ARIZONA COURT OF APPEALS

DIVISION TWO

DEBORAH HEWITT; JAN MITTELSTAEDT, Plaintiffs-Appellants, v. BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY, an agency of the State of Arizona, et al., Defendants-Appellees.	Court of Appeals, Division Two No. 2 CA-CV 2026-0013 Maricopa County Superior Court No. C2025-001929

BRIEF OF *AMICUS CURIAE* ARIZONA CHAMBER OF COMMERCE & INDUSTRY

(FILED WITH THE WRITTEN CONSENT OF ALL PARTIES)

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Michael G. Bailey (#013747)
Vanessa M. Pomeroy, (AZ # 037673)
Arizona Chamber of Commerce & Industry
100 N. 7th Avenue, #120
Phoenix, AZ 85007
Telephone: (602) 248-4430
mbailey@azchamber.com
vpomeroy@azchamber.com
Counsel for Amicus Curiae Arizona Chamber of Commerce & Industry

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION.....1

IDENTITY AND INTEREST OF THE *AMICUS*.....2

ARGUMENT.....5

I. The Legislature Has Broad Discretion in its Implementation of Tax Policy..5

II. Plaintiffs' Requested Relief is Unclear.....8

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Alvarado v. Indus. Comm'n,
115 Ariz. 113 (App. 1977).....5

Apache Cnty. v. Atchison, T. & S. F. Ry. Co.,
106 Ariz. 356 (1970) 6

City of Flagstaff v. Ariz. Dep't of Admin,
255 Ariz. 7 (App. 2023).....9, 10

Home Owners' Loan Corp. v. Phoenix,
51 Ariz. 455 (1938).....5, 6

Kotterman v. Killian,
193 Ariz. 273 (1999).....*Passim*

Mecham v. Gordon,
156 Ariz. 297 (1988).....5

Neptune Swimming Found. v. City of Scottsdale,
256 Ariz. 551 (2024).....9

Rios v. Symington,
172 Ariz. 3 (1992).....6

Rogers v. Mroz,
252 Ariz. 335 (2022).....4

Waddell v. 38th St. P'ship,
173 Ariz. 137 (Tax Ct. 1992).....6

Constitutional Provisions

Ariz. Const. art. 3.....5

Ariz. Const. art. 9 § 7……1

Statutes

A.R.S. § 12-120.21……...……10

A.R.S. § 41-1512……..……4

A.R.S. § 41-1517……1

A.R.S. § 43-1073.01……...…7

A.R.S. § 43-1074……7

A.R.S. § 43-1074.01……...7

A.R.S. § 43-1082……1

A.R.S. § 43-1083.03……...3, 4, 7

A.R.S. § 43-1164.04……..3, 4, 7

A.R.S. § 43-1165……1

A.R.S. § 43-1168……7

A.R.S. § 43-1170……...……7

A.R.S. § 43-1183……7

Rules

ARCAP 16.....1

Ariz. R. Civ. P. 12(b)(6)……2, 9

Other Authorities

2026 Ariz. Legis. Serv. Ch. 140 (H.B. 4168)……..6

INTRODUCTION

The Arizona Chamber of Commerce and Industry (the "Chamber") respectfully submits its *Amicus Curiae* Brief in Support of Defendant-Appellees Board of Directors of the Arizona Chamber of Commerce Authority and Arizona Department of Revenue (collectively, "Defendants") pursuant to ARCAP 16(b)(1)(A). The Chamber supports the arguments raised by Defendants and reiterates that *Kotterman v. Killian* established that tax credits are not subject to the Arizona Constitution's Gift Clause. 193 Ariz. 273 (1999); *see also* Ariz. Const. art. 9 § 7 (the Gift Clause).

Plaintiff-Appellants Deborah Hewitt and Jan Mittelstaedt (collectively, "Plaintiffs") argue ***all*** refundable and non-refundable tax credits issued under the Arizona Motion Picture Program ("Program"), *see* A.R.S. §§ 41-1517, 43-1082, 43-1165, are subject to Gift Clause analysis. This has already been rejected by *Kotterman.* 193 Ariz. at 288 ¶ 52. The Chamber will not reiterate this point which is fully briefed by Defendants. Instead, the Chamber seeks to expand upon the legislature's longstanding constitutional lawmaking authority over taxation and tax credits—especially when the legislature maintains exclusive and broad discretion for a reason.

Moreover, Plaintiffs' requested relief and arguments on appeal are unclear. Despite acknowledging a distinction between refunded tax credits and the non-

refunded tax credit discussed in *Kotterman*, Plaintiffs consistently allege that ***all*** tax credits under the Program, including those that don't implicate a refund, are subject to and violate the Gift Clause consideration analysis. Plaintiffs' claim is flatly barred by *Kotterman*, which was just recently affirmed by the Arizona Supreme Court. And even if this Court decides to distinguish *Kotterman* on the refundable tax credit basis (it should not), any rulings of constitutionality are not appropriate at the Rule 12(b)(6) stage this appeal arrives on. Nor should the Program be enjoined.

For all these reasons, the Court should uphold the superior court's decision and application of *Kotterman*. Alternatively, the Court should reverse for further adjudication before any issues of constitutionality are decided.

IDENTITY AND INTEREST OF THE *AMICUS*[1]

The Chamber is a non-profit, non-partisan organization advocating for free-market public policies and working to ensure economic growth and prosperity for all Arizonans. Its membership includes businesses of all shapes and sizes operating across Arizona that wish to speak with a common voice on a range of issues relating to the Chamber's purpose. Among other things, the Chamber champions economic growth and development in and for our state and strives to

[1] No person or entity, other than *amicus curiae*, contributed funds or resources that were directed to funding this brief. ARCAP 16(b)(3).

support the proper application of our generally pro-growth statutory framework—including tax law.

Importantly, Arizona is home to several development projects, businesses, and headquarters that are essential to local and state economies, job markets, and national security. But Arizona's long-term competitiveness depends on the ability to attract, permit, and build world-class economic development projects. In this regard, Arizona's success is largely due to its business-friendly statutory and regulatory scheme. One benefit current and potential Arizona businesses enjoy is the ability to ascertain their prospective tax liability and credits as defined by statute. But if Plaintiffs' sweeping characterizations prevail, it could create widespread uncertainty surrounding some of the state's biggest economic motivators. Simply put, large employers and developers will be hesitant to invest billions of dollars and create thousands of jobs in a state where its promised tax credits are being judicially withdrawn and/or subject to constant litigation.

What's more, Plaintiffs' wide-reaching allegations could cause uncertainty for Chamber-championed tax credits that bring significant economic growth and development to Arizona. For example, the qualified facilities tax credit, *see* A.R.S. §§ 43-1083.03, 43-1164.04, was established to promote the location and expansion of manufacturing facilities, including manufacturing-related headquarters and research and development facilities to (1) generate high-quality employment

opportunities in Arizona; (2) increase Arizona's property tax base; and (3) enhance Arizona's position as a center for manufacturing.

To qualify, a business is required to "invest in a new qualified facility or expand an existing qualified facility in this state and produce new full-time employment positions where the job duties are associated with the location of the qualifying investment. The taxpayer must meet the employee compensation and employee health benefit requirements prescribed by § 41-1512." A.R.S. §§ 43-1083.03(A), 43-1164.04(A). Our studies confirm this refundable tax credit results in tremendous return-on-investment in Arizona. Losing these positive impacts to Arizona's revenue, job market, and the state's position as a national hub for manufacturing would be bad for Arizona. But if Plaintiffs have it their way, all refundable and non-refundable tax credits would be vulnerable to Gift Clause scrutiny—a result that simply contravenes *Kotterman* and the legislature's will.

For all these reasons, granting Plaintiffs' requested relief here could open the floodgates and allow similar plaintiffs to file lawsuits that can cause economic instability, uncertainty, and certainly damage Arizona's reputation as a state that welcomes manufacturing, development projects, job creating innovation, and economic growth. *See generally* *Rogers v. Mroz*, 252 Ariz. 335, 344 ¶ 38 (2022) (courts routinely protect against actions that would "open the floodgates" to

unwarranted litigation); *see also* *Alvarado v. Indus. Comm'n*, 115 Ariz. 113, 115 (App. 1977) (same).

Economic growth must occur somewhere. For it to be here in Arizona, it is imperative that appeals seeking to disrupt Arizona's lawful tax framework promoting such investments are swiftly dismissed.

ARGUMENT

I. The Legislature Has Broad Discretion in its Implementation of Tax Policy.

The Arizona legislature exercises great discretion when enacting tax law. "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); *see also* Ariz. Const. art. 3 ("The powers of the government of the state of Arizona shall be divided into three separate departments . . . and no one of such departments shall exercise the powers properly belonging to either of the others"). Supplementing the points raised by Defendants, Arizona case law clearly delineates this point. [*See* AB, 05/27/2026, ep. 32–36].

To start, the legislature's Article 3 powers include the right to enact taxes as deemed necessary. *See* *Home Owners' Loan Corp. v. Phoenix*, 51 Ariz. 455, 466 (1938) ("The power of taxation under the Constitution inheres in the sovereignty of

the state and may be exercised only by the state Legislature."); *see also* *Apache Cnty. v. Atchison, T. & S. F. Ry. Co.*, 106 Ariz. 356, 360 (1970) (Arizona courts "have repeatedly said in citing to Article III that a court cannot legislate, but its duty is to construe the law as written by the legislature.").

The legislature maintains discretion in enacting tax law, and with good reason:

> . . . [W]hatever property rights as may exist in a means of measuring a tax belong exclusively to the legislature. The legislature can change the standard for measuring a tax as it sees fit. Implementation of a standard for measuring a tax may lead to circumstances in which a property right arises which a taxpayer can fairly claim. Payment of a tax, for example, may give rise to a right to a refund. In such a case, the property right is the right to the refund.

Waddell v. 38th St. P'ship, 173 Ariz. 137, 141 (Tax Ct. 1992). Indeed, the legislature inherently requires discretion to carry out its duties. *See* *Rios v. Symington*, 172 Ariz. 3, 6 (1992) ("The Legislature, in the exercise of [its] lawmaking power, establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect.").

The legislature here is doing precisely that. In fact, during this past 2026 legislative session, numerous tax credits have been amended or repealed. *See* 2026 Ariz. Legis. Serv. Ch. 140 (H.B. 4168). For example:

Amended:

- Qualified Facilities (A.R.S. §§ 43-1083.03, 43-1164.04) — amending scope of when the tax credit may be claimed
- Contributions to school tuition organizations (A.R.S. § 43-1183) — expanding fiscal year term of the tax credit and reducing tax credit cap
- Dependent Tax (A.R.S. § 43-1073.01) — Raising tax credit

Repealed:

- Individual research and development credit (A.R.S. §§ 43-1074.01, 43-1168) — Partially repealed the refundable portion
- New employment (A.R.S. § 43-1074) — Repealed
- Pollution control equipment (A.R.S. § 43-1170) — Repealed

The legislature is actively exercising its constitutionally guaranteed discretion and policy discernment when regulating tax credits. And the legislature has demonstrated that it will repeal a tax credit that is no longer in the best interest of the state, or amend tax credits when prudence suggests. The legislature's necessarily broad discretion on tax policy informed *Kotterman*, and the two together establish for this Court *that there is no* Gift Clause violation in this case. *See* *Kotterman*, 193 Ariz. at 287–88 ¶ 48. The Court should follow *Kotterman*.

II. Plaintiffs' Requested Relief is Unclear.

But even if this Court might otherwise consider distinguishing *Kotterman* as to the refundable portion of the Program, the Court should refrain from taking that leap because Plaintiffs are not asking the Court to do that. Plaintiffs pay lip-service to a distinction based on a tax credit's refundability, but their claim in this case is all or nothing: that the entire Program, regardless of refundability, violates the Gift Clause.

For example, Plaintiffs argue that *Kotterman* addressed a non-refundable tax credit (*see, e.g.*, [OB, 05/16/2026, ep. 25–26]; [RB, 07/16/2026, ep. 18-22]), but never seek relief that is limited to any refundable portion of the Program. Rather, though making note of the distinction when addressing their facial challenge, Plaintiffs maintain that whether refundable or not, the entirety of the Program ***always*** violates the Gift Clause. *See, e.g.*, [OB, 03/16/2026, ep. 45]; [RB, 07/16/2026, ep. 11]. And Plaintiffs' as-applied challenges fair no better as Plaintiffs never allege that the challenged credits have resulted in a refund. *See, e.g.*, [OB, 03/16/2026, ep. 48]; [RB, 07/16/2026, ep. 11]. Plaintiffs never raise as an alternative argument that the Program is only unconstitutional in part, i.e., in the instances where a refund is actually issued *and* that particular refund fails the Gift Clause consideration analysis. This Court should not make that leap for them.

In other words, Plaintiffs don't ask this Court to distinguish *Kotterman*; they ask this Court to ignore *Kotterman*. It is this "all or nothing" claim that the superior court reviewed under Rule 12(b)(6), and it is the "all or nothing" claim that this Court should reject as it is unsupported by law.

Kotterman is also not in doubt. The Arizona Supreme Court recently affirmed *Kotterman*'s reasoning surrounding tax credits not being a "gift" that are subject to the Gift Clause in *Neptune Swimming Found. v. City of Scottsdale*, 256 Ariz. 551, 560 ¶ 29 (2024). Therefore, to the extent Plaintiffs are requesting this Court overturn *Kotterman*'s reasoning and find all tax credits (including non-refundable tax credits) are subject to Gift Clause review, such a request must be rejected as this Court is bound by the reasoning presented in *Kotterman*. The superior court's analysis got it right and should be affirmed.

If the Court should decide to take the leap that Plaintiffs don't seek and distinguish *Kotterman* as to refundable tax credits (it should not), then the Court should still meticulously avoid making any finding as to constitutionality of the Program or entering any preliminary injunctive relief. With this case arriving on a Rule 12(b)(6) record, the Court should allow Defendants to answer, discovery to occur, and for a final adjudication on the merits. *See City of Flagstaff v. Ariz. Dep't*

of Admin, 255 Ariz. 7, 14 ¶ 26 (App. 2023) ("[A] court of appeals sits as a court of review, not of first view." (citation omitted)).

Plaintiffs' Reply also cites to A.R.S. § 12-120.21(A)(3) for the first time in an attempt to justify injunctive relief. [RB, 07/16/2026, ep. 36]. But such relief is not "necessary and proper to the complete exercise of [this Court's] *appellate jurisdiction*." A.R.S. § 12-120.21(A)(3) (emphasis added). As Plaintiffs explain, they are not seeking an injunction pending this appeal, but one that extends "while this litigation proceeds." [RB, 07/16/2026, ep. 36]. In fact, Plaintiffs' Opening Brief never alleges that the trial court erred in denying a preliminary injunction. *See* [OB, 03/16/2026]. Injunctive relief is simply not appropriate in this case.

CONCLUSION

For all of these reasons, the Court should affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 6th day of August, 2026.

ARIZONA CHAMBER
OF COMMERCE & INDUSTRY

By: */s/Vanessa Pomeroy*
Michael G. Bailey
Vanessa M. Pomeroy
100 N. 7th Ave. #120
Phoenix, AZ 85007

mbailey@azchamber.com
vpomeroy@azchamber.com
Counsel for Amicus Curiae Arizona Chamber of Commerce & Industry

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amicus Curiae* Arizona Chamber of Commerce & Industry submitted under ARCAP 16 uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 2,032 words, (according to the word count feature of counsel's word processing system) in compliance with ARCAP 14.

ARIZONA CHAMBER
OF COMMERCE & INDUSTRY

By: */s/Vanessa Pomeroy*
Michael G. Bailey
Vanessa M. Pomeroy
100 N. 7th Ave. #120
Phoenix, AZ 85007
mbailey@azchamber.com
vpomeroy@azchamber.com
Counsel for Amicus Curiae Arizona Chamber of Commerce & Industry

CERTIFICIATE OF SERVICE

I hereby certify that on the 6th of August, 2026, the Brief of *Amicus Curiae* Arizona Chamber of Commerce & Industry and Certificate of Compliance were electronically filed with the Arizona Court of Appeals Division Two, and electronically served copies of the same to:

Eric M. Fraser
David B. Rosenbaum
Andrew G. Pappas
Gideon Cionelo
Osborn Maledon, P.A.
efraser@omlaw.com
drosenbaum@omlaw.com
apappas@omlaw.com
gcionelo@omlaw.com

Counsel for Defendant /
Appellee Board of Directors
of the Arizona Commerce Authority

Scot G. Teasdale
Arizona Attorney General's Office
Scot.teasdale@azag.gov

Counsel for Defendant / Appellee
Arizona Department of Revenue

Jonathan Riches
Timothy Sandefur
Parker Jackson
Scharf-Norton Center for
Constitutional Litigation at the
Goldwater Institute
jriches@goldwaterinstitute.org
tsandefur@goldwaterinstitute.org

pjackson@goldwaterinstitute.org

Counsel for Plaintiffs / Appellants
Deborah Hewitt and Jan Mittelstaedt

RESPECTFULLY SUBMITTED this 6th day of August, 2026

By: */s/Vanessa Pomeroy*
Michael G. Bailey (#013747)
Vanessa M. Pomeroy (#037673)
100 N. 7th Ave. #120
Phoenix, AZ 85007
mbailey@azchamber.com
vpomeroy@azchamber.com
Counsel for Proposed
Amicus Curiae Arizona Chamber of
Commerce & Industry