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

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In the heart of downtown Phoenix, in one of the most desirable real estate markets in the state, the City of Phoenix ("City") has agreed to an elaborate scheme with a private real estate developer called 6th and Garfield, LLC ("Garfield")[1], which will enable Garfield to avoid having to pay $7.9 million in property taxes that it would otherwise owe, and that any similarly situated property owner would have to pay.

Utilizing the Government Property Lease Excise Tax ("GPLET") abatement provisions of A.R.S. § 42-6209, the City has signed a development agreement with Garfield ("Garfield Agreement" or "Agreement"), whereby Garfield conveys to the City its real property ("Property") on which Garfield currently pays taxes, so that on paper, the Property becomes "City-owned," and thus excluded from the tax rolls by virtue of Ariz. Const. art. IX § 2(1). Then, the City leases the Property back to Garfield, which controls, manages, and profits from the Property during the lease, just as if it had retained title. Thanks to this nominal transfer of ownership, Garfield pays no *ad valorem* property taxes on the development for eight years, while other taxpayers—in Phoenix and beyond—are forced to shoulder the difference. During that eight years, the City also waives the GPLET tax that

[1] Garfield's name has changed during this case. At some points in the record, it is referred to as "Hubbard."

Garfield would have to pay, so that Garfield pays no taxes on the project. Then, at the end of the eight-year lease, the City is contractually bound to convey the Property back to Garfield.

In other words, the GPLET Transaction embodied in the Agreement consists of conveying property to the government *de jure*, while *de facto* it is retained and operated by a private party, for the sole purpose of providing that private party a subsidy and evading taxes that would otherwise be owed. This arrangement violates the Arizona Constitution's Gift Clause and Evasion Clause.

The Gift Clause forbids the City from giving or lending public resources to a private entity unless: (1) the payment is for a public purpose; and (2) the government receives direct, measurable consideration in return, the value of which is proportionate to the government outlay. *Schires v. Carlat*, 250 Ariz. 371, 374–75 ¶ 7 (2021); *Turken v. Gordon*, 223 Ariz. 342, 345 ¶ 7, 348 ¶ 22 (2010). These are conjunctive requirements, *id.*, and the GPLET Transaction fails this test.

The City is giving Garfield a tax benefit worth $7.9 million in exchange for $557,000 in rent payments and $32,000 payments to two local school districts. That's grossly disproportionate by any measure, and thus violates the consideration requirement. Additionally, because the Garfield Project is used and operated for

purely private purposes, and the City exercises inadequate supervision and control, the GPLET Transaction also fails to advance a public purpose.[2]

The Agreement also violates the Evasion Clause. That provision says that "[p]roperty that has been conveyed to evade taxation is *not* exempt [from taxation]." Ariz. Const. art. IX § 2(B) (emphasis added). The City wanted to subsidize Garfield by waiving Garfield's obligation to pay taxes it would otherwise have had to pay. So, it signed an Agreement whereby Garfield *formally* conveys its Property to the City on paper, while *substantively* retaining ownership, including the right to get back title to the property at any point in time, in Garfield's sole discretion. The consequence is that, since the property is, on paper, considered City-owned, it's removed from the property tax rolls. That is a transfer to evade taxation.

Actual property ownership means the right to use, control, and dispose of property. *Cutter Aviation, Inc. v. Dep't of Revenue*, 191 Ariz. 485, 490 (App. 1997). But under the Agreement, the City's "ownership" is pretextual—that is,

[2] The City signed the Agreement to provide this tax-exemption subsidy just months after a Maricopa County Superior Court judge declared a nearly identical arrangement (which also provided an eight-year GPLET tax abatement to a developer of a high-rise luxury apartment building) unconstitutional. *Englehorn v. Stanton*, No. CV 2017-001742, 2020 WL 7487658 (Maricopa Cnty. Super. Ct. June 19, 2020). Despite multiple complaints from taxpayer Appellants to their elected representatives, who asked the City to modify the Agreement to comply with the Constitution, the City persisted in the GPLET scheme.

artificial—because the City retains *none* of the essential rights of ownership. Instead, Garfield enjoys the rights to use, control, and dispose of the Project, even after the purported conveyance. The Project is not and will never be municipal property *in reality*. So the conveyance here is simply a "sham"—that is, "devoid of economic substance and motivated solely by tax considerations." *Coleman v. Comm'r of Internal Revenue*, 16 F.3d 821, 831 (7th Cir. 1994). And the Evasion Clause prohibits that.

STATEMENT OF THE CASE

On May 4, 2022, Appellants Bramley Paulin, *et al.* ("Taxpayers" or "Appellants") filed suit to vindicate their constitutional rights and those of other municipal and state taxpayers. Garfield moved to intervene on May 20, 2022.

The Appellees moved to dismiss (the City on May 26, 2022, and Garfield on August 11, 2022), for failure to state a claim and various other theories, including statute of limitations and laches. Taxpayers cross-moved for summary judgment on both counts on September 12, 2022.

On December 20, 2022, the court granted the Appellees' motion to dismiss the Gift Clause claim, concluding that "as a matter of law … the GPLET Transaction is not subject to the Gift Clause." APP.293. In the same order, the court found that the case was timely filed under the statute of limitations and

denied the motion to dismiss under the laches doctrine. APP.284–88. It also denied Appellees' motion to dismiss the Evasion Clause claim. APP.293–94.

In a subsequent order, however, the court found that "Taxpayers' Evasion Clause claim is barred by laches," APP.373, and granted summary judgment on the Evasion Clause claim in favor of the Appellees. APP.379.

The trial court issued final judgment on December 18, 2023, APP.378–81, and Appellants timely appealed on January 11, 2024. APP.384–86.

STATEMENT OF FACTS

Garfield currently pays *ad valorem* property taxes on the Property, which consists of parcels of land it owns at the southeast corner of Sixth and Garfield Streets in downtown Phoenix. APP.056 ¶ 2; APP.197 ¶ 16. But Garfield will no longer be required to do so after it builds a 26-story high-rise luxury apartment building called the Garfield Project. APP.056 ¶¶ 4, 6; APP.064–65 § 103; APP.081 § 303. Garfield expects at least a 5.56% return on its investment in the Project, but the City has agreed to increase Garfield's profits to 6.51% through the GPLET arrangement—i.e., the taxpayer-financed elimination of property taxes Garfield would otherwise have to pay. APP.060 ¶ 43; APP.249.

Garfield received this subsidy through the Agreement, signed on May 14, 2021. APP.056 ¶ 6; APP.081. Under the Agreement, once Garfield finishes construction of the Garfield Project, it will convey the Property to the City,

APP.056 ¶ 7; APP.064–65 § 103, and the City will immediately lease the Property back to Garfield for eight years. APP.057 ¶ 8 APP.064 § 103; APP.072 § 202.1; APP.074–77 § 202.6. This transfer of title will mean that the Project is putatively "government-owned," and thus exempt from any *ad valorem* property taxes. *Id.*

But during the subsequent eight-year "lease" period, during which Garfield pays no property taxes, Garfield fully controls, operates, and manages the Project, with no oversight or control by the City. APP.057 ¶ 10; APP.114–15 § 8.1. Also, despite being nominally "government-owned," the City cannot transfer title or any interest whatsoever in the Garfield Project to any other party. APP.057 ¶ 12; APP.078 § 202.9. Additionally, Garfield may terminate the lease and acquire the property *at any time and for any reason,* for a $100,000 payment. APP.057 ¶ 15; APP.144–45 § 30.3). At the end of the eight years, the City is contractually required to convey the Garfield Project back to Garfield. APP.057 ¶ 16; APP.135 § 17.2; APP.144 § 30.2; APP.064–65 § 103; APP.078 § 202.9.

The City created this GPLET Transaction to relieve Garfield, and only Garfield, of its *ad valorem* property tax burden. The value of this nullification of Garfield's tax obligations is $7,891,324. APP.058 ¶ 21; APP.198 ¶ 28. In exchange for that $7.9 million benefit, Garfield agrees to give the City $525,000 in rent payments, APP.058 ¶ 24; APP.104 § 3.1, and to give $32,000 to school districts that will be deprived of tax revenue during those eight years due to the tax

abatement. APP.058 ¶ 25; APP.084 § 309. Garfield provides no other direct benefits to the City in the Agreement.

Although other private interests have sought similar tax favors from the City, not all have received them. APP.013–14 ¶¶ 63–64, 67–73; APP.301–02 ¶ 63–64, 67–73. And although the City has promised to give GPLET subsidies to some other developers of high-rise apartment buildings, on the premise that such subsidies were necessary for projects to go forward, those projects went forward anyway without such subsidies. *Id.*

Appellants Paulin and Englehorn and their businesses are Phoenix taxpayers responsible for paying property, sales, and other taxes. They bear a share of the tax burden and are liable for replenishing the public coffers for unlawful government expenditures, gifts, and loans. APP.006–07 ¶¶ 5–7; APP.297 ¶¶ 5–7.

STATEMENT OF THE ISSUES

1. Did the City violate the Gift Clause by granting Garfield, a private real estate developer, $7.9 million through a specially designed tax-elimination, to assist Garfield in operating its own business without providing direct, obligatory consideration to the City in return?

2. Did the City violate the Evasion Clause by agreeing to accept *de jure* conveyance of the Garfield Property (and later re-convey the Property to Garfield) while Garfield retains *de facto* ownership over the Property, so that Garfield can

avoid having to pay property taxes on it—a benefit for which Garfield would not otherwise be eligible?

3. Did the trial court err in finding that the affirmative defense of laches applied to the Evasion Clause claim on a motion for summary judgment when citizen Taxpayers filed this case only after their protests and complaints failed to persuade the City to reject the GPLET Transaction, and when the Appellees failed to prove either untimeliness or prejudice, and when Appellees have unclean hands?

STANDARD OF REVIEW

The application and interpretation of constitutional and statutory provisions is reviewed *de novo*. *Morrisey v. Garner,* 248 Ariz. 408, 410 ¶ 7 (2020).

The trial court's decision that laches applies to the Evasion Clause claim is reviewed for abuse of discretion. *McLaughlin v. Bennett*, 225 Ariz. 351, 353 ¶ 6 (2010).

This Court "determine[s] *de novo* whether … the trial court properly applied the law" and "view[s] the facts and inferences drawn from those facts in the light most favorable to the party against whom judgment was entered." *Korwin v. Cotton*, 234 Ariz. 549, 554 ¶ 8 (App. 2014).

ARGUMENT

I. The Agreement violates the Gift Clause.

The Gift Clause forbids the City from "mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. The purposes of this Clause are twofold: (1) to prevent the "depletion of the public treasury or inflation of public debt by [public entities] engag[ing] in non-public enterprises," *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971) (citation omitted), and (2) to prevent government entities from "giving advantages to special interests." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

The Clause is the strongest prohibition on government financial aid to private businesses in America. *See* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1, 58 (2024). It applies not only to direct expenditures of funds, but also to below-market-rate leases of government-owned property, *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 362 (1974), and to eliminations of financial liability, *Puterbaugh v. Gila County*, 45 Ariz. 557, 564 (1935), including government actions that insulate private entities against *potential future* liability. *Rowlands v. State Loan Bd.*, 24 Ariz. 116, 123 (1922); *Tex. & N. Orleans Ry. Co. v. Galveston Cnty.*, 161 S.W.2d 530, 532 (Tex. App. 1942), *aff'd*, 169 S.W.2d 713 (Tex. 1943). It also applies to tax exemptions or

rebates, *Maricopa County v. State*, 187 Ariz. 275, 279–80 (App. 1996), and to any "other valuable advantages" the government gives to private entities. *Industrial Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973).

The trial court erred on this fundamental question, contravening over a century of law that says the Clause applies not just to expenditures, but to subsidies of *all* kinds, including schemes to eliminate a specific business's tax burdens.

To survive a Gift Clause challenge, any transfer of public funds or grant of a tax benefit to a private entity must (1) serve a public purpose and (2) be in exchange for adequate consideration tendered by the recipient. *Schires*, 250 Ariz. at 374–75 ¶ 7; *Turken*, 223 Ariz. at 345 ¶ 7, 348 ¶ 22. These are conjunctive requirements, so a failure of either violates the Gift Clause. *Id.*

The Agreement fails this test—and is therefore unconstitutional—because the City receives $557,000 for the $7.9 million tax-elimination that it gives to Garfield, resulting in a $7.3 million subsidy. This case can be decided based on that factor alone. But the GPLET Transaction also fails the public purpose element because the City approved this subsidy to increase the profits of a private company, and the City fails to exercise sufficient control over Garfield to ensure that any public purpose is accomplished.

A. The Superior Court erred in finding that the Gift Clause does not apply to the GPLET Transaction.

The court below found that the Gift Clause does not apply to the multi-million-dollar subsidy in this case because "the City did not make a gift of public monies or property." APP.293. This disregards the Clause's plain text, and the many precedents in which courts have held that the Clause prohibits other forms of subsidy that do not involve outright expenditures.

In *Neptune Swimming Foundation v. City of Scottsdale*, 542 P.3d 241 (Ariz. 2024), Scottsdale provided an exclusive license to a private swim club to use public swimming pools. Scottsdale argued, as Phoenix does here, that the Gift Clause did not apply because the license "[did] not cost the City anything" and did not involve the government "spend[ing] money." *Id.* at 250 ¶ 27. The Supreme Court, however, held that giving a private entity use of public facilities, "even absent a monetary cost to the City," is subject to the Gift Clause. *Id.* ¶ 28.[3]

Neptune is hardly the first case to say that an unconstitutional subsidy can exist when government gives a private party a financial benefit, even absent a direct payment of public funds. Specifically, courts have held that for the government to erase a private party's financial liabilities can be an unconstitutional subsidy. In *Puterbaugh*, 45 Ariz. at 564, for example, the court said that if the

[3] In fact, the court explicitly rejected the idea that the Gift Clause is not concerned with the government "forego[ing] collecting" money. *Id.* at ¶ 29.

government "release[s] [a] part[y] from [a] debt, it is clearly a donation of the amount of his indebtedness to such individual, which, under [the Gift Clause] … is forbidden." *Rowlands*, 24 Ariz. at 123, said that "forgiv[ing]" indebtedness "is a donation" that violates the Gift Clause. *Pimalco*, *supra*, and *Maricopa Cnty.*, *supra*, also acknowledged that eliminating tax liability can be a subsidy. And the prospective elimination of *potential* future liability can also be an unconstitutional subsidy. *See Galveston Cnty*, 161 S.W.2d at 532.

Here, the *sole* reason Garfield is eligible for the tax waiver is because the Agreement calls for it to transfer the Property to the City, thereby making it nominally "City-owned,"[4] and consequently shielded by the City's own tax exemption—and then for the City to lease the property back to Garfield at below market rate. This lease violates the Gift Clause, because, as *Neptune*, 542 P.3d at 250 ¶¶ 28–30, expressly held, the Clause applies to below-market leases of government property. This Court also said the same in *Pilot Properties*, when it found that the Clause applied to an arrangement where the city leased public land at below market rates to a private party; the court held that "[a] donation of public property to a private corporation … falls squarely within the prohibition of our

[4] To the extent the Appellees contend that the Garfield project is not "city-owned," they necessarily concede that the transfer of the Property to the City was an artifice to avoid the payment of taxes that would otherwise be due; that violates the Evasion Clause, as discussed in detail below.

constitution." 22 Ariz. App. at 362; *cf.* *Arizona Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 369 (App. 1991) (Legislature's "relinquishment of Arizona's equal footing claims to riverbed lands" violated Gift Clause); *Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 320 (1986) (applying Gift Clause scrutiny to lease of government land).

The City's elimination of Garfield's tax liability via the GPLET Transaction is an unconstitutional form of aid to Garfield, because the Gift Clause forbids the government from extending gifts "*by subsidy or otherwise.*" Ariz. Const. art. IX, § 7 (emphasis added). This phrase comprehensively forbids *all* forms of government aid to private enterprise, under any pretext or in any form.

"Subsidy" means "to assist" by "giv[ing] support or aid to" a private enterprise, out of a belief that the enterprise is a social or economic benefit. *Pilot Properties*, 22 Ariz. App. at 362 (quoting *Webster's Dictionary*). *Black's Law Dictionary* says: "Although governments sometimes make direct payments (such as cash grants), *subsidies are usu[ally] indirect.* They may take the form of … *tax breaks* … guaranteed by a government agency." SUBSIDY, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). The Clause plainly forbids not only direct payments, but also the conferral of other kinds of financial advantages, including the elimination of liability, *Puterbaugh*, *supra*, or the conferral of a

special tax waiver to a single private party that other, similarly situated private parties do not receive.[5]

Under the GPLET Transaction, the City takes title, thereby converting the Project to "government property," while allowing Garfield to continue using it as it would if it retained title. That means the property tax Garfield would ordinarily have to pay doesn't apply—instead, the GPLET tax rate applies, and then the City entirely abates *that*, with the result that Garfield pays no taxes on the Project. It ceases to pay the taxes it's *currently* paying, and it is excused from paying any more for an eight-year period on the completed Project. That obviously "result[s] in aid or support of" Garfield and constitutes a subsidy. *Pilot Properties*, 22 Ariz. App. at 362.

In *State v. Ariz. Bd. of Regents*, 253 Ariz. 6 (2022), the Attorney General sued the Arizona Board of Regents ("ABOR") to enjoin an agreement between ABOR and a private hotel developer that would enable the developer to avoid paying property taxes by exploiting the university's tax-exempt status in a manner nearly identical to this GPLET Transaction. *Id.* at 9 ¶ 2. The developer agreed to

[5] The use of tax exemptions as a form of subsidy was, in fact, among the primary concerns of authors of the Gift Clause. *See* Sandefur, *supra* at 32–43. Tax exemptions were frequently used in the nineteenth century to subsidize railroads. The framers of Arizona's Constitution borrowed language from the Montana Constitution that forbade that type of subsidy, *id.* at 37–38, and also rejected language from the drafted (but unratified) 1891 Arizona Constitution which would have permitted tax exemption subsidies. *Id.* at 52.

build a private hotel on university-owned land, thereby making the property exempt from *ad valorem* property taxes. Upon completion of the project, ABOR would lease the hotel back to the developer to operate the hotel just as it normally would—except without having to pay property tax. The Supreme Court found that the Attorney General's challenge to this scheme was properly brought under a statute allowing him to enjoin "an illegal payment of public monies." *Id.* at 14 ¶ 30. In other words, the Court held that **for the government to design a means whereby a private party can exploit and profit from the government's own property tax exemption is the constitutional equivalent of "illegal[ly] pay[ing] … public monies" to that private party**—and subject to Gift Clause scrutiny. *Id.*

ABOR, *Neptune*, *Pilot Properties*, and other cases cited above show that the Superior Court erred in holding that the GPLET Transaction is immune from Gift Clause scrutiny just because the subsidy here does not consist of a direct expenditure.

But even if that weren't true, **the Agreement itself concedes that the GPLET Transaction is a "government expenditure."** Specifically, under the "Purpose of the Agreement" section, it says: "This Agreement is a development agreement being entered into by the Parties pursuant to A.R.S. § 9-500.05." APP.063–64 § 101; *see also* APP.094 § 516. Section 9-500.05 governs the powers cities have to enter into development agreements with private parties, and to

"spend public monies for and in connection with economic development activities." A.R.S. § 9-500.11(A). The purpose of the Agreement, as both parties stated, is "to promote economic development within a single central business district located in downtown Phoenix." APP.099. And Section 9-500.11(D)(2) defines "[e]xpenditure" to mean "any *waiver*, *exemption*, deduction, credit, rebate, discount, deferral or other *abatement* or reduction of the normal municipal tax liability." (Emphasis added).

Thus, Appellees entered into the Agreement using a statute which expressly defines "expenditure" to include tax "waivers" and "abatements." Since the Court must apply the law under which the Agreement is made and "give effect to the contract as it is written," *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588 (1977) (citation omitted), the GPLET Transaction must be construed as an "expenditure," subject to Gift Clause analysis.

B. The GPLET Transaction violates the Gift Clause's core purposes.

The Gift Clause has two primary goals: (1) to prevent the "depletion of the public treasury or inflation of public debt by [public entities] engag[ing] in non-public enterprise," *Walled Lake Door Co.*, 107 Ariz. at 549 (citation omitted), and (2) to prevent government entities from "giving advantages to special interests." *Wistuber*, 141 Ariz. at 349. The GPLET Transaction does both.

1. The GPLET Transaction depletes the treasury and inflates public debt by eliminating Garfield's *existing* liabilities.

It is axiomatic that decreasing someone's liabilities is equivalent to increasing her assets. *See, e.g.*, *United States v. Kirby Lumber Co.*, 284 U.S. 1, 2–3 (1931). That's why *Rowlands*, 24 Ariz. at 123, and *Puterbaugh*, 45 Ariz. at 564, said that laws that eliminate people's financial obligations to the state are unconstitutional subsidies. It's also why Arizona courts apply Gift Clause analysis to laws that eliminate tax liabilities—as in *Pimalco*, 188 Ariz. at 559–60, and *Maricopa Cnty.*, 187 Ariz. at 280–81.[6]

The lower court distinguished *Pimalco* and *Maricopa Cnty.* by saying they involved "refund[s] of taxes collected lawfully in the past," whereas the Agreement there only exempts Garfield from having to pay taxes *prospectively*. The court said it isn't a subsidy for government to "forgo[] revenues that it could have chosen to collect in the future by changing its laws prospectively so the taxpayers' obligation to pay never arises." APP.291–92. But this distinction is erroneous both factually and legally.

Factually, it's not true that "the City did not give up *ad valorem* taxes already owed by Garfield." APP.293. In fact, it did: Garfield *currently* pays *ad valorem* property taxes on the Property. APP.056 ¶ 2; APP.197 ¶ 16. But thanks

[6] In those cases, there was adequate consideration, so the tax exemptions were constitutional. Here there is not, so it's unconstitutional.

to the Agreement, it will no longer have to pay those taxes. The nominal title-transfer means the property tax rate on the completed Project will be completely nullified for eight years. APP.057 ¶ 8; & APP.064–65 § 103; APP.072 § 202.1; APP.074–77 § 202.6. That means the Agreement *does* include the City giving up tax revenue *it currently* receives—that is, eliminating Garfield's *current* tax liability—as well as the liability that would legally apply in the coming eight years, but for the title-transfer in the Agreement.

Legally, the Superior Court was wrong because the City has *not* "chang[ed] its laws prospectively" so that Garfield's obligation to pay taxes never arises. APP.291. In fact, it has not changed its laws at all. Obviously, the City, like any government, can change its tax laws prospectively, by reducing tax rates or creating a new tax credit for people who fall within certain specified parameters in the future. If *that* were what the Agreement did, this would be a different case—and would not implicate the Gift Clause. But that's not what's happening. Instead of cutting taxes, the City signed a contract whereby it leaves all existing tax laws unaltered, and then nominally takes title to Garfield's Property, in order to give Garfield the City's own tax exemption, so that Garfield pays nothing in property taxes for eight years. That's not "changing the tax laws prospectively"—that's devising an arrangement to zero-out Garfield's tax liability under *existing* laws.

That makes this case like *Pimalco* or *Maricopa Cnty.*, where the government sought to incentivize undertakings by eliminating tax liabilities. Garfield *currently* pays taxes; that obligation will cease in the future—*not* because the City "chang[ed] its laws prospectively so [that Garfield's] obligation to pay never arises," *Maricopa Cnty.*, 187 Ariz. at 280, but because the City has devised a title-transfer gimmick that will "annul" Garfield's obligation to pay under *existing* law. *Id.*

Actually, this case is even more like *Rowlands* or *Galveston Cnty.*, both of which said that eliminating *future* liability violates the Gift Clause. *Rowlands* concerned debtors who took out loans between 1914 and 1920, and who had to repay them, plus interest. 24 Ariz. at 117. Then, in 1921, the Legislature passed a law eliminating their obligation to pay the interest up to 1925. The court said—in 1922—that this was "a donation, a pure and simple gratuity," and therefore unconstitutional, *id.* at 123, even though the interest payments were not yet due. The GPLET Transaction does the same. Just as the debtors in *Rowlands* faced a future obligation to pay interest under existing law, so Garfield *currently* faces an obligation to pay taxes for the Project—and the City has fashioned a stratagem to erase that liability in the years to come, just as the Legislature did in *Rowland*. Thus, the Agreement, is a pure and simple gratuity, even though the property taxes are not yet due.

In *Galveston Cnty.*, the government signed a contract "agreeing to indemnify and save harmless" a railroad that operated a certain drawbridge "from any liability for any injury to person … that might occur in [using] … the drawbridge," 161 S.W.2d at 531—that is, the government would reimburse the railroads for whatever tort judgments might arise in the future. The court said this was "just another name for granting public money or things of value in aid of or to a corporation," in violation of the Texas Constitution's Gift Clause. *Id.* at 532.[7] The government was promising to zero-out the railroads' future liability—and that was an unconstitutional subsidy. Likewise, the City here has prospectively wiped out Garfield's obligation to pay the property tax that will arise in the future.

To emphasize: this is not a situation where, say, the Legislature changes the law so that fruit companies will be taxed at 10% instead of 15% from now on. In that situation, the government has indeed changed the law prospectively to forego future revenue it might have taxed. But here, the City has not changed its laws to reduce taxes; it has fashioned an Agreement to nullify Garfield's *existing* liability to pay taxes it's *now* paying, and that, under the laws *still* in place, it would otherwise have to pay in the future.

[7] Texas's Gift Clause (Tex. Const. art. III § 52), is far less stringent than Arizona's, in that it does not include the phrase "by subsidy or otherwise."

2. The subsidy gives Garfield a special advantage not enjoyed by others.

The Agreement also gives "advantages to [a] special interest[]" that are not enjoyed by other private entities. *Wistuber*, 141 Ariz. at 349.

The Gift Clause was written to prevent favoritism in tax treatment—that is, situations where government zeroes out taxes for particular recipients to subsidize their operations. *See* Sandefur, *supra*, at 32–43. This case involves just such favoritism. There have been other projects—including some nearly identical to the Garfield Project—that have requested something like the GPLET Transaction and were rejected by the City. APP.014 ¶ 74.[8] In other words, **this is *not* a tax credit or program available to anybody who qualifies.** That kind of credit (as, for example, in *Kotterman v. Killian*, 193 Ariz. 273, 285 ¶ 36 (1999)) is constitutionally unobjectionable, because the taxing authority doesn't choose winners and losers; it's a generally available public program. But in *this* case, the City *does* choose who gets a GPLET subsidy (APP.013 ¶ 63; APP.301 ¶ 63), and it eliminates current and future tax liabilities for whom it pleases. This isn't a generally available public program; it's a legal shell game the City has devised to

[8] In 2015, for example, developers of another high-rise apartment building initially sought a GPLET before it was withdrawn by the City. APP.013 ¶¶ 64–66. The developers of that project claimed (as Garfield argues here) that they could not proceed without a GPLET subsidy, *id.*, but it turned out that the project did proceed even without that subsidy. *Id.* ¶ 67; APP.301 ¶¶ 64, 67.

give financial aid to Garfield, because it believes Garfield is worthy of subsidization, and others are not.

The trial court cited *Kotterman*, 193 Ariz. at 285 ¶ 36, to support its finding that the Gift Clause does not apply in this case. That was reversible error. Not only did *Kotterman* involve a generally available public program, but it involved charitable tax credits, not tax abatements. The difference is that a charitable tax credit makes the taxpayer no better off—she still must pay the same amount of money; she simply gets to choose which entity receives her payment. The lack of direct benefit to the taxpayer was key to the Court's reasoning in *Kotterman*: "The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer." *Id.* at 277 ¶ 1. But here, the abatement *definitely* makes the private entity better off: Garfield receives a focused subsidy of $7.3 million that it would not otherwise have. That adds to Garfield's bottom line; it increases Garfield's profit margin from 5.56% to 6.51%, which is just what the City intended. APP.060 ¶ 43; APP.249.

C. The City receives insufficient consideration for the tax abatement it provides to Garfield.

The simplest way to resolve the Gift Clause claim—and this case—is by conducting an analysis of the adequacy of consideration in the Agreement. Because the consideration Garfield gives the City in exchange for the City

eliminating Garfield's tax liability is grossly disproportionate to the amount of the $7.9 million benefit, the Agreement violates the Gift Clause.

1. $7.9 million to Garfield in exchange for $557,000 to the City is unconstitutionally disproportionate.

To survive Gift Clause scrutiny, an allocation of public resources must be supported by *adequate* consideration. That means the recipient of public resources must make a contractual promise to give the public a measurable return value that is proportionate to what it receives. More simply, the Court "focuses on 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*, 376 Ariz. at 376 ¶ 14.

When making this comparison, the Court *"should not give deference* to the [City's] assessment of value but should instead identify the fair market value of the benefit provided to the entity and then determine proportionality." *Id.* at 378 ¶ 23 (emphasis added). Not only is the comparison based on objective fair-market values, but "anticipated indirect benefits," such as economic improvement that the government may hope will result from a development project, cannot be included. *Id.* at 377 ¶ 16. Nor can pre-existing legal duties such as the payment of taxes. *Id.* ¶ 18.

The question the Court must answer is therefore a simple one: **What is the Agreement costing the City (and its taxpayers), and what is the City *directly***

receiving in return? If the latter is grossly disproportionate to the former—in terms of objective fair-market value—the arrangement is unlawful, because it would amount to a gift, akin to spending $1,000 to buy a $10 hammer (which would be a gift of $990). *See* *Turken*, 223 Ariz. at 347 ¶ 16.

According to the City's own economic analysis, if the Project were completed *without* the tax-exemption subsidy, Garfield would pay $6,608,800 in property taxes over the eight-year lease term. APP.058 ¶ 22; APP.249; APP.259. Garfield's estimate agrees with this. *Id.* Taxpayers' estimate is higher: their expert attested that, absent the tax exemption, Garfield would be liable for $7,891,324 in *ad valorem* property taxes over those eight years.[9] APP.058 ¶ 21; APP.198 ¶ 28. But for purposes of the Gift Clause violation, this difference is not material, because **whether the subsidy is $6.6 million or $7.9 million, the values here are grossly disproportionate.**

The parties differ over what the City is promised in return for this benefit, but those disagreements *are questions of law*, and they must be resolved in Appellants' favor. Specifically, when signing the Agreement, the City cited various tax payments and indirect benefits (such as the speculative "economic

[9] The estimates differ because of anticipated growth rates in the value of the completed Project through the duration of the lease. The City thinks the Project will not grow in value at all. APP.058 ¶ 23; APP.198 ¶¶ 24–26; APP.259. Taxpayers estimate a modest growth in property value.

impact" of the Project) as benefits the City receives under the Agreement. But as a matter of law, those don't count. Paying taxes is a pre-existing legal duty and doesn't count as consideration. *Schires*, 250 Ariz. at 377 ¶ 18. The "economic impact" of a development is also an indirect benefit and also does not count. *Id.*; *Turken*, 223 Ariz. at 350 ¶ 33.[10]

There are only two direct payments that Garfield promised in the Agreement to make to the City that *can* count as consideration for the $7.9 million tax benefit Garfield receives. These are: $525,000 in "rent" payments and $32,000 in payments to Phoenix Elementary School District and Phoenix Union High School District. APP.084 § 309. Based on these payments, **in exchange for the $7.9 million tax waiver, the City is receiving only $557,000 in direct benefits from Garfield.** That is "grossly disproportionate" and unconstitutional, as the chart below shows:

[10] The Agreement also includes other values that do not count as consideration because their value to the public, if any, is "too indefinite to enforce, much less value." *Schires*, 250 Ariz. at 378 ¶ 21. But even if the Court accepted *all* the City's assumptions regarding consideration, the benefits the City gives Garfield in the Agreement are *still* grossly disproportionate to the benefits Garfield gives back.

Consideration during GPLET Lease

Consideration	Taxpayers
Foregone property tax	- $7,891,324
Lease payments	$525,000
School district payments	$32,000
Subsidy Amount	-$7,334,324

Whether the City is giving Garfield tax benefits in the amount of $7,891,324, as Taxpayers contend, or $6,608,800 as the City admits, either amount is grossly disproportionate to the $557,000 in objectively measurable, bargained-for contractual benefits. Since by *any* measure, the benefits Garfield gives the City are grossly disproportionate to the benefits the City is giving to Garfield, this is an unconstitutional subsidy. *Turken*, 223 Ariz. at 350 ¶ 35.

2. Neither tax payments nor indirect, speculative "economic impact" can count as consideration under the Gift Clause.

Neither the tax payments Garfield is legally obligated to make to the City, nor the amorphous and speculative "economic impact" of the Project, count as consideration under the Gift Clause.

The Supreme Court said in *Schires*, 250 Ariz. at 377 ¶ 18, that tax payments are *not* consideration for Gift Clause purposes. "A business's obligation to pay taxes is independent of an economic development agreement" because it's a

preexisting legal duty, and is therefore "irrelevant to [Gift Clause] analysis." *Id.*; *accord*, *Turken*, 223 Ariz. at 350 ¶ 38. Also, both *Schires* and *Turken* said that anticipated economic consequences of development—that is, hoped-for improvement in the business environment or increases in "projected sales tax revenue" aren't consideration under the Gift Clause because they're speculative, not objectively measurable, and not legally enforceable. *See* *Schires*, 250 Ariz. at 377 ¶ 16; *Turken*, 223 Ariz. at 350 ¶ 33.

In the Agreement, the City relies on certain anticipated tax payments as consideration for Gift Clause purposes—and the City includes in this calculation anticipated revenue from Transaction Privilege Taxes (TPTs) on construction, anticipated TPTs on tenant lease payments and utilities during the lease term, and anticipated sales and property tax payments that the City hopes to realize *after* the lease expires. APP.074–77 § 202.6. *Schires* and *Turken*, however, make clear that these are not lawful consideration, and are therefore "valueless" for the "give" / "get" comparison. *Schires*, 250 Ariz. at 377 ¶ 16.

The Agreement also contains a "Minimum Direct Benefit" (MDB) provision, which at first glance might seem to guarantee that the City will receive the full tax value of the property. But this provision is illusory and cannot salvage the Agreement's constitutionality. Under that provision, Garfield agrees that the City will receive a minimum amount of $9 million in construction taxes, tenant

taxes and lease payments, and property taxes after the lease term, or—purportedly—it will make up the difference. APP.107–09 § 4.7. But $8.5 million of the taxes Garfield "actual[ly] pay[s]" (as well as the "Net Rent" it pays), are *credited against* this amount. *Id.* That means the amount Garfield owes is satisfied wholly through the payment of taxes it *already* owes and would otherwise pay.

What's more, if the lease is terminated early—which Garfield can unilaterally do at any time—*the MDB is prorated*. In other words, if it cancels before eight years, it is not required to pay the full eight-year amount, but only the proportion that would be due for the amount of time prior to its cancellation. This proration means that the MDB will *always* be fully satisfied through the payment of taxes that Garfield is *already* legally obligated to pay, and that it will never have to make up any difference, even if it cancels the lease early. Thus, the MDB provision does nothing more than reiterate Garfield's promise to do what it already must do—which is never consideration. *J. D. Halstead Lumber Co. v. Hartford Accident & Indem. Co.*, 38 Ariz. 228, 235 (1931).

Only direct, measurable benefits that have been bargained for count as consideration. In this case, there is $7.9 million on one side, and $525,000 in rent payments and $32,000 to school districts on the other side. The MDB does not

change this calculus. The bottom line is that the Agreement obtains inadequate consideration, and therefore results in an unlawful subsidy.

D. The GPLET subsidy fails the public purpose prong of the Gift Clause test because the tax benefit was provided to increase the profits of a private company and the City exercises no control over the Garfield Project.

It's "a core Gift Clause principle" that "[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual." *Turken*, 223 Ariz. at 347–48 ¶¶ 19–20 (citation omitted). The Clause forbids the use of public funds "to foster or promote … purely private or personal interests." *Walled Lake Door*, 107 Ariz. at 549. Further, "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Turken*, 223 Ariz. at 346 ¶ 14.

The fact that the City does not receive adequate consideration in exchange for the tax-nullification subsidy it gives Garfield is sufficient reason to find the Agreement unconstitutional. But the subsidy is also so clearly earmarked for Garfield's private benefit that it also fails to achieve a public purpose. This is true for two reasons.

First, the City awarded Garfield the subsidy to increase Garfield's profit and minimize risk for its investors, so that Garfield will construct high-rise apartments in downtown Phoenix. The City did not *hire* Garfield to build public facilities or to provide any public services, and did not *buy* property or other things from

Garfield. Instead, the *expressly stated* purpose of the GPLET Transaction is to increase Garfield's profits from 5.56% to 6.51%. APP.060 ¶¶ 43–44; APP.249.

Garfield told the City that it "must request assistance from the City … in order to achieve rates of return required by the market." APP.254. In other words, there's insufficient market demand for the construction to be completed (meaning that the City's justification for spending taxpayer resources on the Project is the very fact that it is expected to be an economic loss). The City ultimately approved Garfield's request for a subsidy by arranging the GPLET Transaction. Increasing a private corporation's profits, however, is not a public endeavor; it's a quintessentially *private* one, which is precisely what the Gift Clause is designed to forbid. *Walled Lake Door*, 107 Ariz. at 549; *see also City of Tombstone v. Macia*, 30 Ariz. 218, 222 (1926) (Constitution forbids expenditures "to aid private enterprises and build up private fortunes," such as by "pay[ing] [for] land … to aid in a private enterprise" or "donat[ing] [to] assist[] a company to embark in … manufactur[ing].").

Second, while the government can pay a private entity to provide certain services—for example, health care services—the government must supervise and control that private entity to ensure that it actually provides those services. *Kromko*, 149 Ariz. at 321; *Veterans' Welfare Comm'n v. Dep't of Mont.*, 379 P.2d 107, 111 (Mont. 1963) ("[i]f the [recipient] is not under the control of the state,

neither is its expenditure of funds. Accordingly, gifts to such [recipients], even for ostensibly public purposes, are forbidden by the [Gift Clause].").

In *Kromko*, the government leased land to a private nonprofit to operate a hospital. The court said this satisfied the public purpose requirement because the nonprofit's "operations are still subject to the control and supervision of public officials." 149 Ariz. at 321. The government had to approve "[t]he internal organization of the nonprofit," the appointment of its board of directors, and "any business transaction that could adversely affect the interests of the state," among other things. *Id.* These controls ensured that "no 'private or personal interests of any individual' will be served by the operation of the hospital." *Id.* (citation omitted). *See further State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 612 (Idaho 1959) (payment to utility companies for relocation expenses unconstitutional where the state retained no control over recipients to ensure they spent the funds for that purpose); *State ex rel. Wash. Nav. Co. v. Pierce Cnty.*, 51 P.2d 407, 411 (Wash. 1935) (contract with ferry service unconstitutional because government retained no control over operation of the company).

But under the Agreement, the City exercises *no authority or oversight whatsoever* over the operations of, or decisions pertaining to, the Project. Garfield is a private venture, entirely controlled by private parties. Indeed, the Lease itself specifies that Garfield is "*fully and solely* responsible for the condition,

construction, operation, repair, demolition, replacement, maintenance, and management of the Premises." APP.114–15 § 8.1 (emphasis added). It also says that Garfield has full discretion to use the Project as a multi-family residential building, and make all management decisions related to the building and its operation. APP.115 § 8.2. The City exercises no control over the Project (except for the same police power that it exercises over every other landowner or private business in Phoenix).

Moreover, although putatively a "government-owned" building, the City cannot transfer title or any interest in the Project to any other party. APP.078 § 202.9. And Garfield may terminate the lease and acquire the Property at any time and for any reason, for a *de minimis* payment. APP.144–45 § 30.3. Unlike *Kromko*, the City maintains no authority over the Project's operations, appoints no decisionmakers within the Garfield Group, and cannot approve most transactions related to the disposition of the Project.

Additionally, although this is ostensibly a "lease" of government-owned land to Garfield, the reality is that Garfield remains the *de facto* owner of the Project because Garfield can terminate the "lease" and re-acquire the Property at any time for any reason. APP.057 ¶ 15; & APP.144–45 § 30.3. More on this below.

In sum, the Project represents a completely private endeavor, subject to no meaningful oversight or control. The tax-elimination subsidy is therefore not for a public purpose, but for a private one—which is unconstitutional. *Kromko*, 149 Ariz. at 321. Although government entities have discretion in determining what constitutes a "public purpose," the Agreement is so plainly aimed at private profit, and public control is so lacking, that the City has abused its discretion in approving it.

II. The Agreement violates the Evasion Clause.

All property "is subject to taxation" unless constitutionally exempt. Ariz. Const. art. IX, § 2(A). Only a few categories of property are entirely tax-exempt. These include "federal, state, county and municipal property." *Id.* § 2(C)(1).

"Property that has been conveyed to evade taxation," however, "is *not* exempt." *Id.* § 2(B) (emphasis added) (the "Evasion Clause").

In this case, the City wanted to subsidize Garfield by eliminating its obligation to pay taxes it would otherwise have had to pay. So it fashioned an Agreement whereby Garfield conveys the Property to the City *on paper*, but retains *actual* ownership. Then, since the Property is nominally City-owned, it's exempt from property taxes. Through this artifice, Garfield reaps the benefit of the City's tax exemption. This cannot withstand constitutional scrutiny.

A. The Clause forbids sham transfers, regardless of intent.

A conveyance to evade taxation is an artifice or scheme which is *formally* a transfer of property but *substantively* is not—that is, it's only a paper transaction used as a device to escape a tax burden. A title transfer designed as a shell game to escape current and future tax obligations plainly falls within the Clause. As the Iowa Supreme Court put it, "the law will not uphold any mere manipulation, under the guise of disposition, the only effect of which is to defeat a tax." *Ransom v. City of Burlington*, 82 N.W. 427, 428 (Iowa 1900).

Courts are quite familiar with title-transfer schemes like this. They routinely hold them invalid thanks to the so-called "sham" doctrine. That doctrine applies when transactions are "devoid of economic substance and motivated solely by tax considerations." *Coleman*, 16 F.3d at 831; *see also Fashion Valley Mall, LLC v. County of San Diego*, 98 Cal. Rptr.3d 327, 334 (App. 2009) (sham conveyance "has no economic substance other than to avoid tax liability, and is thus a legal fiction that cannot be given effect for the purposes of determining [one's] property tax liability."). In such cases, courts "disregard[]" the sham conveyance "for … tax purposes." *Lerman v. Comm'r of Internal Revenue*, 939 F.2d 44, 49 (3d Cir. 1991).

No criminal or fraudulent intent is required for the sham doctrine to apply. *See Bank of N.Y. v. Kelly*, 38 A.2d 899, 902 (N.J. Prerog. Ct. 1944) ("[t]he present

transfer is one of a taxable character *regardless of the existence of a motive*, if any, to avoid or evade taxation." (emphasis added)). Indeed, the same year the Evasion Clause was added to the Constitution,[11] the Fourth Edition of *Black's Law Dictionary* was published; it defined "evasion" as "[a]n act of eluding *or avoiding*, ***or*** avoidance by *artifice*"—or "a subtle endeavoring to set aside truth." *Black's Law Dictionary* 654 (4th ed. 1968) (citations omitted; emphasis added). Thus, at the time of enactment, the meaning of "evade" did not include or imply "improper intent," or "secretive or deceptive" motive. All that's required is that the transaction be "devoid of economic substance" beyond obtaining a tax exemption. *Coleman*, 16 F.3d at 832.

Obviously, tax avoidance is not tax evasion, *Jewel Tea Co. v. State Tax Commissioner*, 293 N.W. 386, 391 (N.D. 1940), and a person "may so arrange his affairs that his taxes shall be as low as possible" using lawful means. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934). But there's a difference between valid avoidance and the kind of evasion that the Clause addresses. That difference is the presence of an *artifice* or *pretext*—i.e., a *sham transfer*—arranged to defeat taxation. Thus, the government is "obliged to detect the artificialities by which the transfers are so often disguised. The refinements or technicalities of contracts and

[11] The amendment was Proposition 101 in 1968. *See* APP.344 ¶ 60; APP.358–60.

conveyances are not the true diagnostics of the taxability of a transfer." *Kelly*, 38 A.2d at 901.

The court below said there must be some "improper intent" or "secretive or deceptive" scheme for a conveyance to violate the Clause. APP.376– 379. That was wrong. No fraudulent or secretive or criminal mental state is required, either by the text of the Clause or by its history. The Clause is not a law that penalizes or criminalizes evasion. It does not even forbid conveyances. Rather, it merely declares that certain types of conveyances shall not enjoy a tax exemption. That's why the Clause is located in Article IX § 2, which is devoted to what kinds of property are taxable.

Moreover, the law does not usually require any proof of mental state to deny someone a tax exemption; on the contrary, the law presumes against exemptions, and requires the individual to prove she's entitled to one. *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 291 (1982). The trial court thus erred in holding that there must be some proof of improper or deceptive intent before a transfer will be denied an exemption under the Clause.

Here, the Constitution declares that all property shall be "subject to taxation," Ariz. Const. art. IX, § 2(A), then says that some property is exempt, and then says that no such exemption shall apply if the "[p]roperty … has been conveyed to evade taxation." *Id.* § 2(B).

Courts should not "restrict … [constitutional] guarantee[s] by adding words of limitation contrary to the plain language used." *State v. Patel*, 251 Ariz. 131, 135 ¶ 17 (2021) (citation and internal marks omitted). By adding a "improper intent" or "secretive or deceptive" requirement to this Clause, the trial court added words of limitation that do not exist in the Constitution. That was reversible error. Had the framers of Article IX § 2 intended to include a culpable-mental-state requirement, they would have done so. They did not.

B. The Agreement is a conveyance to evade taxation.

The Garfield Agreement is an artificial conveyance to evade taxation: after the *formal* or *de jure* title transfer, Garfield continues to exercise *substantive* or *de facto* ownership over the Property. The substantive right of ownership means the right to use, control, and dispose of property. *Cutter Aviation*, 191 Ariz. at 490. But here, the City's "ownership" is pretextual—i.e., artificial; a sham—because the City enjoys *none* of the substantive rights of ownership—none of the "sticks in the bundle." Instead, *Garfield* enjoys the rights to use, control, and dispose of the Project even after the purported conveyance: it retains complete control over this for-profit high-rise luxury apartment building, *including the right to have the Project conveyed back to Garfield in its sole discretion*. The City cannot sell it to anyone else, does not occupy the Property, and exercises no authority over Garfield's operations.

Even the Agreement itself says that the title transfer is designed to defeat taxation. It says: the "City acknowledges and agrees that *the intention of the Parties* is for the Project and all eligible improvements … to be subject to the GPLET (and not to *ad valorem* taxation) … and for the GPLET to be abated for a period of eight (8) years." APP.081 § 303 (emphasis added).[12] And Garfield concedes that it "would not have moved forward with the 6th and Garfield Project to begin with if GPLET treatment were not available." APP.327; APP.336 ¶ 8. Thus, it is beyond debate that the purpose of the Agreement was to permit Garfield to convey its property to the City on paper, but not in actuality, to avoid tax liability.[13]

After the purported title transfer, the City exercises *none* of the essential rights of ownership with respect to the Garfield Project, including the rights of use, control, or disposal:

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[12] *See* *Liberty Ins. Underwriters, Inc. v. Weitz Co.*, 215 Ariz. 80, 83 ¶ 8 (App. 2007) ("If the contractual language is clear, we will afford it its plain and ordinary meaning and apply it as written."). *See also* APP.346 ¶ 82; APP.093 § 513. ("The Parties acknowledge that they are sophisticated Parties … [T]he terms contained in this Agreement, including any terms later deemed ambiguous, are to be construed in accordance with their intended meaning.")

[13] Before it reversed course, the trial court made exactly this finding. *See* APP.294 ("it is undisputed that the whole point of the GPLET Transaction is to avoid paying the *ad valorem* property taxes that otherwise would be due if the Property was not transferred to the City.").

- The City cannot use the Garfield Project for its own purposes during the lease term; instead, "During the Term of this Lease, [Garfield] shall have the right to use the Premises for the purpose of the operation of a multi-family residential building." APP.057 ¶ 11; APP.115 § 8.2;
- The City does not manage or control the Project during the lease term; Garfield does. *Id.*; *see also* APP.057 ¶ 14; APP.206 ("the City will delegate a certain amount of 'control' over the property to Garfield as the City's lessee, particularly with respect to the day-to-day management of the Project."); *see also* APP.346 ¶¶ 73–74.
- The City cannot transfer title or any interest in the Garfield Project to any other party. *See* APP.057 ¶ 12; APP.078 § 202.9.
- The City has no right to possess the Garfield Project during the term of the Lease, or after. APP.346 ¶ 76; APP.100 § 1.1.
- The City cannot place any liens or encumbrances on the Project. APP.346 ¶ 75; APP.078 § 202.9; APP.082–83 §§ 306.1, 306.2.
- Garfield may terminate the lease and acquire the property *at any time and for any reason*, for a $100,000 payment. APP.057 ¶ 15; APP.144–45 § 30.3.

- At the end of the eight years, the City conveys the Project back to Garfield. APP.057 ¶ 16; APP.135 § 17.2; APP.144 § 30.2; APP.064–65 § 103; APP.078 § 202.9.

In short, the Project is not owned by the City in any meaningful way; it's owned, controlled, managed, and enjoyed by Garfield and conveyed back to Garfield at Garfield's discretion, at any time. The City's ownership is therefore a sham—paper only—just as artificial as if the property were conveyed to a nonprofit or religious organization but actually owned and used as a for-profit enterprise or non-religious purpose, or if property were conveyed to a disabled veteran but actually owned and used by an able-bodied civilian.

Courts distinguish genuine from pretextual ownership in the context of "taxation of property interests" by "focusing on the context in which the term ['owner'] is used and on the legislature's objective in enacting the subject legislation." *Cutter Aviation*, 191 Ariz. at 491. In *Cutter Aviation*, private parties, including Southwest Airlines, leased land from the City at Sky Harbor and built improvements on the City-owned land. The question arose as to who truly owned the land, and the court applied the traditional meaning of ownership that "includes the rights of control and disposal." *Id.* It found that Southwest was not the owner of the property because:

> The leases mandated the improvements to be built and the uses to which they could be put, and required the city's approval of the

> building specifications. … Neither Southwest nor Cutter were allowed to transfer any interest in their leaseholds, which would include any interest in the improvements, without the city's prior written consent. In addition, upon termination, the improvements were not subject to Southwest's or Cutter's removal or destruction but were to be the property of the city.

Id.

In other words, the lease in *Cutter Aviation* was exactly like the Agreement here, except the roles are reversed. Under the Garfield Agreement, the City *cannot* determine the Project's uses, *cannot* transfer any interest in the property (only Garfield can), and must *return* the property to Garfield at any time, at Garfield's request and upon lease termination. In short, under the *Cutter Aviation* analysis, it is Garfield, not the City, that truly owns the Project. If the law deals with substance, not shadows, the conclusion is clear: Garfield is the true owner of the Property notwithstanding the Agreement, and the agreement is an artifice to avoid taxation.

In *Syms Corp. v. Commissioner of Revenue*, 765 N.E.2d 758 (Mass. 2002), a company created a subsidiary to hold its intellectual property, receive royalties, and then hold them for a few weeks so it could pay the parent company with a tax-free dividend. *Id.* at 762. Throughout the transaction, the parent company continued to control the intellectual property, chose who could use it, maintained its quality control, paid for all the advertising, etc. *Id.* The court, applying Massachusetts' statutory version of an Evasion Clause, held that no tax exemption

could be granted because a business cannot "claim[] the tax benefits of transactions that, although within the language of the tax code, are not the type of transactions the law intended to favor with the benefit." *Id.* at 763. This case is like *Syms Corp.* because the true owner of the Project is Garfield, not the City, just as the true owner of the intellectual property in *Syms Corp.* was the parent company, not the subsidiary.

How the Garfield Project is *actually used* also shows that Garfield is the true owner. *See Tucson Jr. League of Tucson v. Emerine*, 122 Ariz. 324, 325 (App. 1979) ("It is the use of the property itself" that is "decisive" in determining whether the property is exempt from taxation); *R.O.I. Props. LLC v. Ford*, 246 Ariz. 231, 235 ¶ 16 (App. 2019) (property lost its tax-exempt status when it was no longer used for educational purposes). Here, there's no dispute that the Project will be used as "a multi-family residential building," APP.345 ¶ 70; APP.115 § 8.2; APP.307 ("Garfield is developing a 26-story multi-family residential development in downtown Phoenix"); APP.316 ("Garfield agreed to build a luxury apartment complex on 6thStreet and Garfield in Downtown Phoenix."). But that is not a "municipal" use. A municipal use is a public use, not a profit-making private enterprise. The Supreme Court recognized that when it said in *State v. Yuma Irrigation District*, 55 Ariz. 178, 182 (1940), that constitutional tax exemptions do not apply to entities whose "function is purely business and economic, and not

political and governmental." *See also* *City of Phoenix v. Bowles*, 65 Ariz. 315, 317 (1947) ("Where … the city enters the field of private competitive business for profit, it divests itself of its sovereignty *pro tanto*, takes on the character of a private corporation and thereby forfeits its immunity from taxation.").

Just as a property owner could not transfer his property to a charity in order to qualify for a charitable tax exemption, while still *using* the property for a non-charitable purpose, *cf.* *Est. of Spencer v. Comm'r of Internal Revenue*, 52 T.C.M. (CCH) 353 (Tax Ct. 1986), so Garfield cannot transfer the Property to the City to qualify for a municipal tax exemption, while still enjoying all substantive rights of ownership and using it for no actual municipal purpose.

Courts are supposed to focus on "[t]he reality of the transaction" instead of "surface indicia" in cases like this. *Wistuber*, 141 Ariz. at 349. Here, the reality of the transaction shows that, whatever the paperwork might say, the Project is not and will never be "municipal" property. It's a *private*, for-profit Project that is in substance owned by Garfield. The title-transfer is "devoid of economic substance and motivated solely by tax considerations," *Coleman*, 16 F.3d at 831, and is therefore a conveyance to avoid taxation. Consequently, it is not exempt.

C. Statutory compliance does not equate to constitutional compliance.

The Superior Court also erred in finding that "compli[ance] with the GPLET statute," APP.378, means compliance with the Constitution—that is, that as long as

the title-transfer scheme works within the statute, it cannot exceed the Evasion Clause's limits. But "statutory compliance does not automatically establish constitutional compliance." *Turken*, 223 Ariz. at 351 ¶ 41.

Specifically, the trial court found that the GPLET Transaction did not violate the Evasion Clause because the Agreement "[1] was publicly debated and approved by City Council, and [2] complies with the GPLET statute." APP.378. The court also found the GPLET Transaction constitutional because "Garfield and the City complied with all requirements of the GPLET statute in structuring [it]." APP.379. But "a statute cannot circumvent or modify constitutional requirements, and language chosen by a statute's proponents will not bind nor limit the Court's determination of its meaning." *Fann v. State*, 251 Ariz. 425, 434 ¶ 24 (2021).

Remarkably, the City's attorney *conceded* during oral argument that if a private developer had "come to the City" prior to the enactment of the GPLET statute, "and said, 'Hey, why don't you hold on to my property for a while and then we won't have to pay taxes on it,' that, I think, may have been a problem." APP.367 (cleaned up). In other words, the City appeared to share the trial court's view that compliance with the GPLET statute somehow immunizes the subsidy at issue here from constitutional scrutiny.

But it is immaterial that the Agreement complies with the statute. The government might easily comply with *statutory* requirements when violating the

Constitution: it might comply with all statutory requirements for getting a warrant, but still lack probable cause to search; or comply with statutory requirements when forcing someone to attend religious services; or comply with statutory requirements when giving a subsidy to a private business. Nevertheless, the Constitution forbids such things. Neither the City nor the State can "circumvent or modify" the Gift or Evasion Clauses. *Fann*, 251 Ariz. at 434 ¶ 24. And, of course, the Legislature cannot authorize a tax exemption that the Constitution prohibits. *Kunes v. Samaritan Health Serv.*, 121 Ariz. 413, 415 (1979) ("The legislature can exempt only that property the constitution provides it may exempt by law. It cannot do indirectly what it cannot do directly.") (citation omitted)).

In any event, this case is not a facial challenge to the constitutionality of the GPLET statute. Indeed, there are many circumstances in which cities can use the GPLET statute *lawfully*, in full compliance with both the Evasion and Gift Clauses. For example, if a city leases property that is *already owned* by the government to a private party, so that the City receives tax revenue it would otherwise not receive, that would not be a conveyance to evade taxation (or a gift), because it would not be "devoid of economic substance and motivated solely by tax considerations." *Coleman*, 16 F.3d at 831. But that's not what happened here. Instead, the City accepts an artificial, on-paper conveyance of the Property, without exercising any actual ownership or dominion over the Property, and does so solely for tax

purposes: to give Garfield a way to not pay taxes. *That* is a conveyance to evade taxation, regardless of whether the City checked the right statutory boxes.

This transaction is also nothing like the ordinary, legal tax exemptions the government often offers taxpayers. For example, the tax exemption addressed in *Kotterman* gave people a tax credit if they contributed money to a tuition scholarship organization. Participating in that program is a lawful form of tax avoidance *because the taxpayer must still surrender the money*: she contributes to the scholarship organization. This Agreement, by contrast, would be as if the taxpayer got the tax exemption for donating—but then also got back the money she donated! That would be a sham transaction for purposes of evading taxation.

III. The trial court erroneously applied the doctrine of laches.

In contradictory rulings, the trial court first found that laches does not apply to any claim in this case,[14] then reversed itself and found that laches does apply, but only to the Evasion Clause claim.[15] It did so even though no new evidence had been introduced between the court's first ruling on laches and its second. Indeed, the court found that laches applied at the summary judgment stage on an incomplete factual record.[16] But the affirmative defense of laches has never been

[14] APP.288 ("On this record, the Court will not dismiss the action based on the doctrine of laches.")
[15] APP.373 ("Taxpayers' Evasion Clause claim is barred by laches.")
[16] At the very least, disputed questions of fact exist as to whether laches applies, which should have precluded summary judgment.

applied by any Arizona court on an Evasion Clause claim, or indeed, any claim that remotely resembles the facts of this case. In short, the trial court's laches ruling is inconsistent with its prior rulings, is unsupported by the record and without evidentiary foundation, and is contrary to the test this Court and the Supreme Court have set out. By applying laches, the Superior Court rewrote the 12-month statute of limitations for claims against public entities and has thrown into question cases that timely challenge the legality of government action in good faith. That was an abuse of discretion and should be reversed.

Laches is an equitable doctrine based on "[s]imple fairness." *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993). It "may not be invoked to defeat justice but only to prevent injustice." *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013) (citation omitted).

Laches is an affirmative defense and is only available if the Appellees can prove, by a preponderance of evidence, that (1) there was unreasonable delay *and* (2) that delay prejudiced them. *Id.*; *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 8 (2000). But here, there was no delay, let alone unreasonable delay. Instead, Taxpayers diligently pursued resolution of this matter through the proper non-litigation channels, and only sued when the City ignored their efforts to resolve the dispute and made clear that it intended to persist in an action that, just months before, had been declared unconstitutional.

Not only was there no unreasonable delay, but neither Appellee has offered proof that they were prejudiced, as is their burden. On the contrary, both the City and Garfield had advance knowledge of Taxpayers' concerns regarding the legality of the GPLET Transaction; Taxpayers shared those concerns in an attempt to dissuade the City from entering into an illegal Agreement, but both Appellees chose to proceed anyway.

A. There was no unreasonable delay.

Laches only applies if a plaintiff delayed filing a lawsuit in a manner that was "*unreasonable* under the circumstances." *McComb v. Superior Ct.*, 189 Ariz. 518, 525 (App. 1997) (emphasis added). Because it is an affirmative defense, the Appellees must prove, "by the preponderance of the evidence," *Pfeil v. Smith*, 183 Ariz. 63, 65 (App. 1995), that Taxpayers engaged in unreasonable delay. They have presented no such evidence.

Instead, the record shows that Taxpayers tried to resolve this matter without litigation, and only filed suit after the Appellees ignored their complaints and signed what they must have known was an unconstitutional agreement.

When evaluating reasonableness of delay under laches, courts "consider all of plaintiffs' activities, *including their efforts outside* [o]*f litigation*, to resolve the conflict." *McComb*, 189 Ariz. at 526 (emphasis added). Far from being unreasonable, "protests [and] complaints … [a]re indications of *reasonable* delay,"

id. (citation omitted, emphasis added), not the unreasonable delay to which laches applies.

Here, Taxpayers diligently pursued non-litigation alternatives before suing, and only reluctantly filed suit because the City ignored them. As soon as the City authorized negotiations with Garfield in October 2020, Taxpayers wrote to the City, protesting the proposed GPLET Transaction, and asking the City not to adopt it, or any other illegal subsidy to Garfield. In fact, Taxpayers sent three such letters over a four-month period. *See* APP.022–48; APP.051–52. The City repeatedly promised to "get a response out" to Taxpayers. APP.053–54. Yet it never did. It never responded, but—ignoring Taxpayers' protests and complaints—signed the Agreement anyway. Thus, any delay was not on the Taxpayers' part *at all*: it was the City that delayed. When it failed to provide the response it had promised, Taxpayers had no choice but to sue—which they did within the statute of limitations.

Arizona courts have been clear that "[l]aches does not require, as a very first course of action, that plaintiff file a lawsuit." *McComb*, 189 Ariz. at 526. That's because public policy encourages parties to resolve disputes without litigation. *Cf. United Bank of Ariz. v. Sun Valley Door & Supply, Inc.*, 149 Ariz. 64, 67 (App. 1986) ("Public policy favors settlement."). Taxpayers tried that—and the City refused to even answer their letters. The idea that Taxpayers should now be

punished by the application of laches is contrary to *McComb*, contrary to "[s]imple fairness," *Mahoney*, 174 Ariz. at 460, and contrary to wise public policy.

The trial court's order waved away Taxpayers' attempt to persuade their elected representatives not to sign an illegal Agreement. APP.372. But it's hard to see what the trial court, or Appellees, would have Taxpayers do when they have a grievance against their government, other than petition for redress. The Superior Court would apparently prefer a rule that requires citizens who think the government is about to do something unconstitutional to rush to court *before* trying to dissuade their representatives from doing so. Indeed, if affirmed, the lower court's ruling will require that. But that's contrary to the efficient administration of justice—and an improper application of laches, which "may not be invoked to defeat justice but only to prevent injustice." *Prutch*, 231 Ariz. at 435 ¶ 13 (citation omitted).

The Agreement itself actually shows that there was no unreasonable delay in this case. There, Garfield agrees to indemnify, defend, and hold harmless the City for any challenge pertaining to "use of GPLET treatment for the property." APP.346 ¶ 79; APP.119 § 12.1. The GPLET lease, and the tax abatement associated with it, become effective only *after* the property is conveyed to the City. And Garfield does not convey the Property to the City until *after* construction is

completed. This shows that the Appellees planned in the Agreement—indeed, *anticipated*—a lawsuit challenging the legality of the GPLET Transaction.

Actually, they expected the lawsuit to come *not* when the Agreement was signed, or when construction began, but only after construction was completed. That means the case came *much earlier* than Appellees expected, not later. Thus, it was illogical for the trial court to find unreasonable delay.

B. Appellees have not proven substantial harm or prejudice.

Not only have Appellees failed to carry their burden of proving unreasonable delay, but they have also failed to prove that they suffered prejudice based on when this case was filed. "[E]ven had the delay been unreasonable, delay alone will not satisfy the test for laches. The complaining party must also prove prejudice." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 559, ¶ 9 (2009) (citation omitted). To prove prejudice, Appellees must present "evidence of 'substantial harm' or a change in position based on the delay." *Rash v. Town of Mammoth*, 233 Ariz. 577, 583 (App. 2013). But nothing Garfield or the City has submitted provides any proof of prejudice.

Importantly, "[t]he mere possibility of prejudice … is not tantamount to an affirmative showing of prejudice." *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 257, 264 (E.D. Mich. 1997) (citation omitted). *See also* *Transportes Ferreos de Venezuela II CA v. NKK Corp.*, 239 F.3d 555, 561 (3d Cir. 2001)

("mere conjecture or suspicions may not form the basis for establishing appreciable prejudice."). In *Martin*, 219 Ariz. at 559 ¶ 10, the Supreme Court rejected the idea that speculative, or "potential" prejudice satisfies the requirements for laches. There, the Governor argued that laches applied to a special action challenge requiring cities to make deposits into the state general fund, claiming that her office suffered prejudice because "measures *might have been taken* to find alternate sources of revenue to replace the amount at issue" in the case. *Id.* (emphasis added). The Court rejected that argument. *Id.*

Here, the claim of prejudice is even more speculative than that. The *only* evidence Garfield submitted regarding prejudice is a declaration from its authorized representative after this case was filed, which says: "[h]ad Plaintiffs challenged the City's agreement to enter into a GPLET arrangement with [Garfield] in October 2021 or earlier, [Garfield] would have been able to mitigate any potential losses and *potentially* renegotiate the agreement with the City." APP.336–37 ¶ 15 (emphasis added). That's all—and that's legally insufficient because a defendant "must do much more than just *claim* he or she has suffered prejudice," to establish prejudice for laches. *State v. Unkefer*, 225 Ariz. 430, 436 ¶ 24 (App. 2010) (emphasis added). This isn't even a *claim*—much less proof—that Garfield has suffered "substantial harm."

If such speculative potentials were enough to show prejudice, laches would apply to every case. *See* *Irwin Holdings, LLC v. Weigh to Wellness, LLC*, No. 2:18-CV-00774-SGC, 2019 WL 3842800, at *4 (N.D. Ala. Aug. 15, 2019) (court was "dubious that the mere possibility [that] delay could increase a defendant's financial exposure demonstrates undue prejudice" because "[s]uch a low hurdle would render the undue prejudice requirement mostly meaningless and make a laches defense available to virtually any … defendant."). That is not the rule.

In any event, Appellees could *still* renegotiate their arrangement any time, including after construction has been completed and the GPLET Transaction commences. Indeed, they could renegotiate whatever they want even today, or years from now.[17] **Appellees have never even alleged that Garfield "change[d] … position" in any way** based on when this case was filed. *Rash*, 233 Ariz. at 583 ¶ 18. That alone is enough to defeat laches.

C. Unclean hands bars application of laches here.

This is all academic, however, because Garfield is disqualified from seeking laches in the first place, due to unclean hands, which is a complete bar to a laches

[17] After the subsidy in *Rodgers v. Huckelberry*, No. 2 CA-CV 2021-0072, 2022 WL 14972042 (Ariz. App. Oct. 26, 2022), was declared unconstitutional, the parties renegotiated their contract, and the recipient of the subsidy remains in operation. *See* Steve Jess, *Pima County Cuts New Deal with World View*, Ariz. Pub. Media (Jan, 10, 2023).

defense. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002).

The record shows that Appellees intended to proceed with the GPLET Transaction *regardless* of whether or when Taxpayers sued, and despite the fact that they knew the GPLET Transaction was unlawful. In July 2020, *less than a month* after the Maricopa County Superior Court found that the (same) City violated the (same) Gift Clause through an (almost identical) GPLET arrangement in *Englehorn v. Stanton*, No. CV 2017-001742, 2020 WL 7487658 (Maricopa Cnty. Super. Ct. June 19, 2020), Garfield's attorney, Nick Wood, Esq., contacted the City's economic development director to ask about the status of the Garfield GPLET. APP.344 ¶ 57; APP.348. The City answered that it was taking "a pause on taking other GPLET deals to the City Council," due to "the recent trial court ruling invaliding one of our GPLET development arrangements." APP.349. In reply, Garfield's attorney harangued the City's attorney, saying he had spoken to the Mayor and members of City Council, and "[t]hey all agreed that they are going to do business as usual and not let the Goldwater Institute through an arbitrary decision, by an activist judge, with limited affect [sic], control their policymaking prerogative." APP.348.

In other words, **Garfield's attorney was representing that the City would ignore the trial court's decision** in *Englehorn* and proceed with a nearly identical

subsidy. Garfield's attorney further stated that the City should not be worried about litigation "since there is zero exposure to the city, and all the risk is on [Garfield]." PSSOF Ex. 1 at 1. In other words, Garfield *knew* the risk of litigation in this case and (defiantly) accepted that risk.[18]

Meanwhile, Taxpayers were trying, in good faith, to resolve their concerns about the unconstitutional subsidy the City was planning. They repeatedly wrote to the City to urge it to comply with the law—and the City promised to answer, but never did. This, too, demonstrates that the equities are on the Taxpayers' side.

This is a textbook example of "unclean hands." *See* *MacRae v. MacRae*, 37 Ariz. 307, 318–19 (1930) ("'whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, [has] violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him[.]' … [E]quity interposes only to enforce the requirements of conscience and good faith." (citation omitted)).

"'[U]nclean hands' … negates the equitable principle of laches." *Wyatt Processing, LLC v. Bell Irrigation Inc.*, 679 S.E.2d 63, 64 (Ga. App. 2009); *Jarrow Formulas, Inc.*, 304 F.3d at 841. Despite the *Englehorn* decision, and despite Taxpayers' effort to resolve their concerns without litigation, Appellees

[18] Garfield received regular communications from the City regarding Taxpayers' concerns and complaints regarding the GPLET subsidy. *See, e.g.,* APP.336 ¶ 12.

persisted—egregiously—in pursuing a deal identical to one that had just been declared unlawful. If "[o]ne who seeks equity must do equity," *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass'n*, 95 Ariz. 98, 100 (1963), the Appellees are *totally disqualified* from asserting laches. Garfield and the City:

- knew the GPLET Transaction was unconstitutional, APP.348–50;
- knew a lawsuit was likely if the arrangement was not changed to comply with the law, APP.022–50;
- discussed the likelihood of that lawsuit, APP.336 ¶ 12;
- received multiple complaints from these Taxpayers, who urged the City not to adopt the GPLET Transaction, APP.022–50;
- ignored those complaints, *id*.; and
- signed the Agreement anyway.[19]

That is not just a failure to prove prejudice, but a flagrant example of unclean hands. The Appellees are therefore not entitled to laches.

D. The trial court only applied laches to the Evasion Clause claim.

Finally, the Superior Court committed a logical contradiction by applying laches to the Evasion Clause claim but not the Gift Clause claim, even though the

[19] Indeed, that Agreement has an indemnity provision that anticipated a legal challenge to the GPLET arrangement Agreement *even after the Project was completed* whereby Garfield expressly agreed to indemnify the City for that litigation risk. APP.346 ¶ 77–78; APP.064–65 § 103; APP.119 § 12.1.

facts and legal analysis are the same for both. Self-contradiction or internal inconsistency is an abuse of discretion. *Schultz v. Schultz*, No. 1 CA-CV 22-0406 FC, 2023 WL 2484796, at *4 ¶ 24 (Ariz. App. Mar. 14, 2023); *Ortiz v. Diejuez*, 1 CA-CV 18-0606 FC, 2020 WL 1684019, at *6 ¶ 28 (Ariz. App. Apr. 7, 2020); *S. Cross Ranches, LLC v. JBC Agric. Mgmt., LLC*, 442 P.3d 1012, 1020–21 ¶¶ 44–49 (Colo. App. 2019); *Stubbs v. Kansas City Terminal Ry. Co.*, 427 S.W.2d 257, 260 (Mo. App. 1968).

The Superior Court was clear that it considered only the Evasion Clause claim barred by laches. *See* APP.373. Indeed, it went out of its way to distinguish the Evasion Clause and Gift Clause claims in this respect. *See* APP.372 ("The October 29 Letter did not alert the City to an alleged Evasion Clause violation."); APP.373 ("Taxpayers never raised … [the Evasion Clause] issue before filing this action."). It expressly *rejected* application of laches when Appellees argued it in their motions to dismiss, finding that "[o]n this record, the Court will *not* dismiss the action based on the doctrine of laches." APP.288 (emphasis added).

Yet the record never changed, and the equitable considerations are the same for both causes of action. Garfield never offered any evidence to support its laches

theory after the Court's December 20, 2022 Order on the Motions for Summary Judgment and before its August 21, 2023 Order on the Motions to Dismiss.[20]

Obviously, a court can change its mind, but there must be some basis for doing so, and here there was none: the facts did not change in the time between the court's two orders. "An abuse of discretion exists when the record … is devoid of competent evidence to support the decision." *Hurd v. Hurd*, 223 Ariz. 48, 52 ¶ 19 (App. 2009) (citation omitted). The Superior Court itself said the record was devoid of evidence to hold that laches barred the Gift Clause claim. Yet the record is the same in all relevant respects to the Evasion Clause claim. So, by the Superior Court's own admission, the record is also insufficient to find the Evasion Clause claim barred by laches. This internal inconsistency constitutes a reversible abuse of discretion.

And if that is *not* true, and if laches does properly apply here, which it does not, the Superior Court only applied it to the Evasion Clause claim, and expressly declined to apply laches to the Gift Clause claim, APP.288, which means this Court must still resolve at least the Gift Clause claim on the merits.

CONCLUSION

The decision below should be *reversed*.

[20] If there is some reason to treat the two claims differently for laches purposes, the Appellees bore the burden of establishing why, *Rash*, 233 Ariz. at 583 ¶ 18 (party asserting laches bears the burden), and they never did.

NOTICE UNDER RULE 21(A)

Taxpayers request costs pursuant to A.R.S. § 12-341, and attorney fees under the private attorney general doctrine.

Respectfully submitted this 8th day of April 2024,

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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

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Pursuant to Rule 23(g)(2) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Opening Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 13,849 words, excluding table of contents and table of authorities.

Respectfully submitted April 8, 2024 by:

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The undersigned certifies that on April 8, 2024, she caused the attached Appellants' Opening Brief and Appellants' Appendix to Opening Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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