COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN, Appellants, v. CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona, Appellees.	No. 1 CA-CV 18-0379 Maricopa County Superior Court No. CV 2016-013699

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The people of Arizona made it clear at the time of statehood that the government may only spend taxpayer money for the benefit of the public at large and *never* for the promotion of private businesses via subsidies. The City of Peoria (the "City") is promoting Huntington University ("Huntington") and Arrowhead Equities LLC ("Arrowhead") by paying them $2.5 million to operate their private businesses in Peoria, but the payments (or "expenditures") are actually subsidies because the City and its people do not receive valuable consideration in exchange for their money. In addition, the City's stated purpose for the subsidies—economic development—is the exact purpose the authors of the Gift Clause were trying to prevent. Thus, allowing cities to subsidize private businesses in the hope that the public might receive intangible benefits from their operation, without any promise that they *will*, undermines the very purpose of the Gift Clause.

ARGUMENT

I. It is ultimately the Court's responsibility to determine whether the City's expenditures violate the Gift Clause.

The City urges this Court to uphold its gifts to two private businesses out of deference to the judgments of elected officials. Answering Br. ep.16–19 (citing *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387 ¶ 33 (2013)). But while it is true that courts presume the constitutionality of legislative enactments, deference to legislative judgments cannot justify acquiescence in unconstitutional

actions, because a "reviewing court must be independently satisfied" that an expenditure of taxpayer money complies with both prongs of the Gift Clause test. *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 367 (App. 1991). Accordingly, the Court must apply meaningful scrutiny to the Huntington and Arrowhead expenditures "as our supreme court instructed in *Wistuber*…cognizant that [it] must not merely rubber-stamp the [City]'s decision[s]." *Id.* at 369. Determining whether an expenditure violates the Gift Clause "is ultimately the province of the judiciary." *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 14 (2010).

In short, this Court must independently determine (1) whether the Huntington and Arrowhead payments truly serve the public at large and (2) whether the City or the public have received adequate value in return for the payments. Courts determine whether government expenditures satisfy both of these prongs using comparative analysis, not the common-law "abuse of discretion standard," as the City urges this Court to adopt.

A. Gift Clause analysis does not turn on the abuse of discretion standard.

The City argues Taxpayers "had to show that the City Council abused its discretion by concluding that the Agreements served public purposes and that the value of the consideration that Peoria promised to pay…was [not] grossly disproportionate to the Agreements' value to Peoria." Answering Br. ep.17–18. However, this is incorrect because no Arizona Gift Clause case has ever turned on

whether the plaintiffs showed that government officials abused their discretion in spending taxpayer dollars, and no court has actually performed an "abuse of discretion" analysis in any reported Gift Clause case.

It is worth emphasizing this point because the phrase "abuse of discretion" can be confusing. In one sense, officials do abuse their discretion when they make expenditures that lack a public purpose or adequate return consideration, because violating the Constitution is *necessarily* an abuse of discretion. But the deferential legal test that courts typically call "abuse of discretion" is *not* the test used in Gift Clause cases. This is revealed by the history of the phrase's use in Gift Clause litigation.

In the context of public purpose, the phrase "abuse of discretion" first appeared in *City of Glendale v. White*, 67 Ariz. 231 (1948), a case that examined whether Glendale's $48.55[1] yearly membership in a municipal league served a public purpose. The Arizona Supreme Court independently analyzed and determined whether the expenditure served a public purpose, noting that "each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." *Id.* at 237. In doing so, the court considered whether "there is anything inherently…illegal in

[1] Adjusted for inflation, $48.55 in 1948 is equal to $511.48 in 2018. In this case, the City was paying for a membership with tangible benefits, including "improving the quality of service [the city] renders its own taxpayers." 67 Ariz. at 240.

a municipality maintaining membership in the league"—since "the element of discretion" does not arise when courts are able to "say as a matter of law that the expenditures made [are] wholly illegal." *Id.* at 238. Because paying for membership services was not inherently illegal, the court concluded (*after* performing the analysis) that it should not substitute its judgment for the city council's unless the council had unquestionably abused its discretion. *Id.*

Only two other reported Gift Clause cases mention abuse of discretion in the context of public purpose, and both follow the pattern of *White*—that is, the courts performed an independent, comparative analysis of public purpose before they cited the phrase. *Turken*, 223 Ariz. at 348–49 ¶¶ 23–29; *Cheatham v. DiCiccio*, 240 Ariz. 314, 320–21 ¶¶ 20–27 (2016).

In the context of consideration, the phrase originally appeared in *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356 (1974). Although the court in that case stated that "determination of whether a gift or donation has been granted by a municipality to a private corporation is the same as the rule determining the validity of municipal contracts generally," it did not adopt or apply the rule[2] in concluding that "a gift…has been bestowed" if the consideration received by the government "is 'so inequitable and unreasonable that it amounts to an abuse of

[2] The next section discusses why the court did not actually adopt abuse of discretion as the standard.

discretion.'" *Id.* at 363. (citing *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382 (1951)). Seven subsequent Gift Clause cases quoted the phrase, but none of them used an "abuse of discretion" analysis in the context of consideration. *See Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346 (1984); *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319 (1986); *State ex rel. Corbin v. Super. Ct.*, 159 Ariz. 307 (App. 1988); *Hassell*, 172 Ariz. 356; *Maricopa Cnty. v. State*, 178 Ariz. 140 (Ariz. Tax Ct. 1994), *vacated by* 187 Ariz. 275 (App. 1996); *Turken*, 223 Ariz. 342; and *Cheatham*, 240 Ariz. 314.

The bottom line is this: abuse of discretion is *not* the standard courts use to analyze public purpose and consideration in Gift Clause cases. Although that phrase appears in some of these cases, that is only because any unconstitutional act is inherently an abuse of official discretion. But the ordinary "abuse of discretion" standard—which accords deference to a legislative decision that is not "arbitrary and capricious or an abuse of discretion," *Whiteco Outdoor Adver. v. City of Tucson*, 193 Ariz. 314, 317 ¶ 7 (App. 1998)—is not and never has been the legal test for Gift Clause cases. Instead, the actual legal analysis courts use in Gift Clause cases employs a specific comparative analysis of the details of an expenditure to ascertain whether that expenditure both *serves a public purpose* and also provides taxpayers with *proportionate consideration*.

B. Adopting an abuse of discretion standard would render the Gift Clause redundant because taxpayers can already challenge government contracts under that common-law standard.

If this Court were to adopt the common-law "abuse of discretion" standard for determining whether an expenditure violates the Arizona Constitution, the Gift Clause would become a mere redundancy. *See Landrum*, 71 Ariz. at 387.

Landrum involved a municipal contract in which a private business would pay $2500 per month to rent city property for 50 years on condition that the company build a parking garage. The plaintiff challenged this under the common-law rule that "a municipal contract will be declared void if there has been an abuse of discretion on the part of the municipal authorities executing it, or it is tainted with fraud, or is inequitable or unreasonable." *Id.* at 384–85 & 387. In deciding the issue, the court clarified that under that general rule, "one attacking the validity of a contract made by a municipality has the burden of showing….that the contract was either tainted with fraud or *so inequitable and unreasonable that it amounts to an abuse of discretion*." *Id.* at 388 (emphasis added).

Although the court in *Pilot Properties* quoted the italicized language in its discussion of the consideration requirement of the Gift Clause, it did not perform an abuse of discretion analysis. 22 Ariz. App. at 363. Instead, it concluded that determining whether an expenditure constitutes a "gift or donation by way of a subsidy" requires an assessment of material factors such as the fair market rental

value of the property the city was leasing to the private party in that case, the benefits bestowed on the city by eventually obtaining title to the property, "and other factors dealing with consideration received." *Id.*

Of course, a municipal expenditure that constitutes an abuse of discretion would be invalid *regardless* of the Gift Clause. Thus, adopting the abuse of discretion standard for Gift Clause analysis would render the clause redundant. "If it can be prevented, no clause, sentence, or word in the Constitution shall be superfluous, void, or insignificant." *Corp. Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159, 172 (1939). For "it cannot be presumed that any clause in the Constitution is without effect, and a construction which would lead to such result is inadmissible." *Id.* (citation omitted). Consequently, abuse of discretion is not the standard for Gift Clause cases. Instead, courts have adopted a comparative analysis to ascertain both the expenditure's purpose and to weigh consideration.

To "ascertain 'purpose,' [courts] must employ the *Wistuber* court's panoptic view; that is, [courts] must look at all the pertinent circumstances before coming to a conclusion." *Maricopa Cnty. v. State*, 187 Ariz. 275, 280 (App. 1996). Additionally, in "'determining whether a transaction serves a public purpose, courts consider the 'reality of the transaction' and not merely 'surface indicia of public purpose.'" *Cheatham*, 240 Ariz. at 320 ¶ 21 (citing *Wistuber*, 141 Ariz. at

349). This is another way of saying courts must not rubber-stamp the decisions of government officials.

Analysis of consideration is also more searching. Indeed, "the most objective and reliable way to determine whether [a] private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract." *Turken*, 223 Ariz. at 348 ¶ 22. "When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Id.*

Thus, to invalidate the Huntington and Arrowhead expenditures, Taxpayers only had to show *either* that the expenditures do not serve the public *or* that they lack adequate return consideration. Because Taxpayers have shown *both*, the decision below should be reversed.

II. Both agreements fail the consideration prong because economic impact is an indirect benefit, but *Turken* requires direct (i.e., bargained-for) consideration.

The City's $2.5 million payments to Huntington and Arrowhead are grossly disproportionate to what the City claims taxpayers receive in return—a promise to operate a private university within city limits. Answering Br. ep.31–33. But a promise to operate a university is merely a promise to operate one's own business. And while the City's payments are "directly tied" to performance thresholds in

each contract, the thresholds[3] have no market value; in fact, nothing in either contract provides any value to the City. IR.53 ep.6–13, 15–17; IR.58 ep.2–8; IR.62 ep.3–4, 7–9; Opening Br. ep.30–40.

Considering the contracts as a whole, *see Cheatham*, 240 Ariz. at 321 ¶ 25, Taxpayers addressed the City's contention that an operational university within city limits, as a culmination of the performance thresholds, provides tangible value to the City. However, the City does not receive an operational university under the Huntington and Arrowhead agreements. Though Huntington operates its own private school in Peoria, and Arrowhead renovated its own property in Peoria, the City and its residents (the public) do not own or enjoy open access to the campus, nor do they receive any services or other benefits from Huntington.[4] Opening Br. ep.8–14. Of course, they can obtain Huntington's services if they pay full price and are accepted into its Digital Media Arts program, but the same is true for *any* customer of Huntington's—including those who live outside of Peoria and whose tax dollars do not subsidize its operation.

[3] The City mistakenly states that the performance thresholds include "hiring minimum numbers of faculty and staff members." Answering Br. ep.13. Neither contract includes such a requirement. *See* IR.65 ep.6–19 and IR.67 ep.58–97.

[4] This is why the City's comparison to a subsidized flu-shot program is inapt. In that hypothetical, a city is contracting with a pharmacy to purchase flu shots for the public. Flu shots are tangible, as anyone who has received one understands. Moreover, the public would actually receive the flu shots the city purchased. In this case, the public is not receiving anything because the City has not purchased anything (not even a service) with the $2.5 million.

And while it may be true that two businesses operating within city limits affect the general economy, this is true of all businesses. Moreover, the City did not bargain for any such effect.[5] To qualify as consideration under the Gift Clause, consideration must be specifically *bargained for* in the contract, and it is undisputed that the City did not bargain for economic impact. Thus, even if Huntington's operation and Arrowhead's renovation of its property do ultimately yield some economic impact (and there is no guarantee that they will[6]), this impact would be an *indirect* benefit of the contracts. But because *Turken* held that indirect benefits are not consideration, the contracts have zero monetary value to taxpayers, and zero is grossly disproportionate to the City's nearly $2.5 million expenditures under the contracts.

A. "Economic impact" is not direct consideration because the City did not bargain for it.

It is axiomatic in both contract law and under the Gift Clause that a benefit must be *bargained for in the contract* to count as consideration. Restatement (Second) of Contracts §§ 71–72; *Cheatham*, 240 Ariz. at 321 ¶ 29. Something that is not bargained for is not consideration, including benefits that may result *indirectly* from a contracting party's promised performance. The *Turken* Court said

[5] Even if it did, the City and public would not be able to *receive* such an effect, as explained below.

[6] The City's expert testified that economic impact is an estimate and cannot be guaranteed. IR.67 ep.33 at 47:17–49:25.

this when it considered whether the Parking Agreement at issue in that case garnered adequate return consideration for the City of Phoenix:

> In finding that the Parking Agreement satisfied the *Wistuber* test, the superior court viewed the relevant consideration as not only the value of the parking places obtained by the City, but also indirect benefits, *such as* projected sales tax revenue. The court erred in that analysis…*[W]hen not bargained for as part of the contracting party's promised performance, such benefits are not consideration* under contract law or the *Wistuber* test. In evaluating a contract like the Parking Agreement, analysis of adequacy of consideration for Gift Clause purposes focuses instead on the objective fair market value of what the private party *has promised to provide* in return for the public entity's payment.

Turken, 223 Ariz. at 350 ¶ 33 (citation omitted; emphasis added). In other words, only direct consideration, which was bargained for and promised as part of the contracting party's performance, would suffice under the Gift Clause. The other benefits that the city claimed would result from the Parking Agreement in *Turken*—increased tax base, denser development, decreased pollution, and employment opportunities for city residents, *id.* at 348 ¶ 24—were merely indirect and therefore not consideration because the city had not bargained for them, and the developer did not promise to provide them as part of its contractual performance. The only thing the developer had actually promised to provide under the contract was parking spaces.

Likewise, it is undisputed that the City in this case did not bargain for economic impact and that Huntington and Arrowhead did not promise to provide

economic impact as part of their contractual performance. IR.65 ep.6–19; IR.67 ep.58–95. Therefore, economic impact is not consideration under contract law or the Gift Clause. At best, economic impact, if realized, will be an *indirect* benefit of Huntington's operation.

Unlike the contract in *Turken*, however, which provided public parking, the Huntington and Arrowhead contracts do not provide *any* tangible benefit or service (e.g., use of Huntington's facilities or discounted tuition) to the City or the public. Thus, the trial court erred as a matter of law in upholding the expenditures, because the public does not receive any valuable consideration in exchange for its payments to Huntington and Arrowhead.

B. Any value that may result from Huntington's operation is indirect and therefore not consideration.

The City's anticipated $11.3 million economic impact of Huntington's operation is not relevant to determining adequacy of consideration under the Gift Clause because courts only consider "the objective fair market value of what the private party *has promised to provide* in return for the public entity's payment." *Turken*, 223 Ariz. at 350 ¶ 33 (emphasis added). Because Huntington and Arrowhead never promised to provide an $11.3 million economic impact, any impact that results from the actual promises in the contracts is indirect, according to *Turken*, and indirect benefits are not consideration.

Because economic impact, when not bargained for as part of the contracting party's promised performance, is not consideration under *Turken*, the City instead argues that economic impact represents the *value* of the consideration. Answering Br. ep.32. The City attempts to support this argument by claiming that "[t]he only evidence in the record assigning a value to what [Huntington] and Arrowhead promised under the Agreements is the report of Bryce Cook," who "concluded that the only appropriate method for valuing the promise to open and operate a campus…in Peoria is to assess the potential impact of such a campus." *Id.* But the trial court never made such a finding regarding evidence in the record. IR.79. In fact, there are two additional numbers in the record assigning a value to the contracts: zero and $206,630, as argued by Taxpayers. IR.64 ¶¶ 66–67, 77–79. Nevertheless, the trial court did not address whether the parties' valuations are acceptable under *Turken*—even though this is a proper question of law.

Whether the proper amount is zero or $206,630, however, Taxpayers should prevail. In the court below, Taxpayers proved that the value of both contracts is zero because "Huntington and Arrowhead have not promised to give the City any direct economic return on its investment." IR.55 ep.6 ¶ 22. Moreover, the method used by Mr. Cook to measure economic impact is "ill-suited for measuring a project's return on investment and do[es] not measure the actual value of a project." *Id.* ep.4 ¶ 10. This is because economic impact, in this case, is

"merely…[a] prediction of changes in the local economy" rather than "a calculation of the value the City receives from the Huntington project." *Id.* ep.4–5 ¶¶ 11 & 14.

In other words, anticipated changes in the local economy—an intangible concept rather than a concrete representation of a promised return on investment—do not measure what the City or the public can expect to receive from Huntington's operation and Arrowhead's renovation of its own property. Changes in the economy are abstractions that the City cannot receive. Thus, economic impact is not only an indirect benefit rather than a bargained-for and promised performance, but it also fails to measure the value of the actual performance. Thus, it cannot, as a matter of law, serve as the value of the Huntington and Arrowhead contracts.

Another measure of value is the *fiscal* impact of Huntington's operation—which the City's consultant for the project projected to be $206,630—as it represents what the City might tangibly receive into its coffers because of Huntington's operation.[7] IR.55 ep.5–6 ¶¶ 16–18. As explained above, tax revenue is not consideration, because the City did not bargain for it and the legal obligation to pay taxes cannot be consideration, as the City correctly notes. Answering Br. ep.33–34. However, assuming the contracts do contain valuable, bargained-for

[7] However, this number is overinflated. See IR.53 at 11–12.

consideration, tax revenue is a fair estimate of the City's return on investment—and therefore a better estimate of the market value of the Huntington contract.

Whether the objective fair market value of the Huntington contract is zero or $206,630, either number is grossly disproportionate to the City's $1.875 million expenditure.[8] And the objective fair market value of the *Arrowhead* contract is simply zero. Opening Br. ep.37–40. Zero is, of course, grossly disproportionate to the City's $737,496 payment.

"The Gift Clause prohibits subsidies to private entities, and paying far more than the fair market value…plainly would be a subsidy." *Turken*, 223 Ariz. at 350 ¶ 35. The City's $2.5 million payments to Huntington and Arrowhead are subsidies because the City has paid far more than fair market value for their operation. Because the City's expenditures are subsidies to private businesses, both expenditures violate the consideration prong of the Gift Clause, and Taxpayers were entitled to summary judgment on that ground alone.

III. Neither agreement benefits the public at large.

As a threshold matter, the City is incorrect that the Huntington and Arrowhead agreements only need to serve a public purpose if they lack consideration. Answering Br. ep.37–39. "A public purpose…does not alone

[8] The City promised to pay Huntington up to $1.875 million and Arrowhead up to $737,496. The Court should determine disproportionality of consideration for each contract separately.

remove a challenged transaction from the prohibition of the gift clause"; there must *also* be proportionate consideration. *Hassell*, 172 Ariz. at 369 (citing *Wistuber*, 141 Ariz. at 349 and *Pilot Properties*, 22 Ariz. App. at 363); Opening Br. at 40–43. Because the City does not receive proportionate consideration in return for its $2.5 million payments to Huntington and Arrowhead, the expenditures are subsidies and violate the Gift Clause on that ground alone, regardless of their purpose.

Nevertheless, Taxpayers have shown that the expenditures do not truly serve the public, and the agreements fail the Gift Clause on that ground as well. Opening Br. ep.17–27. In response, the City attempts to divorce the word "public" from public purpose and claims that a statute, A.R.S. § 9-500.11, exempts its expenditures from the Constitution's requirements. But the City's interpretation of the Gift Clause contradicts decades of Gift Clause precedent, and statutes cannot trump constitutional limitations.

A. Divorcing the word "public" from public purpose would be a radical departure from Gift Clause precedent.

The Gift Clause "was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises," and "either objective may be violated by a transaction even though that transaction has surface indicia of public purpose." *Wistuber*, 141 Ariz. at 349 (citations omitted). This is why courts examine the *reality* of a challenged transaction under a "panoptic view of the facts" rather than

deferring to a government's own characterization of an expenditure's purpose. *Id.*

The City has provided many details about the programs it claims inspired its contracts with Huntington and Arrowhead—the EDIIP and the EDIS and P83. Answering Br. ep.9–15. But Taxpayers are not challenging the City's programs or the purpose of those programs. The City's programs are not the purpose of the specific payments to Huntington and Arrowhead; if anything, they are merely *surface* indicia of their purpose. In determining a contract's purpose, however, courts examine the reality of the specific transactions. In reality, the Huntington and Arrowhead expenditures do not serve the public but instead deplete the treasury by giving advantages to two private businesses.

In contrast, a purpose that is truly public must "involv[e] an entire community" or be "[o]pen or available for all to use, share, or enjoy." PUBLIC, *Black's Law Dictionary* (10th ed. 2014). Gift Clause jurisprudence—from the very first case to the most recent—has never departed from this meaning.

The first case to construe the Gift Clause, *Fairfield v. Huntington*, 23 Ariz. 528 (1922), upheld payments and medical expenses for the State Engineer, who was injured in an explosion while performing official duties. The court noted that "[a]n appropriation made in discharge of a moral obligation resting upon the state must be regarded as being for a public purpose." *Id.* at 535. Of course, compensating a public employee injured while performing public duties is

certainly distinguishable from compensating private businesses for operating themselves.

The last reported case to construe the Gift Clause is *Cheatham*, in which the court held that procuring a police force for the city, the intended purpose of the contract at issue, served the public. 240 Ariz. at 320 ¶ 23. Procuring a police force is distinguishable from subsidizing two private businesses that are not generally available or open to the public. *Cf. Proctor v. Hunt*, 43 Ariz. 198 (1934) (public purpose for governor's use of supplies and services but no public purpose for personal use); *Graham Cnty. v. Dowell*, 50 Ariz. 221 (1937) (invalidating an expenditure for a private road); *S. Side Dist. Hosp. v. Hartman*, 62 Ariz. 67 (1944) (citing R.C.L. for the proposition that a purpose is public if institution receiving the funds is a public corporation, not a private one, is required to serve the public, and its officers are chosen by the public).

In addition, even cases that have approved expenditures that also benefit private parties rest on the principle that the government must serve the public at large and may not single out any one person or company for special treatment. *See*, e.g., *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545 (1971) (upholding a town-owned water line supplying water to a private company because supplying water provides a direct benefit to the public at large).

In summary, although public purpose may have evolved "to suit industrial

inventions and developments and to meet new social conditions," Answering Br. ep. 26 (citing *City of Tombstone v. Macia*, 30 Ariz. 218, 226 (1926)), its meaning has *never* changed so drastically as to completely nullify the word "public" in the public purpose test, thereby sanctioning deals that directly and specially benefit favored private businesses while providing only intangible and indirect benefits to the public. Even when the *White* court upheld an expenditure of public money for a city's membership in a municipal league, which a prior court had invalidated, it explained that spending "funds in a reasonable effort to learn the manner in which complex municipal problems…are being solved in sister cities" improves the quality of service the city renders to its own taxpayers. 67 Ariz. at 240.

The expenditures at issue in this case simply do not benefit to the public at large. The City hopes the expenditures will lead to general economic improvement and claims that this case is about "the role of municipal governments in "helping to develop their local economies." Answering Br. ep.6. But Taxpayers have never challenged the City's role in achieving these laudable goals. In fact, they even suggested how the City could do so without violating the Gift Clause. *See* Opening Br. ep.28 (describing how a faster permit process would develop the economy).

Taxpayers are challenging two specific expenditures—not the City's role in the abstract or its programs in general—because neither expenditure serves the

public as set forth in these specific contracts. Taxpayers have explained why abstract hopes of economic development, as contemplated by *this* arrangement, do not serve the public: because any benefits that might result from the Huntington and Arrowhead deals are secondary, indirect, and intangible. Opening Br. ep.17–27. In contrast, Huntington and Arrowhead primarily, directly, and tangibly benefit from the $2.5 million. *Id.* Thus, approving such expenditures requires the Court to divorce the word "public" from the public purpose test and would be a radical departure from Gift Clause jurisprudence.

B. Declaring that a statute overrules the Arizona Constitution is not necessary because A.R.S. § 9-500.11 does not authorize subsidies.

The City also claims that A.R.S. § 9-500.11 exempts it from the Gift Clause's public purpose requirement. But a statute cannot authorize a city to do what the Arizona Constitution prohibits. If this Court were to construe A.R.S. § 9-500.11 as the City asks it to, however, the statute would be unconstitutional.

The statute provides that "the governing body of a city or town may appropriate and spend public monies for and in connection with economic development activities." A.R.S. § 9-500.11(A). It then states that an expenditure "includes any waiver, exemption, deduction, credit, rebate, discount, deferral or other abatement or reduction of the normal *municipal tax liability* that otherwise applies to similar existing business entities and properties in that city or town…and

that is generally understood as an inducement to locate a business facility or other operation in the city or town." A.R.S. § 9-500.11(D)(2) (emphasis added).

In other words, the statute authorizes cities to use tax incentives, not direct payments to private businesses, "as an inducement to locate" within city limits. *Id.* (defining an "expenditure" for economic development activities). But even if this Court adopts the City's interpretation, a statute can never supplant the Constitution. "When a state statute conflicts with Arizona's Constitution, the constitution must prevail." *Dobson v. State ex rel., Comm'n on Appellate Ct. Appointments*, 233 Ariz. 119, 124 ¶ 17 (2013). *See also Windes v. Frohmiller*, 38 Ariz. 557, 561 (1931) ("This court will not violate the people's trust by attempting to subvert their constitution to any legislative enactment.").

CONCLUSION

When Arizona became a state in 1912, the people of Arizona decided that "[n]either the state, nor any county, city, town, municipality, or other subdivision of the state shall ever…make any donation or grant, *by subsidy* or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7 (emphasis added). A "subsidy" is "[a] grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for state aid, because likely to be of benefit to the public." SUBSIDY, *Black's Law Dictionary* 1117 (2d ed.

1910). Thus, the framers of the Arizona Constitution made it clear that *any* donation or grant of public money in aid of the promotors of *any* enterprise is unconstitutional—even those likely (but not guaranteed) to benefit the public in some way.

The decision of the Superior Court should be reversed, with instructions to enter judgment for Appellants.

Respectfully submitted December 4, 2018, by:

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 5,157 words, excluding table of contents and table of authorities.

Respectfully submitted December 4, 2018 by:

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN, Appellants, v. CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona, Appellees.	No. 1 CA-CV 18-0379 Maricopa County Superior Court No. CV 2016-013699

CERTIFICATE OF SERVICE

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The undersigned certifies that on December 4, 2018, she caused the attached Appellants' Reply Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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