ARIZONA COURT OF APPEALS
DIVISION TWO

DEBORAH HEWITT, an individual; and JAN MITTELSTAEDT, an individual, Plaintiffs-Appellants, v. BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY; ARIZONA DEPARTMENT OF REVENUE Defendants-Appellees.	Arizona Court of Appeals Case No. 2 CA-CV 2026-0013 Maricopa County Superior Court No. CV2025-001929

BRIEF OF AMICUS CURIAE THE PELICAN INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF PLAINTIFFS-APPELLANTS

(Filed with the Written Consent of All Parties)

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INTEREST OF AMICUS CURIAE[1]

The Pelican Institute for Public Policy is a nonprofit, non-partisan research institute whose mission is to research and develop policy solutions that advance individual liberty, free enterprise, and opportunity for all Louisianans. Founded in 2008 and based in New Orleans, the Pelican Institute is the leading voice for free markets in Louisiana, and it believes that lasting prosperity comes from a free economy and from a government that commits public funds only to genuinely public ends — not to subsidies for favored private interests.

The Pelican Institute writes from the birthplace of the American film tax credit. Louisiana was the first state in the nation to adopt a film-production incentive, and in the decades since it has become the leading example of what these programs actually deliver: not a self-sustaining industry, but a recurring drain on the treasury that lawmakers have repeatedly capped, scaled back, and moved to repeal. The Pelican Institute has studied that experience closely as part of its research on Louisiana's tax code and fiscal reform, and it has watched the same story unfold in state after state. *See generally* Pelican Inst. for Pub. Pol'y, *Fiscal Reform to Write*

[1] Pursuant to ARCAP 16, amicus states that no party or party's counsel authored this brief in whole or in part, and that no person other than amicus and its counsel contributed money intended to fund the preparation or submission of this brief.

Louisiana's Comeback (Oct. 2024); *see also* Pelican Inst. for Pub. Pol'y, *A Tax Plan for Our Brighter Future* (2023).

Amicus has a strong interest in this case because the questions it presents are inextricably linked to the principles the Pelican Institute champions: fiscal responsibility, the protection of taxpayers, open markets rather than government favoritism, and constitutionally limited government under the rule of law. Arizona's Gift Clause—like the fiscal and constitutional limits the Pelican Institute defends in Louisiana—exists to keep public money from being diverted to private enterprises under the banner of economic development. The decision below, if left standing, would read that protection out of the Arizona Constitution for precisely the kind of subsidy it was designed to reach.

Amicus seeks to assist this Court not by re-briefing Arizona law, which the parties ably address, but by supplying what no party can: the multi-state policy record. The Pelican Institute offers its research and analysis on the real-world results of film tax credits in Louisiana, Georgia, New Mexico, and beyond—evidence that the "economic development" these programs promise is, as a factual matter, a mirage, and that the public dollars they spend are gone whether the credit is paid out as a refund or sold for cash. That perspective bears directly on both questions at the heart of this appeal: (1) whether these credits spend public money, and (2) whether the public receives anything of comparable value in return.

INTRODUCTION AND SUMMARY OF ARGUMENT

Through the Arizona Motion Picture Production Program, A.R.S. §§ 41-1517, 43-1082, 43-1165, "the Legislature has appropriated $125 million per year to fund private film production in the state[.]" Op. Br. 10. The credits are refundable: "[w]hen the credit exceeds a company's tax liability, the State pays the difference with public funds." *Id.* at 26; *see* A.R.S. §§ 41-1517(H), 43-1082(A), (D)(4)–(5). The superior court nonetheless dismissed this Gift Clause challenge on the pleadings, holding that a tax credit—even a refundable one—is categorically beyond the Gift Clause's reach, and that Taxpayers' claims were in any event too speculative because they did not allege that refunds would actually issue.

The Pelican Institute writes as amicus because it has seen this movie before—and its sequels. Louisiana invented the film tax credit in 1992. Georgia perfected it, building "the Hollywood of the South" on the most aggressive incentive in the country. New Mexico expanded it amid an oil-revenue surplus. Arizona itself tried a version of it from 2005 until its repeal in 2015. Every one of those experiments generated the same two results: real money left the treasury—by refund check, by cash rebate, or by credits sold on an open market—and the promised public return never arrived. That record answers both of the superior court's premises, and it answers the State's policy defenses on appeal.

First, the multi-state record refutes the threshold holding that no public money is at stake. *Kotterman v. Killian* rested on the fact that, for a non-refundable credit, "no money *ever* enters the state's control." 193 Ariz. 273, 285 ¶ 36 (1999) (emphasis in original). A refundable film credit is the opposite: the State cuts a check. And refunds are not a hypothetical edge case—in this industry they are the design. Production companies rarely carry state income-tax liability remotely approaching the 15–20% of production costs these credits promise, which is why Louisiana and New Mexico simply pay cash rebates and why Georgia made its credits transferable for cash. The Complaint's allegations describe the program's central case, not a fringe scenario. *Infra* Part I.

Second, Arizona and the other states that pioneered these credits have spent decades retreating from them because audited experience shows the "get" is illusory. Arizona's own Department of Commerce reported that the prior credit paid out $8.6 million to generate $2.3 million in state and local taxes. *See infra* Part II.A. Louisiana capped, cut, and cut again the program it invented—after its House voted to abolish it outright. *See infra* Part II.B. Georgia's auditors found an 81% loss on $5.2 billion in credits—and the studios left anyway. *See infra* Part II.C. New Mexico's liability is projected to nearly triple in four years. *Infra* Part II.

Third, the multi-state record supplies the very facts the Gift Clause test asks about. The only return the Program requires—an on-screen acknowledgment, for a

film that need never be released—has no objective fair market value, and the "anticipated indirect benefits" the State invokes are "valueless" and "irrelevant" as a matter of law, *Schires v. Carlat*, 250 Ariz. 371, 377 ¶¶ 16, 18 (2021), and false as a matter of fact. *Infra* Part III.

Fourth, the State's policy defenses—competitive necessity, a parade of horribles about 30 other credits, and a plea to leave tax policy to the Legislature—all fail, and the multi-state record shows why. No state can win a bidding war against every other state and the United Kingdom; the Gift Clause's own two-part test is the limiting principle that protects ordinary credits; and the political durability of these programs even after audited failure is precisely why constitutional spending limits are judicially enforced. *Infra* Part IV.

Amicus The Pelican Institute adopts the Statement of the Case and Statement of Facts in Appellants' Opening Brief. Dismissal is reviewed de novo, and it is appropriate "only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130 ¶ 7 (2020) (cleaned up) (citation omitted). The judgment should be reversed.

ARGUMENT

I. Film tax credits spend public money. In this industry, the refund is the design—not a hypothesis.

A. *Kotterman*'s rationale—money that "never enters the state's control"—does not describe a refundable credit.

The superior court incorrectly read *Kotterman* to place anything labeled a "tax credit" beyond the Gift Clause. *Kotterman*'s own reasoning was narrower and factual. The Supreme Court began with what "public money" means, then explained why the non-refundable scholarship credit was not an appropriation of it:

> According to Black's Law Dictionary, "public money" is "[r]evenue received from federal, state, and local governments from taxes, fees, fines, etc." *Black's Law Dictionary* 1005 (6th ed. 1990). As respondents note, however, no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials.

Kotterman, 193 Ariz. at 285 ¶ 36 (emphasis in original). On that premise, the Court concluded that "[o]ne cannot make a gift of something that one does not own." *Id.* at 288 ¶ 52. Whatever the merits of that premise for a credit that only reduces a tax bill, it is simply not true of the Program. When a company's credit exceeds its liability, money does leave "the state treasury": "the State pays the difference with public funds." Op. Br. 26; *see* A.R.S. §§ 41-1517(H), 43-1082(A), (D)(4)–(5). A check drawn on the treasury is the paradigm of public money under the State's own

control, which is the very thing *Kotterman* said was absent. It is also public money by the definition *Kotterman* itself invoked. A nonrefundable credit leaves revenue uncollected—never "received," never deposited, never the State's. A refund check is drawn on revenue the State has already collected and holds. The distinction is not one Taxpayers invented for this appeal. It is *Kotterman*'s own.

The Gift Clause forbids donations or grants "by subsidy or otherwise," Ariz. Const. art. 9, § 7—language that reaches the substance of a payment, not the label the Legislature attaches to it. *Cf. Neptune Swimming Found. v. City of Scottsdale*, 256 Ariz. 551, 560 ¶ 28 (2024) ("Granting a private enterprise exclusive use of City-owned property, even absent a monetary cost to the City, constitutes an expenditure for Gift Clause purposes."). If an arrangement with no monetary cost can be an "expenditure," a program that cuts checks certainly is.

B. Mature film-credit programs pay out cash, because production companies' tax liability consistently does not approach the size of the credit.

The superior court separately faulted Taxpayers for failing to allege that credits will actually produce refunds—as though the refund feature were a remote contingency. The national experience shows the opposite: the cash payout is the point of these programs, and the mature programs are built around it.

Louisiana "offers a 25% rebate on production costs, which can reach as high as 40% in some cases." Gene Maddaus, *Louisiana Moves to Eliminate $150 Million Film Tax Credit*, Variety (Nov. 12, 2024). New Mexico likewise pays "a direct rebate of between 25% and 40%" of qualifying expenditures. Morgan Lee, *New Mexico Denies Film Incentive Application on 'Rust' Movie After Fatal Shooting by Alec Baldwin*, Associated Press (July 2, 2024). And Georgia's credit "amounts to free cash. Most studios owe little in local income taxes. Instead, they can sell the credits to Georgia taxpayers." Cole Murphy, *Georgia's Film Tax Incentive Bombs at the Box Office*, Wall St. J. (Jan. 23, 2026). That is the standard architecture nationwide: as the National Conference of State Legislatures describes the programs, the credits "are often refundable—eligible for refund without any tax liability, or transferable," in which case the company "can sell the excess credits to another taxpayer who owes the state taxes." National Conference of State Legislatures, *State Film and Television Incentive Programs* (updated Aug. 27, 2025).

The reason is arithmetic. These credits are calculated as 15 to 40% of a production's total in-state spending. No production company's state income-tax bill approaches that figure—income tax is owed on profit, not on spending, and a production entity often has little or no in-state profit at all. A credit sized to production costs therefore must exceed tax liability in the ordinary case, and the payout mechanism (refund, rebate, or transferability) exists precisely to close that

gap. That is why Georgia's studios, which "owe little in local income taxes," sell their credits for cash, Murphy, *supra*., and why Louisiana and New Mexico skip the pretense and pay rebates outright.

Arizona's Program follows the same blueprint: credits calculated as a percentage of total qualified production costs, up to $125 million per year, refundable in cash when they exceed liability. A.R.S. §§ 41-1517(H), 43-1082(A), (D)(4)–(5); Op. Br. 10, 26. On a motion to dismiss, the question is whether Taxpayers could prevail "under any interpretation of the facts susceptible of proof." *Brnovich*, 250 Ariz. at 130 ¶ 7 (cleaned up) (citation omitted). Allegations that a refundable film credit will in fact be refunded are not speculation; they describe how programs of this design have historically operated. The refundability point "is a critical distinction," Reply Br. 18, and it is a factual one—exactly the kind of question that cannot be resolved against the pleader as a matter of law.

II. Every state that pioneered film tax credits has retreated from them—Arizona included—because the promised public benefit did not materialize.

The modern film-subsidy era is a natural experiment run no fewer than 43 times. "Today, 43 states offer them, compared to only a handful in 2002," at a collective cost of "about $1.5 billion" in fiscal year 2010 alone. Robert Tannenwald, *State Film Subsidies: Not Much Bang for Too Many Bucks*, Ctr. on Budget & Pol'y Priorities (updated Dec. 9, 2010) ("Tannenwald"). 44 states ultimately adopted a

film incentive; by 2018, 14 had terminated their programs. Michael Thom, *Does Program Evaluation Affect Program Termination? Insights from the Repeal of Corporate Tax Incentives for the Motion Picture Industry*, 49 Pol'y Stud. J. 1135, 1135–36 (2021) ("Thom, *Program Termination*"). The results are in. The same story repeats in the five states that matter most here: Arizona itself, Louisiana, Georgia, New Mexico, and Michigan.

A. Arizona already ran this experiment. Its own reports showed a net loss, and the Legislature repealed the program for good reason.

Arizona enacted a motion-picture tax credit in 2005 and expanded it in 2007. The Department of Commerce's own reporting recorded the results: in 2008, the program generated 317 direct film-industry jobs, another 413 indirect jobs, and roughly $2.3 million in additional state and local tax revenue—against more than $8.6 million in credits paid out to obtain it—what the Department itself tallied as "a net cost to the State general fund of $6,324,023." *See* Ariz. Dep't of Commerce, *Motion Picture Production Tax Incentives Program: Annual Report—Calendar Year 2008*, at i (Mar. 18, 2009), https://azmemory.azlibrary.gov/nodes/view/136032 ("2008 Commerce Report"); *see also* Howard Fischer, *Court Upholds Arizona Film Tax Credits, Rejects Gift Clause Challenge*, Ariz. Capitol Times (Nov. 14, 2025). The 2007 figures showed a $1.7 million net loss. *See* Fischer, *supra*. The Legislature repealed the program in 2015. *See id.*

The money that did flow largely flowed out of state. "According to the Arizona Department of Commerce, film producers subsidized by the state in calendar year 2008 spent 62 percent of their budgets outside of Arizona." Tannenwald, *supra*; *accord* 2008 Commerce Report at i (of the six subsidized productions' $119.3 million in total spending, 38% occurred in Arizona). Paying $8.6 million for $2.3 million in return, on productions that spent nearly two-thirds of their budgets elsewhere, is a give-versus-get failure documented in Arizona's own books—before this Court looks anywhere else.

The coda is telling. Even Arizona's own stories are filmed elsewhere. *Only the Brave* (2017), the film about the nineteen Granite Mountain Hotshots who died fighting the Yarnell Hill Fire, was shot in New Mexico—"[t]hat is our story," Representative Stephanie Stahl Hamilton reminded her colleagues, yet filming it in Arizona was not "economically feasible." Fischer, *supra*. *Hamlet 2* (2008) was set in Tucson—and filmed in Albuquerque. *Id.* Proponents cited those examples as reasons to enact the Program. They prove the opposite: production is perfectly mobile, it goes wherever the subsidy is largest, and a state that tries to buy it is bidding against every other state's treasury.

B. Louisiana audited its program for two decades, never found a positive return, and has spent a decade dismantling it.

Louisiana "in 1992 became the first state in the country to offer a tax incentive to film and TV productions," Brian Welk, *The First State to Ever Offer a Filming Tax Credit Is Voting to Eliminate It*, IndieWire (Nov. 12, 2024), though the program generated little activity until it was amended a decade later, Maddaus, *supra*. Once amended, it grew the way these programs always grow: payouts exceeded $260 million by 2013. Welk, *supra*. No government in America has more experience administering and auditing a film tax credit.

The audits are unambiguous. Louisiana's Legislative Auditor examined the program's first decade of maturity and found that in calendar years 2008 through 2010 the State certified $128.6 million, $106.1 million, and $196.8 million in credits—against just $20.7 million, $15.1 million, and $27.0 million in state tax revenue generated—for a net state fiscal impact of *negative* $107.9 million, $91 million, and $169.8 million in three consecutive years. La. Legislative Auditor, *Motion Picture Tax Credit Program: Performance Audit* at 7 (Apr. 24, 2013) ("2013 La. Performance Audit"). A decade later, the Auditor's economists surveyed every study the State had commissioned since 2009—at least eight—and reported that they "have consistently found" that subsidized projects generate household income "but not enough tax revenue to make up the cost of the credits." La. Legislative Auditor, *Motion Picture Investor Tax Credit: Informational Brief* at 3 (May 8, 2023) ("2023 La. Auditor Brief"). The most recent independent study put the return at 23 cents in

state taxes per credit dollar; Louisiana's own Department of Revenue put it at 7 cents. *Id.* at 3–4. Amicus knows of not one study, in over 20 years, that has ever found the program paying for itself.

Then came the retreat—in stages, each one a legislative judgment that the program was not worth its cost. Louisiana capped the program at $180 million in 2015, cut the cap to $150 million in 2017, *id.*, in November 2024 Louisiana put it on the chopping block: as filed, H.B. 2 of Governor Jeff Landry's tax-reform special session would have eliminated the credit outright, and the House of Representatives passed that version 87–12. Maddaus, *supra*.[2] The enacted law spared the program but cut its cap again, from $150 million to $125 million. The reform's stated aim was "eliminating special interest loopholes" from a code the Governor opened the session by calling "bloated," "broken," and "filled with special interests, carve outs, loopholes, and latent benefits for a few." Press Release, Off. of the Gov. of La. (Nov. 22, 2024), https://gov.louisiana.gov/news/4693; *see also* Gov. Jeff Landry, Opening

[2] As filed, H.B. 2 of Louisiana's 2024 Third Extraordinary Session would have eliminated the motion picture tax credit. As enacted, it reduced the program's annual cap from $150 million to $125 million. *See* La. H.B. 2, 2024 3d Extraordinary Sess. (2024); House and Senate vote records, https://www.legis.la.gov/Legis/ViewDocument.aspx?d=1390732, https://www.legis.la.gov/Legis/ViewDocument.aspx?d=1391303, and https://www.legis.la.gov/Legis/ViewDocument.aspx?d=1391327; Gene Maddaus, *Louisiana Film Incentive Saved, With $25 Million Cut, In State Budget Deal*, Variety (Nov. 22, 2024), https://variety.com/2024/film/news/louisiana-film-credit-saved-state-budget-deal-1236218103/.

Remarks, 2024 Third Extraordinary Sess. (Nov. 6, 2024), https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2024/nov/1106_24_243es_day1gov (6:50–7:15); *A Tax Plan for Our Brighter Future*, *supra*, at 14. By the time of the Governor's remarks, 555 separate tax preferences were worth more than $7 billion a year. The state that invented the film tax credit, with the longest experience of any government in America administering one, has, three decades in, capped its program at less than half of what it paid out in 2013—and that ceiling, $125 million, is the sum Arizona has just committed to spend every year.

The defense of the program should sound familiar, because Arizona will hear the identical script. Film Louisiana's president told legislators that "$180 million in our tax credit program goes out, $360 million goes directly to Louisiana residents and over $600 million in sales on top of that come to the state of Louisiana. … It's the definition of economic development." Welk, *supra* (quoting Jason Waggenspack). Louisiana's lawmakers—with 30 years of actual returns in front of them—voted 87–12 the other way. The "definition of economic development" turned out to be a definition of spending: a line item to be capped, cut, and finally eliminated when the state needed its money back.

C. Georgia—the biggest "winner" of the subsidy war—proves that no state can win it.

If any state should vindicate the theory of the Program, it is Georgia. The Georgia General Assembly expanded its film incentive in 2008: "Studios can receive credits equal to 20% of production costs incurred in-state, plus an extra 10% if they promote Georgia by putting its peach logo in the movie's credits." Murphy, *supra*. The program has no cap. Ben Fritz, *Disney's Marvel Abandons Georgia, Taking Livelihoods With It*, Wall St. J. (Aug. 18, 2025). And because "[m]ost studios owe little in local income taxes," the credits are transferable—"free cash" that studios "sell … to Georgia taxpayers." Murphy, *supra*. For a time it worked, if attracting productions is the measure: "Georgia was essentially the Walmart of shooting locations." *Id.* (quoting producer Mitch Olson).

Then Georgia's auditors did the arithmetic. "Auditors estimated that every dollar the state awarded studios—$5.2 billion between 2015 and 2022—returned only 19 cents in tax revenue, an 81% loss." *Id.*; *accord* Ga. State Univ. Fiscal Rsch. Ctr., *Tax Incentive Evaluation: Georgia's Film Tax Credit* at ii tbl. ES1 (Dec. 2023) (prepared for Ga. Dep't of Audits & Accounts) (state fiscal ROI of $0.15–$0.19 per dollar; projected net fiscal effects of −$618 million in FY2024, worsening to −$1.05 billion by FY2028) ("2023 Ga. Evaluation"). That is the Gift Clause's give-versus-get disparity, quantified at scale: the most successful film-subsidy program in America, by its own government's accounting, loses 81 cents of every public dollar it spends.

And the industry the $5.2 billion was supposed to purchase did not stay. Film-related spending in Georgia peaked in fiscal 2022 at $4.4 billion across 412 productions; by 2025 it had fallen to $2.3 billion across 245 productions. Murphy, *supra*. Marvel—whose franchises anchored "the Hollywood of the South"—is now "making two new 'Avengers' movies and the next 'Spider-Man' at a facility outside London," because rising labor costs mean "it's now cheaper to shoot in the U.K." Fritz, *supra*. The director of Georgia's own Film Office concedes that labor costs are the biggest factor driving studios out of the state. *Id.*

What remains is overbuilt infrastructure and stranded workers. Athena Studios opened in Athens in 2023; two years later its occupancy "hovers around 25%," and its chief executive has "filed some plans for a potential change of use to a data center." Murphy, *supra* (quoting Joel Harber). Trilith Studios, one of the largest production facilities in North America, saw bookings drop by half in a single year. *Id.* Crew members on a game show filmed in Atlanta now sing their own lyrics to the "Made in Georgia" jingle that closes productions shot there: "Unemployed in Georgia." Fritz, *supra*.

Georgia's experience is the Gift Clause's origin story replayed with soundstages instead of rail yards. The Gift Clause "designed to prevent the economic losses of the 19th century suffered by municipal corporations which gave money, credit *or other valuable advantages* to railroads, canal companies, etc." *Indus. Dev.*

Auth. of Pinal Cnty. v. Nelson, 109 Ariz. 368, 372 (1973). Then as now, governments courted a glamorous, footloose industry with public wealth; then as now, the industry took the money and moved to the next bidder; and then as now, "the evil to be avoided" was "the depletion of the public treasury … by giving advantages to special interests." *Schires*, 250 Ariz. at 374 ¶ 6 (citations omitted). Georgia is a striking example of why the race for bigger subsidies is "[a] strange game [where] [t]he only winning move is not to play." *WarGames* (MGM/UA Entertainment Co. 1983).

D. New Mexico, which is among the most generous programs in the country, shows the other failure mode: unbounded, ever-growing liability.

New Mexico has not repealed its program; it has expanded it. That makes it the cautionary tale for what Arizona is signing up for if the Program stands. New Mexico's incentive "is among the most generous in the nation, offering a direct rebate of between 25% and 40%" of qualifying expenditures; "[a]s a percentage of the state budget, only Georgia pays out more[.]" Lee, *supra*.

The liability curve points one direction. After lawmakers "raised caps and expanded the film tax credit amid a multibillion-dollar surplus linked to record oil and natural gas production," rebate payouts hit "$100 million in the fiscal year ending in June 2023 and are expected to rise to nearly $272 million by 2027, according to tax agency records and the Legislature's budget and accountability office." *Alec Baldwin's "Rust" denied New Mexico tax incentives ahead of actor's*

involuntary manslaughter trial, CBS News (July 3, 2024). Nearly a tripling of the annual outlay in four years—an entitlement whose growth is set by film-industry demand, not by any legislature's appropriation judgment.

The "Rust" episode captures both the arbitrariness of administration and the private character of the benefit. New Mexico's tax authorities denied that production's application "for incentives worth as much as $1.6 million"—a rebate the producers' counsel said "was going to be used to finance a legal settlement" of the wrongful-death claims arising from the on-set shooting. *Id.* (quoting attorney Melina Spadone). In one recent 12-month period, the State approved 56 applications and partially or fully denied 43—more than four of every ten. *Id.* A program that pays public money on odds like those, for uses as private as settling a producer's litigation, is not an instrument of public purpose. It is a subsidy—administered case by case, growing without limit, and captured by the industry it was meant to attract.

E. Michigan—once the most aggressive program in the country—spent half a billion dollars, ended up with fewer film jobs than it started with, and left its pension funds paying a studio's bills.

Michigan enacted the nation's most generous film incentive in April 2008 and spent an estimated $500 million on it before the Legislature and Governor Snyder terminated the program in 2015. Michael Thom, *The False Promise of Film Incentives*, Mackinac Ctr. for Pub. Pol'y 2 (Apr. 14, 2026). The industry it bought

shrank while the checks flowed: by September 2009, Michigan had 5,290 motion-picture-industry jobs—fewer than the 5,867 it had in April 2008, when the program was signed. *Fewer People Employed in Michigan Movie Industry Than Before Film Tax Credits Began*, Mich. Capitol Confidential (Apr. 20, 2010). The State's own commissioned analysis measured the fiscal return at 24 cents on the dollar under the credit program and 38 cents under the successor rebate. Reg'l Econ. Models, Inc., *Modeling Tax Return on TV, Film, and Digital Media Incentives in Michigan* tbl. 1 (Mar. 31, 2014) (prepared for the Michigan Film Office). And when a subsidized Pontiac studio missed payments on $18 million in bond obligations—obligations a 2010 deal left the State of Michigan Retirement Systems "on the hook" for—the pension funds, 80% from the school employees' pension, paid the studio's bills: $1.68 million by early 2013. Tom Gantert, *Public Employee Pension Systems Raided To Pay Film Studio Bills*, Mich. Capitol Confidential (Mar. 8, 2013). Teachers' retirement money servicing a movie studio's bond debt is the Gift Clause's 19th-century railroad story, updated.

III. The multi-state record supplies the facts the Gift Clause test demands: the "get" is illusory, so the "give" is a subsidy.

A public expenditure survives the Gift Clause only if it serves a public purpose and is supported by adequate consideration—that is, only if "the value to be received by the public" is not "far exceeded by the consideration being paid by the public."

Schires, 250 Ariz. at 376 ¶ 13 (quoting *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984)). The consideration inquiry "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," *id.* ¶ 14, measured by "the objective fair market value of what the private party has promised to provide in return for the public entity's payment," *id.* (quoting *Turken v. Gordon*, 223 Ariz. 342, 350 ¶ 33 (2010)) (cleaned up). The following is what the record shows on each side of that ledger.

A. The "give" is enormous and unmistakably real.

Arizona's Program appropriates up to $125 million per year. Op. Br. 10. For perspective, the payment stream in *Turken*—"as much as $97.4 million" over decades for parking spaces—was one this Court concluded "quite likely violates the Gift Clause." 223 Ariz. at 344 ¶ 1. The Program can exceed that sum every single year. And as Part I and Part II show, these dollars leave the treasury in the most literal way: Georgia paid out $5.2 billion; New Mexico's rebates will approach $272 million annually; Arizona's own prior program paid $8.6 million in a single reporting period.

B. The bargained-for "get" is an acknowledgment no one may ever see.

The Program's only required return is an on-screen acknowledgment that the production was filmed in Arizona. "[T]ax credit recipients are not even required to

actually release or distribute any subsidized film to receive the credit or tax payment." Op. Br. 17 (citing ROA.1 ¶ 110). A promise of an acknowledgment in a film that need never exist in public has no ascertainable market value; like the unenforceable "marketing" obligations in *Schires*, it "may be too indefinite to enforce, much less value." 250 Ariz. at 378 ¶ 21.

C. The claimed indirect benefits are legally irrelevant—and factually false.

The State's remaining defense of the bargain is jobs, industry, and tax revenue. As a matter of law, those do not count: only "direct benefits" bargained for as part of the private party's promised performance are consideration, and "anticipated indirect benefits" are not. *Turken*, 223 Ariz. at 350 ¶ 33. Anticipated economic impact is "valueless" anticipated indirect benefit, *Schires*, 250 Ariz. at 377 ¶ 16, and projected "fiscal impact is an indirect benefit that is irrelevant to our analysis," *id.* ¶ 18; *accord Turken*, 223 Ariz. at 350 ¶ 38 (tax projections were no consideration where the developer had no obligation "to produce a penny of tax revenue").

The multi-state record shows that this legal rule is not a technicality—it reflects economic reality. The most careful independent analyses converge on the same verdict: states recoup on the order of "16 cents in tax revenues on the subsidy dollar," for "net revenue costs … ranging from $0.72 to $0.93 per awarded subsidy dollar." Tannenwald, *supra*. With more than 20 years of program data, Louisiana's

Legislative Auditor pegs the fiscal return at 23 cents per dollar by the most generous independent estimate and 7 cents by the Department of Revenue's own. 2023 La. Auditor Brief, *supra*, at 3–4. Georgia's auditors say 19 cents. Murphy, *supra*. Georgia's official evaluation puts the cost in labor terms: "$24.44 in credits generated for every $1 of net labor income supported" by the program. 2023 Ga. Evaluation at 27. And surveying the literature across 29 states, the same evaluation found fiscal returns ranging from 3 to 77 cents on the dollar—never breakeven, anywhere. *Id.* at 13. In likely the most rigorous single-state study, Massachusetts's Department of Revenue found the Commonwealth "lost $88,000 in tax revenue for every new job created by the Commonwealth's film tax credit and filled by a Massachusetts resident." Tannenwald, *supra*. "The best jobs go to non-residents," because "producers import scarce, highly paid talent from other states," while "[m]any of the jobs created by film tax credits are temporary and part-time." *Id.* Arizona's prior program fit the national pattern precisely: 62% of subsidized budgets spent out of state, and $2.3 million returned on $8.6 million paid. *Supra* Part II.A.

The peer-reviewed literature is to the same effect, and it speaks directly to refundable credits. The leading national study, by the same expert whose testimony is in this record, examined every state program from 1998 through 2013 and found that "[r]efundable tax credits had no employment effect and only a temporary wage effect," and that no credit type "affected gross state product or motion picture

industry concentration." Michael Thom, *Lights, Camera, but No Action? Tax and Economic Development Lessons From State Motion Picture Incentive Programs*, Am. Rev. Pub. Admin. 1 (2016). A quasi-experimental follow-up across more than 30 states found "mostly ... no statistically significant effects" on employment. Michael Thom, *Do State Corporate Tax Incentives Create Jobs? Quasi-experimental Evidence from the Entertainment Industry*, St. & Loc. Gov't Rev. 1 (2019). An independent difference-in-differences study reached the same result: "no meaningful effect on ... employment, wages, and establishments in the film industry and in related industries." Patrick Button, *Do Tax Incentives Affect Business Location and Economic Development? Evidence from State Film Incentives*, 77 Reg'l Sci. & Urb. Econ. 315 (2019). Even California's billion-dollar credit—the program every other state is bidding against—shows "no evidence ... [of] a substantial effect on motion picture industry employment in California." Michael Thom, *Time to Yell "Cut?" An Evaluation of the California Film and Production Tax Credit*, 10 Cal. J. Pol. & Pol'y 1, 15 (2018). And the only study to test the macroeconomic claim directly—using instrumental-variable methods that permit causal inference—"finds no link between incentives that promote in-state filming and states' economic growth or level." John Charles Bradbury, *Do Movie Production Incentives Generate Economic Development?*, 38 Contemp. Econ. Pol'y 327, 336 (2020).

The outliers are revealing: a North Carolina study claiming $1.52 in revenue per credit dollar was commissioned by the Motion Picture Association of America and drew a "highly critical" review from the State's own Fiscal Research Division, John Charles Bradbury, *What Do Film Incentives Mean for the North Carolina Economy?*, 2 CSFE Issue Briefs 1, 9 (Fall 2019), and a Los Angeles study touting California's credit was funded in part by the same trade association—a fact its lead author admitted only after a journalist asked. Thom, *Time to Yell "Cut?"*, *supra*, at 5. Meanwhile, state agencies doing their own math keep landing in the same place: Missouri, 11 to 19 cents per dollar; Maryland, 10 cents—with a recommendation to let the program sunset. Bradbury, *North Carolina Economy*, *supra*, at 5.

The public-purpose prong fares no better, for reasons the parties develop and one the record underscores: the Program's funds are earmarked for the private commercial ventures of production companies, over which the State retains no meaningful "direct control and supervision." *See Gilmore v. Gallego*, 258 Ariz. 38, 47 ¶ 38 (2024); *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986). New Mexico's "Rust" rebate—sought to fund a private legal settlement—shows just how private the use of these funds can be. *Supra* Part II.D. Whether analyzed as purpose or as consideration, the arrangement is the same: public money out, private benefit in, and nothing of measurable value returned. That "is a subsidy from the public to

the seller," *Schires*, 250 Ariz. at 376 ¶ 14 (citation omitted)—exactly what article 9, section 7 forbids.

IV. The State's policy defenses—competitive necessity, a parade of horribles, and "leave it to the Legislature"—all fail, and the multi-state record shows why.

A. "Competitive necessity" is a race no state can win, and losing it is not a public purpose.

The Program's animating theory is that Arizona must pay because other states pay. The record answers that theory twice over. *First*, the race is unwinnable. Georgia outbid every American rival for 15 years, spent $5.2 billion, and was then outbid itself by the United Kingdom, on labor costs no state subsidy offsets. *See* Murphy, *supra*; *see also* Fritz, *supra*. A production that came for the subsidy leaves for the next one; Arizona's experience with *Only the Brave*—its own story, filmed in New Mexico—is the rule, not the exception. And the bidding war is accelerating, not abating: since 2021, at least 18 states have enacted measures to implement or expand film incentives, National Conference of State Legislatures, *supra*, and in 2025 alone Illinois raised its credit from 30% to 35%, Texas raised annual spending to $300 million, and California more than doubled its program to $750 million per year. Thom, *False Promise*, *supra*, at 1. *Second*, and more fundamentally, the Arizona Constitution does not contain a competitiveness exception. Chasing mobile

private capital with public money is the special-interest favoritism the Gift Clause was adopted to end, *Nelson*, 109 Ariz. at 372; a policy anxiety, however sincere, "in no way changes" the constitutional analysis. *Cf. Kotterman*, 193 Ariz. at 287–88.

B. The "parade of horribles" marches the wrong way: the Gift Clause's own test is the limiting principle, and this Program is nothing like an ordinary credit.

The ACA warns that subjecting the Program to Gift Clause scrutiny "would jeopardize Arizona's tax framework," cataloguing some thirty credits, "nine" of them "refundable." Ans. Br. 60–62. The alarm is misplaced for two reasons.

First, scrutiny is not invalidity. Applying the Gift Clause to a credit means asking the same two questions asked of every expenditure: public purpose, and consideration not grossly disproportionate. A dependent credit, a property-tax relief credit, or a charitable-contribution credit answers those questions easily—such credits are broad-based tax relief or reimbursement for taxes already paid, available to any taxpayer who fits the class; they pay no one to run a private business. The same is true of the "nine" refundable credits the ACA identifies: refundability triggers the Gift Clause's questions; it does not flunk them. The two-part test itself is the limiting principle, and it has policed Arizona expenditures for a century without collapsing the tax code. Louisiana's own fiscal leaders drew that same line in 2024: with Louisiana Senator Franklin Foil stating targeted incentives are no

substitute for "lower[ing] the rates for everyone and treat[ing] everyone the same." Sen. Franklin Foil, Remarks, 2024 Third Extraordinary Sess. (Nov. 2024) (52:30–52:52), https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2024/11/112224SCHAMB.

Second, this Program is categorically different from the credits on the ACA's list, and the difference is visible in how governments themselves account for film credits. They are budgeted like spending: capped at an annual appropriation ($125 million here; $150 million in Louisiana), preapproved and postapproved application by application, audited, and—when fiscal reality intrudes—cut like any other line item. Louisiana's 2024–25 reform treated the credit as a cost to be eliminated to pay for broad-based tax relief. Maddaus, *supra*. Georgia tallies its film payouts in the billions. Murphy, *supra*. New Mexico's budget office projects the program's outlays the way it projects any expenditure. Lee, *supra*. No state books its dependent credit that way, because no one anywhere believes a family's tax relief is a subsidy to a commercial venture. Holding this Program to the Gift Clause endangers subsidies—nothing else.

C. "Leave it to the Legislature" has it precisely backwards: the political durability of these programs is why the Gift Clause is judicially enforced.

The ACA's remaining defense is institutional: "[s]etting tax policy is a legislative function," and courts should stay out. Ans. Br. 32–33. The superior court echoed the point, leaning on *Kotterman*'s remark that whether a credit yields a taxpayer "profit" is "a policy matter for the legislature." 193 Ariz. at 287–88. Taxpayers address that remark directly, *see* Op. Br. 26. The deeper answer comes from the record.

Film-subsidy programs are a textbook case of concentrated benefits and diffuse costs—a well-organized industry on one side of the ledger and every taxpayer, a few dollars at a time, on the other. The result is that ordinary politics cannot reliably unwind them even after documented failure. Georgia's program survives an official audit finding an 81% loss; indeed, "lawmakers have thrown still more money at filmmakers" since. Murphy, *supra*. Louisiana's Legislative Auditor documented nine-figure annual losses as early as 2013—yet the program survived another decade, and it took a governor's special session and a full fiscal overhaul before the House voted to eliminate it—and even then the program survived the final bargain, at a $125 million cap, 2013 La. Performance Audit, *supra*, at 7, over the industry's insistence, to the end, that the program is "the definition of economic development." Welk, *supra; see* supra note 2.

The pattern repeats. Iowa shut its program down in 2010 after an audit revealed millions of dollars in improper payments—and has now resurrected it.

Thom, *False Promise*, *supra*, at 1. Michigan spent half a billion dollars, repealed its program in 2015, and by 2024 faced legislation to revive it at 30% of producers' costs—up to $2 billion over ten years; the bill cleared committee before failing in the House. *Id.* at 2. A subsidy that keeps rising from its own audited failures is not one the political process can be trusted to police. The termination literature quantifies the ratchet: across every state repeal through 2018, a program's age and the size of the subsidized industry's employment reduced the likelihood of termination—each year of delay entrenches the beneficiary class further—and even an independent evaluation showing that costs exceed benefits "does not guarantee termination." Thom, *Program Termination*, *supra*, at 1135, 1149. Arizona's own framers understood the dynamic. The Gift Clause "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds" in aid of the last century's glamour industries. *Turken*, 223 Ariz. at 346 ¶ 10 (citation omitted). A constitutional limit on subsidies exists precisely because legislatures, session by session, cannot be counted on to claw back entitlements from organized beneficiaries. Judicial enforcement is not an intrusion on the constitutional design; it is the design. And where the text speaks—"by subsidy or otherwise," Ariz. Const. art. 9, § 7—deference ends.

CONCLUSION

For decades, states have financed these programs on the *Field of Dreams* theory of economic development: build the subsidy, and the industry will come. Instead, it came. It took the money. And when someone built a bigger subsidy somewhere else, it left.

The superior court upheld the Program by holding that no public money is spent and that the value of what the public receives is beside the point. The states that invented these credits know better. They have watched the checks go out, watched the industry move on, and—one by one—cut their losses. The Gift Clause was written to keep Arizona out of exactly this business. This Court should reverse and hold that the Program violates article 9, section 7 and, at a minimum, should reverse the dismissal so that the Program receives the factual scrutiny the Gift Clause requires, which is a disposition even the ACA's alternative request for a merits record concedes is available. *See* Ans. Br. Part II.

RESPECTFULLY SUBMITTED this 5th day of August, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 4 and 16, undersigned counsel certifies that this brief uses proportionately spaced 14-point Times New Roman type, is double-spaced, and contains 7121 words (exclusive of the caption, tables, signature block, and certificates).

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