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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEBORAH HEWITT, et al.,

Plaintiffs,

vs.

BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY, et al.,

Defendants.

Case No. CV2025-001929

DEFENDANT BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY'S RESPONSE TO BRIEF OF ARIZONA SENATE PRESIDENT WARREN PETERSEN AS *AMICUS CURIAE*

(Assigned to Honorable Michael Herrod)

(Oral Argument: September 12, 2025, 1:30 p.m.)

The Board of Directors of the Arizona Commerce Authority respectfully responds to the amicus brief submitted by Warren Petersen, in his official capacity as the President of the Arizona State Senate, under A.R.S. § 12-1841. Plaintiffs have consented to the filing of this response.

I. Argument

A. The distribution of powers.

The Senate President's brief begins by advancing a claim (at 3–5) that is not in dispute: that the Arizona Constitution limits the Legislature's authority, and that the Court may enforce those constraints. Yet courts do not go searching for constitutional questions to resolve. On the contrary, as the Senate President's own authority explains, "[l]egislation is presumed to be constitutional." *Waddell v. 38th St. P'ship*, 173 Ariz. 137, 140 (Tax Ct. 1992). When faced with constitutional questions, Arizona courts "beg[in] from the proposition that it is [their] duty to save a statute, if possible, by construing it so that it does not violate the constitution." *Seisinger v. Siebel*, 220 Ariz. 85, 89, ¶ 11 (2009) (quotation omitted). Doing so here requires only following the Supreme Court's on-point holding in *Kotterman v. Killian*, 193 Ariz. 273, 288, ¶ 52 (1999), that tax credits do not implicate the gift clause in the first place.

Tax policy, as the Senate President acknowledges, is the Legislature's province. He correctly notes (at 4) that "the policy decisions of whom or what to tax, the amount or rate of such levies, and the purposes for which the resulting revenues should be disbursed are entrusted largely to the Legislature's judgment." And the Supreme Court long ago cautioned against courts' "usurp[ing] this [legislative] function" by "substituting [their] concept of public policy for that of the legislative body." *Tanque Verde Enters. v. City of Tucson*, 142 Ariz. 536, 542 (1984). The Legislature exercised its tax-policy judgment when it enacted the Program in 2022. This Court should avoid getting in the middle of this follow-on tax-policy dispute three years later.

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B. The Gift Clause.

On the merits, the Senate President advances arguments that would undermine the Legislature's tax policy even more broadly, are at odds with the Plaintiffs' claims in this case, and lack legal support.

1. The Senate President begins (at 5) from the premise that a refundable tax credit "is, as a matter of law and common sense, a 'subsidy,' within the meaning of the Gift Clause," and ends (at 8) on the same definitive note. In between (at 6), he acknowledges the variety of "normative justifications for refundable tax credits." But those are policy debates reserved for the Senate President and other legislators, not this Court. And the Legislature has enacted tax policy that includes numerous refundable tax credits.

Currently, in fact, Arizona law includes five refundable individual income tax credits, *see* A.R.S. §§ 43-1072 (property tax credit); 43-1072.01 (increased excise taxes paid credit); 43-1083.03 (qualified facilities credit); 43-1083.01 (renewable energy industry credit); 43-1074.01(C) (research and development credit); as well as four refundable corporate income tax credits, *see* A.R.S. §§ 43-1165 (motion picture production costs credit); 43-1164.04 (qualified facilities credit); 43-1164.01 (renewable energy industry credit); 43-1168(D) (research and development credit).

If the Senate President were correct, all of these legislative enactments would be "subsidies" subject to Gift Clause scrutiny. But as the ACA's Motion to Dismiss pointed out (at 11), that result is impracticable and avoidable. Take the Increased Excise Taxes Paid Credit, which provides tax relief for lower income-earners. This refundable credit alone has been applied over 13 million times since 2001, providing Arizona taxpayers with more than $600 million in tax relief. Office of Econ. Rsch. & Analysis, Ariz. Dep't Revenue, Arizona's Individual and Corporate Income Tax Credit Report 36 (Nov. 30, 2024). Each year, the Department of Revenue issues around half a million small-dollar income-tax credits under this program. *Id.* The Senate President (like Plaintiffs) would have courts scrutinize each one and invalidate any that does not serve a public purpose

and reflect adequate consideration under the Gift Clause. The Court should avoid that untenable result. It should also avoid undermining the other refundable tax credits that the Legislature has enacted—and could repeal if it so chose.

2. Next, the Senate President criticizes (at 5) the "flawed premise" of the ACA's defense of the Program, which he says "sweep[s] [refundable tax credits] in with … an undifferentiated panoply of tax exemptions, deductions, and offsets." But his quarrel is not with the ACA; it is with Plaintiffs. Plaintiffs' Complaint alleges that "[t]he Gift Clause applies not only to money but also to other valuable advantages such as tax credits or exemptions." Compl. ¶ 127. Plaintiffs' Response to the ACA's Motion to Dismiss doubles down on that claim, arguing that "the Gift Clause bans *any* form of government aid to private entities—whether it's money, tax exemptions, or exclusive privileges." [Pls.' Resp. at 2; *see also id.* at 9 (asserting that the Arizona Constitution "forbids tax-exemption or tax-refund subsidies just like any other kind of subsidy," and arguing that the Program "raises … constitutional concerns" even where it "eliminates tax liabilities" and does not result in a refund).] It is Plaintiffs, in other words, who sweep together refundable tax credits and other tax exemptions, deductions, and offsets—not the ACA—so the Senate President's criticism (at 5) is misdirected.

To the extent the Senate President seeks to narrow Plaintiffs' claims (and take up Plaintiffs' cause on that basis), he should not be allowed to do so. For decades, it has been the rule that "[a]micus curiae will not be permitted to create, extend, or enlarge the issues." *City of Phx. v. Phx. Civic Auditorium & Convention Center*, 99 Ariz. 270 (1965).

In any event, the constitutional distinction the Senate President attempts to draw between refundable and nonrefundable tax credits is unavailing. In the Senate President's telling, a tax credit becomes constitutionally problematic only when a particular credit exceeds a particular taxpayer's tax liability, resulting in a refund. [Amicus Br. at 6 (arguing that "refundable credits are unique in a key—and, for Gift Clause purposes, dispositive—respect. Whereas a person who has no tax liability to offset 'does not obtain any benefit or assistance' from a deduction, a refundable tax credit program—in which

any 'unused credit [is] paid to the taxpayer'—is 'the equivalent of a direct expenditure program.'").] But the constitutionality of a tax statute cannot depend on individual taxpayers' tax liability in a given year. That is particularly true here, where Count 1 of Plaintiffs' Complaint is a facial challenge to the Program as a whole. [Compl., Count 1.]

The Senate President also hypothesizes (at 7) that, if the ACA were correct, then the payments at issue in *Turken v. Gordon*, 223 Ariz. 342 (2010), and *Schires v. Carlat*, 250 Ariz. 371 (2021), could have been shielded from constitutional scrutiny if they had been characterized as "refundable tax credits." But if the Senate President were correct that *only* refundable tax credits are constitutionally suspect, and *only* when a credit exceeds the taxpayer's liability, then the cities in *Turken* and *Schires* could have avoided constitutional scrutiny by structuring the transactions there as *non*-refundable tax credits that reduced the private parties' prospective tax liability to zero. The Senate President evidently perceives no Gift Clause issue there.[1]

Nor should he. Prospective tax credits—like the Program credits here and the school tuition organization tax credits in *Kotterman*—reduce taxpayers' tax liability *in advance*. They therefore forgo money that does not really belong to the state. *Kotterman* confirms that such prospective tax credits do not implicate the Gift Clause at all. And again, their constitutionality cannot depend on individual taxpayers' tax liability.

II. Conclusion

For all the reasons in the ACA's Motion to Dismiss and Reply, the Court should dismiss Plaintiffs' claims with prejudice.

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[1] In a footnote (at 7–8 n.2), the Senate President carves out a hypothetical exception for a government that "impose[s] a new tax, and then extinguish[es] it for politically favored taxpayers." There is no allegation here that the Program eliminates purely artificial taxes.

DATED this 15th day of August, 2025.

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The foregoing has been electronically filed via AZTurboCourt and electronically delivered this 15th day of August, 2025, to:

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Response: Defendant Board of Directors of the Arizona Commerce Authority's Response to Brief of Arizona Senate

E-Service notification was sent to the following recipient(s):

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