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. CV2025-001929

AMICUS CURIAE BRIEF OF THE STATE OF ARIZONA IN SUPPORT OF DEFENDANTS/APPELLEES

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INTRODUCTION & INTERESTS OF AMICUS CURIAE

Appellants urge novel theories that ignore precedent and conflict with the legislature's (including the people's) plenary power over tax policy under the Arizona Constitution.

Accordingly, the State files this as-of-right brief under Arizona Rule of Civil Appellate Procedure 16(b)(1)(B) because this case presents issues of statewide importance, including regarding the constitutionality of tax credits and the legislature's exclusive role to set tax policy for the state.

ARGUMENT

I. The legislature has plenary authority to set tax policy for the state, which includes the power not to tax.

As Arizona courts have long recognized, the "legislature has plenary power over taxes." *Luhrs v. City of Phoenix*, 52 Ariz. 438, 449 (1938). This "power of taxation under the Constitution inheres in the sovereignty of the state and may be exercised only by the state Legislature." *Vangilder v. Ariz. Dep't of Revenue*, 252 Ariz. 481, 488 ¶ 25 (2022) (citation omitted); *see, e.g.*, *Maricopa County v. S. Pac. Co.*, 63 Ariz. 342, 347 (1945) ("The legislature is the source of the taxing power, and without a grant from it no taxes can be levied or collected."). And of course, the legislature shares that tax power with the people. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6 ¶ 15 (2013) ("The

legislative power of the people is as great as that of the legislature." (citation omitted)).

Certain constitutional restrictions apply to the legislature's taxing power, both substantively and procedurally. For instance, whenever the legislature imposes a tax, it must "state distinctly the object of the tax, to which object only it shall be applied," among other requirements. Ariz. Const. art. 9, § 3. But "[e]xcept where restrained by the Constitution, the Legislature's power over taxation is plenary." *S. Pac. Co. v. Pima County*, 38 Ariz. 11, 18 (1931); *see generally* Ariz. Const. art. 9, §§ 1-26.

Importantly, the legislature's broad taxation authority includes the power *not* to tax. The Constitution expressly identifies categories of property that "[t]he legislature may exempt" from taxation. Ariz. Const. art. 9, § 2(E). More generally, the Constitution contemplates that the legislature may also pass "other tax exemption feature[s] [for] computing tax liability," such as "a tax deduction, exemption, exclusion, [or] credit." Ariz. Const. art. 9, § 22(B)(3).

In fact, the legislature has no "positive duty to tax all non-constitutionally-exempt property." *Airport Props. v. Maricopa County*, 195 Ariz. 89, 101 ¶ 44 (App. 1999). "There are many classes of taxation which

the state may provide for but does not." *Id.* at 104 ¶ 58 (citation omitted). And when deciding what to "omit[] … from the state's exercise of its power to tax by dint of sovereign political discretion," the legislature has a "broad and deep reservoir of discretionary governmental authority." *Id.* at 101 ¶¶ 42-43, 45. Indeed, for the first 20 years of statehood, the legislature did not tax income at all. *See Webb v. Frohmiller*, 52 Ariz. 128, 129 (1938) ("In 1933, the Eleventh Legislature, at its First Special Session, adopted chapter 8, commonly known as the income tax law…."); *Boyce v. City of Scottsdale*, 157 Ariz. 265, 267 (App. 1988) (discussing powers granted to Arizona State Tax Commission under the Income Tax Act of 1933).

II. The Arizona Constitution's Gift Clause does not apply to tax credits.

The legislature's taxation power is primarily addressed in article 9 of the Arizona Constitution, titled Public Debt, Revenue, and Taxation. That article also contains the so-called Gift Clause, which provides in relevant part that the state may not "make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. 9, § 7. The Gift Clause does not apply to bona fide tax credits that the legislature adopts pursuant to its plenary taxation authority. That established principle is dispositive in this case.

A. Precedent instructs that tax credits are not expenditures of public money subject to the Gift Clause.

The Constitution's Gift Clause applies when the government gives something of value that it owns to a private party, including, for example, "the grant of public money," "debt forgiveness," granting "exclusive use of [public]-owned property" to a "private enterprise," or "a long-term lease of public property." *Neptune Swimming Found. v. City of Scottsdale*, 256 Ariz. 551, 560 ¶ 28 (2024) (citations omitted).

Importantly, "such arrangements are not like [a] tax credit"—which does not trigger Gift Clause scrutiny—"because the state does not own untaxed taxpayer income." *Id.* at 560 ¶ 29. Accordingly, the state's decision to "forego[] collecting some of that income by applying [a tax] credit could not be a 'gift'" under the Gift Clause. *Id.* (discussing reasoning in *Kotterman v. Killian*, 193 Ariz. 273 (1999)); *cf. Green v. Garriott*, 221 Ariz. 404, 413-14 ¶ 36 (App. 2009) (noting that "*Kotterman* has addressed and resolved these particular issues" in constitutional challenge to "analogous" tax credit under article 2, § 12 and article 9, § 10).

In short, "[o]ne cannot make a gift of something that one does not own," and tax credits do not implicate anything the state owns. *Kotterman*,

193 Ariz. at 288 ¶ 52. Rather, they are "credits against tax liability, not withdrawals from the state treasury," and so they do "not constitute an appropriation" of public funds. *Cain v. Horne*, 220 Ariz. 77, 82 ¶¶ 22-23 (2009).

Other courts have similarly concluded that tax credits are not appropriations or expenditures of public monies. For example, in a challenge to a tax credit under Missouri's gift-clause analog, the Missouri Supreme Court found that "tax credits are not expenditures" because no "withdrawal of public funds … occurs with the granting of a tax credit." *Manzara v. State*, 343 S.W.3d 656, 660 (Mo. 2011). Instead, "a tax credit expresses the legislature's wish to declare a portion of the pool of taxable assets off-limits to its own power to collect taxes." *Id.* "Properly understood, this does not result in 'less' money in the treasury because the legislature never wished it to be there in the first place." *Id.* In this way, "[a] tax credit is not a drain on the state's coffers; it closes the faucet that money flows through into the state treasury rather than opening the drain." *Id.*

The same is true in other jurisdictions, as well. *See, e.g.*, *Magee v. Boyd*, 175 So. 3d 79, 121-22 (Ala. 2015) ("[W]e conclude that the … construction of the term 'appropriation' to include the tax credits [at issue] is contrary to the

Alabama Constitution, existing caselaw, and the commonly accepted definition of the term appropriation."); *Gilligan v. Att'y Gen.*, 595 N.E.2d 288, 291 (Mass. 1992) (discussing precedent holding that "proposed tax credits did not set aside monies in the treasury and, thus, could not be viewed as an appropriation"); *Toney v. Bower*, 744 N.E.2d 351, 357-58 (Ill. App. 2001) ("We are unwilling to interpret the term 'public fund' so broadly as to endanger the legislative scheme of taxation…. [W]e reject plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money….").

Thus, in good company with other courts, the Arizona Supreme Court has already resolved the threshold and dispositive question here—the Gift Clause does not apply.

B. Constitutional text and structure confirm that tax credits are not a donation, grant, or subsidy subject to the Gift Clause.

Even if the Arizona Supreme Court had not already held in *Kotterman* (and then reaffirmed in *Neptune*) that tax credits do not trigger the Gift Clause, the text and structure of article 9 of the Constitution independently confirm as much.

To start, article 9 repeatedly recognizes specific kinds of tax exemptions, including, for example, "[h]ousehold goods that are … used

solely for noncommercial purposes," § 2(C)(3); the property of non-profit "educational, charitable or religious association[s] or institution[s]," § 2(E)(1); "[p]ersonal property that is used in a trade or business or for agricultural purposes," § 2(E)(2); cemeteries, § 2(E)(3); property of a resident "widow or widower," § 2(E)(4); property of adults with "a medically certified total and permanent disability," § 2(E)(5); property of certain "honorably discharged veteran[s]," § 2(E)(6); and "watercraft registered for operation in Arizona," § 16.

Recall also that article 9 acknowledges the legislature can take a number of actions to "provide[] for a net increase in state revenue[]," which includes not only imposing new taxes or increasing existing rates, § 22(A), (B)(1)-(2), but also the "reduction or elimination of a tax *deduction, exemption, exclusion, credit* or other tax exemption feature in computing tax liability," § 22(B)(3) (emphasis added).

In other words, the Constitution repeatedly acknowledges the legislature's power *not* to tax, whether through deductions, exemptions, exclusions, or tax credits. Plainly, the initial framers and subsequent amenders thought extensively about what they wanted to exclude—or wanted the legislature to be able to exclude—from taxation.

Yet, the Gift Clause—in the same article 9—says nothing about taxes or tax exemptions. Rather, using quite different language, the Gift Clause prohibits the state from "mak[ing] any *donation or grant*, by *subsidy* or otherwise," to a private individual or entity. Ariz. Const. art. 9, § 7 (emphasis added). Notably, the Gift Clause contains the only reference to a "subsidy" in all of article 9. And, at the same time, it makes no reference whatsoever to any of the legislature's taxation tools that the rest of the article repeatedly addresses.

The distinct language used in the Gift Clause compared to the rest of article 9 strongly supports that the framers did not consider tax exemptions, deductions, and credits to be a prohibited "donation or grant" or "subsidy" under the Gift Clause. Equating those distinct terms ignores the language the framers chose throughout article 9 and in the Gift Clause in particular. *Cf. Biggs v. Betlach*, 243 Ariz. 256, 259 ¶ 13 (2017) ("Taxes are not mentioned in the (C)(2) exception, in contrast to (C)(3), which excepts '[t]axes, fees or assessments that are imposed by counties, cities, towns and other political subdivisions of this state.' To treat 'tax' as subsumed within 'assessment' for purposes of (C)(2) would contradict the constitutional language…." (alteration in original, citations omitted)).

Appellants' contrary argument defies the precision and detail throughout article 9. For example, the article distinguishes between "[t]axes, fees or assessments." *E.g.*, Ariz. Const. art. 9, § 22(C)(3). It refers separately to "tax[es] … laid or appropriation[s] of public money." *E.g.*, Ariz. Const. art. 9, § 10. When relevant, it specifically defines "expenditure" and "local revenues." Ariz. Const. art. 9, § 21(4)(b), (c). And, again, the article reflects the framers' understanding of the differences between "a tax deduction, exemption, exclusion, [and] credit." Ariz. Const. art. 9, § 22(B)(3).

If the framers understood tax credits to be a prohibited subsidy, they would have used language in the Gift Clause to reflect that understanding. And they certainly would not have expressly acknowledged the legislature's power to pass tax credits and other "tax exemption feature[s]" within the very same article. Ariz. Const. art. 9, § 22(B)(3).

Indeed, it is non-sensical to read the Gift Clause's absolutist prohibition on donations, grants, and subsidies as encompassing tax credits, exemptions, and deductions when the rest of article 9 explains in detail what the legislature must do substantively and procedurally to enact those tax policies. There is simply no textual basis for interpreting the Gift Clause as applying to and subsuming tax credits and other tax-exemption

mechanisms. The more logical reading, which gives effect to the distinct language the framers used in different sections, is that the Gift Clause's prohibited transactions (donations, grants, and subsidies) are different in kind than the tax policy decisions that the rest of article 9 authorizes the legislature to make.

C. Applying the Gift Clause to tax laws makes no sense.

Two additional points illustrate why appellants' novel theory makes no sense.

First, the Arizona Supreme Court has instructed that "tax revenue" pursuant to an "independent" legal "obligation to pay taxes" is not relevant to the Gift Clause analysis of whether a public entity has received adequate consideration. *Schires v. Carlat*, 250 Ariz. 371, 377 ¶ 18 (2021). If a public entity's calculable expectation of an *increase* in revenue is constitutionally irrelevant under the Gift Clause to sustain a transaction, then it makes no sense for a foregone increase in future revenue because of tax credits to somehow trigger constitutional scrutiny.

Second, the legislature's authority to set tax policy is bound up in other social and economic policy determinations. The legislature has long enacted exemptions, deductions, and credits to incentivize certain behavior or

otherwise provide relief and support to the public as it deems appropriate. *E.g.*, John D. Leshy, *The Arizona State Constitution* 277 (2d. ed. 2013) (discussing how part of article 9, § 13, added in 1950, was "designed to encourage manufacturing establishments within the state, by exempting their inventories from taxation"). The Gift Clause framework does not map onto these sorts of legislative policy decisions and threatens real separation of powers concerns if courts open that door.

For example, the legislature has created a tax credit for employers who hire "recipients of temporary assistance for needy families [TANF] … who are residents of this state." A.R.S. § 43-1175(A). How would a court weigh the constitutional adequacy and trade-offs of the state foregoing those tax monies against the economic and social benefits from increased employment of families receiving TANF? And by what standard and with what expertise would a court determine that the legislature committed a constitutional error in judgment by opting to incentivize private employment of that population rather than increasing tax revenue in the same amount for some other governmental expenditure?

The same sorts of impossible (and inappropriate) questions would arise with family income tax credits, A.R.S. § 43-1073, or the tax credit for

low-income individuals who are disproportionately affected by increased sales taxes, A.R.S. § 43-1072.01, among many others.

Consider also the industry tax credit for corporations that produce a certain amount of renewable-based energy, A.R.S. § 43-1164.03, or the tax credit for qualified corporate research and development, A.R.S. § 43-1168. The legislature acted well within its police and tax powers in deciding to incentivize and reward energy conservation and creation, which is of particular interest to a drought-prone state that is increasingly dependent on energy to keep its population cool in hot summers. Likewise, the legislature has rationally decided to incentivize certain qualified research that can benefit the state and its residents. How would a court weigh the proportionality of foregone revenue to the immediate and long-term benefits of these sorts of social, economic, and environmental policy choices?

Myriad other hypotheticals further illustrate the impropriety and absurdity of the novel analysis that appellants urge this Court to adopt.

For instance, imagine that the legislature amended the tax code to create new tax credits for middle-income individuals and families and, at the same time, increased taxes on high-earning households. But imagine that the increase on the high earners did not fully offset the tax credits to the

middle class. According to appellants, that tax credit to the middle class would be an expenditure of public monies subject to the Gift Clause analysis because, they say, foregone future revenue is indistinguishable from an expenditure of public monies. Suppose, however, that the tax increase on the high-earners was the exact same amount as the tax credit to the middle class. Would that simultaneous tax increase remove constitutional scrutiny on the tax credit merely because it would maintain the same level of expected tax revenue as the prior year? Or would that legislative shift in relative tax liability itself be subject to the Gift Clause? And if so, would the tax increase be relevant in the consideration analysis?

Appellants' theory seems to be that any reduction in tax revenue from the status quo at this moment in time triggers constitutional scrutiny. *E.g.*, Opening Br. at 29-30 ("[E]very dollar offset against a private company's tax liability is one less dollar available for public use…."). But what if the legislature were to significantly downsize government operations and accordingly changed tax policy in various ways to reflect different budgetary needs? Can the legislature really not do that without proving to a court that the tradeoff and foregone tax revenue was constitutionally justified? Again, how would a court even assess the purported "give" in that

situation (broad tax credits, deductions, exemptions, or reductions in taxes owed) against the "get"?

These and other questions abound if the Court departs from precedent and treats foregone future tax revenue—meaning untaxed and uncollected private monies—as something the state already owns and is required to continue collecting at current levels.

D. Any concerns about faux tax credits or lack of recourse are not present here.

Appellants suggest (at 29-30) that every tax credit is constitutionally suspect and must be examined for "the realities" behind the credit. To be sure, courts must take a "panoptic view" of transactions that are analyzed under the Gift Clause, and "an illegal subsidy cannot be sheltered from scrutiny merely because it is embedded within an otherwise valid contract." *Gilmore v. Gallego*, 258 Ariz. 38, 44 ¶ 26 (2024). But for the reasons explained, none of that comes into play with tax credits, which are not an expenditure or transaction of public monies at all.

That is not to say that the legislature could slap a rubber-stamp label of "tax credit" on something that did not look like a bona fide or traditional tax credit. For example, if the legislature embedded in the tax code a law

that purported to reduce tax liability by giving away public property in an amount supposedly equal to the tax credit—or some sort of similar arrangement that looked very different from a normal credit or deduction—that might present the sort of case where courts should look at the "realities" behind the tax credit name. But nothing like that is present here.

In all events, the public is not without recourse as to injurious or unequal tax policies. The legislature's taxation authority is broad but not unlimited. *See generally* Ariz. Const. art. 9, §§ 1-26; *see also, e.g.*, *Aileen H. Char Life Int. v. Maricopa County*, 208 Ariz. 286, 291 ¶ 7 (2004) ("Arizona's Uniformity Clause provides greater protection for taxpayers than does the Equal Protection Clause of the Fourteenth Amendment and is designed 'to ensure that each taxpayer's property bear[s] the just proportion of the property tax burden.'" (citation omitted)). And other constitutional provisions govern the use of public monies, as well.

But as to these tax credits and this challenge under the Gift Clause, appellants' recourse is not with this Court. They must lobby their representatives in the legislature to make a different policy decision. Or, they could take matters into their own hands and appeal to the people's legislative power. *See* Ariz. Const. art. 22, § 14 ("Any law which may be

enacted by the Legislature under this Constitution may be enacted by the people under the Initiative.").

III. The Court should affirm.

Appellants' facial and as applied challenges fail for other reasons, too.

As an initial matter, it is far from clear that a "facial" Gift Clause challenge even exists. The Gift Clause "focuses on *the challenged arrangement alone* and does not ask the court to consider whether the public entity could have made a better deal." *Neptune*, 256 Ariz. at 560 ¶ 32 (emphasis added). The Clause "is simply a check on the proportionality of *the deal that was chosen*" by a public entity. *Id.* (quoting what "amicus State of Arizona correctly stated") (emphasis added).

In other words, the Gift Clause analysis is a transaction-specific inquiry. The Clause applies at the level of a specific "challenged expenditure," *Schires*, 250 Ariz. at 374 ¶ 7, i.e., a contract or transaction between a public entity and private party. That analysis—including "whether 'the value to be received by the public is far exceeded by the consideration being paid by the public,'" *id.* at 375 ¶ 7 (citation omitted)—does not scale up to a generally applicable law that may result in many different transactions, with different private parties and "gives" and "gets."

To the extent any "facial" Gift Clause challenge to a generally applicable law (rather than an actual transaction) could ever be cognizable, the challenged law would have to be tantamount to a transaction itself. That is, the law on its face would have to contemplate one single transaction—or, possibly, a discrete number of transactions—where, at a minimum, the principal terms were fixed and clear. Without those features, a generally applicable law does not present any "give" and "get" for a court to analyze.

That is the case here. Even assuming the Gift Clause could apply to tax credits, the challenged statutes do not, on their face, contemplate any specific or necessary transaction and recipient.

And to the extent appellants' challenges rely on the possibility of negative tax liability resulting in a refund greater than taxes paid, they fare no better because refundability is not facially required. A monetary refund is only one of several options for the taxpayer, including applying the negative liability to subsequent years. And appellants have not alleged that any refunds actually have occurred or will occur.

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of August, 2026.

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ARIZONA COURT OF APPEALS

DIVISION TWO

DEBORAH HEWITT; JAN MITTELSTAEDT, Plaintiffs/Appellees, 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. CV2025-001929

THE STATE OF ARIZONA'S STATEMENT OF ALLOWANCE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS/APPELLEES

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Pursuant to Arizona Rule of Civil Appellate Procedure 16, "[a] person may file a brief as amicus curiae only if" one of three circumstances apply, one of which is if "[t]he person is the State of Arizona or an officer or agency of the State of Arizona." Ariz. R. Civ. App. P. 16(b)(1)(B).

The circumstances for allowance to file a brief as amicus curiae are stated in the disjunctive. Accordingly, the State does not need the consent of the parties under (b)(1)(A), nor to seek leave with a motion under (b)(1)(C), in order to participate as amicus curiae under (b)(1)(B). *See also id.* 16(d)(1) (contrasting allowance to "file" amicus brief at the petition for review stage with "lodg[ing]" a brief "submitted under Rule 16(b)(2)").

As authorized by Rule 16(b)(1)(B), (d)(1), and (e), the State submits the accompanying Amicus Curiae Brief in Support of Defendants/Appellees. Notwithstanding the language in the Rule, one of the prompts on TurboCourt requires either a motion for leave to file or documentation of the parties' consent; it does not provide an option consistent with the State's allowance to file under Rule 16. To satisfy the electronic filing prompt, the State submits this statement of allowance in lieu of a motion for leave to file its brief or documentation of the parties' consent.

RESPECTFULLY SUBMITTED this 5th day of August, 2026.

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ARIZONA COURT OF APPEALS

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Plaintiffs/Appellees,

v.

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Defendants/Appellees.

Court of Appeals
Division Two
No. 2 CA-CV 2026-0013

Maricopa County
Superior Court
No. CV2025-001929

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

☐ A brief and is submitted under Rule 14(a)(5).

☐ An accelerated brief and is submitted under Rule 29(a).

☐ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e).

☐ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

☒ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the Amicus Curiae Brief of the State of Arizona In Support of Defendants/Appellees to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,536 words.

3. The document to which this Certificate is attached does not exceed the 12,000 word limit for amicus curiae briefs set by Rule 14(a)(4).

RESPECTFULLY SUBMITTED this 5th day of August, 2026.

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CERTIFICATE OF SERVICE

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I hereby certify that on August 5th, 2026, the State of Arizona's Amicus Brief in Support of Defendants/Appellees was electronically filed with the Clerk's Office, and pursuant to ARCAP 4(f), a copy was e-served via the Court's e-filing system and sent via electronic mail to:

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