IN THE SUPREME COURT

STATE OF ARIZONA

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

APPELLANTS/PETITIONERS' CONSOLIDATED RESPONSE TO *AMICI CURIAE* BRIEFS OF THE LEAGUE OF ARIZONA CITIES AND TOWNS, PIMA COUNTY, AND GREATER PHOENIX LEADERSHIP, ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTRODUCTION

Much of the *amici*'s briefs consist of the political argument that subsidies to private businesses are a good idea. But "the most basic rule" of legal interpretation is that judges should "not enlarge the meaning" of the Constitution's simple English words "in order to make them conform to their own … economic views." *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, ¶6 (1976); *see also Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 413 ¶40 (2005) ("It is not [the Court's] role to determine public policy…. The framers of our constitution and the Arizona voters who ratified it" did so and courts "are bound to follow that mandate.").

Amici also engage in straw-man arguments that misconstrue Taxpayers' position and exaggerate this case's implications. This case does not threaten the constitutionality of all economic development. Nor does it affect municipalities' ability to enter into contracts that create private benefits in addition to public ones.

To put it simply: the Gift Clause says government cannot give away taxpayer money. Government can, however, *buy* things for the public. But because "paying far too much for something effectively creates a subsidy," *Turken v. Gordon*, 223 Ariz. 342, 350 ¶32 (2010), this Court has crafted a two-part test for determining whether an expenditure that *appears* to be a purchase is really a gift. *Id.* at 347 ¶18, 349 ¶30. First, the purchase must be for a qualitatively "public purpose." *Id.* at 346 ¶11. Second, the public must receive an equivalent benefit—measured by objective fair market value—for its payment. *Id.* at 349-50 ¶32.

Like *Turken*, this case can be decided on consideration alone: the City paid Huntington and Arrowhead $2.6 million—but these firms promised nothing in

return: no products, no services, no use rights. Instead, they simply promised to run their private business. There is no principled difference between this and paying McDonald's to sell hamburgers. *Amici* say that would be constitutional, because that is "economic development." But that is not, *by itself*, a valid public purpose—and even if it were, an expenditure is not constitutional where, as here, it lacks a *specific exchange of adequate value by the recipient of public funds*.

ARGUMENT

I. Paying businesses to operate themselves is not valid consideration.

A. Indirect, anticipated, or non-bargained-for benefits are invalid.

The *only* contractual obligations that Huntington and Arrowhead are bound by here are the agreement by Huntington to operate its own business in Peoria, and Arrowhead's agreement to renovate its own property for Huntington to use (for Arrowhead's profit). These are not promises to *provide anything to the City*. Paying businesses to operate within city boundaries, in exchange for no specific goods, services, etc., to the City, is merely an unconstitutional location subsidy.

Several *amici* argue about whether various kinds of contracts with private entities would satisfy the Gift Clause, but none of their examples have any relation to this case. For example, the League of Cities and Towns ("League") refers to "programs that support businesses in their communities for employee retention, reimbursement for personal protective equipment," etc. League Br. at 10. Presumably such programs would include specific, enforceable promises by those businesses to employ a certain number of residents, or to buy certain medical equipment, and would ensure that the amount of the payments are proportionate to

those benefits. That, at least, is what the Gift Clause requires. *See, e.g.*, *Turken*, 223 Ariz. at 350 ¶34; *Cheatham v. DiCiccio*, 240 Ariz. 314, 322, ¶32 (2016). But the Huntington and Arrowhead contracts contain no such promises. Neither firm promised that the public will receive *anything* in exchange for the $2.6 million. Nor did the City bargain for the benefits that it asserts here (general economic improvement and increased tax revenue)[1] as part of the *contracts*.

All Huntington and Arrowhead promised in return for the payments is to complete "performance thresholds" for operating their own businesses, APP.042–52. But the City does not *receive* these "performance thresholds," so they have no value as consideration. *Amicus* Pima County argues that the mere existence of "performance thresholds" satisfies the consideration requirement per se, Pima Br. at 16, but as the Attorney General's supplemental *amicus* brief (at 5-6) shows, this cannot be correct. Were it so, municipalities could evade the Gift Clause's requirements simply by requiring recipients of gifts to promise to spend those gifts within a certain time. That would turn the *Turken* test into "a test of whether the [city] has a stupid staff." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). Instead, the Gift Clause requires a substantive comparison of values, and an assurance that government exercise "sufficient control" over expenditures to ensure that they actually buy things of proportionate value for the public. *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 322 (1986).

[1] Although not consideration here, because not promised or bargained for in the contract, tax revenue is something the City does receive from Huntington. That does not satisfy the Constitution, however, as explained in Taxpayers' Supp. Br. at 11-12.

In fact, *Turken* expressly rejected the argument that, absent contractual guarantees, hoped-for economic improvements could satisfy the Gift Clause. There, the city argued that paying nearly $100 million to a private shopping mall for a few parking spaces was constitutional because the city hoped for greater *indirect* benefits from the mall's operation. 223 Ariz. at 350-51 ¶¶40-41. This Court held that such indirect benefits are not consideration. *Id.* at 350 ¶33.

The same applies here. The City is paying Huntington and Arrowhead $2.6 million because it *hopes* their operation will stimulate the economy. Absent contractual promises, such hoped-for economic stimulation is not consideration. Indeed, the payments in this case are even more lopsided than in *Turken*, where at least Phoenix received public parking spaces in exchange for taxpayer money. Here, the public receives *nothing* tangible—that is, nothing specific and measurable; no goods, no services, no use rights—for its payments. The things the City and *Amici* identify as being desired by or beneficial to the City (anticipated economic stimulus, employment opportunities, educational opportunities, tax revenue) may have value, but they are irrelevant to the consideration analysis in this case, because none of these hoped-for benefits are *promised performance in the contracts*. *Id.* at 350 ¶33.

B. Gift Clause consideration must be measurable and proportionate.

Pima County argues that the consideration prong of the *Turken* test should use the ordinary contract law concept of consideration, and that "there shouldn't be some special rule in the Gift Clause context." Pima Br. at 12. But *Turken* explicitly says this is wrong. 223 Ariz. at 349–50, ¶¶31-35.

In private contract law, courts do not compare the value paid with the value received, because any agreement to act or forbear is consideration for contract law purposes, *id.* at ¶32, and because private parties are at liberty to pay subsidies if they wish. But the Gift Clause limits what transactions the *government* may enter into: it forbids gifts and subsidies—and that logically requires a comparison between expenditures and benefits received. *Id.* at 350 ¶34. This is to ensure against situations where the government pays (in *Turken*'s hypothetical) $5 million for something worth only $5,000, which would equate to a gift of $4,995,000. *Id.*

The consideration analysis requires the Court to examine "the objective fair market value of what the private party has promised to provide in return for the public entity's payment." *Id.* at ¶33. For this reason, the City must obtain *measurable* benefits in exchange for public funds. Payments for things that are by their nature not susceptible of measurement cannot be consideration for Gift Clause purposes. For this reason, the League is wrong when it suggests that "economic diversity" alone satisfies the Gift Clause. League Br. at 5. *Turken* expressly addressed this when it said that such abstract benefits "may well be relevant in evaluating whether spending serves a *public purpose*," but "when not bargained for as part of the contracting party's promised performance…are not consideration." 223 Ariz. at 350 ¶33 (emphasis added). In this case, the same reasoning leads to the conclusion that the Huntington and Arrowhead agreements are gifts. Neither party promised to give anything to, or do anything for, the public in exchange for the taxpayer money they received.

To put the point more simply, the government may constitutionally decide to buy goods or service from one business rather than another on the grounds that the purchase will—in addition to obtaining a proportionate benefit for the public—increase the "economic diversity" in the area. But it may not subsidize a private business, and obtain no value from that business, and then justify that gift of funds on the grounds that the payment increases "economic diversity."

C. Only bargained-for promises can be Gift Clause consideration.

Amici mischaracterize Taxpayers' position as arguing that *any* expenditure to benefit the economy "has zero value," League Br. at 6, 20, and that ruling in their favor would render it "unnecessary for this Court to analyze the terms of the contracts at all" when economic development is involved. *Id.* at 4. But Taxpayers have never suggested that "economic development" is always *valueless*, or that contracts executed in the hopes of improving the economy cannot contain valuable, constitutionally required, consideration. Rather, they say that because the City's hoped-for economic development was "not bargained for as part of the contracting part[ies'] promised performance," *these* contracts do not contain valuable consideration and are therefore unconstitutional gifts. *Turken*, 223 Ariz. at 350 ¶33.

It is actually *amici* who urge the Court to ignore the terms of the contracts and count vague notions of "economic development" and other non-bargained-for benefits as consideration. This Court cannot do that. Instead, it must "compare the public expenditure to what the government receives *under the contract*." *Id.* at 348 ¶ 22 (emphasis added). Under *these* contracts, neither company has any binding obligation to provide direct, specific, quantifiable benefits to the City.

The Huntington agreement does not require Huntington to enroll students from Peoria, or to hire anyone, much less anyone from Peoria; it is merely required to appoint leadership and enroll students. Peoria officials exercise no control over Huntington's operations; Huntington's out-of-state Board of Trustees makes the decisions. Taxpayer's Supp. Br. at 17. Applicants for employment must sign a statement of religious faith to be hired, which excludes many would-be candidates. APP.076 ¶ 24. And its sole program of study, Digital Media Arts, is a niche market, not a general educational program as provided by a public university.

Therefore, the contract secures nothing of quantifiable value for Peoria residents. Pima suggests an expert could just assign a value to "what a community like Peoria will normally be required to pay in the 'market' to induce a company like HU to relocate there." Pima Br. at 13. But the reason Pima puts the word "market" in scare quotes is because there *is* no such market. Communities don't pay businesses to operate for the benefit of others; *customers* pay businesses for goods or services provided *to customers*. And here, Peoria is not *buying* a business or goods or services from a business. It's just paying businesses to operate.

Peoria could have easily crafted an agreement that would have avoided all of these deficiencies: it could have required Huntington to provide admissions preferences or tuition discounts for Peoria residents. It could have required Huntington to give Peoria residents special access to its facilities, or offer them free or discounted classes, programs, or events. It did none of these things.

It is precisely to prevent government officials from spending taxpayer money without getting enough (or *anything*) for the public in return that the people

adopted the Gift Clause. Even the League admits that the Clause's "function is to protect the public funds." League Br. at 2. In that sense, the Clause *is* "a special rule," Pima Br. at 12—it's a rule that requires courts to compare the objective fair market value of the good or service promised to the government against the amount of tax dollars spent. *Turken*, 223 Ariz. at 350 ¶33.

Oddly, Pima argues that the Gift Clause was *not* drafted to prevent government from subsidizing private businesses merely in the hope that their operations would improve the economy, and to support this contention, it relies on an example of its own waste: a pre-statehood incident in which that county issued bonds for a railroad, "incur[ing] $150,000 in debt and the public received nothing in return." Pima Br. at 16. What this is supposed to prove is unclear, because Pima acknowledges that this was *just* the sort of thing the Clause was written to prevent—and Pima fails to show how the Peoria arrangement is different in principle from that situation. It says the Huntington and Arrowhead agreements were "heavily negotiated," *id.*, but the mere existence of negotiations cannot satisfy the Gift Clause. It says the subsidies in this case were part of a "transparent" program "with defined parameters," *id.*, but mere transparency cannot ensure that public expenditures are proportionate to the recipient's contracted-for performance, as the Gift Clause requires. *Turken*, 223 Ariz. at 350 ¶33. And unless the "parameters" include requirements that the public receives specific goods or services that are of adequate value, an arrangement violates the Gift Clause. *Id.* at ¶34. But no such guarantees exist here.

Thus Pima's railroad example fails to show that *these* arrangements satisfy the Gift Clause.[2] On the contrary, it supports Taxpayers' argument: like the railroads of past ages, Huntington and Arrowhead received taxpayer money to engage in their private business, with no contractual promise to deliver direct, or even *indirect*, benefits to the public. Taxpayers' Supp. Br. at 17.

The Pima railroad debacle would have been avoided if the Gift Clause had existed then, because that Clause forbids all such transactions, regardless of their anticipated outcome. Disregarding that Clause puts taxpayers at risk. In fact, the City recently entered a similar arrangement with Trine University—which failed. Taxpayers' Supp. Br. at 18. Such debacles are why the framers of our Constitution banned *all* forms of subsidies to private business regardless of their perceived desirability. *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 53 (1959).

II. Paying private businesses to operate in hopes of stimulating "economic development" is not a valid public purpose under the Gift Clause.

As noted above, this case, like *Turken*, is primarily about consideration: because Huntington and Arrowhead have not bound themselves by contract to provide the City with benefits that are even close to being proportionate to the $2.6 million of taxpayer money, the agreements violate the Gift Clause. That makes it unnecessary for the Court to articulate a test for public purpose. Nevertheless, the

[2] To the extent that Pima thinks these "safeguards" prove "there is no rational basis" for concluding that agreements at issue violate the Gift Clause, that argument commits the fallacy of begging the question. Pima Br. at 16. Even the League admits that compliance with statute does not guarantee that an expenditure complies with the Constitution. League Br. at 11. The question in this case is whether the "safeguards" satisfied the Gift Clause. Taxpayers argue that they did not.

public purpose offered by the City in justification for these agreements (economic development) is constitutionally inadequate in the circumstances of this case.

To be clear: Taxpayers do *not* argue that policies aimed at incentivizing economic development can never serve a public purpose, or that developing the economy can never be a factor in a decision to spend public funds. Rather, they contend that in *this* case, the location subsidies given to Huntington and Arrowhead do not serve a public purpose. The question here isn't whether economic development is *per se* constitutional. Rather, it's whether a grant to a private entity that provides nothing to the public in return, serves a public purpose simply because it might spur economic development. Arizona law answers no.

Kromko, 149 Ariz. at 321, said that while the definition of public purpose may be broad, it "'cannot be used to foster or promote the purely private or personal interests of any individual.'" (citation omitted). While the distinction between public and private beneficiaries is "perhaps incapable of definition," *City of Tombstone v. Macia*, 30 Ariz. 218, 222 (1926), decisions—and particularly *Turken*—have focused on the specific, identifiable benefits obtained by the public (such as "providing parking" 223 Ariz. at 348 ¶23) rather than abstract benefits such as anticipated economic growth. But here, Huntington and Arrowhead have made no promises to provide anything specific and identifiable—or even something as abstract as economic development—to the City. Unlike in *Turken* or *Kromko*, the beneficiaries of the expenditures here are overwhelmingly private entities, engaged in a private enterprise. That cannot be rationalized on the theory that they will serve the "public" purpose of general economic growth.

A. A public purpose benefits community rather than private interests.

GPL is plainly wrong when it suggests that public purpose is a subjective, intent-based standard. GPL Br. at 9. Nobody suggested in *Turken*, for example, that the City did not subjectively believe its subsidy of a private shopping mall would benefit the public somehow. Yet this Court repeatedly emphasized that the test is *objective*, not subjective. 223 Ariz. at 345–48 ¶¶10-29.

Similarly, the *amici*'s emphasis on judicial deference is misleading. Pima Br. at 5 and League Br. at 15 say "public purpose" is exclusively for the City to decide. But *Turken* made clear that "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." 223 Ariz. at 346 ¶14. True, courts apply an abuse of discretion standard to the public purpose question—but *a misapplication of law or legal principles is an abuse of discretion*. *Tobin v. Rea*, 231 Ariz. 189, 194 ¶14 (2013); *Rios Moreno v. Ariz. Dep't of Econ. Sec.*, 178 Ariz. 365, 367 (App. 1994).

There is no bright-line rule for public purpose, but it is nonetheless a crucial distinction if the Gift Clause is to serve its purpose of preventing government from simply handing out public money for private enterprises. Arizona cases have said a public benefit is one that obtains specific values—goods or services—for the public, or serves a traditional government function. It was medical services in *Kromko*, parking in *Turken*, and pollution control in *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368 (1973). By contrast, paying for land for a private firm or donating start-up capital to a fabric company are not public purposes, *Macia*, 30 Ariz. at 222–23, nor is buying (non-blighted) land to devote it to "a more desirable

economic land use," *Hogue v. Port of Seattle*, 341 P.2d 171, 191 (Wash. 1959), or distributing money "to private facilities without any government control or contractual requirements to utilize the money to provide indigent care." *Orthopedic Hosp. of Okla. v. Dep't of Health*, 118 P.3d 216, 221 ¶9 (Okla. Civ. App. 2005).

In other words, determining what purposes are public involves a multifactor analysis, which borrows from other legal contexts in which the question of "public" purposes arises. *Turken*, for instance, cited *Macia*, a Tax Clause case, on this question, because that Clause also requires that taxes be levied for a "public purpose." 223 Ariz. at 346 ¶12. A similar "public" analysis also applies to eminent domain cases—where, again, courts determine whether an act is sufficiently public by considering such factors as: whether title to the property will be held by a private or public entity, whether the land will be used for private profit or to provide public services, what degree of control the government will exercise over the property, whether the whole community will use it or only a few people, whether profit is the overriding motivation, etc. *Bailey v. Myers*, 206 Ariz. 224, 230 ¶24 (App. 2003). There is no "mechanical formula" for determining public versus private, *id.* at 228 ¶15, but a use is "unquestionably public" when property is taken "to build streets, jails, government buildings," and other entities that "the government will own or operate"—and private where a taking is for "private developers for private commercial use." *Id.* ¶16.[3]

[3] Of course, "public use" for eminent domain purposes is not identical to "public purpose" for Gift Clause purposes, *Turken*, 223 Ariz. at 349 ¶29 n.5, but *Bailey*'s multifactor analysis helps determine whether a government act is "public."

Applying this analysis, the Huntington and Arrowhead agreements are, again, insufficiently public. The land is in private hands; it will be used for private profit; Huntington will provide no public services (just a single degree program for paying students who seek instruction from a specific sectarian perspective); the campus will not be open to the public, and private business success is the overriding goal—with, of course, the hope of indirect benefits flowing therefrom. The project is about private developers engaged in a commercial use.

The problem with saying economic development is *per se* a "public purpose" is that all private businesses contribute to development in some sense. As Michigan's Supreme Court has said, the "vague economic benefit stemming from a private profit-maximizing enterprise" is not itself a public undertaking because "'incidentally every lawful business'" will "'in some manner advance the public interest.'" *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004) (citation omitted). Such a conclusion would therefore entirely erase the boundary between public and private purposes.

The League is correct that government expenditures need not "affect all residents equally" to serve public purposes, League Br. at 2, but that is irrelevant, because that is not what it means to serve the public "at large." Rather, the question is whether the expenditure is for purposes that, as a matter of principle, are public in nature. *Humphrey v. City of Phoenix*, 55 Ariz. 374 (1940), supports this point, because it has long been held that "slum clearance projects" are "for the public good and general welfare, even though the effect is felt by a given class more than by the community at large." *Id.* at 387. In other words, cities may fund programs

that benefit some members of the public more than others. *Accord*, *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549–50 (1971).

But this case does not involve the elimination of slums, eradication of blight, or any other public undertaking that just happens to benefit a private party. It is the reverse: a payment to a private party that obtains no public benefits, but which the *amici* say will produce "vague economic benefit." *Hathcock*, 684 N.W.2d at 786. That is insufficient. *Only* Huntington and Arrowhead benefit *directly and certainly* from those expenditures, as contemplated in the contract. As another court has observed, "general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public as distinguished from a private purpose." *State ex rel. Beck v. City of York*, 82 N.W.2d 269, 274 (Neb. 1957). This is true even though "the city may be benefited by the location of the company in the city." *Id.*

Amici are wrong to say this Court "rejected a 'primary/incidental benefit' analysis" in *Turken*. League Br. at 17. Rather, *Turken* said that the rule that the public must be the primary beneficiary of an expenditure "reflects a core Gift Clause principle." 223 Ariz. at 348 ¶20. *Amici* ask this Court to invert this core principle, and hold that an expenditure need *not* primarily serve the public, but may primarily serve a *private* interest as long as the government claims the public will benefit in the long run—a claim to which (*amici* argue) courts must defer. League Br. at 17; Pima Br. at 7; GPL Br. at 7. That, however, is simply not the test.

B. This Court has never said location subsidies serve a public purpose.

Turken involved a location subsidy like this one. The shopping mall was going to be built in Scottsdale, so Phoenix gave it a subsidy to get it to locate in Phoenix, instead. 223 Ariz. at 344 ¶3; *See also Turken v. Gordon*, 220 Ariz. 456, 459 ¶3 (App. 2008). Phoenix argued that this was constitutional because it would result in increased tax revenues. This Court said no. *Turken*, 223 Ariz. at 350 ¶ 33. Rather than focus on those anticipated, indirect benefits, the Court focused on the specific, bargained-for benefits promised in the contract: i.e., the parking spaces.

In fact, Arizona courts have never held that economic development, *by itself*, is a public purpose. Instead, they have held that government must obtain some *specific*, public benefit. Although Pima Br. at 9-10, claims that the Town's installation of a water line in *Walled Lake Door* "would have no purpose other than supplying water to [a] factory in the event of a fire," that is not what this Court said. This Court *rejected* the claim that the water line would "benefit only the Company," and concluded that "ownership and control over the water line…remain in the *Town*." *Walled Lake Door*, 107 Ariz. at 549-50 (emphasis added). It also concluded 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.* (emphasis added).

Likewise, *Nelson* never said economic development was a sufficient public purpose for an expenditure, as *amici* claim. GPL Br. at 5-6; Pima Br. at 11. Pima speculates that the real purpose of installing air pollution control facilities in a smelter at a copper mine "likely wasn't to protect the public," *id*. at 11, but this

directly conflicts with the Court's holding that "[t]he obvious public purpose sought to be accomplished" by the expenditure "is the protection of the health of the citizens of this state by preventing…pollution." *Nelson*, 109 Ariz. at 374.

Perhaps *amici* are confused by the fact that government often creates infrastructure in hopes that economic growth will follow. That is a constitutional public purpose. Addressing air pollution, or providing fire protection, or fixing roads, are legitimate public functions, which government may undertake in the expectation that a healthy infrastructure will ensure economic development. Taxpayers have never contended that the government could not (to use the example from *Turken*, 223 Ariz. at 350 ¶34) pay for a private party to repair a sewer line, in hopes that this will help improve the business environment in the community. Such a project would not be a gift of public funds—even if the city considered the possibility of economic development as a reason to engage in the project—as long as the contract specified goods and services to be provided by the contractor, and the value of the repair was proportionate to the expenditure. And even public health expenditures must include government oversight to ensure that the payments obtain public benefits instead of benefitting private interests. *Kromko*, 149 Ariz. at 321; *Orthopedic Hosp. of Okla.*, 118 P.3d at 221–22 ¶9.

That is a far cry from what happened here. The Huntington and Arrowhead agreements do not contemplate the delivery of goods or services to the public, but simply pay these private firms with tax dollars to operate their own businesses for profit in Peoria. That's all, and that alone has no quantifiable value; it therefore cannot withstand the *Turken* test.

C. Payments aimed at development alone don't satisfy the Gift Clause.

GPL cites out-of-state cases for the proposition that economic development, by itself, is a public purpose. But they are distinguishable in revealing ways.

The arrangement in *Burkhardt v. City of Enid*, 771 P.2d 608 (Okla. 1989), was remarkably different from the arrangement here. There, the government bought land, and leased it to a private operator in exchange for specific contractual guarantees, including public use of the property and special scholarships for locals to attend the university. *Id.* at 611. None of those are present here. Huntington and Arrowhead retain ownership of their property and are not required to let the public use it; they provide no benefits to Peoria citizens, are not subject to government oversight to ensure public purposes are accomplished, and do not provide general education as the university in *Burkhardt* did.

Likewise, in *Hayes v. State Prop. & Bldgs. Comm'n*, 731 S.W.2d 797 (Ky. 1987), the court found that the contract included guarantees that Toyota would pay the state the difference if anticipated tax revenues fell below expectations. Thus, the court found that "[n]o conveyance of publicly financed property without the receipt of fair market value compensation will occur." *Id.* at 799. That is wholly different from the Huntington and Arrowhead agreements, which include no exchange of equivalent values, and in which tax dollars are given to these private entities without the promise of *any* revenues, goods, or services for the public.

All the other cases GPL cites come from states with drastically different gift clauses. In *Hale v. State*, 818 N.W.2d 684 (N.D. 2012), North Dakota's Supreme Court declared that that state's constitution contains an express exception to its gift

clause allowing the state to engage in "enterprises," which, it said, is what was happening there. *Id*. at 694. In *Bordeleau v. State*, 960 N.E.2d 917, 922 (N.Y. App. 2011), the court emphasized that New York's Constitution allows the government to give grants to "public benefit corporations," which is what was occurring there. Our Constitution contains no such provision, and Arrowhead and Huntington are not public benefit corporations. *Salem v. McMackin*, 291 N.E.2d 807 (Ill. 1972), involved the Illinois Constitution, which does not contain a gift clause comparable to ours.[4] And *Moschenross v. St. Louis Cnty.*, 188 S.W.3d 13 (Mo. App. 2006), involved Missouri's Constitution, which imposes only a lenient "primary effect" test. *Id*. at 21–22. None of those cases sheds light on our Constitution.

Blinson v. State, 651 S.E.2d 268 (N.C. App. 2007), would be more helpful if this Court were disposed to entertain the *amici*'s political arguments instead of following the Constitution's language. That case involved a $300 million subsidy to Dell Computers to keep a factory in Forsyth County. *Id.* at 330. North Carolina has no gift clause comparable to ours, so the court upheld the subsidy. But the factory only employed half the 2,000 workers Dell said it would hire, *see* Adams, *Dell Shuts NC Plant Despite $300 Million in Incentives*, Heartland Institute, Dec. 14, 2009, and two years later, the factory closed anyway. The 900 workers lost their jobs—and taxpayers lost their tax money. WRAL, *Dell to Close N.C. Plant,*

[4] *See* Bieszczat, *State Constitutional Gift Clause Challenges to Release Time Provisions of Collective Bargaining Agreements*, 2017 U. Ill. L. Rev. Online 1 (2017) ("Unlike Arizona constitutional jurisprudence, Illinois courts have not expressly imposed a requirement that public spending be supported by adequate consideration in order for spending to be constitutionally valid.").

Oct. 8, 2009. *Blinson*—like the Pima County railroad debacle—shows why our Constitution contains its strong prohibition against government "*ever* giv[ing] or [lending] its credit…, or mak[ing] *any* donation or grant, *by subsidy or otherwise*, to any…corporation." Ariz. Const. art. 9 § 7 (emphasis added).

III. A ruling for Taxpayers does not prevent cities from promoting economic development or providing aid during an emergency.

It is ironic that the League Br. at 7, complains that cities are facing "budget shortfalls" and "significant revenue loss" due to COVID-19—while also arguing that cities should *not* be held to constitutional spending limits. On the contrary, it is *most* important to obey the Constitution during emergencies. *Arizonans for Second Chances v. Hobbs*, 471 P.3d 607, 613–14 ¶9 (Ariz. 2020).

Starting a business is risky even when funded by experienced private investors in prosperous times. And Peoria taxpayers have been burned by lopsided deals before, as in the Trine University case. APP.057–58 ¶12. As *amici* acknowledge, taxpayer dollars are not plentiful. League Br. at 7. With many Arizonans out of work and in the midst of a national crisis, it is more important than ever to ensure that the public gets something of adequate value for its dollars.

Ruling for Taxpayers would not prevent cities from dealing with emergencies like the pandemic in a targeted way that ensures their citizens receive something in exchange for their money. Buying health supplies for the public, or compensating businesses that the government orders shut down, League Br. at 10, serve public purposes. That question, in fact, was answered in *Turken*, 223 Ariz. at 350 ¶34, and *Kromko*, 149 Ariz. at 321, which said expenditures for public health

must obtain specific, contracted-for benefits of equivalent fair market value, and be overseen by public agencies to ensure the purchases aren't private subsidies.

There's no basis for concern that enforcing the Gift Clause here will render local governments powerless to serve traditional public interests. Pima suggests that railroads, public markets, and convention centers would be unconstitutional under the Taxpayers' argument, Pima Br. at 8, but this is false. Railroads are regulated public utilities and common carriers (thus legally required to serve all, *Mendel v. Mt. States Tel. & Tel. Co.*, 117 Ariz. 491, 493 (App. 1977)). Public markets are a traditional public function, as are firefighting and pollution control. Pima Br. at 10-11. Convention centers are public facilities owned, operated, or overseen by public bodies. None of these examples are comparable to a city giving $2.6 million to two private companies who have not bound themselves by contract to provide any goods, services, or other measurable and specific benefits to the public in exchange for the money, and are not subject to government oversight, but are simply being subsidized to operate for their own profit.

Nor is the League correct that Taxpayers make an "extreme" argument that cities may "not engage in any form of economic development." League Br. at 3. There are many *constitutional* things cities can do to foster a business-friendly environment, such as improving road maintenance, public safety, and recreational facilities. What they may not do is give gifts of public funds to private businesses.

CONCLUSION

The Court should *reverse* the judgment of the Court of Appeals, with instructions to enter judgment for Taxpayers.

Respectfully submitted this 5th day of November 2020 by:

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