



BACKGROUND
NEPTUNE SWIMMING FOUNDATION v. CITY OF SCOTTSDALE

Executive Summary

Government subsidies to private business come in all shapes and sizes. Sometimes government hands money directly to a private business. Sometimes it gives companies tax exemptions or other benefits. And sometimes it allows private businesses to use government-owned property for free or for substantially below-market rates. In any case, when government subsidizes private businesses, it violates the Arizona Constitution’s Gift Clause—a provision that prohibits city, county, or state officials from picking winners and losers in the marketplace.

In this case, officials in the city of Scottsdale decided to give one private company exclusive use of four city-owned swimming pools at amounts far below what others were willing to pay. It did so through an arbitrary process that violated the city’s own procurement rules, and despite the fact that the city admitted that a different business was actually the higher bidder. The Goldwater Institute has gone to court on behalf of Swim Neptune—a competitive youth swimming organization that wants the opportunity to use these pools for a fair price. We’re arguing that the state Constitution does not allow the city to simply cut deals that enrich private companies with public money.

The Problem

Swim Neptune is a competitive youth swimming organization that operates across much of the Phoenix area. For years, Swim Neptune has been trying to gain access to Scottsdale public pools. But that’s complicated by the fact that for more than 50 years, the city has given an exclusive use contract to the Scottsdale Aquatic Club (SAC). SAC is a private organization that requires a membership fee and the completion of an athletic tryout to join. Scottsdale allows SAC exclusive use to city-owned swimming pools, and it has refused to allow Swim Neptune access to pools, giving SAC a virtual monopoly.

That monopoly comes at the cost of taxpayers. The city has long required SAC to pay only \$3 for the use of a “short course” swimming pool lane per hour, and \$4 per hour for “long course” lanes, though they recently increased the cost by a dollar. In comparison, Scottsdale charges other users \$10 per short course lane per hour and \$23 per long course lane per hour. This adds up quickly, given that SAC typically uses 30,000 lane hours per year, meaning that the exclusive agreement costs the city more than \$284,000 in lost revenue each year.

Fifteen years ago, Swim Neptune began asking the city to let it use the pools, but the city has consistently refused. In 2016, however, when Swim Neptune filed an objection to the city’s proposal to renew its exclusive agreement with SAC, the city agreed to issue a Request for Proposals (RFP)—which was supposed initiate a competitive bidding process. The RFP (and the city’s ordinances) said that the “most advantageous bidder” would be awarded the contract.

But that’s not what happened. Swim Neptune offered to pay the city \$12 per hour for both “short course” and “long course” lanes. This was substantially more per swim lane than SAC was paying. When the city completed its paperwork on the RFP, it initially concluded that SAC had won, and it announced that it would grant SAC the award. But Swim Neptune pointed out that the city had made a mathematical error, and that Swim Neptune was actually the highest bidder. The city reexamined the paperwork and agreed: Swim Neptune was, in fact, the highest bidder. Yet rather than grant Swim Neptune the contract, the city decided to add a new requirement: It demanded that Swim Neptune and SAC give additional in-person presentations about how they would use the swim lanes—a requirement both Neptune and SAC protested. Then the city simply cancelled the RFP entirely and gave SAC the use of the swim lanes anyway.

The Law

The Arizona Constitution’s Gift Clause provides that “[n]either the state, nor county, city, town, municipality, or other subdivision shall *ever* give or loan its credit in the aid of, or make any donation or grant, *by subsidy or otherwise*, to any individual, association, corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company or corporation.”¹

This language is absolute, and it applies not only outright payments to private companies, but also other kinds of benefits, such as tax exemptions.² One form of subsidy is when government allows private entities to use government property at substantially below-market rates.

The purpose of the Gift Clause is simple: to prevent the government from using its powers to enrich people or organizations based on their political influence as opposed to their merit. During the nineteenth century, state and local governments spent countless millions subsidizing private companies—particularly railroads—which often led to bankruptcy and scandal. Learning from those lessons, most states in the union adopted constitutional provisions forbidding government from spending its money on private enterprises. Arizona’s Constitution, written in 1910 and approved in 1912, includes some of the strongest legal prohibitions on corporate welfare in the country.

The Arizona Supreme Court has ruled that government can give money or resources to private entities without violating the Gift Clause so long as a.) it does so for a public purpose (instead of for the benefit of a private entity) and b.) it gets a proportional value in exchange for its money. In other words, courts look at “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 in violation of the Gift Clause.”³ In other words, the Gift Clause allows the government to *buy* things, but not to give money away—and if a government expenditure “greatly exceed[s] the consideration received in return,” it can “amount to a subsidy to a private entity.”⁴ For example, “a city’s purchase of a garbage truck would undoubtedly serve a public purpose. Purchasing the truck for twenty times its fair value, however, would constitute a subsidy to the seller.”⁵

¹ Ariz. Const. Art. IX, § 7 (emphasis added).

² See *Englehorn v. Stanton*, No. CV2017-001742 (Maricopa Co. Super. Ct. Aug. 17, 2020).

³ *Schires v. Carlat*, 480 P.3d 639, 644 (Ariz. 2021).

⁴ *Turken v. Gordon*, 223 Ariz. 342, 347 (2010).

⁵ *Id.*

But Scottsdale isn't getting anything at *all* in return for giving one company a monopoly on use of public resources. SAC didn't agree to give the city anything in exchange for use of the pools other than the below-market payments. And those payments are so far below the market rate that in effect taxpayers are being forced to subsidize SAC to the tune of \$200,000 a year.

Case Logistics

The plaintiff in the case is Neptune Swimming Foundation.

The defendant is the city of Scottsdale.

The case was filed in Maricopa County Superior Court in May 2019. The Superior Court ruled against Swim Neptune in December 2020. The appeal was filed in February 2021 and is case number 1 CA-CV 21-0053.

The Legal Team

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