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' REPLY BRIEF AND RESPONSE TO CROSS APPEAL OF INTERVENOR/APPELLEE/CROSS-APPELLANT 6TH & GARFIELD OWNER LLC, AND DEFENDANTS/APPELLEES/CROSS-APPELLANTS CITY OF PHOENIX AND JEFF BARTON AND SUPPLEMENTAL APPENDIX

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I. Laches does not apply.

The trial court committed reversible error in its application of laches, both because the circumstances here simply do not warrant it, and because the court used the wrong evidentiary standard.

A. The proper standard of review is *de novo*.

The correct standard of review for this Court to apply to the trial court's laches finding is *de novo,* because the lower court based that ruling on a misapplication of the law. When reviewing an application of laches, appellate courts defer to trial courts' factual findings, but review their legal conclusions *de novo*. *Rash v. Town of Mammoth*, 233 Ariz. 577, 583 ¶ 17 (App. 2013). Of course, a misapplication of law is an abuse of discretion, *Timothy B. v. Dep't of Child Safety*, 252 Ariz. 470, 474 ¶ 14 (2022), but "[t]he availability of equitable relief and equitable defenses is also subject to [this Court's] *de novo* review." *Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, 210 ¶ 8 (App. 2010). Such *de novo* review is particularly appropriate when laches has been applied at the summary judgment stage, as it was here. *2977 Camino Las Palmeras, LLC v. Deutsche Bank Nat'l Tr. Co., as trustee for New Century Alternative Mortg. Loan Tr. 2006-ALT1*, No. 2 CA-CV 2018-0141, 2019 WL 2591565, at *8 ¶ 37 (Ariz. App. June 24, 2019). Because application of laches here turns on application of

legal and equitable principles applied at the summary judgment stage, *de novo* review applies.

B. There was no unreasonable delay.

Laches applies only 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). But there was no unreasonable delay here. Plaintiffs tried—as responsible citizens are supposed to—to persuade their government not to enter into an illegal transaction. They sent multiple communications to City officials protesting the proposed Agreement, which the City ignored. APP.343 ¶ 54. "[P]rotests, complaints and negotiations" like this are "indications of *reasonable* delay," not *unreasonable* delay. *McComb*, 189 Ariz. at 526 (emphasis added).

Appellees try to distinguish *McComb*, but cannot. Resp. at 25–26. Taxpayers here, like the *McComb* plaintiffs, "immediately requested documents," 189 Ariz. at 525, pertaining to the GPLET Agreement, but although the City had those documents on hand, it did not produce the Agreement for *60 days* after it was requested—and 21 days *after* construction on the Project began. APP.344 ¶¶ 58–59, APP.336 ¶ 13; Supp. App. at 40 of this brief.[1]

[1] This was a probably illegal. Arizona law requires that public records be produced "promptly." A.R.S. § 39-121.01(D). When records are "available for immediate production," courts require disclosure "at once." *W. Valley View, Inc. v. Maricopa*

That fact also shows that Appellees were not prejudiced by any delay in filing the case—because Taxpayers *could not* have filed a Complaint *before* construction began, due to their not having a copy of the Agreement for nearly a month after that. Garfield chose to start construction on the Project *10 days* after signing the Agreement, even though it knew of the Agreement's legal infirmities. *Id.*

What's more, even after Taxpayers received the Agreement, and then petitioned their government not to engage in an illegal transaction, *the City* again delayed. It repeatedly promised to "get [Taxpayers] a response" to their written complaints about the proposed transaction, APP.049–50, 53–54, but never did: it ignored them and chose to proceed—despite the *Englehorn v. Stanton* ruling (No. CV2017-00174, 2020 WL 7487658 (Ariz. Super. June 19, 2020)), which found a nearly identical arrangement violated the Gift Clause. *See* APP.344 ¶ 57.

Appellees did this even though either one could have "fil[ed] [their] own declaratory judgment action" to resolve the transaction's constitutionality, as the trial court observed when it initially rejected Garfield's laches argument at the Motion to Dismiss stage. APP.288. Indeed, in the GPLET Lease itself, Garfield

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Cnty. Sheriff's Off., 216 Ariz. 225, 230 ¶ 21 and n.8 (App. 2007). Here, Taxpayers asked for a copy of the Agreement on April 16, 2021. *See* APP.344 ¶ 59. Yet the City delayed *60 days* before providing it to Taxpayers.

expressly acknowledged that it could file "any declaratory action against [a] Person regarding the validity of the [GPLET] Lease." PSSOF ¶ 81.

Thus, as in *McComb*, it was the *Appellee's* delay that caused there to be, "[a]s a practical matter … little time in which" to file suit. 189 Ariz. at 525. The City failed to produce the Agreement, probably in violation of the public records law, and Garfield chose to immediately begin construction on the Project despite its awareness of the likely lawsuit. None of this was Taxpayers' fault, and under *McComb*, laches cannot apply.

It would be unreasonable to penalize citizens for trying to avoid litigation by petitioning their government to obey the law. That's why the court below, and Appellees, are wrong to say that only "bilateral" negotiations count under the laches test. APP.372; Resp. 23. That's not the law, and it makes no sense. Where citizens try to persuade the government to obey the law and avoid litigation, it doesn't matter that they aren't bilateral parties at a negotiation table. As the Supreme Court observed in another Gift Clause case, "we should encourage resolution of constitutional arguments in court rather than on the streets," *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350 (1984)—and citizens should not have the courthouse door shut on them under laches just because they asked their government in good faith to avoid litigation (and were ignored).

When evaluating the reasonableness element of a laches defense, courts "consider all of plaintiffs' activities, *including their efforts outside litigation*, to resolve the conflict" before suing. *McComb*, 189 Ariz. at 526 (emphasis added). Taxpayers here made multiple efforts to avoid litigation—and Appellees refused to listen. As a matter of "simple fairness," *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993), the timeframe in which Taxpayers pursued this case was reasonable.

C. Appellees have failed to prove they suffered any prejudice.

Garfield has never proven that it suffered *any* prejudice based on when this case was filed. Garfield bears the burden of proving by a preponderance of evidence not only that it was prejudiced by unreasonable delay, but that it changed its circumstances because of the delay. *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013); *Rash*, 233 Ariz. at 583 ¶ 18. But the *only* evidence Garfield offered, and the *only* argument Appellees make now, Resp. at 26–27, is that Garfield was purportedly prejudiced because it started construction on the Project before this case was filed, and that—based on one sentence in a declaration submitted by Garfield's authorized representative when Garfield moved to intervene—that Garfield "would have been able to mitigate any potential losses and *potentially* renegotiate the agreement with the City," APP.336–37 ¶ 15 (emphasis added), if Taxpayers had sued earlier. Noticeably absent from this wholly speculative statement is *any* evidence about how the timing of this case

actually prevented Garfield from mitigating any *actual* losses, or *what* Garfield would *actually* have done had Taxpayers sued six months sooner. There's no evidence that it would have stopped construction or changed position; on the contrary, that's implausible, given that Garfield started construction 10 days after signing the Agreement.

What's more, both Appellees anticipated litigation resulting from the City's "use of GPLET treatment for the Property," APP.119, and they expected that litigation to come *not* when construction started, but all the way up until *after construction was completed*. APP.346 ¶ 77–78; APP.064–65 § 103; APP.119 § 12.1. What that shows is that Garfield knew a case challenging the constitutionality of the Agreement would likely be brought, and accepted that risk—and that Taxpayers sued *sooner* than Garfield expected. That, again, shows there was no prejudice—and thus that laches does not apply. The trial court's finding to the contrary was reversible error. *McLaughlin v. Bennett*, 225 Ariz. 351, 353 ¶ 6 (2010); *Arizona Laborers, Teamsters & Cement Masons Loc. 395 Health & Welfare Tr. Fund v. Hanlin*, 148 Ariz. 23, 29–30 (App. 1985).

Finally, Garfield sought, and the City approved, the GPLET Lease to increase Garfield's anticipated profits on the Project from 5.56% to 6.51%. APP.060 ¶ 43; APP.249. Even if this case had been filed six months earlier (indeed, even if the GPLET tax abatement is ultimately struck down), there's no

evidence Garfield would "abandon the Project" as a result. APP.282. The opposite appears to be true; in a similar case, the City promised, but then withdrew a GPLET abatement, APP.013 ¶¶ 64–67; APP.301 ¶¶ 64-67, and in another, the City was enjoined from providing a GPLET abatement, APP.013–14 ¶¶ 68–72; APP.301–02 ¶¶ 68—72, but both projects went forward anyway. *Id.* In any event, apart from pure speculation by Appellees' counsel, there's no evidence that Garfield would abandon the Project based on when this case was filed, or even *whether* it was filed.

D. Appellees have unclean hands.

Appellees have unclean hands, which is a complete bar to laches. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002). First, the City withheld the GPLET Agreement—a public record subject to prompt disclosure—until after construction began. Second, Appellees signed the Agreement barely three months after the Superior Court ruled that a practically identical contract was illegal[2]; indeed, they discussed that previous ruling and *explicitly chose to defy it*. APP.348–349. Finally, Garfield began construction a mere 10 days after signing the GPLET Agreement, making litigation before construction "very difficult if not impossible," *McComb*, 189 Ariz. at 525, which

[2] Appellees argue that the *Englehorn* Agreement was different from this one. Resp. at 29-30. It was not. *See* 2020 WL 7487658.

shows that Garfield intended to proceed regardless of whether *or when* Taxpayers filed suit. Since "[o]ne who seeks equity must do equity," *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass'n*, 95 Ariz. 98, 100 (1963), Garfield is *totally disqualified* from asserting a laches defense.

E. The trial court erred in failing to hold Appellees to their burden of proof.

Not only did the trial court misapply the doctrine of laches, but it also committed reversible error by failing to hold Appellees to their burden of proof. It did this by first rejecting application of laches, then granting it, based on identical facts and law.

Appellees contend that "there is nothing inherently contradictory about the Superior Court's decision to decline to rule on … laches" at the motion to dismiss stage, and then later to grant summary judgment on that basis. Resp. at 22. That may be true, but that's not the problem. Rather, the abuse of discretion is that the court expressly rejected application of laches at the motion-to-dismiss stage, then later entered summary judgment on that basis *even though the factual record was identical*.

It's the very definition of "arbitrary" for a court "to arrive at opposite conclusions on substantially the same state of facts and the same law," *Whittle v. Bd. of Zoning Appeals*, 125 A.2d 41, 45 (Md. 1956), and therefore an abuse of discretion. *Johnson v. Lagrew*, 447 S.W.2d 98, 102 (Ky. App. 1969). Yet here,

the court declined to apply laches at the dismissal stage, APP.287–88, then later entered summary judgment based on laches, claiming that it was doing so "on a more complete record," APP. 371; Resp. at 7, when in fact the record remained exactly the same.[3]

Since laches must be proven by a preponderance of evidence, *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 8 (2000), and Appellees failed to carry that burden at the Rule 12 stage, they must necessarily have failed to carry it at the summary judgment phase. There was no "more complete record"—there was just an abuse of discretion.

In fact, the trial court appears to have concluded that laches applied based exclusively on the passage of time between the Agreement and the lawsuit. But that was reversible error because lapse of time is legally inadequate to establish a laches defense. *Weller v. Weller*, 14 Ariz. App. 42, 47 (1971). Rather, the Appellees were required to prove that delay was *unreasonable* and caused *prejudice*, and proving that requires "consideration of the circumstances and merits

[3] When Appellants filed their Complaint, they also moved for a Preliminary Injunction, and Garfield moved to intervene, attaching to its motion several documents, including a declaration from its authorized representative. APP.334–37. The Court later stayed discovery pending disposition of the dismissal motion and Taxpayers' Cross-Motion for Summary Judgment. 2/7/2023 Order, IR.82. Yet, *no additional evidence* was introduced between the time the court denied the dismissal motion and the time it granted the summary judgment motion based on laches.

of a suit." *Day v. Wiswall's Estate*, 93 Ariz. 400, 403 (1963). Yet the *only* purported evidence of prejudice in Garfield's declaration was its speculation that it might "have been able to mitigate any potential losses and *potentially* renegotiate the agreement with the City," had Taxpayers sued earlier. APP.336 ¶ 15.

That is not "substantial evidence" of prejudice, as the law requires. *Rash*, 233 Ariz. at 583 ¶ 17. What's more, the trial court improperly accepted it without benefit of further discovery or depositions. Thus, it based its laches finding *not* on the actual facts and circumstances, but on delay alone, along with Garfield's speculation about what might "potentially" have happened. That was reversible abuse of discretion. *See Schnepp v. State ex rel. Dep't of Econ. Sec.*, 183 Ariz. 24, 30 (App. 1995) (reversing application of laches where there was no evidence of prejudice).

II. The GPLET Agreement violates the Gift Clause.

A. The Gift Clause applies to the GPLET subsidy.

The Gift Clause applies to tax refunds, tax forgiveness, the lease of government property at below market rates, and any other kind of subsidy.

Appellees argue that the Clause categorically does not apply when the government subsidizes a private business by waiving future tax liabilities. Resp. at 31–32. But that rule that has never been applied in any Arizona case, would contradict the Gift Clause's plain language—which forbids aid "by subsidy *or*

otherwise." Ariz. Const. art. IX § 7 (emphasis added)—and defies history and common sense.

The Gift Clause's language is "as clear and comprehensive as language can be." *State v. Dixon*, 213 P. 227, 233 (Mont. 1923). It was written in the wake of myriad schemes to exempt businesses from future taxation as a means of subsidizing them—and was written to forbid that. Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1, 57 (2024). The phrase "by subsidy or otherwise" means, *inter alia*, that government "may not do by indirection what [it] cannot do directly." *State v. Wienrich*, 170 P. 942, 944 (Mont. 1918). Obviously exemption from *future* taxation is indirectly providing *present* financial assistance—it's the functional equivalent of forgiving taxes: a subsidy. Whether government refunds taxes, prepays them, or as here, forgives or abates taxes that would be due, the Gift Clause applies.

It would be illogical to say that the constitutional ban on government aiding private companies "by subsidy or otherwise" somehow doesn't apply when it wipes away a company's future liabilities. That's why *Texas & N.O.R. Co. v. Galveston County*, 161 S.W.2d 530 (Tex. App. 1942), found that a law promising to eliminate a company's future tort liability was an unconstitutional subsidy. Appellees say that case isn't persuasive because the Texas Gift Clause forbids the government from "grant[ing]" any "thing of value" to a business, Tex. Const. art.

III § 52(a), but Arizona's Gift Clause is *more comprehensive* than Texas's, because it forbids any kind of financial aid "by subsidy or otherwise." Ariz. Const., art. IX § 7. Elimination of liability is certainly a thing of value—but it's also a "subsidy or otherwise." The Gift Clause's authors knew that; they were familiar with the use of tax exemptions as subsidies, and chose to forbid them. Sandefur, *supra*, at 32–38, 43–55.

Appellees cite *Maricopa County v. State*, 187 Ariz. 275 (App. 1996), in trying to argue that laws eliminating future tax liabilities are exempt from the Gift Clause, but the law in that case also provided for "*forgiv[ing] any unpaid* excess taxes" if the taxpayer could show that the property was, in fact, used for agricultural purposes—and that was held unconstitutional. *Id.* at 278 (emphasis added).

Even if the Clause only applied to eliminating existing tax liabilities, Taxpayers would still be entitled to judgment, because Garfield *does* owe taxes on the Garfield Project, which the Agreement nullifies. Contrary to Appellees' claim that "the City did not give up *ad valorem* taxes already owed by Garfield," APP.293, Resp. at 32, the City did just that, in two ways. **First**, Garfield *currently* pays *ad valorem* taxes on the Property, APP.056 ¶ 2; APP.197 ¶ 16, but the GPLET Agreement relieves Garfield of this tax burden *entirely*. In other words, once the Property transfers, and is deemed *de jure* government-owned, Garfield's

currently owed property taxes will go from $9,429.04 to zero. APP.197; ¶ 16. **Second**, once the Project is completed, Garfield *will* owe property taxes on the completed Project—to the tune of nearly $1,000,000 annually by operation of law, APP.200, ¶ 33, but, once the GPLET Lease becomes effective, those taxes are completely forgiven by the City for eight years. So the agreement voids both future *and present* tax liability.

Appellees claim the Gift Clause doesn't apply because the City doesn't "own" the GPLET benefit. Resp. at 32. This is legally and factually untrue. Legally, under Section 42-6209(A), "[a] city or town may abate the [property] tax" for an eight-year period. That power is "owned" by the City because *it* gets to decide whether to bestow that benefit on favored recipients. And it has chosen to give it some and not others. APP.013–14 ¶¶ 63–73; APP.301–02 ¶ 63–73.

Just this year, the Supreme Court held that City ownership of intangible "access rights" was subject to Gift Clause review. In *Neptune Swimming Found. v. City of Scottsdale*, 542 P.3d 241 (2024), Scottsdale, like Appellees here, argued that the Gift Clause did not apply because "the state does not own untaxed taxpayer income," *id.* at 250 ¶ 29, but the court rejected that argument: "the City owns the property access rights granted by [the swimming pool use] License." *Id.* In the same way, the City here owns the right to give, or not give, its GPLET abatement to Garfield. *Neptune* forecloses Appellees' argument.

There's also no doubt that the Gift Clause applies to the leasing of government property at below market rates. In *Neptune*, the court squarely held, "[g]ranting a private enterprise exclusive use of City-owned property, *even absent a monetary cost to the City*, constitutes an expenditure for Gift Clause purposes." *Id.* ¶ 28 (emphasis added). Other cases also say the Clause applies when government subsidizes private enterprise by granting use of government property at below-market rates. *See Schires v. Carlat*, 250 Ariz. 371, 376 ¶ 14 (2021) ("The state may not give away public property"); *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 362–63 (1974) (Gift Clause applies to lease of government property to a major league spring training team for nominal rent).

On this point, Appellees are in an irreconcilable Catch-22. On the one hand, they admit the Garfield Project *is City property*. They're even emphatic on that point. *See* Resp. at 46 ("[T]he [Garfield] property is a capital asset of the City."); *id*. at 51 ("the City owns title."); *id*. at 52 (the "City actually holds legal title to the land."). If that's true, then the Gift Clause obviously applies because the City is leasing its property to a private party without collecting tax on it—to the tune of $7,891,324. APP.058 ¶ 21; APP.198 ¶ 28. If it isn't true, then Appellees are violating the Evasion Clause, as explained in Appellants' Opening Brief at 33–43 and below.

Appellees try to escape this dilemma by arguing in a footnote that Taxpayers "did not allege, and there is no evidence in the record to suggest, that the rent paid by Garfield to the City during the eight-year lease term is below market value." Resp. at 39 n.9. But that's not true: Taxpayers *did* allege that "[t]he rent payments required by the GPLET Lease will never exceed the value of the favorable tax treatment created by the Development Agreement *and* are grossly disproportionate to the public benefits conferred upon the Developer under the Development Agreement." APP.017 ¶ 97 (emphasis added). Also, focusing on the rent, not the tax abatement, is immaterial, because the abatement is the primary subsidy the City is giving Garfield. *See* Neptune, 542 P.3d at 250 ¶¶ 28–29; Schires, 250 Ariz. at 376 ¶ 14; *Pilot Props.*, 22 Ariz. App. at 362–63. But even focusing on just the rent and not the abatement, the City is leasing a multi-million dollar high-rise luxury apartment building to Garfield for a fraction of its market value, APP.104 § 3.1, so even if the tax abatement isn't included in the Gift Clause analysis, the City's give is still "grossly disproportionate" to its "get."

Appellees also claim *Kotterman v. Killian*, 193 Ariz. 273, 285 ¶ 36 (1999), supports their argument that the Gift Clause does not apply to the selective abatement of taxes for some, but not all, taxpayers. Resp. at 34. This argument also fails. No party in *Kotterman* argued that the state was giving funds to taxpayers by letting them keep their money—because **the taxpayers did not, in**

fact, keep their money. The tuition tax credit allows taxpayers a choice: pay the state or pay a school. Taxpayers are therefore no better or worse off financially—which means the government is not making a "donation or grant, by subsidy or otherwise"—the individual taxpayers are. 193 Ariz. at 288 ¶ 51.

The opposite is true here. The City abates Garfield's taxes—forgiving its tax liability—and **Garfield adds that to its bottom line.** The extra $7.3 million increases its profit margin from 5.56% to 6.51%. APP.060 ¶ 43; APP.249.

If the City had allowed individual taxpayers to direct their money to economic redevelopment by way of a tax credit, the situation would be closer to *Kotterman*. But the tax abatement here is not a charitable tax credit; it's a business subsidy of the kind the Constitution forbids. *Kotterman* recognized the importance of that point: "[The Gift Clause] was historically intended to protect against the extravagant dissipation of public funds by government in subsidizing private enterprises such as railroad and canal building in the guise of public interest." *Id.* at 288 ¶ 52 (citation and quotes omitted).

The absence of "such evils" was dispositive in *Kotterman*; the presence of "such evils" is dispositive here.

In any event, to the extent that Appellees misquote *Kotterman* to support the idea that the Gift Clause cannot apply to tax exemptions "because the government does not 'own' future taxes that have not yet been collected," Resp. at 32, that

argument is put to rest by *Neptune*'s holding that it's a subsidy for the City to give valuable intangible rights to a private party "even absent a monetary cost to the City." 542 P.3d at 250 ¶ 28.

Appellees claim the GPLET abatement isn't a selective subsidy, but a general public benefit, because "any business willing to develop the blighted area" could have submitted a development proposal. Resp. at 3. But that's a red herring. Whenever the government provides a gift, donation, "subsidy or otherwise" to a private business, it violates the Gift Clause, even if other businesses are given a chance to receive a similar illegal gift. *Wistuber*, 141 Ariz. at 349 (one of the core purposes of the Gift Clause is "to prevent governmental bodies from depleting the public treasury by giving advantages to special interests."). Anyway, it's indisputable that the City *doesn't* approve every response to its RFP; it exercises discretion in deciding to subsidize some companies and not others. APP.013 ¶¶ 64–66; APP.014 ¶ 74. So this subsidy, not a general public benefit. 193 Ariz. at 288 ¶ 52; *see also Wistuber*, 141 Ariz. at 349, (One of the core purposes of the Gift Clause is "to prevent governmental bodies from depleting the public treasury by giving advantages to special interests.").

That's also why Appellees' references to *other* statutes, not at issue here, that purportedly grant special treatment to some parties and not others is unconvincing. All Appellees' examples involve situations where *every* taxpayer

satisfying the eligibility criteria receives the credit. Resp. at 35. For example, all taxpayers with dependents are eligible for a credit. A.R.S. § 43-1073.01. There's no discretion on the part of the taxing entity, and no special benefit to confer or withhold. Here, by contrast, *not* all taxpayers meeting eligibility criteria receive a GPLET. APP.013 ¶¶ 64–66; APP.014 ¶ 74. This is not a generally applicable benefit. It's a subsidy to the specific recipient that the City chose.

Finally, and alarmingly, Appellees claim the Gift Clause does not "appl[y] to all 'subsidies.'" Resp. at 39–40. Actually, the Clause expressly forbids the government from giving financial benefits to private entities "by subsidy or otherwise." Ariz. Const. art. IX § 7.[4] The framers chose this language carefully, to comprehensively forbid subsidies to private enterprises, in whatever form. Sandefur, *supra* at 38–43, 52–53. And courts have repeatedly held that the eliminating a tax liability is subject to Gift Clause analysis. *See, e.g.*, *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559–60 (App. 1997); *Maricopa Cnty.*, 187 Ariz. at 280–81; *cf.* *Rowlands v. State Loan Bd. of Ariz.*, 24 Ariz. 116, 123 (1922).

[4] True, "by subsidy or otherwise" modifies "credit, donation, or grant," but that still prohibits the GPLET tax subsidy because "donation" means "[a] gift … something, esp. money, that someone gives to a person or an organization by way of help." DONATION, Black's Law Dictionary (12th ed. 2024). The GPLET tax treatment is a donation to Garfield's bottom line, intended to increase its profit margin. Here, the City is giving a tax donation to Garfield to subsidize its private activities.

Maybe there's a way to subsidize a business that isn't a "grant," "donation," "loan," "credit," "*or otherwise*," and is therefore constitutional—but if so, this isn't it. The Constitution's prohibition on aid to private entities is broad and unequivocal, and forbids the City from "giving advantages to special interests," *Schires*, 250 Ariz. at 374 ¶ 6 (citation omitted), through special tax treatment.

B. The Agreement violates the Gift Clause.

1. The City receives constitutionally inadequate direct consideration for the $7.9 million subsidy it is providing to Garfield.

Appellees contend that Garfield's agreement to provide a so-called "Minimum Direct Benefit" (MDB) means the City is receiving sufficient consideration. But the MDB is a mirage, and this argument is meritless.

Nearly all the payments Appellees say count toward the MDB are tax obligations *already owed* by Garfield to the City, and the Supreme Court has said that the payment of taxes is *not* consideration under the Gift Clause. *Schires*, 250 Ariz. at 377 ¶ 18. Here, $8.5 million of the $9 million MDB is satisfied through the payment of taxes, which *Schires* categorically excludes as consideration.[5]

It's fanciful to contend that the City will realize an economic benefit "regardless of whether future tax obligations decrease." Resp. at 46. The

[5] The other $525,000 are lease payments for the duration of the GPLET Lease. Taxpayers concede that direct lease payments count as consideration—but they're grossly disproportionate.

Agreement provides that the entire MDB amount will be satisfied through Garfield's preexisting duty to pay taxes, whether Garfield stays for the full Lease term or not. If Garfield *does* stay, all the taxes it has paid, and even the taxes it owes *after* the eight-year lease, count toward the MDB amount. APP.107–09 § 4.7. If not, Garfield is obligated to pay only "a *prorated* [MDB] Amount," which means the MTD will be deemed *satisfied* by the taxes it has paid up until that point. *Id*. (emphasis added). And even if the Lease gets transferred to another party, Garfield will be released from its obligations, and the new "tenant's" taxes—including taxes paid after *their* GPLET Lease expires—will all count toward the MDB. APP.108–09. Therefore, *under no circumstances* is Garfield "guarantee[ing]" anything that it's not already obligated to pay in taxes. Resp. at 46.

In short, paying taxes isn't consideration under the Gift Clause, because it's a pre-existing duty, as the court squarely held in *Schires* 250 Ariz. at 377 ¶ 18, and *Turken v. Gordon*, 223 Ariz. 342, 350 ¶ 38 (2010)—and Appellees cannot magically transform it into consideration by the abracadabra of writing it into a development agreement. That just makes it *illusory* consideration. *See, e.g.*, *Twp. of Brooks v. Hadley*, No. 299409, 2014 WL 4337438, at *2 (Mich. App. Sept. 2, 2014) (writing a preexisting duty into a contract makes it illusory consideration).

Appellees argue that Garfield contractually agreed to (1) "donate $100,000 to the City's Affordable Housing Trust Fund," (2) "make available 10% of residential units for workforce housing for the [eight-year] lease term," (3) "convey title [to] the property to the City," (4) "during which the property is a capital asset of the City"—and that these are consideration. Resp. at 46. But they make no argument as to why these count under the Gift Clause—and that's because these purported "benefits" run to other private parties (not the City), or directly benefit Garfield (not the City), or are otherwise "too indefinite to enforce, much less value." *Schires*, 250 Ariz. at 378 ¶ 21. Anyway, even if all of these did count as consideration, they're still woefully disproportionate to the $7.9 million the City is giving Garfield.

Finally, Appellees make the bizarre argument that "anticipated taxes foregone [by the City] cannot count" as a direct benefit to Garfield." Resp. at 47. This is baseless. The amount of the tax abatement Garfield receives from the City isn't "speculative," as Appellees say, *id.*—it's publicly known and can be easily calculated, as all parties have done here. APP.058 ¶ 22; APP.249; APP.259; APP.058 ¶ 21; APP.198 ¶ 28. There's nothing anticipated nor speculative about it—and all of it goes into Garfield's pocket.

Appellees admit that "if Garfield were to exercise its buyout option [and thus take possession of the Project before the end of the Lease], *it would only be*

able to do so on pain of paying property taxes." Resp. at 53–54 (emphasis added). So the bottom line—here, *literally* Garfield's "bottom line"—is simple: Garfield gets a $7.9 million tax subsidy, for which it gives *de minimis* "rent" payments to the City. That's grossly disproportionate and unconstitutional.

2. The GPLET subsidy also fails the public purpose prong of the Gift Clause.

While this case can be decided based solely on inadequate consideration, the subsidy is also so clearly earmarked for Garfield's private benefit that it fails to achieve a public purpose.

First, the *stated* purpose of the subsidy is to increase the Garfield Project's profits by 0.95%. APP.060 ¶ 43; APP.249. But utilizing taxpayer resources to "foster or promote the purely private or personal interests" of any business is precisely what the Gift Clause forbids. *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971).

Second, the City exercises insufficient "control and supervision" over the Project. *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986). In a footnote, Appellees say the City exercises sufficient control over the Project because there are "restrictions on Garfield's use of the Property," including a rule that the Project not be used for the "retail sale of liquor or alcoholic beverages." Resp. 44 n.12. This is risible. Having Garfield agree that it cannot use a 26-story high-rise luxury apartment building as a liquor store is not a meaningful reservation of control.

Instead, the operative facts are that Garfield can use, control, and operate the Project however it chooses without meaningful oversight from the City. The fact that the City calls it public does not make it so. *Cf.* *Weaver v. Graham*, 450 U.S. 24, 31 n.15 (1981) ("'The Constitution deals with substance, not shadows.'" (citation omitted)).

III. The Agreement violates the Evasion Clause.

A. Appellees' attempt to rewrite the Constitution fails.

As for the Evasion Clause, Appellees seek to add words to the Clause that aren't there. They contend, without any legal or textual support, that the word "evade" in the Clause "includes a level of illegality or deceit." Resp. at 48. But no such requirement exists in the Constitution, and this Court should not add words to the Clause that don't exist. *Arizona Free Enter. Club v. Hobbs*, 253 Ariz. 478, 489 ¶ 38 (2022) ("We interpret constitutional and statutory provisions as they are written, and we are constrained from rewriting the law under the guise of interpreting it even if we divine a more desirable intended outcome than the text allows.").

Courts will 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 & internal marks omitted). Here, the Constitution guarantees that all property shall be "subject to taxation," Ariz. Const. art. IX, § 2(A), unless

exempt, and that "[p]roperty that has been conveyed to evade taxation is *not* exempt." *Id.* § 2(B) (emphasis added). By adding "illegality or deceit," as factors under the Evasion Clause, Garfield is adding words of limitation that do not appear in the Constitution. Had the framers of Article IX § 2 intended to include these elements, they would have done so.

To support their argument, Appellees point to the definition of "*tax evasion*," instead of the definition of "evade." "Tax evasion," however, is a term of art referring to a statutory crime, and the Constitution does not typically specify crimes; Article IX is devoted to tax policy. The reason the Evasion Clause doesn't use this term of art is that the concepts of "conveyances to evade taxation" and "tax evasion" are simply different. Appellees are committing the fallacy of "category error"—no different than if they tried to interpret the "just compensation" clause by consulting the dictionary definition of "worker's compensation law," or to interpret traffic statutes by looking up "drug trafficking."

The Evasion Clause doesn't make anything criminal—it just specifies the limit of the tax exemption. Interpreting the Clause as applying only to criminal tax evasion would render it redundant. Tax evasion was already illegal when the Clause was adopted in 1968, APP.344 ¶ 61—indeed, since territorial days, *id.* at ¶ 62—so there was no need to change the Constitution in 1968 to say criminal transactions are void and unenforceable. Courts presume that lawmakers "[do] not

intend to do a futile act by including a provision … that is inert and trivial … [or] superfluous." *Patterson v. Maricopa Cnty. Sheriff's Off.*, 177 Ariz. 153, 156 (App. 1993).

Appellees' addition of a criminality element to the Evasion Clause also fails because Arizona law uses the word "evade" as synonymous with "avoid" in many non-criminal contexts. *See, e.g.*, A.R.S. § 25-112 ("Parties residing in this state may not *evade* the laws of this state relating to marriage by going to another state or country for solemnization of the marriage."); *Walker v. Dallas*, 146 Ariz. 440, 444 (1985) (Discussing *evading* service of process); *Prutch*, 231 Ariz. at 435 ¶ 10 (courts may consider an appeal that has become moot if there is an issue "capable of repetition yet *evading* review." (emphasis added)).

In short, the word "evade" does not imply any kind of criminality, let alone "illegality" or "deceit." Resp. at 48–49. Instead, it just means that when property is conveyed as an artifice or sham to avoid taxation, the property is "not exempt" from taxation. Opening Brief at 34–37.

B. Statutory compliance does not mean constitutional compliance.

Appellees next argue that because the City complied with the statutory procedures when awarding a GPLET to Garfield, they've complied with the Constitution. Resp. at 50–51. Nonsense.

First, "statutory compliance does not automatically establish constitutional compliance." *Turken*, 223 Ariz. at 351 ¶ 41. So even if it is true that "the tax laws have been complied with *to the letter*," Resp. at 51 (emphasis in original), that says nothing about whether this transaction is *unconstitutional*. Nor is statutory compliance relevant to the meaning of the Evasion Clause. *Fann v. State*, 251 Ariz. 425, 434 ¶ 24 (2021) ("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 [the Constitution's] meaning.").

Second, Appellees are wrong to say that "Taxpayers' real complaint is with the *Legislature's* decision to allow municipalities to purchase private property and then abate GPLET taxes." Resp. at 48. Of course, the City has "purchased" nothing, as Appellees appear to concede when they say that Garfield "convey[ed] title of the property to the City *for no charge*." *Id.* at 46 (emphasis added). But more importantly, Taxpayers aren't challenging the facial constitutionality of the GPLET statute. Instead, they're challenging this transaction, and doing so on a specific factual record. In fact, Taxpayers concede that the City *could* use the GPLET statute in ways that don't violate the Evasion Clause. One way would be, if property is *already owned* by the government, and is conveyed to a private party, there's no tax to evade. *State v. Ariz. Bd. of Regents*, 253 Ariz. 6 (2022). And

there are certainly other land transfers between or among the government and private parties that don't implicate the Clause or the statute.

But this case isn't concerned with those things. This is the easy case: if a private party has conveyed property to the government *in name only*, retaining all the *de facto* rights of ownership, and done so for the sole purpose of receiving a tax exemption it's not entitled to, then the property is not exempt. Ariz. Const. art. IX, § 2(B).

C. This is a sham transaction.

The Garfield Project is not actually owned by the City, and it is not municipal property under existing law, because the City exercises *none* of the essential rights of ownership, such as the right to use, control, transfer, or possess the Property, which are considered the "sine qua non" of ownership. *Cutter Aviation, Inc. v. Arizona Dep't of Revenue*, 191 Ariz. 485, 490 (App. 1997).

Appellees don't dispute any of these facts, or point to anything in the record showing that the City is the *actual* owner of the Project, apart from observing that "the City owns title of record," Resp. at 51, which, of course, is just the problem: the transfer is a "sham" conveyance to evade taxation. *Fashion Valley Mall, LLC v. County of San Diego*, 98 Cal. Rptr.3d 327, 334 (App. 2009). It's a "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).

What's more, while the City holds *de jure* "title of record," the Property is *actually* only used as a private high-rise luxury apartment building, *never* as municipal property, and "[i]t is the use of the property … which is decisive" in determining whether property is tax-exempt. *Tucson Jr. League of Tucson v. Emerine*, 122 Ariz. 324, 325 (App. 1979).

Tellingly, the City once believed that the Evasion Clause applied to tax abatements to private real estate developers. At a City Council meeting on April 3, 1987, the issue of the "City's experience with tax abatement" was on the agenda, PSSOF ¶ 67, and City official Bob Logan said that "tax abatement was complicated by the constitutional provision that no property could be conveyed to the City for the sole purpose of evading taxation." *Id.* ¶ 68. He went on to say that "in light of this complexity, the City does not foresee many developers being able to use tax abatement." *Id.* In other words, the City previously viewed tax abatements for private developers as unconstitutional, because they involve conveying property for the purpose of evading taxes.

But even accepting the fiction that the Garfield Project is "government-owned" doesn't help the Appellees, because *State v. Yuma Irr. Dist.*, 55 Ariz. 178, 182 (1940), and *City of Phoenix v. Bowles*, 65 Ariz. 315, 317 (1947), hold that when government-owned property is put to private, for-profit use, it loses its tax-exempt status. Appellees' attempt to distinguish those cases falls flat. They say

Yuma and *Bowles* are not persuasive because a municipality cannot "surrender[ ] [its] tax-exempt status when it engages in economic development activity." Resp. at 55. But Taxpayers are not arguing that the *City* is surrendering *its* tax-exempt status. On the contrary, they assert that *Garfield* must lose *its* tax exemption, because the Project was conveyed to evade taxation, and that means it "is *not* exempt." Ariz. Const. art. IX § 2(B) (emphasis added). The conveyance here is "devoid of economic substance and motivated solely by tax considerations," which means it is a sham, *Coleman v.Comm'r of Internal Revenue*, 16 F.3d 821, 831 (7th Cir. 1994), and the Evasion Clause requires that the *de jure* title-transfer must be disregarded for tax purposes. *Cf. Lerman v. Comm'r of Internal Revenue*, 939 F.2d 44, 49 (3d Cir. 1991).

RESPONSE TO CROSS APPEAL

I. The cause of action only accrued when there was a signed agreement with known and final terms.

Appellees make a remarkable statute-of-limitations argument in their cross appeal. They say the limitations period began, not when the City and Garfield made their illegal agreement, but in October 2020 when they were "considering" making that agreement. Resp. 60. But that's not how accrual works.

A statute of limitations defense "is not favored," *Logerquist v. Danforth*, 188 Ariz. 16, 22 (App. 1996), but here, Appellees' statute of limitations argument is worse than unfavorable; it's contrary to law. A cause of action challenging the

terms of a government contract cannot possibly accrue until that contract is *in fact executed*, and its terms and conditions are known, agreed to, and fixed. This is particularly true in the Gift Clause context, which requires an assessment and comparison of consideration on both sides of the final, signed transaction—an assessment that cannot occur until the transaction's final terms are agreed to. Until the Garfield Agreement was signed by both parties, it was tentative only; it might *never* have been signed—and it was expressly subject to change until then.

A cause of action accrues (and the limitations clock starts) when the plaintiff "discovers … that the claim *exists*." *HSL Linda Gardens Properties, Ltd. v. Freeman*, 176 Ariz. 206, 207 (App. 1993) (emphasis added). Accrual does not happen when a plaintiff's injury is speculative, or potential, or a mere possibility. Accrual "requires not only an alleged 'wrong' but also *injury*. In other words, the limitations period does not commence until an actionable wrong *exists*, that is, [a tort] that results in appreciable, *non-speculative* harm to the plaintiff." *Manterola v. Farmers Ins. Exch.*, 200 Ariz. 572, 576 ¶ 10 (App. 2001) (emphasis added; cleaned up). But as long as the Garfield Agreement was still being negotiated, debated, considered, weighed, etc., it was not final, and it inflicted no appreciable, non-speculative harm on Taxpayers. Garfield could have changed its mind, as could the City. If Taxpayers had tried to sue then, their case would have been dismissed as unripe. *Canyon del Rio Invs., L.L.C. v. City of Flagstaff*, 227 Ariz.

336, 342 ¶ 25 (App. 2011); *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 565 ¶ 31 (App. 2003). There was nothing to challenge until binding obligations were imposed on the City, which did not occur until the City and Garfield reached an agreement and executed it.

Indeed, there was no obligation on the part of either the City or Garfield to *ever* enter the challenged GPLET transaction until the GPLET Agreement was actually signed.[6] This is made plain in the Letter of Intent ("LOI") between the City and Garfield. That document states:

> Binding agreements will not exist between the parties unless and until agreements containing all terms and provisions authorized by the Phoenix City Council are prepared, executed, and delivered by both parties. This non-binding Letter is not intended to, and does not, impose any obligation whatsoever on either party. The parties further acknowledge that either party may terminate the negotiation of the agreements for any reason or no reason and that neither party owes the other party any duty to negotiate formal, binding agreements. The parties acknowledge that this non-binding Letter does not address all essential terms of the transaction contemplated by it and that such essential terms will be the subject of further negotiation. Neither party may claim any legal rights against the other by reason of actions taken, or not taken, in reliance upon this non-binding Letter, including, without limitation, any partial performance of the transaction contemplated by it. No prior or subsequent correspondence or course of dealing between the parties may be construed to create any contract or to vest any rights in either party with respect to the transaction contemplated by this Letter. This paragraph supersedes all conflicting language, if any, in this Letter.

IR.18, ep.33–34.

[6] In fact, if the Ordinance itself had obligated the City to enter into an agreement giving up its taxing power—thereby injuring Taxpayers—then the Ordinance would have been an unconstitutional contract surrendering the taxing power. *See* Ariz. Const. art. IX § 1 ("The power of taxation shall never be ... contracted away."). The Appellees are thus asking the Court to interpret the Ordinance in an unconstitutional manner.

In other words, there were no binding agreements, no fixed terms, and no obligations for any party—and terms were subject to change—until the Garfield Agreement was made effective on May 14, 2021. *That's* the earliest date on which a cause of action could accrue. A cause of action accrues when "a wrong [has] occurred and *caused* injury," *Doe v. Roe*, 191 Ariz. 313, 323 ¶ 32 (1998) (emphasis added)—not when a wrong *could* occur or *might* cause injury. This case was therefore brought within the one-year limitations period.

Appellees contend that Appellants "were aware of … their claims" when the city passed Ordinance S46966 in October 2020, Resp. at 60, and that the execution of the Garfield Agreement was a "'foregone conclusion'" on that date." *Id*. at 62, but that Ordinance merely *authorized* the City Manager to *enter negotiations and discussions* regarding contract terms and conditions.[7] It did not approve any final agreement. In fact, the record makes clear that negotiations between the City and Garfield after this period and prior to the execution of the Garfield Agreement, were intense, with material provisions negotiated, revised, and added. IR.33. Mere authorization is not the kind of injury that enables a plaintiff to sue. *See, e.g.*, *Aegis of Arizona*, 206 Ariz. at 566 ¶ 31.

[7] Under the Ordinance, "City staff" were expressly authorized to include "[o]ther terms and conditions deemed necessary" when negotiating with Hubbard to *enter into* "a development agreement, lease agreement … and other agreements." IR.2 at ep.74–75.

In fact, the mere adoption of an ordinance is virtually *never* an injury for statute of limitations purposes. *See* *Lindner v. Kindig*, 826 N.W.2d 868, 873 (Neb. 2013); *Gillmor v. Summit Cnty.*, 246 P.3d 102, 110–11 ¶¶ 32–33 (Utah 2010). That's because plaintiffs are virtually never injured by the simple passing of an ordinance; they get injured when that ordinance is implemented. Here, Taxpayers were not injured by the *negotiations* between the City and Garfield—and Appellees concede that in October 2020, Taxpayers were only aware "that the City was *considering* providing GPLET tax treatment" for the Garfield Project. Resp. at 60. Just because the City was *considering* whether to provide an illegal subsidy does not mean it had done so; in fact, *it still has not* provided the entire subsidy, which is still ongoing.

Anyway, any time before it signed the Agreement, the City could have chosen not to. It was only the Agreement, finalized May 14, 2021, that injured Taxpayers and started the limitations clock.

Understanding accrual requires "an analysis of the elements of [the cause of action]." *Thompson v. Pima Cnty.*, 226 Ariz. 42, 45 ¶ 10 (App. 2010). Here, the cause of action—the unconstitutionality of the agreement—is such that injury could *only* have occurred when the Agreement was approved, not while it was just being negotiated, or when the possibility of an agreement was authorized by ordinance. That's because in a Gift Clause case, the Court must compare the

objective fair market value of promises made on both sides of the challenged transaction—to compare what the government "gives" and "gets." *Schires*, 250 Ariz. at 376 ¶ 14. As Appellees admit, "a Gift Clause violation is unique to the facts at hand," and therefore "every project is evaluated on a case-by-case basis." Resp. at 30. And that requires that all terms and conditions of the transaction be known. But those terms could not be known until the Agreement was finalized, because its terms were subject to change until then, and the Agreement might never have materialized at all.

Taxpayers could not have challenged the Agreement until it existed. They did so in a timely manner.

II. In a taxpayer action, the statute of limitations likely doesn't even begin to run until a project is completed.

What's more, Taxpayers have not only been injured by the Agreement, but they are still going to be injured in the future. That injury consists of the illegal provision of a subsidy. *Ethington v. Wright*, 66 Ariz. 382, 386 (1948). That injury will continue in the future when public funds are actually paid (or tax liabilities are actually zeroed out). The GPLET Lease providing for the tax abatement does not commence until *after* construction is complete and the Project is conveyed to the City. APP.346 ¶ 77–78. And given that a taxpayer may bring a claim from "the date of an illegal payment of public monies," *Ariz. Bd. of Regents*, 253 Ariz. at 14

¶ 30 (2022), this lawsuit was timely filed when the Agreement bound the City to that illegal payment—*and could still have been timely filed long afterwards*.

Appellees cite *Cruz v. City of Tucson*, 243 Ariz. 69 (App. 2017), a public records and abuse-of-process case, to argue that it established a statute of limitations defense in this Gift Clause and Evasion Clause case. Resp. at 57–58. That is head-scratchingly inapposite. There, the plaintiff's claim accrued when she was aware that the city had engaged in an abuse of the judicial process. She was aware of those facts *and had been injured*. *Cruz*, 243 Ariz. at 72 ¶ 8. Here, by contrast, Appellants were not—and could not have been—aware that a GPLET subsidy would be granted, or that an illegal expenditure would occur, until the Agreement was signed (because the City could have chosen to change or reject the Agreement). And they will *continue* to be injured as long as the subsidy is being provided to Garfield. Thus, not only was this case filed within the limitations period, but Appellants could have sued up to one year *after* the property was transferred to the City and the City illegally spent public resources on it.

Appellees next argue that *State v. Ariz. Bd. of Regents*, 251 Ariz. 182 (App. 2021) stands for the proposition that a Gift Clause claim accrues before an agreement is executed. Resp. at 58–59. But the Supreme Court **reversed** that decision and issued a ruling that supports Appellants' position. It said the statute of limitations begins to run "*after* an injury occurs *and* is (or reasonably should

have been) discovered." *Ariz. Bd. of Regents*, 253 Ariz. at 13 ¶ 26 (citation & marks omitted, emphasis added).

Here, neither factor was satisfied until the Agreement was ratified by the City and Garfield. First, as explained above, Taxpayers could not have reasonably discovered the *terms* of the Gift Clause violation until the Agreement actually existed. Second, they were not injured, and could not have been, until the City formalized its obligations in the Agreement. If the limitations period begins to run in a Gift Clause case upon "'the date of an illegal payment of public monies,'" *id.* at 14 ¶ 30, then Taxpayers here could have sued *at the earliest* when the City incurred a legal obligation to receive the GPLET Property and provide Garfield with the subsidy. But it also includes the date on which the subsidy is provided to Garfield; i.e., the date construction is completed.

Finally, Appellees argue that Taxpayers should have brought this case earlier, even if it was not ripe: "By focusing on ripeness," they say, "the Superior Court improperly based the accrual analysis on when Taxpayers had a definitive cause of action rather than when Taxpayers were on notice to investigate." Resp. at 60 (emphasis omitted). But this is a bizarre argument. The limitations clock does not start when a person is merely on notice to *investigate*—it starts when she

is *injured*.[8] Here, Taxpayers' case was not ripe until Appellees reached an Agreement—and Taxpayers would have been legally and ethically prohibited from filing suit based on a mere "investigative" expectation of potential future injury.

In refashioning the statute of limitations under Section 12-821, Appellees would apparently have aggrieved taxpayers run to court without knowing whether an illegal expenditure will *actually ever* occur, let alone the facts necessary to discern whether the "give" exceeds the "get" for purposes of the Gift Clause. Fortunately, the Legislature did not impose such an unworkable rule when it enacted Section 12-821.

CONCLUSION

The judgment should be *reversed.*

[8] Appellants are confused by the word "investigate." A claim accrues for limitation purposes when the plaintiff is aware of sufficient facts to investigate the injury *that has, in fact, occurred or is imminent*—not to investigate *whether* an injury *might* occur in the future. *Walk v. Ring*, 202 Ariz. 310, 316 ¶ 22 (2002) ("the plaintiff must at least possess a minimum requisite of knowledge sufficient to identify *that a wrong occurred* and *caused* injury…. [I]t is not enough that a plaintiff comprehends a 'what'; there must also be reason to connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether *the injury* might result from fault." (cleaned up)). A cause of action does *not* accrue, as Appellants believe, when a person is aware of a *possible* future injury—and no "duty to investigate" can change that.

Respectfully submitted this 17th day of July, 2024.

/s/ *Jonathan Riches*
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Timothy Sandefur (033670)
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SUPPLEMENTAL APPENDIX

Thomas Stack

From: Silvia Valadez
Sent: Monday, June 14, 2021 11:54 AM
To: Bramley Paulin
Cc: Nichelle N Zazueta-Bonow
Subject: RE: PRR#2cbccbcf-e38a-4b1f-8f00-56d65aa196b1
Attachments: Paulin-04162021-623PM ITS Results Redactions_Redacted.pdf

Mr. Paulin,
Please find the final responsive document to your PRR attached.

Thank you much.

Kind Regards,

PHOENIX IS HOT
Silvia Valadez Barba
Management Assistant I
City of Phoenix
Community and Economic Development

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From: Bramley Paulin <bramleypaulin@cox.net>
Sent: Friday, June 11, 2021 1:26 PM
To: Silvia Valadez <silvia.valadez@phoenix.gov>
Cc: Nichelle N Zazueta-Bonow <nichelle.zazueta-bonow@phoenix.gov>
Subject: Re: PRR#2cbccbcf-e38a-4b1f-8f00-56d65aa196b1

Thank you for the update.
Bramley
(602) 918-2998

On Jun 11, 2021, at 1:13 PM, Silvia Valadez <silvia.valadez@phoenix.gov> wrote:

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

CERTIFICATE OF COMPLIANCE

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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' Reply Brief, Response to Cross Appeal and Supplemental Appendix appears in proportionately spaced type of 14 points, is double spaced using a Roman font, the Reply contains 6,949 words, and the Response to Cross Appeal contains 2,035 words excluding table of contents and table of authorities.

Respectfully submitted July 17, 2024 by:

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COURT OF APPEALS
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CERTIFICATE OF SERVICE

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The undersigned certifies that on July 17, 2024, she caused the attached Appellants' Reply Brief and Response to Cross Appeal of Intervenor/Appellee/Cross-Appellant 6th & Garfield Owner LLC, and Defendants/Appellees/Cross-Appellants City of Phoenix and Jeff Barton and Supplemental Appendix to be filed via the Court's Electronic Filing System and electronically served a copy to:

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