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

NOTICE OF SUPPLEMENTAL AUTHORITY

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Pursuant to Rule 17 of the Arizona Rules of Civil Appellate Procedure, Plaintiffs/Appellants Bramley Paulin, *et al.*, hereby notify the Court of the decision of the Arizona Supreme Court in *Gilmore v. Gallego*, No. CV-23-0130-PR, 2024 WL 3590669 (Ariz. July 31, 2024), which held that certain contracts by the City of Phoenix that included subsidies to private entities violated the Gift Clause. The decision is particularly relevant here for two reasons.

First, in discussing the earlier precedent of *Schires v. Carlat*, 250 Ariz. 371 (2021), the *Gilmore* court explained that the tax payments required by the contract in that case did not count as consideration under the Gift Clause because they were pre-existing legal duties. *See* 2024 WL 3590669 at * 8 ¶ 41 ("Preexisting legal obligations cannot constitute consideration for Gift Clause purposes."); *Cf. Schires*, 250 Ariz. at 377, ¶ 18 ("A business's obligation to pay taxes is independent of an economic development agreement … [and] is an indirect benefit that is irrelevant to our analysis.").

In this case, the City and Garfield have argued that preexisting tax obligations *should* count as consideration, contrary to the Supreme Court's holding in *Schires*, and now as clarified in *Gilmore*. Specifically, Appellees contend that tax payments that are paid as part of the "Minimum Direct Benefit" are consideration from Garfield to the City. Appellees' Joint Response Brief at 46 ("Garfield contractually agreed to provide a minimum direct benefit in the

amount of $9 million, including net rent, and *guaranteed tax revenue*." (emphasis added). But the vast majority of payments that satisfy the "Minimum Direct Benefit" are preexisting tax obligations that Garfield would otherwise pay to the City. Appellants' Opening Br. at 27–28; Appellants' Reply Br. at 19–20. These preexisting tax obligations "cannot constitute consideration for Gift Clause purposes," as the Supreme Court made crystal clear in *Gilmore*, 2024 WL 3590669 at *8 ¶ 41.

Appellees also argue that the City's elimination of tax *liabilities* to Garfield through the GPLET abatement should *not* count as consideration because the amount of foregone revenue is purportedly "speculative." Ans. Br. at 47. To support that point, they cite language in *Schires* which says speculative benefits are too imprecise to be included in the "give" / "get" consideration comparison. *Id.* But the *Gilmore* decision makes clear that that is not what *Schires* said. 2024 WL 3590669 at *8 ¶ 41. *Schires* said that *a private entity's* obligation to pay taxes cannot count as consideration because of the preexisting duty rule, *Schires*, 250 Ariz. at 377, ¶ 18, *not* because the amount was speculative. The City's waiver of Garfield's tax liabilities is neither a preexisting legal obligation of a private party, nor is it speculative in this case.

Second, the release time provisions found unconstitutional in *Gilmore* are benefits that are *not* direct outlays of government money: they consist of hours of

time which, in previous contracts, had been deemed vacation time or personal-time-off, but which in the contract at issue were given to the union instead, with the result that "released" employees could spend that time working on behalf of the private entity. *See* 2024 WL 3590669 at *7 ¶ 37 ("The release time provisions at issue are precisely that: a 'release' from the ordinary duties for which Unit II employees were hired, to instead perform, in the main, lawful union activities." (emphasis omitted)). That reinforces the Supreme Court's point earlier this year in *Neptune Swimming Found. v. City of Scottsdale*, 542 P.3d 241, 250 ¶ 28 (Ariz. Feb. 6, 2024), that intangible benefits conferred upon private entities—here, exemption from future tax liability— nonetheless qualify as illegal subsidies.

In this case, Defendant/Appellees have argued otherwise. *See* Joint Response Brief at 38–40 (arguing that tax-exemption is not a subsidy because "the city does not 'own' any future ad valorem tax payments."). The Supreme Court in *Gilmore* made clear that the "Gift Clause aims to prevent subsidies to private individuals, associations, and corporations," 2024 WL 3590669 at *7 ¶ 37, and prevents the allocation of "public funds *and resources*" to private parties. *Id.* at *9 ¶ 42 (emphasis added).

Respectfully submitted this 5th day of August, 2024,

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CERTIFICATE OF SERVICE

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The undersigned certifies that on August 5, 2024, she caused the attached Notice of Supplemental Authority to be filed via the Court's Electronic Filing System and electronically served a copy to:

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