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 2021-0072 Pima County Superior Court Case No. C2016-1761

APPELLANTS' REPLY BRIEF

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
Timothy Sandefur (033670)
Jonathan Riches (025712)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Plaintiffs-Appellants

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INTRODUCTION

In Gift Clause cases, courts focus on "[t]he reality of the transaction," *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984), and "look at all the pertinent circumstances before coming to a conclusion." *Maricopa Cnty. v. State*, 187 Ariz. 275, 280 (App. 1996). But the County is instead asking the Court to ignore the realities of the transaction. Its arguments consist almost entirely of the kind of "overly technical view[s]" the Supreme Court has warned against. *Turken v. Gordon*, 223 Ariz. 342, 352 ¶ 47 (2010).

The reality of this transaction is simple: the County borrowed $15 million, using County property as collateral,[1] and then spent that money to "front-end[] the

[1] The County says it "did not borrow anything." Ans. Br. at 56. This is at best a hyper-technical notion. The County sold certificates of participation—i.e., shares in anticipated lease revenue—to U.S. Bank National Association for $15 million, using County owned facilities as collateral. Those $15 million are public funds. *City of Phoenix v. Super. Ct.*, 109 Ariz. 533, 535–36 (1973) (proceeds from sale of revenue bonds are public funds subject to constitutional constraints); *State ex rel. Beck v. City of York*, 82 N.W.2d 269, 271–72 (Neb. 1957). The County must repay that plus $4,259,134 in interest on those certificates, meaning it is legally obligated to pay back $19,444,134. ROA169 ep.4 ¶ A.16. The Superior Court concluded from this that "technically speaking" the County was not loaning "*its* credit." ROA184 ep.14. But in Gift Clause cases, courts are not supposed to rely on such "technical[ities]." *Turken*, 223 Ariz. at 352 ¶ 47. Since it is undisputed that the County must "repay" that $15 million, ROA184 ep.4, and since to "borrow" means to incur an obligation that must be repaid in the future, the County did borrow something: $15,185,000, plus interest. And even if the certificates of participation aren't technically collateralized, it's still the County's credit—it certainly is not WV's. The Court should reject semantic arguments to the contrary. But even if it doesn't, the Gift Clause violation does not really depend on whether the County technically borrowed anything. It depends on whether the County *lent or gave*

capitalization" of World View (WV), a private company, ROA184 ep. 4, by custom-designing and constructing facilities for WV's use. In return, WV pays the County monthly payments, not pegged to any actual market rental rate, but designed instead to repay the County for the cost of fronting WV this start-up capital. The deal was also structured so that WV would receive a tax write-off worth $4 million, enjoy effectively exclusive use of a $2 million custom-built balloon launchpad for 20 years, and obtain fee simple title to the building for a token ten-dollar payment (now raised to $5 million).

Arizona's Constitution prohibits the County from "*ever* giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, *by subsidy or otherwise*, to any individual, association, or corporation." Ariz. Const. art. IX § 7 (emphases added). The WV arrangement violates that prohibition because it consists of a loan plus several outright subsidies.

Yet the County seeks to obscure the reality of the transaction, and to exploit various technicalities, to avoid this plain and unequivocal prohibition.

For example, it says this case does not involve a loan because the County "does not expect repayment of any amount related [to] the expense to build the facilities." Ans. Br. at 57. That is just not true. The County's own brief admits

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anything to WV, and it did: the building, the launchpad, the tax exemption, and the option.

that the deal was designed to "ensure [that] the County receives full value for constructing the Building," *id.* at 47, and the County admitted, and the Superior Court found, that the County designed the monthly payments "to ensure that [Pima] County [will] get back its investment in the construction of the [WV] Building." ROA184 ep.4.

Nevertheless, the County says "[t]here is no borrower-debtor relationship between [WV] and the County," Ans. Br. at 53, because the Lease Purchase Agreement (LPA) does not expressly designate WV as a debtor to the County. That is a crude "overly technical" argument that improperly focuses on form instead of substance. The reality of this transaction is that the County spent taxpayer money to build the facilities, and allows WV to use those facilities and pay the County back for its cost over two decades, assuming WV survives that long. That's a loan, whatever semantics the County prefers to use—and therefore unconstitutional.

Another example: the County argues that because the Government Property Lease Excise Tax (GPLET) exemption exists by operation of state law, WV's $4 million tax break cannot violate the Gift Clause, because technically speaking the County didn't *give* it to WV. This is both "overly technical" and entirely irrelevant. The County arranged the deal so it would technically own the property during the 20-year period—despite giving WV all the *substantive* rights of

ownership—expressly because the parties believed this arrangement would give WV a tax exemption that no other firm enjoys. That exemption reduces WV's liabilities—i.e., puts cash in WV's pocket—and to characterize it as an "indirect" benefit, Ans. Br. at 37, is simply not credible. This tax exemption is a direct $4 million benefit to WV, for which WV gives the County *nothing*. That violates the Gift Clause. *Cf. Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559–60 (App. 1997).

Another example of the County's effort to exploit "overly technical" arguments: it tries to distinguish loans from loans of credit, Ans. Br. at 50–57—a distinction never endorsed by any Arizona court—and argues that the Constitution doesn't bar the County from directly lending public resources to private corporations, as long as those corporations promise to pay the money back at some future date. *Id.* at 57. That's wrong; the Constitution forbids government from "subsid[izing]" private companies, Ariz. Const. art. IX § 7, which means "assist[ing]" or "giv[ing] support or aid to" them, *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 362 (1974), and that obviously includes loans.

But this Court need not address that question, because "[i]t is axiomatic" that the County may not do indirectly what it is may not do directly. *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 396 (1923). Even if the Court were to endorse this purported distinction—to say loans of credit only occur when the

government co-signs a loan or similarly enables the private entity to obtain a loan from a bank—the WV arrangement is still unconstitutional because it is an indirect loan of credit: the County borrowed money (via the "certificates of participation") from U.S. Bank National Association, ROA184 ep.4, then spent that money to build the facilities, which it is now lending to WV in exchange for monthly payments, through which the County will repay its own debt. In other words, the County found an *indirect* way of enabling WV to borrow money from U.S. Bank National Association, no different than if Peter borrows money, then lends it to Paul on the condition that Paul repay it, so that Peter can repay his original loan. Since the Constitution comprehensively forbids the County from "ever giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, by subsidy *or otherwise*," Ariz. Const. art. IX § 7 (emphasis added), and the County cannot do indirectly what it cannot do directly, *State ex rel. Cryderman v. Wienrich*, 170 P. 942, 944 (Mont. 1918), the County's overly technical argument still cannot overcome the realities of this transaction or render it constitutional.

There are other examples, discussed below, of the County's effort to exploit "overly technical" arguments to obscure the "realit[ies] of [this] transaction." *Turken*, 223 Ariz. at 352 ¶ 47; *Wistuber*, 141 Ariz. at 349. None of them suffice. The loan and other subsidies to WV are unconstitutional.

ARGUMENT

The County wants this Court to take a "close enough is good enough" approach. It urges the Court to ignore subjects such as the risk of WV defaulting, Ans. Br. at 49, and disregard, among other things, the difference between a loan and a purchase—which the County characterizes as Taxpayers "ripping apart" the WV arrangement. *Id.* at 32. But courts in Gift Clause cases are expected to "look at *all* the pertinent circumstances," to examine "the facts of *each* transaction," and focus on "[t]he *reality*" rather than legal fictions or formalities. *Maricopa Cnty.*, 187 Ariz. at 280 (emphasis added); *Wistuber*, 141 Ariz. at 349 (emphases added). Moreover, "[i]n deciding the sufficiency of consideration … courts should *not* give deference to the public entity's assessment of value." *Schires v. Carlat*, 250 Ariz. 371, 378 ¶ 23 (2021) (emphasis added).

The WV arrangement consists of a loan, accompanied by four outright gifts, each of which is an unconstitutional subsidy. To prevail, Taxpayers need only establish entitlement to judgment on one of these.

I. The County's loan to WV is unconstitutional.

The County says there is no loan between the County and WV. That is, at best, a hypertechnical argument that ignores the realities of the transaction. The County is lending WV property, which WV pays for over time. That cannot be reasonably disputed. *See* Appellants' Opening Br. (AOB) at 26–34. The County

says this isn't a loan because there's no note or deed of trust, and the transaction "creates no debt on the County's ledgers." Ans. Br. at 53. That argument elevates form over substance. The fact that the County did not formalize a lender-debtor relationship with WV in a written document does not alter the reality of the transaction. The reality is that WV spent money (which it raised through certificates of participation that it must pay off) to build the facilities, then let WV use those facilities while paying over time for their acquisition, which is meant to recoup the amount the County spent. That is a loan in substance, regardless of the form—and courts must focus on substance, not form, in Gift Clause cases. *Wistuber*, 141 Ariz. at 349. Virtually identical arrangements were found unconstitutional in *Port of Longview v. Taxpayers of Port of Longview*, 527 P.2d 263 (Wash. 1974), in *City of York*, 82 N.W.2d 269, and in *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952)—all in states that have Gift Clauses *less* strict than Arizona's.[2] AOB 27–30.

[2] The County seeks to distinguish *City of York*, *Port of Longview*, and other cases on the grounds that there, government "gave public money directly to a private corporation," Ans. Br. at 55, whereas here, the County built the facilities itself. This is an irrelevant distinction, since the County is still lending the facilities (which are owned by the County and are therefore public resources) to WV, which WV pays for over time—which is what *City of York* and *Port of Longview* found unconstitutional. True, the bonds in *City of York* were direct obligations by the city, but *State ex rel. Corbin v. Super. Ct. in and for Cnty. of Maricopa*, 159 Ariz. 307, 310 (App. 1988), squarely holds that that distinction is irrelevant. The *revenue* of bonds, or certificates of participation, are public, and lending them is forbidden.

What's more, Arizona courts have expressly rejected this argument. *Corbin* explained that where a government entity issues bonds, and spends that money, that expenditure is still subject to the Gift Clause even if "[t]he bonds [do] not represent a general obligation of the [government] … because proceeds from the sale of such revenue bonds [are] public funds." 159 Ariz. at 310. *Port of Longview*, *City of York*, and *North Miami* also all rejected the argument that government financing of private enterprises is exempt from the Gift Clause if it's done in a way that imposes no general obligation on the government. *See* AOB at 27–30.

And it doesn't really matter, because the Gift Clause forbids the County from lending, not borrowing, so how the source of the funds is characterized matters less than the question of whether the County is lending public resources to WV. The revenue from the sale of certificates of participation is unquestionably public, *Corbin*, 159 Ariz. at 310, so the answer is yes. Consequently, the County's attempt to evade the Gift Clause on the technicality that the $15 million it raised through "certificates of participation," and then spent for WV's benefit—and which WV is contractually bound to repay—"creates no debt on the County's ledgers," Ans. Br. at 53, is contrary to the law. This is still a loan of public resources and still unconstitutional. The words of *City of York*, 82 N.W.2d at 271, are apt here:

> [T]he framers of our Constitution had in mind a prohibition against giving or loaning the credit of the State or any subdivision thereof for a purely private purpose. This supports the fundamental principle that public moneys may not be used for private purposes. To impose such a prohibition as a matter of constitutional policy on the State, only to have its beneficent purpose thwarted by a refinement of definition not contemplated by its framers, would be to avoid the very purpose for which it was intended. It is not the function of courts to thus rewrite constitutional provisions to avoid their plain effect. It is the plain intention of this provision that state government, including political subdivisions thereof, shall not extend credit in aid of private persons and private enterprises.

The same reasoning has led Arizona courts to reject overly technical or formalistic interpretations of the Gift Clause, and instead to give effect to its underlying purpose, which is to bar government from subsidizing—i.e, "giv[ing] support or aid"—to private enterprises with public money. *Pilot Properties*, 22 Ariz. App. at 362 (citation omitted).

The County employs another overly technical argument to evade the realities of the transaction when it tries to differentiate loans from loans of credit. No Arizona court has ever drawn such a distinction, but it isn't necessary for this Court to address it, because even if only "loans of credit" are prohibited, the WV deal still constitutes a loan of credit. The County cannot do indirectly what it cannot do directly. *Standard Oil Co.*, 25 Ariz. at 396; *City of York*, 82 N.W.2d at 271. In fact, that is what the phrase "by subsidy or otherwise" means. *Wienrich*, 170 P. at 944.

Here, instead of co-signing loan documents between WV and a bank, the County itself borrowed $15 million from U.S. Bank National Association (through its certificate-of-participation arrangement), then spent those public funds on assets for WV, which WV uses for 20 years (then acquires title), by paying the County back—through monthly payments, which the County uses to pay the certificates. That means the County "enable[d] a borrower to obtain a loan *[in]directly* from a lender," *Wood v. Salder*, 468 P.2d 42, 46 (Idaho, 1970) (emphasis added)—in other words, it's an indirect "loan of credit," just as if John Doe were to tell Richard Roe, "I will not co-sign your loan, but I will borrow the money myself, then lend it to you, and when you repay me, I will repay my lender." Thus even granting *arguendo* the distinction the County offers, the WV arrangement is still unconstitutional. *See further Jarrolt v. Moberly*, 103 U.S. 580, 585–86 (1880) ("It would be a narrow constitutional provision to hold that [the Gift Clause] prohibited the creation of indebtedness by a municipality by a direct use of its credit for [a private] company, and yet permitted such creation by the indirect use of it for the same purpose.").

If the Court does consider the County's purported distinction, it should reject it. The Gift Clause was written to "requir[e] that public money be used only for public purposes," and to bar counties from "[giving] money, credit *or other valuable advantages*" to "private corporations," which expose taxpayers to the risk

of being forced "to pay the obligations from public treasuries" if those companies "fail[] in their obligations." *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973) (emphasis added). The Constitution forbids the County from aiding WV "by subsidy or otherwise," and subsidy means "[a]ssist … give support or aid to," *Pilot Properties*, 22 Ariz. App. at 362 (citation omitted), which the loan obviously does. The reality of this transaction is that the County borrowed money on behalf of a start-up business, instead of that business obtaining start-up capital on its own.

To let counties subsidize private enterprises by *directly* lending them public assets, when the Constitution forbids the giving of assets or lending of *credit* to private entities (*by subsidy or otherwise*), would open an obvious loophole for private exploitation. Counties could evade the Gift Clause by simply "lending" any amount of public money to a private company for 20 years or 99 years or any amount of time, regardless of the risk, or other relevant factors, and despite the intent of the Clause. As *Pilot Properties* put it, "it is clear that the drafters of [the Gift Clause] intended that government property or funds were not to be given to private industry and whether we characterize a subsidy as being merely more illustrative or as an absolute prohibition along with 'grants,' or 'donations,' this intent must be given effect." *Id.*

In *Lassila v. City of Wenatchee*, 576 P.2d 54 (Wash. 1978), the Washington Supreme Court found that a similar scheme by a city government violated that state's Gift Clause. There, the city bought land for the purpose of selling it to a private firm to build a theater. *Id.* at 56–57. The Court said that because the city was "act[ing] as a mere financing conduit for [the private party's] purchase of the theater site," it was "unconstitutionally lending its credit." *Id.* at 57. "A municipality," it said, "is absolutely prohibited from acting as a financing conduit for private enterprise." *Id.* at 58. Here, the County has *admitted* that it is acting as a financing conduit for private enterprise. That violates the loan of credit prohibition.

The County says that because its agreements with WV don't formally denominate WV as the County's debtor, there's no loan. But that again elevates form over substance—and contradicts the County's own admissions that the WV agreement was designed so that the County could spend these funds for WV's benefit, and WV would (hopefully) pay the County back over 20 years, while using the property. *See* ROA184 ep. 4 (County admitting it was "front-ending the capitalization" of WV's business); *id.* ep.6 (County admitting it was "financ[ing the WV] project" and arranging to "recover [its] capital outlay with interest" from WV). That is subsidization, and it's unconstitutional.

The County argues that loans of public resources are constitutional because the court allowed them in *Nelson*. But *Nelson* is easily distinguishable. It held that the government could raise funds through revenue bonds and then spend them for devices to prevent air pollution, which served the public purpose of "the protection of the health of the citizens of this state." 109 Ariz. at 374. As the Court of Appeals said in *Turken v. Gordon*, 220 Ariz. 456, 463 ¶ 17 (App. 2008), such expenditures "will not constitute donations or subsidies." *Nelson* is like *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545 (1971)—both are cases in which government provided a public service (fire protection in *Walled Lake Door*) which a private entity happened to benefit from. They are entirely different from this situation, where the government is acting as a venture capitalist, "front-ending the capitalization" of a start-up firm. ROA184 ep.4. In this situation, government is devoting public funds to the "aid of enterprises … engaged in private business," which is unconstitutional. *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 53 (1959) (citation omitted).

II. The tax exemption subsidy is unconstitutional.

The County also resorts to technicalities to obscure the reality of the transaction in addressing the GPLET tax break.

First, it argues that because this tax break exists by operation of law, extending it to WV cannot violate the Gift Clause—on the theory that the County

"does not own" the exemption, so it can't give it to WV. Ans. Br. at 40. But the County *does* "own" it. That is, the tax break "belongs" to the County by virtue of state law, and the County arranged this deal so it would technically retain title to the property (while WV is the constructive owner, enjoying all the substantive rights of use and ownership) for the express purpose of extending that benefit to WV for 20 years. So the tax break *is* something the County has, and the County *is* giving it to WV. And because WV gives back nothing in exchange, that is a subsidy.

Courts have applied Gift Clause analysis to tax breaks before, in *Pimalco* and *Maricopa Cnty.* The County tries to distinguish those cases on the grounds that they "are tax *refund* cases," rather than tax *exemption* cases, Ans. Br. at 41, but that's just the sort of "overly technical" hair-splitting courts are not supposed to indulge in Gift Clause challenges. *Turken*, 223 Ariz. at 352 ¶ 47. As for *Kotterman v. Killian*, 193 Ariz. 273 (1999), which the County cites for the proposition that it can't "give" the tax exemption to WV, that case involved an entirely different situation: taxpayers were entitled to a tax credit up to $500 if they donated that amount to a school tuition organization, which would give the money to schools, including private schools. In finding that this did not violate constitutional prohibitions on public subsidies to religious organizations, the court held that the money involved was not public money because it always "remain[ed]

in the taxpayer's ownership." *Id.* at 285 ¶ 40. Consequently, there could be no subsidy because the state "cannot make a gift of something that [it] does not own." *Id.* at 288 ¶ 52. Here, by contrast, the County *does* "own" the GPLET. It is a benefit possessed by the County. Unlike the money in *Kotterman,* it *is* in the County's hands—and the County arranged the LPA to give it to WV for 20 years.

All tax exemptions are intangible benefits that exist by virtue of law, and which might be said to be not "owned." Yet tax exemptions for private entities *are* subsidies—indeed, they were among the primary reasons the Gift Clause was written. *See* AOB at 20–21. The Constitution forbids the County from aiding private enterprises "by subsidy *or otherwise*." Ariz. Const. art. IX § 7 (emphasis added). So, whatever label is attached to the exemption, it violates the Gift Clause.

Second, the County says the exemption "is not 'bargained-for consideration,'" because the LPA disclaimed any warranty by the County that WV would enjoy the exemption. Ans. Br. at 38. But a disclaimer of a warranty doesn't mean something isn't consideration. "As-is" or "at buyer's risk" contracts disclaim warranties, but they're still supported by valid consideration. Quitclaim deeds disclaim warranty of title, but that title is still bargained-for consideration. *USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 354 (App. 1986). Consideration is "*either* a benefit to the promisor *or* detriment to the promise," *id.* (emphasis added), and WV certainly receives this benefit. As for bargained-for, the County

attested in the LPA itself that it believed WV would enjoy the tax exemption, and promised to help WV establish its entitlement to that exemption if challenged. Thus the exemption was bargained-for consideration which must be supported by proportionate return to satisfy the Gift Clause. *Schires*, 250 Ariz. at 376 ¶ 14.

Third, the County argues that the exemption is only an anticipated indirect benefit to WV—attempting to liken the $4 million exemption to the economic and fiscal impacts that the cities of Peoria and Phoenix hoped would result from subsidies to private entities in *Schires* and *Turken*, respectively. But this argument fails because what *Schires* and *Turken* meant by "indirect" was that the economic benefits of the subsidies were anticipated, projected, or hoped-for ("consequential," to use the contract law term)—i.e., they did not result from the actions of the contracting parties themselves, were not objectively measurable, and were not contemplated in the contract. *See Schires*, 250 Ariz. at 376–77 ¶¶ 14-15; *Turken*, 223 Ariz. at 350 ¶ 33. But here, the $4 million GPLET tax exemption *was* bargained for—it is expressly referenced in the contract—and it *is* directly traceable to the actions of the contracting parties. Also, its "objective fair market value" *can* be measured. *Schires*, 250 Ariz. at 376 ¶ 14 (citation omitted). It consists of a $4 million relief from tax liability. And it is not indirect because it does not depend on any consequential act. It is a "discharge or reduction of [WV's] liabilit[ies]," which "produces a corresponding increase in assets,"

Hoffman v. Rauch, 300 U.S. 255, 256 (1937)—i.e., it's money *directly* in WV's pocket.

The fact that the County enjoys this exemption as a function of state law is an irrelevant technicality. A Gift Clause case considers the realities of the transaction, examines "what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires*, 250 Ariz. at 376 ¶ 14. Here, the public is subsidizing WV's private, for-profit undertaking with a $4 million tax exemption no different from the tax exemptions for railroads that gave birth to the Gift Clause a century ago. The County gets nothing in return for that tax break. It is therefore unconstitutional.

III. The launchpad subsidy is unconstitutional.

The County clings to the legal fiction that the launchpad is a public transportation facility like a freeway, despite acknowledging that there's no public demand for a launchpad and that nobody other than WV has ever used it. ROA169 ep.7 ¶ A.26, ep.4 ¶ 12. Nor are there any actual plans for anyone to use it. The County says WV has "had discussions" with some companies that "expressed interest" in using it, Ans. Br. at 42, but that's all—nothing specific. And the County says WV "must … make the Launchpad available for use by the general public," *id.* at 12, but that is just not true: WV "may, in its *commercially*

reasonable discretion, prohibit" others from using the launchpad. ROA147 ep.50–51 § 4.1 (emphasis added). "Commercially reasonable discretion" means: consistent with reasonable commercial practices by private for-profit firms of that kind. *Gulf Homes, Inc. v. Goubeaux*, 124 Ariz. 142, 144–45 (1979). In other words, WV can block use of the launchpad by anyone whose use of the pad does not serve WV's own private, commercial interests. That's not true of actual public transportation facilities.

The County's argument boils down to saying that because the pad is *technically* owned by the County, it's *technically* a public facility. But Gift Clause cases are not decided on technicalities; they're decided based on the realities of the transaction. *Wistuber*, 141 Ariz. at 349; *Turken*, 223 Ariz. at 352 ¶ 47. The reality of this transaction is that there's no public demand for a high-altitude balloon launch pad; it was tailor-made to WV's specific needs—the County admitted it would not have built any balloon launchpad if WV had not wanted it. ROA169 ep.15 ¶ E.4. And the pad is used exclusively by WV for 20 years; WV can choose (in its "commercially reasonable discretion") who else gets to use it, and nobody else has used it. *Id.* ep.4 ¶ 12. So to characterize it as a public transportation facility is simply not realistic.

The County tries to liken the launchpad to the water main in *Walled Lake Door*, but that is not plausible. In that case, the business burned down, and

demanded fire protection before rebuilding. 107 Ariz. at 547. The city therefore installed a water main. The court found that "supplying of water for purposes of preserving and protecting lives and property is a 'public purpose' and one which will provide a direct benefit to the public at large." *Id.* at 550. Fire spreads, and can threaten the entire community, so installing water lines protects the general public and is a traditional public function. Thus the fact that one company would "indirectly benefit" from its construction was of "no consequence." *Id.* Essentially the opposite happened here: the County came up with the scheme to subsidize WV by building a balloon launchpad for which there is no public demand, solely to *directly* finance a start-up company. Building balloon launchpads is not a traditional government function, and balloon launches (or their absence) do not spread to threaten the whole community like fire does.

In any event, even if the launchpad *did* satisfy the "public purpose" portion of the Gift Clause analysis, the Court must still determine whether WV gives back to the County a proportionate benefit in exchange for the benefit of using it. *Schires*, 250 Ariz. at 376 ¶ 14. The County's sole argument in this respect is to say that WV "provides a valuable service to the County" by "assum[ing] full responsibility for maintenance and operation" of it. Ans. Br. at 42. But the cost of maintaining it is perhaps $12,800 per year, ROA169 ep.3 ¶ A.10, which is 1/156th the cost of the launchpad. The County says Taxpayers "do not appear to argue"

that this "is inadequate consideration," Ans. Br. at 42, but on the contrary, Taxpayers have all along argued that this is totally inadequate. These maintenance costs are not legitimately classified as consideration in the first place,[3] but even if they are, and even if we multiply $12,800 by 20 years, WV pays about $250,000 for a facility that cost taxpayers $2 million.

There is another relevant difference. Arizona courts have said that government funding for a private entity can only be constitutional where the private entity is "subject to the control and supervision of public officials" to ensure that the entity performs a public service. *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986). In *Kromko*, the government conveyed land to a nonprofit, but the court said that did not violate the Gift Clause because it was for the operation of a university hospital, and the private entity's use of the resources was overseen by state officials to ensure that the company discharged that public responsibility. *Id.* And, of course, the water main in *Walled Lake Door* was also maintained and operated by public officials. That is *not* true of the launchpad, as

[3] It's question-begging to say that WV repays the County for the launchpad by maintaining it, since the County only built it because WV wanted it. ROA169 ep.15 ¶ E.4. It would be illogical to say the County can give something to a private entity for its own private profit, so long as the private entity promises to maintain that thing. Under that theory, the county could pay to build a railroad for a private company, as long as the railroad company promises to maintain the tracks and engines.

the County admits. *See* Ans. Br. at 43 ("for 20 years *World View* will manage day-to-day operations of the launchpad." (emphasis added)).

The County's effort to distinguish *Sjostrum v. State Highway Comm'n*, 228 P.2d 238 (Mont. 1951), fails. It says the railroad bridge was built and owned by the private company, which is true—but the state legislature then passed a law "designat[ing]" it public, so that taxpayer money could be spent on its maintenance. *Id*. at 239. The court said this effort to pretend a private bridge was actually a public highway was a sham because "only the toll paying travelers using the railroad bridge and the railway company that … operates [it] … may expect to benefit from the proposed contract." *Id.* at 241. The same is true here. The fact that the County, instead of the private company, "constructed" the launchpad, *id.*, only makes this situation worse: the County has built, and is providing, a $2 million tailor-made facility for WV's private use. Just as the bridge in *Sjostrum* was "not a part of any state highway system," *id.*, so the launchpad is not, *realistically speaking*, part of any public transportation infrastructure. To pretend otherwise is to ignore the realities of the transaction and subvert the Gift Clause by allowing the County to "exten[d] … aid to … corporations for the purpose of fostering business enterprises.'" *Id.* (citations omitted).

True, the LPA does not give WV title to the launchpad. But that doesn't change the fact that for 20 years, WV gets to profit from the exclusive use of it—

including the right to refuse its competitors (if any were ever to exist) permission to use it. The reality of this transaction is that the launchpad is a special use property designed for WV, which cost the County $2 million, and which the County is effectively giving to WV for two decades for basically nothing.

IV. The option to take title for a token payment is unconstitutional.

The County's argument regarding the $10 option also depends fundamentally on obscuring the reality of the transaction—in this instance, the difference between renting and buying. In a rental agreement, the renter pays to use the property but does not acquire title. In a purchase agreement, the buyer pays to acquire the fee. Here, the County is either *renting* the property to WV—in which case, the payments acquire no portion of the fee, and *WV is then being given the right to acquire the fee to a $14 million building for a mere token payment of $10* (now $5 million), which is grossly disproportionate and violates the Gift Clause—or the County is *selling* the property to WV over time, in exchange for monthly payments, in which case this is an unconstitutional loan, as explained at AOB 26–34.

The County says it isn't grossly disproportionate to sell a $14 million building to WV for $10, because WV can only take advantage of this if it "makes all its payments for twenty years." Ans. Br. at 46. But those payments are supposed to be *rental* payments—payments for use, that acquire no fee interest—

so they cannot be added to the $10 for purposes of comparing "what the public is giving and getting." *Schires*, 250 Ariz. at 376 ¶ 14.[4] On the other hand, if the monthly payments are actually *purchase* payments, then this arrangement is an unconstitutional loan, because WV is borrowing the facilities and paying the County back over 20 years.

The County urges the Court to blur this distinction and view this contract as "neither a pure sale, nor a pure lease, but a contract between the two." Ans. Br. at 47. But that would mean blinding itself to the realities of the transaction, so the Court should refuse. Instead, it should "look at all the pertinent circumstances." *Maricopa Cnty.*, 187 Ariz. at 280. This deal is "a purchase agreement," just like in *City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n*, 99 Ariz. 270, 287 (1965), but instead of selling County owned property outright, the County has arranged to lend the property to WV now, and be paid back over time—which is a loan—or to rent the property for 20 years and then sell it at far below market value. Either way, that is unconstitutional.

[4] And, if they are rental payments, then they must be compared to the market rental rate to ensure proportional consideration. Since it is undisputed that the payments are below market rate for a decade, the rental payments are an unconstitutional subsidy. AOB 51–56.

V. The below-market monthly payments are unconstitutional.

The Court found that WV's monthly payments are below the market rental rate for at least the first decade, ROA184 ep.22–23, and the County does not argue otherwise.[5] Indeed, it's undisputed that the County never bothered to even determine what the market rate was before setting the payment amounts. ROA175 ep.5 ¶ 24. That's because this isn't a true rental transaction, but a sale. *Phoenix Civic Auditorium*, 99 Ariz. at 287.

The County says that because WV will pay (at best) 16 percent less than the value of the property, that's close enough for government work. Ans Br. at 34. Indeed, it thinks the phrase "grossly disproportionate" means small gifts of public funds are constitutional. *Id.* That is not correct. The Constitution forbids *all* gifts of public funds to private entities, not just really big ones. But by *any* measure, what WV gets is "grossly disproportionate" to what it gives under this deal. Not only does WV pay below market rates each month. Not only is there the risk that WV will default, costing Taxpayers the $15 million. Not only does WV get a $4 million tax exemption. Not only does WV get exclusive use of a $2 million custom-built launchpad practically for free. Not only does it get to buy a $14 million building for $10 after 20 years (or $5 million, which is still grossly

[5] The County spends much time discussing Bradley's expert opinion, but at no time in this appeal have Taxpayers relied on any expert opinion that was not endorsed by the Superior Court.

disproportionate. *See* AOB at 47 n.21). But *also,* WV is paying less per month than use of the building is worth.

The reality of this transaction is that WV is getting approximately $20 million in benefits, and giving back about half of that to the County. *See* AOB 56.[6]

It's ironic that the County accuses Taxpayers of "ripping apart" the agreement—i.e., focusing too closely on details rather than the big picture, Ans. Br. at 32—when it's actually the *County* that does that, by exploiting "overly technical" arguments, *Turken*, 223 Ariz. at 352 ¶ 47, to urge the Court to *ignore* the tax exemption, *ignore* the launchpad, and *ignore* the option, and focus solely on one part of the LPA, taken "in isolation," *Cheatham v. DiCiccio*, 240 Ariz. 314, 321 ¶ 25 (2016)—so that it can conclude that taxpayers will "only" lose 16 percent on the deal.

Perhaps the most striking instance of the County's effort to persuade this Court to ignore the realities of the transaction is when it says the risk of default "is immaterial to the Gift Clause analysis." Ans. Br. at 49. That is obviously wrong. Courts in Gift Clause cases are expected to "look at all the pertinent

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[6] The County refers in its brief to "jobs." There is no evidence before the Court regarding the value of jobs as consideration, and they cannot therefore factor into the analysis. Moreover, the County's position before the Superior Court was that WV's monthly payments are *alone* sufficient consideration. It did not brief the issue of the value of jobs in the Superior Court, and that court's consideration analysis relied solely on the value of the monthly payments.

circumstances," which is what "panoptic" means. *Maricopa Cnty.*, 187 Ariz. at 280. Risk is obviously a pertinent circumstance. The whole *point* of the Gift Clause is to protect taxpayers from the risk of default. *See Nelson*, 109 Ariz. at 372 ("[Gift Clauses] were designed to prevent the economic losses of the 19th century suffered by municipal corporations which gave money, credit or other valuable advantages to railroads, canal companies, etc. When the private corporations failed in their obligations, the municipalities were required to pay the obligations from public treasuries.")

If courts were to ignore this reality, local governments could easily evade the Gift Clause by leasing land to private companies for 99 years at a dollar a year, by simply reciting in the lease agreements that in year 100, the companies will pay off the total value of the leases. Arizona courts have never ignored the risk of default in this way, *cf. Pilot Properties*, 22 Ariz. App. at 363 (requiring courts to consider "the fair market rental value of the property … and *other factors* dealing with consideration" in a 99-year lease situation (emphasis added))—which would invite speculation with public resources on risky ventures. This Court should not be the first.

VI. To sum up.

The County argues that:

- If the Court *ignores* the $2 million launchpad, because the County technically retains title to it, and
- If the Court *ignores* the $4 million tax exemption, because it's technically a function of state law, and
- If the Court *ignores* the risk that WV will not make all its monthly payments over 20 years, and
- If the Court *ignores* the fact that the County has *already* had to restructure the payment scheme because the COVID Pandemic did *indeed* make it impossible for WV to make its payments, AOB at 10, n.1, and
- If the Court *ignores* the difference between renting something and buying it, and instead regards this transaction as some chimerical blend of the two, and
- If the Court *ignores* the fact that the monthly payments are below market rates for the first decade of the 20-year period,

—then the public will "only" lose 16 percent of the deal, and that's close enough to satisfy the Gift Clause.

The Taxpayers, by contrast, argue that substance matters more than form in Gift Clause cases, and that the Court should examine "the facts of *each* transaction," *Wistuber*, 141 Ariz. at 349 (emphasis added), and "all the pertinent

circumstances," *Maricopa Cnty.*, 187 Ariz. at 280, rather than taking the "overly technical view" that the County offers. *Turken*, 223 Ariz. at 352 ¶ 47. The reality of this transaction is that WV gets some $20 million in benefits and promises to give about half of that. *See* AOB 56. That's not proportionate and it is not constitutional.

The judgment should be *reversed*.

Respectfully submitted this 7th day of December, 2021 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE

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CERTIFICATE OF COMPLIANCE

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
Timothy Sandefur (033670)
Jonathan Riches (025712)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Plaintiffs-Appellants

Pursuant to Rule 14(a) of the Ariz. R. of Civ. App. P., I certify that the body of the attached Appellants' Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 7000 words, excluding the table of contents and table of citations.

Respectfully submitted this 7th day of December, 2021 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the
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CERTIFICATE OF SERVICE

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
Timothy Sandefur (033670)
Jonathan Riches (025712)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Plaintiffs-Appellants

The undersigned certifies that on December 7, 2021, she caused the attached Appellants' Reply Brief to be filed via the Court's Electronic Filing System, and emailed a copy to:

Mary R. O'Grady
Emma Cone-Roddy
OSBORN MALEDON, P.A.
2929 N. Central Ave., Ste. 2100
Phoenix, AZ 85012
mogrady@omlaw.com
econe-roddy@omla.com
Attorneys for Defendants

/s/ *Kris Schlott*
Kris Schlott, Paralegal