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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

JONATHAN BARTH, et al.,

Plaintiffs,

vs.

TOWN OF GILBERT, an Arizona Municipal corporation, et al.,

Defendants.

Case No. TX2024-000440

PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

(Assigned to The Honorable Erik Thorson)

Plaintiffs Jonathan Barth and Home Builders Association of Central Arizona ("HBACA") respond to Defendant Town of Gilbert's Motion to Dismiss and Defendant Arizona Department of Revenue's Motion to Dismiss, and request that the Motions be denied. This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case is not a dispute about tax assessments. This is a constitutional challenge to Gilbert's Ordinance No. 2918 ("Ordinance"), which increases tax rates on services, something expressly prohibited by the Arizona Constitution. Plaintiffs do not seek monetary relief, but declaratory and injunctive relief. No administrative exhaustion requirement applies—and such exhaustion would be futile, anyway. Plaintiffs assert a facial challenge to Ordinance No. 2918's increased tax rates on the services they provide.

The Arizona Constitution expressly prohibits any town or political subdivision from imposing or increasing any transaction-based tax 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). Despite this clear prohibition, on October 22, 2024, the Gilbert Town Council approved an increased tax rate on services by adopting Ordinance No. 2918. The Ordinance identified which transaction privilege tax categories the increased tax rate applies to, and identified four categories of services that Plaintiffs engage in.

Individuals, businesses, and taxpayers, including Plaintiff Jonathan Barth, who engage in the rental or lease of hotels and short-term rental properties and transient lodging pursuant to Gilbert Municipal Code Sections 58-444 and 447, must now pay a higher tax rate for the services they perform as result of the Ordinance.

Members of Plaintiff HBACA, who engage in general contracting services pursuant to Gilbert Municipal Code Sections 415 and 416, must now pay a higher tax rate on the services they perform as a result of the Ordinance.

These Plaintiffs seek declaratory and injunctive relief that the Ordinance's taxes on services violate Article IX § 25 of the Arizona Constitution and ask this Court to enjoin Defendants from enforcing the unconstitutional taxes.

Defendants, citing the Arizona Anti-Injunction Act (A.R.S. § 42-11006), argue that Plaintiffs may not challenge the tax unless they first pay it and seek a refund—which they do not request here—and then, after appealing that process, seek declaratory relief. That is not correct.

First, the Anti-Injunction Act applies only to property taxes, and this case involves a tax on services, not on property. Plaintiffs are also challenging the constitutionality of the tax *only*, not seeking monetary relief. As such, they are not barred by the Anti-Injunction statute.

Second, administrative exhaustion here is both not required in this constitutional case and is futile.

Third, the Ordinance's increased tax on services is facially unconstitutional because constructing contracting and hotel/lodging are always "services" as that term is ordinarily used.

Fourth, Plaintiff HBACA has associational standing to seek declaratory and injunctive relief on behalf of its members.

The Motions should be denied.

BACKGROUND

On October 22, 2024, the Gilbert Town Council adopted Ordinance No. 2918, which increases Gilbert's Transaction Privilege Tax ("TPT") taxes. First Amended Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 17. The Ordinance increases the general TPT from 1.5% to 2.0%. *Id.* ¶ 18. The Ordinance lists the business categories of the Gilbert Municipal Code that the TPT tax rate increase applies to, which

includes among others, Sections 58-415, 58-416, 58-444, and 58-447.[1] *Id.* at Exhibit 1. The Ordinance also includes an additional increased TPT tax rate for Section 58-447 of the Code. *Id.*

The Ordinance increases the tax rate on hotels and other transient lodging businesses set out in Section 58-5444 of the Code, from 1.5% to 2.0%. Compl. ¶¶ 19-20. The Ordinance also increases the tax rate on transient lodging as set out in Section 58-447 of the Code, from 2.8% to 5.0%. *Id.* ¶¶ 23-24. Plaintiff Barth rents out a one-bedroom "in-law suite" attached to his primary residence, as a short-term rental which is considered a "hotel" or "transient lodging" under the Code. *Id.* ¶¶ 21-22, 25, 27. When Plaintiff Barth rents out his property as a short-term rental, he is performing a "service" within the meaning of Article IX § 25 of the Arizona Constitution. *Id.* ¶ 29. Plaintiff Barth has and continues to rent his property as a short-term rental and is therefore subject to, and has paid, the increased taxes passed by the Ordinance. *Id.* ¶¶ 26, 32.

The Ordinance increases the tax rate on "construction contracting" as set out in Section 58-415 of the Code, from 1.5% to 2.0%. *Id.* ¶ 35-36. The increased TPT tax rate applies to "prime contractors" which includes "a contractor who supervises, performs or coordinates … [the] development or improvement, including the contracting … ." *Id.* ¶ 37 (quoting A.R.S. § 42-5075(R)(10)). Prime contractors and others engaged in construction contracting are taxed on the services performed from undertaking or overseeing construction activities performed on real property and real property improvements. *Id.* ¶ 38. The Ordinance also increases the tax rate on "speculative builders" as set out in the Section 58-416 of the Code, from 1.5% to 2.0%. *Id.* ¶¶ 43-44. Speculative builders are real property owners who improve the real property themselves or contract through others to improve the real property. *Id.* ¶ 46.

[1] Defendant ADOR cites the Model City Tax Code ("MCTC") provisions because the Gilbert Municipal Code is adopted from the MCTC. However, Plaintiffs only reference the Gilbert Municipal Code as those are the provisions at issue in the Complaint.

Plaintiff HBACA is a trade association for the residential construction and development industry, and many of its members are subdivision developers and home builders. *Id.* ¶¶ 8, 10. The HBACA works to eliminate overly restrictive and costly building laws and regulations that drive up the cost of housing. *Id.* ¶ 11. The HBACA's goals are adversely and directly affected by the enactment of the increased tax on services. *Id.* Members of Plaintiff HBACA are engaged in and will continue to engage in construction contracting as prime contractors and speculative builders, and are therefore subject to, and have paid, the increased taxes passed by the Ordinance. *Id.* ¶¶ 40, 42, 48-49.

LEGAL STANDARD

Defendants move for dismissal pursuant to Ariz. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, and 12(b)(6) for failure to state a claim upon which relief can be granted. A Rule 12(b)(1) motion to dismiss concerns the trial court's subject-matter jurisdiction and "refers to a court's statutory or constitutional power to hear and determine a particular type of case." *Church of the Isaiah 58 Project of Ariz., Inc. v. La Paz Cnty.*, 233 Ariz. 460, 462 ¶ 9 (App. 2013) (citation omitted). While a 12(b)(6) motion to dismiss relates to whether "as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (cleaned up, citation omitted).

Motions to dismiss are disfavored and "should not be granted unless it appears certain that a party would not be entitled to relief on its asserted claim." *Ariz. Soc'y of Pathologists v. Arizona Health Care Cost Containment Sys. Admin.*, 201 Ariz. 553, 557 ¶ 19 (App. 2002). To determine if a claim for relief can be granted, "courts … assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman*, 230 Ariz. at 356 ¶ 9.

The same is true for a motion to dismiss for lack of standing. Courts will consider the "facts alleged in the complaint [as] true … and determine whether the complaint, construed in a light most favorable to the plaintiff, sufficiently sets forth a valid claim."

Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC, 256 Ariz. 88, 92 ¶ 8 (App. 2023) (citation omitted).

LEGAL ARGUMENT

I. Arizona's Anti-Injunction statute is not a legal barrier.

A. The Anti-Injunction statute only applies to property taxes.

Arizona's Anti-Injunction statute only applies to *property* taxes not TPT taxes. A.R.S. § 42-11006.[2] That statute is found in Chapter 11, Article 1 of Title 42, and Chapter 11 is devoted to property taxes. And in *State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993), the Supreme Court found that Section 42-204(A)—the predecessor to Section 42-11006—applies *only* to property taxes.

The taxes at issue in this case, however, are TPT taxes: "an excise on the privilege or right to engage in particular businesses within the taxing jurisdiction." *Vangilder v. Arizona Dep't of Revenue*, 252 Ariz. 481, 485 ¶ 7 (2022) (citation omitted). They are taxes on services, not on property—so the Anti-Injunction statute does not apply.[3] While Defendant ADOR agrees that the four business categories of the Code are TPT taxes, *see* ADOR's Motion at 3, it nevertheless argues that these are property taxes because they concern "property transaction[s], such [as] renting real property." *Id.* at 4. But that does not make the challenged TPT taxes property taxes.

First, it is elementary that a property tax is an *ad valorem* tax. *Pima Cnty. v. State*, 552 P.3d 512, 514 ¶ 6 (2024). A TPT tax is not an *ad valorem* tax because it is a privilege tax, levied based on transaction—not assessed value. *McAhren v. Bradshaw*, 57 Ariz. 342, 349 (1941); *City of Phoenix v. Phoenix Newspapers, Inc*., 100 Ariz. 189, 192–93 (1966).

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[2] Defendant Town of Gilbert also points to A.R.S. § 42-11004, which regards property taxes as well and fails for the same reasons.

[3] Defendant Arizona Department of Revenue ("ADOR" or "Department") also argues that the U.S. Supreme Court strictly enforces the Federal Anti-Injunction Act and has a single narrow exception. Defendant Arizona Department of Revenue's Motion to Dismiss ("ADOR's Motion") at 13. That law is obviously inapplicable, since it applies only to the jurisdiction of federal courts—specifically federal *district* courts—and this is not a federal district court. *Lavis v. Bayless*, 233 F. Supp.2d 1217, 1219 (D. Ariz. 2001).

In fact, the business categories identified as Sections 58-415, 58-416, 58-444, and 58-447 of the Gilbert Municipal Code are all found within the section for privilege taxes. *See* Code at Ch. 58, Art. IV. Such taxes are imposed "upon persons on account of their *business* activities." *Id*. § 58-400 (emphasis added). The Gilbert privilege tax is reported by its *business* tax classification. *See Taxable Business Activities and Rates*, Town of Gilbert (last visited May 6, 2025),[4]. These *business* activities generally require a license from the Town, and the TPT rates are determined by the Town. None of that is true of property taxes, which are handled by the County, are not imposed based on a person's business activity, and are assessed based on the market value of a piece of property, as determined by a county assessor.

Second, just because taxes *relate* to property does not change them into property taxes.[5] For example, utilities—which are also subject to the new 2.0% tax rate for the "gross income from the business activity upon every person engaging or continuing in the business of producing, providing, or furnishing utility services … to … consumers or ratepayers who reside within the Town," Code § 58-480—are certainly not property taxes. They involve utilities on real property, but that does not convert them into property taxes. Rather, the business activity is a TPT tax because of the transaction or service, not because the transaction or service *occurs on* real property.

Were Defendants' argument correct—that a TPT tax is actually a property tax (and therefore subject to the Anti-Injunction Act) because it is a transaction that in some way *involves the use of property*—the result would be to transform taxes that are currently considered service-related TPT taxes into property taxes. For example, the sale of gasoline falls within the TPT statute (A.R.S. § 42-5061(A)(22)), when such sales clearly take place

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[4] https://www.gilbertaz.gov/departments/finance-mgmt-services/tax-compliance-division/taxable-business-activities-and-rates.

[5] This is also true of Defendant Town of Gilbert's argument that because the service of lodging contemplates charges for access to and use of tangible property. *See* Defendant Town of Gilbert's Motion to Dismiss ("Town's Motion") at 12-13. The tax does not transform into a tax on goods because the service tax relates to tangible personal property.

at gas stations. That does not transform the tax on that retail sale into a property tax. Moreover, the TPT statute contains a specific section devoted to transient lodging, which is classified as a TPT *service*. A.R.S. § 42-5070. That statute says that "the business of operating … a hotel or motel, including an inn, tourist home or house, dude ranch, resort, campground, studio or bachelor hotel, lodging house, rooming house, apartment house," etc., is a service covered by the TPT statute. Yet all of these and more are forms of property usage. That does not make these things into *property taxes*—a term that means *ad valorem* taxation of real estate. *Third*, the cases Defendants cite did not apply the Anti-Injunction statute to TPT taxes. In *Church of Isaiah*, the taxpayer sought injunctive and declaratory relief after being denied a religious-*property* exemption. 233 Ariz. at 461 ¶ 3. In *Drachman v. Jay*, 4 Ariz. App. 70, 71 (1966), the taxpayer sought to enjoin the county assessor for certain *property* assessments.

By contrast, Arizona courts have not required plaintiffs to pay first and seek refunds in order to challenge the validity of a TPT tax. Indeed, they have not hesitated to issue injunctions or other equitable relief to bar ADOR from enforcing unconstitutional or illegal TPT taxes. In *Vangilder*, *supra*, the Arizona Supreme Court declared that Pinal County's illegal TPT tax should be enjoined.[6] The plaintiffs were not required to pay first and seek refunds. Likewise, in *SolarCity Corp. v. Arizona Dep't of Revenue*, 243 Ariz. 477, 479 ¶ 4 (2018), the plaintiffs were awarded declaratory relief against an invalid tax and were not required to pay first and proceed by way of a refund action. So, too, in *State v. Levy's*, 119 Ariz. 191, 191 (1978), the court issued declaratory relief finding a TPT exemption unconstitutional. And in *McCluskey v. Sparks*, 80 Ariz. 15, 20-21 (1955), and *Southern Pac. Co. v. Cochise Cnty.*, 92 Ariz. 395, 403 (1963), plaintiffs sought to enjoin officials from imposing taxes unconstitutionally, and the court granted that relief.

Indeed, the Arizona Supreme Court recently declared that a statewide *income* tax increase was "facially unconstitutional" under the Arizona Constitution. *Fann v. State*, 251

[6] In *Vangilder*, ADOR argued that the Anti-Tax Injunction Act barred injunctive relief; this Court rejected that argument and ruled for the plaintiffs. *See Vangilder v. ADOR*, No. TX 2017-000663 (Aug 2, 2018).

Ariz. 425, 435 ¶ 31 (2021). This case was brought by taxpayers prior to the assessment of taxes and also sought declaratory and injunctive relief. On remand, the statute was enjoined in its entirety. *Fann v. State*, No. CV2020-015495, 2022 WL 2981553, at *1 (Ariz. Super. July 26, 2022). Neither the Anti-Injunction statute, nor any other doctrine, prevented taxpayer plaintiffs in that case from receiving that relief.

In short, neither the Anti-Injunction Act nor any other law requires these plaintiffs to pay first and seek a refund in order to challenge the legal validity of a TPT tax on services—not property—by way of declaratory and injunctive relief.[7]

B. Even if that act applied, this case falls within an exception because the Town has acted without a semblance of authority.

Even if this case *did* involve a property tax, the Anti-Injunction Act would still not apply. While courts are reluctant to enjoin taxes prior to collection, *State ex rel. Lane v. Superior Court*, 72 Ariz. 388, 391 (1951), there is an exception when the tax is levied "without semblance of authority and resulting injury cannot be adequately provided by proceedings at law." *Church of Isaiah*, 233 Ariz. at 464 ¶ 19-20 (citation omitted). Plaintiffs meet both of these requirements.

First, the Town is imposing its service tax without a semblance of authority. The state Constitution forbids service taxes, Ariz. Const. art. IX § 25, and where a law is so obviously unconstitutional, it can give no semblance of authority. *Lane*, 72 Ariz. at 391. The Constitution could not be clearer in forbidding towns from imposing or increasing taxes on services. Thus, the Town is acting without a semblance of authority.

True, courts have defined the phrase "semblance of authority" as requiring "something more than a dispute between the taxpayers and the taxing officials," *McCluskey*, 80 Ariz. at 19–20. It applies where the government imposes a tax without a "specious appearance" of authority, *Church of Isaiah*, 233 Ariz. at 465 ¶ 22 (citation

[7] Section 42-1254(D)(1) governing the administration of taxes, provides that injunctive relief if not available to "prevent or enjoin the collection of any tax." But that statute concerns *appeals* to tax court, which this is not.

omitted), in which case a plaintiff may seek injunctive relief. *Crane Co. v. Arizona State Tax Comm'n*, 63 Ariz. 426, 447 (1945).

This is that case. Here, the unconstitutionality of the Town's tax is so plainly obvious there is no colorable pretext for its imposition. No complicated legal analysis or obscure doctrine is necessary. The Constitution says that the Town "shall not impose or increase any sales tax, transaction privilege tax, luxury tax, excise tax, use tax, or any other transaction-based tax … on the privilege to engage in, or the gross receipts of sales or gross income derived from, any service." Ariz. Const. art. IX § 25. The Ordinance taxes transient lodging businesses, which are *services*.[8] It taxes construction contracting *services*. Thus, the exemption applies.

In *Nelssen v. Electrical District No. 4 of Pinal County*, 60 Ariz. 145 (1942), the court said that the pay-and-seek-a-refund rule "only applies when one is dissatisfied with the amount of his assessment, and *desires to raise no other objection thereto*." *Id*. at 150–51 (emphasis added). But because the plaintiff in that case "was not, and could not have been, legally" subjected to the tax, the Supreme Court said that "the trial court should have enjoined the [government] … from attempting to levy any further district taxes thereon." *Id*. at 156. *Nelssen* was a property tax case. This case is not—all the more reason why there is no barrier to injunctive relief here.

As for whether the Plaintiffs will be injured in a manner that "cannot be adequately provided by proceedings at law," *Church of Isaiah*, 233 Ariz. at 464 ¶ 19, this case involves *not* a disputed assessment, refund, or valuation, but a pure constitutional claim. The deprivation of a constitutional right "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Associated Gen. Contractors of Calif., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) ("[A]lleged constitutional infringement will often alone constitute irreparable harm."). The only possible remedy available here is to declare the Ordinance unconstitutional and permanently enjoin Defendants from imposing this unconstitutional tax.

[8] This is obvious because it is not the sale of goods, and it must be one or the other.

The proceedings suggested by Defendants concern such harms as the overpayment of taxes (A.R.S. § 42-1118), disputes relating to tax collection (A.R.S. § 42-1251), disagreements relating to decisions by the Department (A.R.S. §§ 42-1252, 1254), and the like. None of these redress the harm imposed by unconstitutional taxes.

While an award of monetary damages is an adequate remedy when damages are calculable with reasonable certainty and address the full harm suffered, an injunction is proper "where a loss is uncertain" or if "the full amount of … damages would be difficult to calculate." *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 65 ¶ 10–11 (App. 2011) (citation omitted). That is the case here. It is impossible *ex ante* to determine how much liability the Town's unconstitutional tax is likely to impose on Plaintiffs. Thus, there is no adequate remedy at law.

Here, the Plaintiffs cannot be made whole by a refund because the harm is the imposition of an unconstitutional tax. And even so, it would be difficult to estimate the necessary refund of monies collected pursuant to the unconstitutional tax because it would have to include all the losses of potential clients that Plaintiffs must endure due to the unconstitutional tax. *See id.* ¶ 12 (injunction "may be appropriate to prevent a loss of potential customers.").

The increased TPT and transient lodging taxes impair Plaintiff Barth's short-term rental business by increasing expenses for customers who have more cost-effective lodging options available outside of Gilbert. Compl. ¶ 33. The increased TPT taxes impair Plaintiff HBACA's members who engage in construction contracting by contributing to rising housing prices and causing financial hardship for its members. *Id.* ¶ 41. Plaintiffs cannot be adequately compensated for the irreversible, detrimental impact that rising costs have on their businesses and no amount can truly restore constitutional harms. *Am. Trucking Ass'n, Inc. v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[C]onstitutional violations cannot be adequately remedied through damages." (citation omitted)). There is no bar to injunctive relief here.

II. No exhaustion is required.

As for requiring Plaintiffs to present their constitutional claims to ADOR in an administrative proceeding, exhaustion is not required where it would be futile. *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370 ¶ 16 (2013). When the administrative body lacks power to provide relief, exhaustion is futile. *Cf. Moulton v. Napolitano*, 205 Ariz. 506, 514 ¶ 24 (App. 2003). Here, ADOR has no authority to declare a law unconstitutional. *Id.* at 513 ¶ 20.

More than that, in fact: ADOR has taken the position before this Court that **it considers itself required to implement tax statutes that it *concedes* to be illegal.** In *Vangilder, supra*, it agreed with the plaintiffs that the county tax at issue in that case violated Arizona law—but nevertheless insisted on collecting the tax. *See* Response to Motion for Preliminary Injunction, *Vangilder v. Department of Revenue*, No. TX2017-000663 (Ariz. Super. Ct. Mar. 19, 2018) at 9 (admitting the tax to be illegal but stating that it would continue to enforce it "in the absence of a court order."). It would plainly be futile for Plaintiffs to present constitutional arguments to ADOR.

ADOR argues that it needs to create a factual record, apply its expertise, and correct any errors to moot judicial controversies. ADOR Motion at 5 (quoting *Moulton*, 205 Ariz. at 511). But the issue presented is a legal question of the constitutionality of a tax. There is no dispute as to the application of the taxes, because Plaintiffs were *already* subject to the taxes (Sections 58-415, 58-416, 58-444, and 58-445 of the Code), under the previous TPT rate. The Ordinance did not change any factual circumstances surrounding TPT taxes. Whatever its expertise on tax disputes, ADOR has no special expertise on constitutional matters. Those cases, like this one, are properly brought to this Court. Plaintiffs have sufficiently alleged that they are subject to and have paid the increased taxes passed by the Ordinance, Compl. ¶¶ 26, 32, 40, 42, 48-49, which is sufficient for them to seek relief here.

III. Plaintiffs have adequately pleaded a facial challenge.

A facial challenge is an inquiry into whether the law itself is unconstitutional. *Hernandez v. Lynch*, 216 Ariz. 469, 472 ¶ 8 (App. 2007). This "requires a showing that no set of circumstances exists under which the statute would be valid." *Fann*, 251 Ariz. at 433 ¶ 18 (2021). The law must be "unconstitutional in all of its applications." *Simpson v. Miller*, 241 Ariz. 341, 344-45 ¶ 7 (2017) (citation omitted). Statutes that impose a tax liability, moreover, are strongly construed "in favor of taxpayers and against the government." *Scottsdale/101 Assocs., LLC v. Maricopa Cnty.*, 238 Ariz. 291, 292 ¶ 7 (App. 2015) (citation omitted). Here, Plaintiffs challenge the increase of the tax on services enacted by the Ordinance.

"Service" is a broad term indeed, encompassing a range of activities that do not involve the exchange of goods, and is typically viewed as useful labor. Compl. ¶¶ 57-58. When interpreting the Constitution, words are given "their ordinary meaning," and "will not apply 'fine semantic or grammatical distinctions.'" *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 244 ¶ 21 (2020) (citation omitted). Here, no fine parsing is necessary. "Service" means the "[p]erformance of labor for [the] benefit of another." *Black's Law Dictionary* 1533 (4th ed. 1968), or, more simply, "[t]he act of doing something useful for a person or company for a fee." *Black's Law Dictionary* 1399 (8th ed. 1999). The TPT business sections that apply to the Plaintiffs—construction contracting, leasing/lodging—are considered services as those terms are commonly and ordinarily used. *See, e.g.*, SERVICE, Black's Law Dictionary (12th ed. 2024) ("[S]ervice denotes an intangible commodity in the form of human effort, such as labor, skill, or advice."); SERVICE, Merriam-Webster,[9] ("useful labor that does not produce a tangible commodity"); HOSPITALITY, *id.*, ("the activity or business of providing services to guests in hotels, restaurants, bars, etc.").

A defendant cannot obtain dismissal based on pure speculation. *FBI v. Fikre*, 601 U.S. 234, 235 (2024) ("[a] defendant's speculation" "is insufficient to warrant

[9] https://www.merriam-webster.com/dictionary/service.

dismissal."); *Leist v. Acad. Mortg. Corp*., No. CV-16-00314-PHX-DGC, 2016 WL 1593815, at *3 n.3 (D. Ariz. Apr. 20, 2016) ("A court cannot grant a motion to dismiss based on speculation."); *Coleman*, 230 Ariz. at 356 ¶ 9 ("Courts look only to the pleading itself when adjudicating a Rule 12(b)(6) motion." (cleaned up)). Yet the Town of Gilbert's Motion to Dismiss depends entirely on what it calls "[h]ypotheticals," and on what it "imagine[s]." Town's Motion at 12-13.

These imaginings are far beyond the scope of a motion to dismiss—even in a facial constitutional challenge. For example, the Town argues that a business owner might charge customers for "access to and use of tangible property and physical space (e.g., [a] suite, its bed, bathroom, soaps, towels, etc.)," and that this "would not be for service." *Id.* at 12. But this is not just speculation—it is question-begging. The whole question in this case is whether providing lodging as Plaintiffs do, qualifies as a "service," which cannot be taxed. The Town cannot obtain dismissal by committing the fallaciously circular argument of merely asserting its own belief that the answer is yes.

The Town cites *Qwest Dex, Inc. v. Arizona Dep't of Revenue*, 210 Ariz. 223 (App. 2005), for the proposition that "charg[ing] for access to and use of tangible property and physical space" be something other than a service. Town's Motion at 12-13. But *Qwest Dex* certainly does not say that. In that case, the taxpayer contracted with out-of-state printing companies and paper mills to print phone books. The question was whether the phone books were subject to the use tax or whether the printing services were exempt from that tax. *Id.* at 224–25 ¶¶ 2, 6. The court said that the TPT is different from a use tax because the former is a tax on "gross receipts from taxable activity," *Id.* at 226 ¶ 13, while the use tax is imposed on "sales of tangible personal property." *Id.* at 225 ¶ 12. It concluded that in contracts for the sale of goods that include services, the "dominant purpose" of the contract determines how the tax applies. *Id.* at 226-27 ¶ 17.

But there is no indication that renting property to lodgers is a "mixed contract" for goods and services. On the contrary, the short-term renting of a house is not a sale of tangible property of *any* sort. It's just the provision of a service—specifically, lodging,

which Arizona's TPT statute *itself* defines as a service. A.R.S. §§ 42-5010(A)(2)(a), 42-6004(H).[10]

More importantly, although the City "imagine[s]" rental contracts that would, somehow, combine services with the sales of goods, Town's Motion at 12, its Ordinance does not contemplate such a thing. It is specifically focused on "transient lodging." *See* Compl. Ex.1 § II. The Ordinance increased the tax in Section 58-447 of the Town's Tax Code that applies to "the business activity of any hotel engaging or continuing within the Town in the business of charging for lodging and/or lodging space furnished to any transient." This is a tax on a service and is facially unconstitutional. Plaintiffs need not defeat the Town's speculation that there might someday be business owners who do this *and also sell property* to prevail here. To require that would be akin to saying that a tax on accounting services would not necessarily violate the constitutional prohibition against taxes on services because there might be an accountant out there who would also sell office equipment.[11]

So, too, with construction contracting. While a contractor may indeed provide, and charge for, materials such as lumber and drywall, these are billed and taxed separately. This case focuses on the constitutionality of the charge for the *service*. The charge for the

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[10] Section 42-6004(H) bars cities from imposing "[TPT], sales, gross receipts, use, franchise or other similar tax[es] or fee[s], however denominated, on the business of renting or leasing real property for residential purposes." The inclusion of this exemption proves that the "business of renting" for residential purposes is a *service* that would, but for this express exception, be subject to the TPT tax. What's more, the fact that the statute forbids the Town from taxing this business under any tax or fee "however denominated" proves all the more that the challenged tax is unlawful. This is at least sufficient to survive a motion to dismiss.

[11] To the extent that the Town is arguing that the inclusion of, say, soap or shampoo in the service of providing lodging would make the business of transient lodging services into a "mixed contract" for goods and services, this argument is akin to saying that because the accountant provides her client with a printed copy of his tax return, she is actually selling him the paper and the staple holding them together. This is a frivolous argument. Customers who obtain transient lodging services are paying for the *service* of providing and cleaning a room—not for the *de minimis* goods involved.

lumber, etc., is simply not in dispute—and Defendants cannot obtain dismissal of that challenge by observing that sometimes contractors do both.

IV. The HBACA has standing.

Standing generally requires a showing of a "personal, palpable injury." *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377 ¶ 10 (App. 2008). But in a case involving associational standing, the court must determine whether there is a legitimate organizational interest in an actual controversy involving the association's members and whether judicial economy and administration will be promoted by allowing representational appearance. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svcs.*, 148 Ariz. 1, 6 (1985). A court may also consider other relevant factors such as whether the association's "members would have standing to sue in their own right;" whether "the interests which the association seeks to protect are relevant to the organization's purpose;" and whether the claim asserted or the relief requested "requires the participation of individual members." *Id.*

The Town argues that HBACA lacks standing on the theory that "resolving whether Gilbert's tax increases have been imposed on a 'service' would depend on the facts of each HBACA member's particular transactions." Town's Motion at 10. In support of this claim, it cites *Kard*, 219 Ariz. 374, in which the court found that HBACA lacked associational standing to seek damages, because the calculation of those damages would require individualized proof by HBACA members. *Id.* at 378 ¶ 15.

But it is simply not true that "resolving whether Gilbert's tax increases have been imposed on a 'service' would depend on the facts of each … transaction[]." Town's Motion at 10. The tax in question applies *explicitly* to "construction contracting." Compl. ¶ 41. It applies to those engaged in the business of "supervis[ing], perform[ing], or coordinat[ing] … development, or improvement." *Id.* ¶ 37. No individualized facts are required to decide the purely legal question of *whether that is a service*. The fact that some contractors might perhaps combine these services with the sale of goods or land is irrelevant. And that means there are no individualized facts that need to be found in the

same way that money damages require individualized proof. The same reasoning explains why in the *Kard* case, the court found that HBACA *did* have standing to seek declaratory relief. 219 Ariz. at 380 ¶ 27.

By the Town's logic, there could never be associational standing at all. Consider *Armory Park* , 148 Ariz. 1, which the Town approvingly cites. There, the court found that the association had standing to bring a public nuisance claim (involving damage to real property) because "the association has a legitimate interest in an actual controversy involving its members and … judicial economy and administration will be promoted by allowing representational appearance." *Id.* at 6. But by the Town's logic, this should have been denied, because each individual landowner was injured in some unique way, and the nuisances took different forms at different times. The *Armory Park* court rejected that sophistry, holding that "the relief sought is universal to all of its members and requires no individual quantification by the court." *Id.*

The same is true here. HBACA is asserting a constitutional challenge—not seeking damages or tax refunds that might require an "individual quantification." *Id.* It represents members of the residential construction and development industry, many of whom are developers and homebuilders. Its members do business in construction contracting in Gilbert and are subject to the tax that the Town has imposed. There is thus simply no question that HBACA members have been injured, and would have a right to sue on their own. That is all that is required under *Armory Park*. 148 Ariz. at 6.

What's more, the claims for HBACA members are all the same—that the tax on construction services violates the Constitution—and the Association seeks only declaratory and injunctive relief. It thus promotes judicial efficiency to have one entity, its associational representative, assert this challenge on behalf of its members, instead of requiring each HBACA member who engages in construction contracting in Gilbert to seek her own injunction against the Town's tax on construction services.

CONCLUSION

The Court should deny Defendants' Motions to Dismiss.

RESPECTFULLY SUBMITTED this 12th day of May 2025.

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CERTIFICATE OF SERVICE

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