if it *were* true, that would *still* mean the Board acted unlawfully, because in *that* case, its selection of Swaim and Barker would have lacked *any* basis, and would therefore have been arbitrary and capricious—and an abuse of discretion. *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 247–48 (App. 1989) (government acting for no reason at all is an abuse of discretion). If Swaim and Barker had *not* done 30 percent of the preconstruction work and planning before January 2016, ROA 112 ep 8 ¶ 2—if they'd not had what Huckelberry called "prior involvement and detailed understanding of World View requirements" by that time, Appellees' Br. at 53 (quoting Huckelberry memo)—

then the County would have had no basis *at all* for selecting them to build the World View facilities in a short timeframe. That would certainly have been unlawful.

But that is not what happened. What happened is what the Superior Court said happened: the County selected Swaim and Barker to design the World View project in August 2015, then "received their services" for five months, ROA 116 ep 3–4, and then, when they had done 30 percent of the planning, ROA 112 ep 8 ¶ 2, the Board used their prior involvement and their detailed understanding of the project as the reasons for awarding them the contract. ROA 116 ep 4. And because the County procured Barker's and Swaim's services beginning in August 2015 without following the procurement statutes—at a time when "it was not 'impracticable' to allow others the opportunity to [participate]," *id.* ep 3–4—the Board's decision in January 2016 to award them the contract was necessarily "tainted" by the illegality of its procurement during those five months. *City of Tombstone*, 1 Ariz. App. at 272. That was an abuse of discretion.

B. Even with deference, the Board still violated the law by failing to determine how much competition was practicable.

The County offers no legal argument against Appellants' contention that the County violated A.R.S. § 34-606 by failing to inquire whether any competition was practicable under the circumstances. It's undisputed that although the County asserted that an impracticability existed under Section 34-606, it made no attempt

to procure contracting or architecture services "with such competition as [was] practicable," *id.*, or even to inquire into how much competition would have been practicable.

Instead of providing a legal argument on this point, the County engages in rhetoric and *ad hominem* (such as "Taxpayers simply don't like the World View deal," Appellees' Br. ep 56)—and then misrepresents Appellants' arguments. Contrary to those misrepresentations, Appellants do *not* contend that the County's determination of impracticability is entitled to no deference. Rather, Appellants argue that even *with* such deference, the County *still* violated the law, because A.R.S. § 34-606 requires the County to make emergency procurements "with such competition as is practicable under the circumstances" *even where impracticability exists*. That's why the statute uses the word "except." That duty is nondiscretionary. So even if the County receives deference with regard to the existence of an emergency or impracticability, such deference does not entitle it to disregard that duty. *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1228 (10th Cir. 2002); *United States v. Smith*, 80 F. App'x 847, 848 (4th Cir. 2003); *Ctr. for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 970–71 (N.D. Cal. 2013).

The County failed to inquire whether or how much competition was practicable under the circumstances. The Superior Court found that Huckelberry "selected" Barker and Swaim for the World View project in August 2015—at a

time when no impracticability existed, ROA 116 ep 3–4—and that, as early as October 2015, he "actively was looking for a way to ensure that only one architect, Swaim, would be considered for the job." *Id.* at 4. Then the Board awarded Swaim and Barker the contract with no deliberation or analysis, by ratifying the Huckelberry memo, which recommended only Swaim and Barker, due to their "five month 'head start.'" *Id.* The memo never assessed the practicability of any competition. And the Board never considered or determined it. ROA 106 ep 9 ¶ 35.

But A.R.S. § 34-606 provides that even where a county thinks it would be impracticable to procure services in the ordinary way, it must still make procurements with such competition as is practicable. The County made no attempt to discharge this nondiscretionary duty. The County's argument—that it is owed deference in determining what is in the public interest and what constitutes impracticability—is therefore simply off-topic.

CONCLUSION

The County concludes its brief with a naked political argument and an inappropriate *ad hominem* attack on the taxpayers' attorneys. But such tactics only "show[] the paucity of [the County's] own reasoning." *Huntington Beach City Council v. Super. Ct.*, 115 Cal. Rptr. 2d 439, 448 (App. 2002), by trying to "distract from the merits of the litigation." *Revson v. Cinque & Cinque, P.C.*, 221

F.3d 71, 82 (2d Cir. 2000). This case must be decided on the law, instead. *State v. Lynch*, 238 Ariz. 84, 96 ¶ 28 (2015).

Whether or not the World View project is a good idea is not at issue here. This case is about a *legal* question: was it a violation of the procurement statutes for Huckelberry to "hand-pick[] Swaim and Barker" in August 2015, ROA 116 ep 3, and "acquir[e] … services" from them, A.R.S. § 41-2503(32)(a), for five months—and then for the Board of Supervisors to use that "five month 'head start,'" ROA 116 ep 4—as well as Swaim and Barker's willingness to provide the services for free—as reasons to award them the contract? The Superior Court said no, on the grounds that Huckelberry is not an "agent," and therefore the procurement statutes do not apply. *Id.* But the legislature did not intend the procurement laws "to be so easily avoided." *Achen-Gardner*, 173 Ariz. at 53. Because Huckelberry undeniably *procured* those services for the County, his actions must have been unlawful, because only agents are allowed to procure. A.R.S. § 34-604(B). And given that the Board's decision to award Swaim and Barker the contract was based on that initial illegal procurement and the resulting unequal access to information, its decision was an abuse of discretion. The County also violated the law by failing to pay for those five months of preconstruction services, A.R.S. § 34-605(B), by failing to consider whether any competition was practicable under the circumstances, A.R.S. § 34-606, and by failing to formulate a

limited procurement process, and directly selecting Swaim and Barker instead, which it lacks authority to do. County Procurement Code § 11.12.060(A)(1). *See* AOB ep 36–38.

What is at issue here is the *law*, and the County violated it. The decision of the Superior Court should be *reversed*, and judgment entered for Appellants.

Respectfully submitted this 11th day of March, 2019 by:

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellants, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellees.	No. 2 CA-CV 2018-0161 Pima County Superior Court Case No. C20161761

CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 14(a) of the Ariz. R. of Civ. App. P., I certify that the body of the attached Combined Cross-Answering Brief and Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 11,388 words, excluding the table of contents and table of citations.

Respectfully submitted this 11th day of March, 2019 by:

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The undersigned certifies that on March 11, 2019 she caused the attached Appellants' Answering Brief to be filed and served via the Court's Electronic Filing System, and emailed a copy to:

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