COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRAMLEY PAULIN; AUSTIN SHEA [ARIZONA] – 7TH STREET AND VAN BUREN LLC; AND CULVER PARK – 1129 NORTH FIRST STREET, LLC; MAT ENGLEHORN; HOPELESSLY URBAN, LLC, Plaintiffs / Appellants / Cross-Appellees, v. CITY OF PHOENIX, a municipal corporation of the State of Arizona; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix, Defendants / Appellees / Cross-Appellants, 6TH & GARFIELD OWNER, LLC, a limited liability company, Intervenor / Appellee / Cross-Appellant.	No. 1 CA-CV 24-0086 Maricopa County Superior Court No. CV 2022-005658

JOINT RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

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Pursuant to the Court's November 4, 2024, Order, Defendants City of Phoenix and Jeff Barton and Intervenors 6th and Garfield Owner, LLC (collectively, "Defendants") respond to Taxpayer's August 5, 2024, Notice of Supplemental Authority ("Notice"), which cites to *Gilmore v. Gallego*, 552 P.3d 1084 (2024).

In *Gilmore*, plaintiffs challenged release time provisions in a Memorandum of Understanding between the City of Phoenix and the Phoenix Police Union. *Gilmore*, 552 P.3d at 1086-87 ¶¶ 3-11. Specifically, the MOU included "paid release provisions" for union members to engage in "lawful union activities," like "attend[ing] Union seminars." *Id.* at 1086 ¶ 7. These provisions cost the City approximately $499,000 per year. *Id.* at 1087 ¶ 11. The "benefits" the City received in return were "participation on task forces" and "representation of [police union] employees in grievance proceedings." *Id.* at 1093 ¶ 40. Because these benefits were "microscopic compared to the City's expenditure," the release time provisions violated the Gift Clause. *Id.*

Gilmore supports two arguments made by Defendants in their Joint Response Brief ("J.R.B.").

First, Defendants argue that the $9 million "Direct Benefit Amount" paid by Garfield to the City qualifies as consideration under the Gift Clause because it is "contractually guaranteed" and provides tangible "economic benefit[s] to the City." J.R.B. at 46. Paragraph 32 of *Gilmore* supports this position by contrasting

quantifiable "enforceable promis[es]" (which are "adequate consideration") against non-quantifiable "indirect benefits" (which are not). In particular, *Gilmore* explained that—unlike the $9 million direct benefit amount—the "benefits" provided to the City under the MOU were "too indefinite to enforce, much less *value*." *See Gilmore*, 552 P.3d at ¶¶ 32, 40 (emphasis added and quotation omitted).

Second, Defendants argue that "anticipated tax revenue forgone" has "no place in the Gift Clause inquiry." J.R.B. at 47. Paragraph 41 of *Gilmore* supports this argument by explaining that "[p]reexisting legal obligations cannot constitute consideration for Gift Clause purposes."

Beyond these two items, *Gilmore* is largely irrelevant because it does not concern the matters actually decided by the Superior Court below: (1) that this case is barred by laches and (2) that the Gift Clause does not apply to the transaction. *See id.* at 42.

Still, Taxpayers argue that *Gilmore* supports their position that the $9 million minimum direct benefit amount is irrelevant for Gift Clause purposes because it "explain[s] that tax payments required by the contract in that case did not count as consideration under the Gift Clause …." Notice at 1. The contract in *Gilmore* did not concern "tax payments." And even if it did, Taxpayers ignore that (1) Garfield is obligated to pay the entire $9 million regardless of its total tax liability and (2) Garfield is obligated to make numerous other "direct" payments to the City outside

of the minimum direct benefit amount. *See* J.R.B. at 17, 46. This situation is thus easily distinguishable from cases like *Schires v. Carlat*, 250 Ariz. 371 (2021), which is cited throughout the Notice, where the *only* direct benefit the private party provided to the government was "anticipated" future taxes. *Schires*, 250 Ariz. at 377 ¶¶ 17-18; *see also* J.R.B. at 46.

Taxpayers also argue that *Gilmore* supports the position that the Gift Clause applies to transactions even if they do not involve "direct outlays of government money." Notice at 2-3. But the release time "benefits" the City conferred to the Union *were* direct outlays of government money. *Gilmore*, 552 P.3d at 1086-87 ¶¶ 7, 11 (explaining that the City "paid" workers to perform union activities, which cost around $499,000 per year). Regardless, Defendants have never argued that only "direct outlays of government money" are subject to the Gift Clause. Rather, they have explained that there is a difference between measures (1) forgoing future, un-owned, revenues (which are *not* subject to the Gift Clause) and (2) refunding revenues that the government already collected (which are subject to the Gift Clause). J.R.B. at 33-37; *see also Maricopa Cty. v. State*, 187 Ariz. 275, 280 (App. 1996). This case falls under the former category because the City does not "own" future, un-collected, *ad valorem* taxes. J.R.B. at 34. Nothing in *Gilmore* purports to overturn this straight-forward distinction.

For these reasons, *Gilmore* supports Defendants' arguments.

Respectfully submitted this 13th day of November, 2024.

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Plaintiffs / Appellants / Cross-Appellees,

v.

CITY OF PHOENIX, a municipal corporation of the State of Arizona; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix,

Defendants / Appellees / Cross-Appellants,

6TH & GARFIELD OWNER, LLC, a limited liability company,

Intervenor / Appellee / Cross-Appellant.

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The undersigned certifies that on this 13th day of November, 2024, a copy of the Joint Response to Notice of Supplemental Authority using the e-filing system for filing and transmittal of documents to the Court, and that a copy of the filing was served via e-mail to the following:

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Respectfully submitted this 13th day of November, 2024.

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