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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEBORAH McEWEN, 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 MOTION TO DISMISS

(Assigned to Honorable Michael Herrod)

(Oral Argument Requested)

I. Introduction

In 2022, the Legislature enacted the Arizona Motion Picture Production Program[1] to spur economic activity in the state. The Program includes tax credits—a common and longstanding feature of Arizona tax policy. Plaintiffs Deborah McEwen and Jane Mittelstaedt now assert that these tax credits violate the Arizona Constitution's Gift Clause. They do not, just like other tax credits, deductions, and exemptions do not. Plaintiffs' constitutional challenge runs headlong into binding precedent, finds no support in the Arizona Constitution's text or history, and would upend state tax policy. The Court should dismiss Plaintiffs' Complaint under Rule 12(b)(6) because their claims fail as a matter of law. Alternatively, the Court should dismiss under Rule 12(b)(1) because Plaintiffs lack standing to bring their claims in the first place.

First, in *Kotterman v. Killian*, 193 Ariz. 273 (1999), the Supreme Court squarely held that tax credits do not implicate the Gift Clause. The Court's decision in that case—which rejected a Gift Clause challenge to School Tuition Organization tax credits—forecloses Plaintiffs' claims in this case.

Second, the Gift Clause's plain text confirms that it does not apply to tax credits. The Gift Clause states that neither the state nor any subdivision of the state "shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. It does not mention tax credits; it prohibits the state from giving donations, grants, and subsidies. But before the state can give funds, it must first own them. And because the state does not own the future taxable income of its citizenry, the state cannot give those funds away. To conclude otherwise, the Court would have to presume that all future taxable income belongs to the state, so if the state foregoes imposing taxes on it, the state has provided taxpayers a gift. That conclusion would be legally, practically, and conceptually untenable.

[1] The Program is codified at A.R.S. §§ 41-1517, 43-1082, and 43-1165.

Third, concluding that tax credits implicate the Gift Clause—contrary to *Kotterman* and the Gift Clause itself—would raise separation-of-powers concerns. The Constitution assigns tax policymaking to the Legislature, not the courts. And the same framers who adopted the Gift Clause also provided the Legislature broad discretion in enacting tax exemptions, including those for private corporations.

Fourth, permitting taxpayers to challenge every tax credit under the Gift Clause would jeopardize Arizona's entire tax framework. Arizonans benefit from various income tax credits, exemptions, and deductions, including for contributions to religious and educational institutions. Arizona's transaction privilege and use taxes likewise employ multiple classifications, exemptions, deductions, and credits. Yet, if income tax credits are gifts, the courts must open their doors to a wave of new constitutional challenges to all such credits, deductions, and exemptions.

Alternatively, Plaintiffs' claims should also be dismissed for lack of standing. Taxpayer standing arises only to challenge government expenditures and appropriations, and tax credits are neither. Plaintiffs also fail to allege a specific and concrete injury. Instead, their allegations describe only generalized and hypothetical pecuniary harm.

II. Plaintiffs' Allegations

Plaintiffs are two taxpayers who allege the Program violates the Gift Clause both facially and as applied to pre- and post-approved tax credits. [Compl. ¶¶ 1, 3–4.] The Legislature enacted the Program into law through HB2156, which became effective on September 24, 2022. [*Id.* ¶¶ 55–58.] HB2156's stated purpose is "to provide a program that creates long-term economic benefits to this state, including the development of high-paying employment opportunities for residents of this state." [*Id.* ¶ 63.]

To that end, the Program provides tax credits to certain film production companies and for productions based in Arizona. [*Id.* ¶ 64.] The Program established annual caps for the total amount of tax credits available to taxpayers. [*Id.* ¶¶ 74–76.] "For 2023, the ACA could preapprove up to $75,000,000 in tax credits." [*Id.* ¶ 74.] "For 2024, the preapproval

cap was $100 million." [*Id.* ¶ 75.] "For 2025 and each calendar year thereafter, the annual cap is $125 million." [*Id.* ¶ 76.]

"Tax credits issued through the [Production Program] are refundable per A.R.S. §§ 43-1082(F), 43-1165(F)." [*Id.* ¶ 92.] If a taxpayer's tax liability is less than the credit, the amount can be paid or deferred. [*Id.* ¶ 93 ("Refundable tax credits may be paid to the taxpayer (in a lump sum or in not more than five annual installments), issued as a credit voucher to be carried forward and applied against future tax liabilities, or a combination of a refund and a credit voucher.").]

The Program includes pre- and post-approval processes. [*Id.* ¶¶ 70–72.] "A pre-approval certification does not guarantee a company's ability to claim tax credits. Final eligibility for tax credits is determined in accordance with the post-approval completion process." [*Id.* ¶ 109.] "Once the production is complete, to obtain post-approval for a pre-approved tax credit, a motion picture production company must submit an audited statement completed by a certified public accountant in this state that certifies the total amount of eligible production costs associated with the production." [*Id.* ¶ 72 (quotation marks omitted).]

Count 1 of the Complaint challenges the Program on its face. Plaintiffs contend the Gift Clause applies to "tax credits" and "exemptions," including the Program tax credit, which results in the theoretical possibility of "the State foregoing the collection of income taxes" and creates the theoretical possibility of a refund from "any remaining credit amount." [*Id.* ¶¶ 127, 144.]

Counts 2 and 3 are as-applied challenges to "MoPic-2024-004," an allegedly pre-approved tax credit, and "MoPic-2023-008," an allegedly post-approved tax credit. [*Id.* ¶¶ 116–17, 148–58.] Plaintiffs allege the "tax credit[s] designated" as MoPic-2024-004 and MoPic-2023-008 are "primarily for the personal or private purposes of the recipient" and are "counted against" the caps for pre- and post-approvals. [*Id.* ¶¶ 149, 151, 155–56.]

Plaintiffs allege that only MoPic-2023-008 "is eligible to be claimed against the private recipient's 2024 income tax liability." [*Id.* ¶ 150.] Plaintiffs do not allege that

MoPic-2024-004 is eligible to be claimed against any private recipient's tax liability. [*See id.* ¶¶ 148–58.] Nor do Plaintiffs allege that the taxpayers seeking credits under MoPic-2023-008 and MoPic-2024-004 have a tax liability less than the pre- or post-approved credit amounts. [*See id.*] And Plaintiffs do not allege that MoPic-2023-008 and MoPic-2024-004 have resulted or will result in any tax refund. [*See id.*]

III. Legal Argument

The Court should dismiss Plaintiffs' claims because Plaintiffs have failed to state a claim under Rule 12(b)(6) and the Court lacks subject-matter jurisdiction under Rule 12(b)(1). Binding Arizona law, the plain text of the Gift Clause, and the intent of the framers prohibit Gift Clause challenges to tax credits, including potentially refundable credits. Plaintiffs also lack taxpayer standing to bring any such challenge.

A. The Gift Clause does not apply to tax credits.

Supreme Court precedent and the constitutional text, structure, and history all dispose of Plaintiffs' claims. "A Rule 12(b)(6) motion to dismiss should be granted if the complaint fails to state a claim upon which relief can be granted." *Stauffer v. Premier Serv. Mortg., LLC*, 240 Ariz. 575, 577, ¶ 9 (App. 2016). In ruling on a motion to dismiss, the court does not accept as true "allegations consisting of conclusions of law" and "legal conclusions alleged as facts." *Id.* at 577–78, ¶ 9.

Moreover, "[a]ll statutes are presumed to be constitutional and any doubts will be resolved in favor of constitutionality." *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 554 (1981). "'[W]here there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional.'" *State v. Arevalo*, 249 Ariz. 370, 373, ¶ 9 (2020) (quoting *State v. Ramos*, 133 Ariz. 4, 6 (1982)). The party challenging a statute bears the burden of demonstrating its invalidity. *Arevalo*, 249 Ariz. at 373, ¶ 9.

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1. The Supreme Court already has decided this question in *Kotterman*.

In *Kotterman*, 193 Ariz. at 288, ¶ 52, the Supreme Court rejected the premise of Plaintiffs' claims: that "a tax credit amounts to a 'gift.'" *Kotterman* involved a challenge to the constitutionality of A.R.S. § 43-1089, "which allows a state tax credit of up to $500 for those who donate to school tuition organizations (STOs)." 193 Ariz. at 276, ¶ 1. The plaintiffs challenged the STO tax credit under several federal and state constitutional provisions, including the Gift Clause. *Id.*; *see also id.* at 284, ¶ 30. The Court rejected all those challenges. *Id.* at 292, ¶ 72.

The Supreme Court explained that "a tax credit [does not] amount[] to a 'gift'" because "[o]ne cannot make a gift of something that one does not own." *Id.* at 288, ¶ 52. That is, the state cannot own taxable income that taxpayers have not yet earned, so the state gives nothing away by foregoing the imposition of any taxes on such income. *Kotterman* makes clear that prospective tax credits do not implicate the Gift Clause at all, and thus forecloses Plaintiffs' Gift Clause challenge to Program tax credits.

The balance of *Kotterman*'s reasoning supports the same conclusion. Justice Feldman, in dissent, had argued that taxpayers "may well make a profit on the tax credit" and receive "a dollar-for-dollar refund." *Id.* at 309–10, ¶ 148, n.17 (Feldman, J., dissenting). The majority, however, concluded that this concern "in no way change[d] [its] constitutional analysis" because it is the role of "the legislature and the taxing authorities," not the courts, "to make judgments about the overall wisdom of the tax credit." *Id.* at 287–88, ¶ 48.[2] *Kotterman* squarely applies here, and it forbids Plaintiffs' claims as a matter of law.

[2] The Court's analysis on this point comes in the context of its rejection of two other constitutional claims (under article II, § 12, and article IX, § 10), but it applies with equal force here.

2. The plain text of the Gift Clause shows it does not apply to tax credits.

The Gift Clause's plain text confirms that tax credits do not implicate it. It states that neither the state nor any subdivision of the state "shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7.

A tax credit is not a gift, donation, grant, or subsidy. As the term was understood when our Constitution was adopted, a "gift" is "[a] voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously." *Gift*, Black's Law Dictionary 540 (2d ed. 1910); *see also Donation*, Black's Law Dictionary 392 (2d ed. 1910) ("A gift"); *Grant*, Black's Law Dictionary 547 (2d ed. 1910) ("A generic term applicable to all transfers of real property."); *Subsidy*, Black's Law Dictionary 1117 (2d ed. 1910) ("A grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for state aid, because likely to be of benefit to the public.").

An income tax credit is not a "conveyance" or "grant of money." Instead, with tax credits, including refundable credits, "the taxing entity forgoes revenues that it could have chosen to collect in the future by changing its laws prospectively so the taxpayers' obligation to pay never arises." *See Maricopa Cnty. v. State*, 187 Ariz. 275, 280 (App. 1996). And because the taxpayer's obligation to pay never arises, the taxpayer—not the state—always owned the taxable income at issue. As the Court in *Kotterman* recognized, this means the state had nothing to give away. *Kotterman*, 193 Ariz. at 288, ¶ 52.

To conclude otherwise, the Court would have to find that all future taxable income presumptively belongs to the state; only then could the state give it away by declining to tax it. But the state cannot own all future taxpayer income. Such a proposition would turn on their head many of our society's foundational values, including private property rights and the prohibition of taxation without proper representation and consent. It would also stretch the state's taxing power to include an unfettered and arbitrary authority to

confiscate property. *See, e.g.*, *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934) ("[Due process] is applicable to a taxing statute … only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.").

Finally, tax credits, deductions, and exemptions are not subsidies. The United States Supreme Court has recognized as much. *See Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship."); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 590 (1997) ("[T]here is a constitutionally significant difference between subsidies and tax exemptions."). Justice Brennan explained why "[t]ax exemptions and general subsidies … are qualitatively different":

> Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

Walz, 397 U.S. at 690 (Brennan, J., concurring). Arizona's tax credits are like tax exemptions. *Kotterman*, 193 Ariz. at 288, ¶ 50 (there is "no constitutional difference between a [tax] credit and a deduction"). Both relieve the burden of paying taxes and are not government gifts, donations, or subsidies.

Under its plain terms, the Gift Clause does not apply to tax credits.

3. Applying the Gift Clause to tax credits would conflict with the Arizona Constitution's structure and history.

Applying the Gift Clause to tax credits would not only contravene *Kotterman* and ignore the constitutional text, it would also conflict with the Constitution's structure and history. The Constitution mandates the separation of powers and allows the Legislature, not the courts, to set tax policy.

The constitutional text on these points is clear. Article III divides "[t]he powers of the government of the state of Arizona … into three separate departments, the legislative, the executive, and the judicial," and specifies that, "except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const., art. III. "Nowhere in the United States is this system of structured liberty [separation of powers] more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988). The Constitution also makes clear that "[t]he power of taxation shall never be surrendered, suspended or contracted away." Ariz. Const. art. IX, § 1. And it is well established that "setting tax rates is a legislative function," which courts "usurp" 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). It is a "well-settled constitutional standard" that the Legislature has the "unlimited discretion to set the rate of taxation of a legally imposed revenue raising tax." *Id.* at 539.

Debate at the Constitutional Convention confirms Arizona's deep commitment to this separation of powers and the Legislature's long-held authority to enact tax exemptions. On November 19, 1910, the Convention heard discussion on Proposition 106, which included an earlier version of the Gift Clause and other provisions that later became Article IX, covering "Public Debt, Revenue, and Taxation." The Records of the Arizona Constitutional Convention of 1910, at 464, 1260 (John S. Goff ed., 1991) (hereinafter "Goff").

Up for discussion was article IX, § 2: "All property in the State not exempt under the laws of the United States or under this Constitution, or exempted by law under the provisions of this section, shall be subject to taxation to be ascertained as provided by law." Ariz. Const. art. IX, § 2 (1912); *see also* Goff, *supra*, at 475. Everett Ellinwood raised the concern that, "[i]f you leave the exemption at all you leave to [the Legislature] the right to exempt railroads and other property, unless you specifically mention it here and then shut the door so no other property shall be exempted." Goff, *supra*, at 475.

Morris Goldwater responded immediately: "I am willing to let it go that way." *Id.* And in fact the delegates left the text unchanged, allowing for the possibility of tax exemptions. *See id.* at 475; *see also* Ariz. Const. art. IX, § 2 (1912).

As historians have observed, these delegates gave the Legislature "'extremely broad discretion' in taxing matters." John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 78 (1988) (quoting G.M. Bakken, *Rocky Mountain Constitution Making 1850–1912*, 53–63 (1987)). This was intentional. George W.P. Hunt, President of the Convention and Arizona's first governor, explained during the convention that "[a] simple and elastic constitutional provision … leaves the needed discretion to the legislature and permits accommodation to the changing needs of growing communities." Goff, *supra*, at 466. Further, permitting legislative discretion to enact tax exemptions was consistent with Arizona's territorial practice of providing certain private entities tax exemptions. *See* Leshy, *supra*, at 12, n.58 ("The Territorial Legislature granted tax exemptions to new railroads in 1897, 1899, 1901, and 1903.").

The framers never intended to burden the judicial branch with deciding tax-policy questions. The enactment of tax credits falls squarely within the Legislature's discretion. *See Tanque Verde Enters.*, 142 Ariz. at 542. The Court should reject Plaintiffs' invitation to assume that legislative function. *See id.*

4. Applying the Gift Clause to tax credits would upend Arizona's tax framework.

Concluding that tax credits do implicate the Gift Clause would also subject to constitutional scrutiny thousands of tax credits, deductions, exemptions, and classifications, including well-established programs like charitable contributions and credits for contributions to private schools and religious organizations. If mere reduction in potential future tax revenue could violate the Gift Clause, virtually every taxation decision would trigger Gift Clause inquiry: the choice whether to tax certain transaction privilege revenues (like retail sales) and not others (like legal services); the decision to allow some income tax deductions (medical expenses) and not others (personal travel);

the decision to exempt from use and transaction-privilege taxes certain purchases (equipment used in manufacturing) and not others (expendables used in manufacturing). Thankfully, the Gift Clause does not apply to these legislative decisions.

Plaintiffs allege that "[t]he Gift Clause applies not only to money but also to other valuable advantages such as tax credits or exemptions," and say "[a] public expenditure violates the Gift Clause unless (1) the expenditure serves a public purpose and (2) reflects adequate consideration." [Compl. ¶¶ 127–28.] Adopting that view would leave huge swaths of Arizona tax policy vulnerable to constitutional attack.

Most obviously, it would reopen the question the Supreme Court settled more than 25 years ago in *Kotterman*: whether STO tax credits are unconstitutional. *Kotterman*, of course, held that they implicated neither the Gift Clause (art. IX, § 7) nor the Constitution's prohibitions on aid to religion (art. II, § 12) or aid to private schools (art. IX § 10). *Kotterman*, 193 Ariz. at 284, 292, ¶¶ 30, 72. Article II, § 12 states that "[n]o public money or property shall be appropriated for or applied .... to the support of any religious establishment," while Article IX, § 10 prohibits any "appropriation of public money made in aid of any church, or private or sectarian school." The Court held that a tax credit benefiting religious organizations and private schools was not "public money … applied," an "appropriation," or "aid" for the same reason it was not a gift: "It does not follow ... that reducing a taxpayer's liability is the equivalent of spending a certain sum of money." *Kotterman*, 193 Ariz. at 287, ¶ 45. And the Court knew the ramifications of concluding otherwise. If the STO tax credits were unconstitutional, then courts may "be forced to rule that deductions for charitable contributions to private schools were [also] unconstitutional." *Id.* at 288, ¶ 50. That conclusion obviously is untenable, but it would flow naturally from subjecting every tax credit or exemption to Gift Clause scrutiny, as Plaintiffs insist the Court must do. [Compl. ¶¶ 127–28.]

Applying the Gift Clause in this manner would also jeopardize at least 30 other tax credits.[3] Take, for instance, Arizona's Increased Excise Taxes Paid Credit, which like the Program here, is refundable. *See* A.R.S. § 43-1072.01(D). This tax credit helps mitigate sales tax increases for low-income taxpayers. *See id.* § 43-1072.01(A)–(B). Since 2001, the Department of Revenue has applied this refundable credit over *13 million times*, providing needy taxpayers with over $600 million in relief. Office Econ. Rsch. & Analysis, Ariz. Dep't Revenue, Arizona's Individual and Corporate Income Tax Credit Report 36 (Nov. 30, 2024). Under Plaintiffs' logic, courts would need to analyze each such credit, and could invalidate any one that does not "serve[] a public purpose" and "reflect[] adequate consideration." [*See* Compl. ¶ 128.] For the Increased Excise Credit

[3] *See, e.g.*, A.R.S. §§ 43-1075 and 43-1163 (Affordable Housing Credit); § 43-1081.01 (Agricultural Pollution Control Equipment Credit); § 43-1084 (Agricultural Water Conservation System Credit); § 16-954B (Clean Elections Credit); § 43-1085 (Commercial and Industrial Solar Energy Credit); § 43-1088 (Contributions to Qualifying Charitable Organizations Credit); § 43-1088 (Contributions to Qualifying Foster Care Organizations Credit); §§ 43-1183 and 43-1089.04 (Corporate Contributions to School Tuition Organizations); §§ 43-1184 and 43-1089.04 (Corporate Contributions to School Tuition Organizations for Disabled or Displaced Students); § 43-1073.01 (Dependent Tax Credit); § 43-1086 (Donations to the Military Family Relief Fund Credit); § 43-1165 (Motion Picture Production Costs Credit); § 43-1079.01 (Employing National Guard Members Credit); § 43-1014 (Entity Level Income Taxes Paid); § 43-1073 (Family Income Tax Credit); § 43-1076.01 (Healthy Forest Ecological Restoration Workforce Training); § 43-1076.01 (Healthy Forest Production); § 43-1071 (Income Taxes Paid to Other States or Countries Credit); § 43-1072.01 (Increased Excise Taxes Paid Credit); § 43-1074.02 (Investment in Qualified Small Businesses Credit); § 43-1075 (Affordable Housing Credit); § 43-1082 (Motion Picture Production Costs Credit); § 43-1074 (New Employment Credit); § 43-1089 (Private School Tuition Organization "Original" Credit); § 43-1089.03 (Private School Tuition Organization "Switcher" Credit); § 43-1072 (Property Tax Credit); § 43-1089.01 (Public School Fees and Contributions Credit); §§ 43-1083.03 and 43-1164.04 (Qualified Facilities Credit); § 43-1164.05 (Renewable Energy Production for Self-Consumption Credit); §§ 43-1083.02 and 43-1164.03 (Renewable Energy Production Tax Credit); §§ 43-1074.01 and 43-1168 (Research and Development Credit); §§ 43-1074.01(A)(1)(c) and 43-1168(A)(1)(d) (Research and Development Credit for University Research); §§ 43-1089.02 and 43-1181 (School Site Donation Credit); § 43-1083 (Solar Energy Device Credit); § 43-1178 (Taxes Paid for Coal Consumed in Generating Electrical Power Credit).

alone, this could require courts to scrutinize hundreds of thousands of tax credits issued annually by ADOR.

Allowing Plaintiffs' claims to proceed could also undermine Arizona's numerous transaction-privilege classifications.[4] Persons "engaging or continuing in this state in the commercial lease classification," for example, have a zero percent state sales tax. A.R.S. § 42-5010(A)(4). In Plaintiffs' view, all such commercial-lease revenue presumptively belongs to the state, so if the state declines to collect taxes on it, then the state has provided taxpayers a gift.

It is not the Court's role "to make judgments about the overall wisdom of the tax credit …. That obligation falls to the other branches of government." *Kotterman*, 193 Ariz. at 288, ¶ 48. The Court should decline Plaintiffs' invitation to upend Arizona tax policy, open the courts to myriad challenges of every tax credit and transaction-privilege classification, or put at risk the state's longstanding incentives for donations to religious and educational organizations.

B. Plaintiffs lack standing because tax credits are not government expenditures, and Plaintiffs cannot show a distinct pecuniary injury.

Alternatively, Plaintiffs lack standing to sue in the first place. Although the text of the Uniform Declaratory Judgments Act is broad, "standing is still required" and courts cannot "act as legislators by setting policy or issuing advisory opinions." *Ariz. Creditors Bar Ass'n, Inc. v. State*, 257 Ariz. 406, 410, ¶ 12 (App. 2024). "[D]eclaratory relief should be based on an existing state of facts, not those which may or may not arise in the future."

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[4] *See, e.g.*, A.R.S. § 42-5061 (Retail Classification); § 42-5062 (Transporting Classification); § 42-5063 (Utilities Classification); § 42-5064 (Telecommunications Classification); § 42-5065 (Publication Classification); § 42-5066 (Job Printing Classification); § 42-5067 (Pipeline Classification); § 42-5068 (Private Car Line Classification); § 42-5069 (Commercial Lease Classification); § 42-5070 (Transient Lodging Classification); § 42-5071 (Personal Property Rental Classification); § 42-5072 (Mining Classification); § 42-5073 (Amusement Classification); § 42-5074 (Restaurant Classification); § 42-5075 (Prime Contracting Classification); § 42-5076 (Online Lodging Marketplace Classification).

Id. A plaintiff has standing to bring an action if it alleges a "distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). "An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Id.* For taxpayer standing, "[w]hen there is no expenditure of funds raised by taxation, the rationale for permitting standing does not exist, and the Arizona courts have denied standing." *Dail v. City of Phx.*, 128 Ariz. 199, 202 (App. 1980).

Here, Plaintiffs lack standing because tax credits are not government expenditures, and taxpayers have standing to challenge only government expenditures. *See id.* In Arizona's seminal case on this issue, *Ethington v. Wright*, the Supreme Court explained that taxpayer standing "is based upon the taxpayers' equitable ownership of [state] funds and their liability to replenish the public treasury for the deficiency which would be caused by the [alleged] *misappropriation*." 66 Ariz. 382, 386 (1948) (emphasis added). But the state cannot misappropriate what it does not own, and as discussed above, the state does not own future taxable income. *See Kotterman*, 193 Ariz. at 288, ¶ 50 ("We have already concluded that this tax credit is not an appropriation of public money.").

Welch v. Cochise County Board of Supervisors, 251 Ariz. 519 (2021), also confirms that Plaintiffs lack standing here. The plaintiff in *Welch* sued to enjoin the purportedly unlawful appointment of a justice of the peace and sought taxpayer standing because the salary of the justice of the peace would be paid with taxpayer dollars. *Id.* at 522–23, ¶¶ 6, 9. This relationship, though, was "too remote" and "incidental" because no facts showed the appointment of the justice of the peace would have "added to taxpayers' liabilities." *Id.* at 525, ¶ 19. The Court also rejected the application of a formulaic test to establish taxpayer standing, which would have been "meaningless" because "it is difficult to imagine a government action lacking at least some impact on taxpayer funds." *Id.* at 524, ¶ 17.

As in *Welch*, Plaintiffs' allegations here that the Program will have "some impact on taxpayer funds," without more, cannot establish taxpayer standing. [*See* Compl. ¶ 146 ("Plaintiffs will bear a share of the burden for replenishing state coffers for public funds

gifted by the state.").] Plaintiffs do not allege that the Program will increase their tax liability or result in the imposition of any new taxes. Indeed, Plaintiffs neither point to any specific amount of taxpayer funds that will be used for the Production Program nor allege that MoPic-2023-008 and MoPic-2024-004 have resulted or will result in any refund or transfer of money to taxpayers. [*See id.* ¶¶ 148–58.]

Plaintiffs cannot overcome these deficits by alleging that the Program's tax credits *could* result in refunds or credit vouchers drawn from funds with caps designated by the Legislature. [*See id.* ¶¶ 74–76, ¶ 93.] The designated caps are a ceiling that merely limit the issuance of *potential* credits; they are not actual expenditures or amounts of approved credits. And the *possibility* of taxpayers receiving refunds is likewise a hypothetical pecuniary harm. As most taxpayers know, whether they receive any refund depends on a variety of factors, including the amount of the taxpayer's liability and the application of other credits and exemptions. Here, there are even more unknowns, including whether a pre-approved credit will reach the post-approval stage and, if so, whether it will receive the necessary verification from a certified public accountant. [*Id.* ¶¶ 72, 109.]

The Court should find that Plaintiffs lack taxpayer standing to challenge the Production Program's tax credits because tax credits are not government expenditures, *see Ethington*, 66 Ariz. at 386; *Kotterman*, 193 Ariz. at 288, ¶ 50, and Plaintiffs' alleged incidental harm turns on hypothetical facts "which may or may not arise in the future," *see Ariz. Creditors Bar Ass'n, Inc.*, 257 Ariz. at 410, ¶ 12.

IV. Conclusion

The Gift Clause does not apply to tax credits. The Court should therefore dismiss with prejudice Plaintiffs' facial and as-applied constitutional claims. Alternatively, the Court should conclude that Plaintiffs lack standing to bring their claims.

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DATED this 28th day of April, 2025.

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GOOD FAITH CONSULTATION CERTIFICATE

Pursuant to Rules 7.1(h) and 12(j) of the Arizona Rules of Civil Procedure, Defendant Board of Directors of the Arizona Commerce Authority's undersigned counsel certifies that, on March 19, 2025, he met and conferred via videoconference with counsel for Plaintiffs regarding the Board's Motion to Dismiss but could not resolve the issues.

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The foregoing has been electronically filed via AZTurboCourt and electronically delivered this 28th day of April, 2025, to:

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