

## **Barth v. Town of Gilbert**

### **Executive Summary**

The Arizona Constitution forbids local governments from increasing any tax on “services.”<sup>1</sup> Despite this constitutional prohibition, the Town of Gilbert recently imposed an across-the-board tax increase that included taxes on services. Services include many types of business that do not produce tangible goods, such as advertising, photography, utilities, hotel/lodging, and construction. In this case, the Goldwater Institute is challenging two unconstitutional tax increases on homebuilding and short-term rental properties.

### **Background**

On October 22, 2024, the Gilbert Town Council adopted Ordinance No. 2918, amending the Town Tax Code to increase the general transaction tax rate. Ordinance No. 2918 has three parts:

(1) an increase to the sales tax rate from 1.5% to 2.0%. This applies to goods and services in Gilbert, including but not limited to advertising, contracting, publication, hotels, motels, and short-term rentals, restaurants and bars, communications, and utilities;

(2) a new use tax created at the rate of 2.0%. This is applied to online purchases from out-of-state vendors who do less than \$100,000 in sales in Arizona per year; and

(3) an increase to the bed tax rate from 2.8% to 5.0% to be applied to hotel, motel, and other transient lodging for a period of less than 30 consecutive days. This is in addition to the sales tax that also applies to the same hotel, motel, and short-term lodging.

The taxes will be paid by residents, small businesses, and tourists and will drive up the costs to consumers, including home buyers and guests at hotels and short-term rentals.

Jonathan Barth is a Gilbert taxpayer and resident who rents out a private bungalow attached to his home to make extra income. Because Jonathan rents his bungalow as a short-term rental, he must pay both sales and bed taxes on the income derived from it.

The Home Builder’s Association of Central Arizona (“HBACA”) is a trade association for residential construction and homebuilding industry. They are advocates for affordable housing and work to remove unnecessary building laws and regulations that drive up the cost of housing. Gilbert’s new increased sales tax on construction contracting services will directly drive-up costs for homebuyers in Gilbert.

The new taxes are effective on January 1, 2025.

### **Legal Analysis**

Taxation on any service violates the Arizona Constitution:

The state, any county, city, town, municipal corporation, or other political subdivision of the state, or any district created by law with authority to impose any

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<sup>1</sup> Ariz. Const. art. IX, § 25.

tax, fee, stamp requirement, or other assessment, *shall not impose or increase any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other transaction-based tax*, fee, stamp requirement or assessment on the privilege to engage in, *or the gross receipts of sales or gross income derived from, any service* performed in this state.

Ariz. Const. art. IX, § 25 (emphasis added).

The prohibition is clear and robust: any increase in tax on services is unconstitutional. “Service” is a broad term that covers many enterprises but can be summarized to be activities that do not produce goods. The term service generally encompasses what is offered by hospitality businesses, including hotels, restaurants, bars, and the like.

Gilbert’s new tax will apply to a range of services, including advertising, contracting, publication, hotels, motels, other forms of transient lodging, restaurants and bars, communications, transporting, and utilities.

Since leasing a property as a short-term rental and engaging in construction contracting activities are both services, Jonathan Barth and members of the HBACA will see their tax liabilities increased. They are seeking a declaration that Gilbert’s tax on services is illegal and to enjoin the Town from enforcing the tax.

#### Case Logistics

The case is *Barth v. Town of Gilbert*. The complaint was filed on December 27, 2024, in Maricopa County Superior Court.

The Goldwater Institute represents Jonathan Barth, a Gilbert taxpayer and short-term rental owner, and the Home Builders Association of Central Arizona, a trade association for residential construction and homebuilding.

The Town of Gilbert, Mayor Brigitte Peterson, Vice Mayor Scott Anderson, Councilmember Kathy Tilque, Councilmember Chuck Bongiovanni, Councilmember Yung Koprowski, Councilmember Bobbi Buchli, Councilmember Jim Torgeson, and Arizona Department of Revenue, are all defendants and sued in their official capacity only.

#### Legal Team

**Stacy Skankey** is a Staff Attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation, where she litigates in areas of property rights, government transparency, free speech, economic liberty, and regulatory reform.

**Adam Shelton** is a Staff Attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation, where he litigates in the areas of education, parental rights, economic liberty, and free speech.

**Jon Riches** is the Vice President for Litigation for the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation and General Counsel for the Institute. He litigates in federal and state

trial and appellate courts in the areas of economic liberty, regulatory reform, free speech, taxpayer protections, public labor issues, government transparency, and school choice, among others.