

**COPY**

**MAR 10 2025**



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

JOHNATHAN BARTH, an Arizona  
resident; and HOME BUILDERS  
ASSOCIATION OF CENTRAL ARIZONA,  
an Arizona corporation,

Plaintiffs,

vs.

TOWN OF GILBERT, an Arizona  
Municipal corporation; and ARIZONA  
DEPARTMENT OF REVENUE, an agency  
of the State of Arizona,

Defendants.

Case No. TX2024-000440

**FIRST AMENDED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**(Assigned to the Honorable  
Erik Thorson)**

**INTRODUCTION**

1. This case challenges the constitutionality of the Town of Gilbert's increased tax rate on services, adopted by Ordinance No. 2918 ("Ordinance"). The Ordinance unlawfully raises the Transaction Privilege Tax ("TPT") tax rates for construction contracting, the rental and lease of hotels and short-term rental properties, and the tax rate for transient lodging. *See Exhibit 1.*<sup>1</sup>

<sup>1</sup> Plaintiffs received written consent from Defendant Arizona Department of Revenue, and the Town of Gilbert informed Plaintiffs in writing it had no objection to the filing of this Amended Complaint on March 10, 2025, after meeting and conferring as required by Ariz. R. Civ. P. 12(j) on March 3, 2025.

2. The Arizona Constitution prohibits “any county, city, town, municipal corporation, or other political subdivision of the state, or any district created by law” 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).

3. Despite the Arizona Constitution's prohibition on increasing taxes for services, on October 22, 2024, the Gilbert Town Council approved the Ordinance.

4. The increased tax rates took effect January 1, 2025.

5. As a result of the Ordinance, individuals, businesses, and taxpayers, including Plaintiff Jonathan Barth, who engage in the rental or lease of hotels and short-term rental properties, including for transient lodging, pay a higher tax rate for the services they perform. Additionally, individuals, businesses, and taxpayers that engage in general contracting services, including the members of Plaintiff Home Builders Association of Central Arizona (“HBACA”), pay a higher tax rate on the services they perform.

## PARTIES, JURISDICTION, AND VENUE

6. Plaintiff Jonathan Barth is a resident and taxpayer in Gilbert, who owns a short-term rental property located at 307 South Neely Street in Gilbert (“Property”). Plaintiff Barth pays the Town TPT and Transient Lodging taxes when he rents or leases the Property as transient lodging.

7. Plaintiff Barth also pays to the Town *ad valorem* property taxes on the Property. As a Gilbert taxpayer, Plaintiff Barth is responsible for paying property, sales, and other taxes, and is liable for an increased levy of taxes imposed by the Town, including by the Ordinance.

8. Plaintiff Home Builders Association of Central Arizona (“HBACA”) is an Arizona corporation headquartered in Phoenix. HBACA is a trade association for the residential construction and development industry, and many of its members are

1 subdivision developers and home builders. HBACA serves the interests of its members at  
2 the state, county, and local levels of government.

3 9. The HBACA is a “person” within the meaning of A.R.S. § 41-1001(17).

4 10. Several of the HBACA’s members are subdivision developers and home  
5 builders in Gilbert and subject to the TPT tax. The Ordinance increases the tax burden on  
6 HBACA members who are liable for the increased tax levy.

7 11. The HBACA also works to eliminate overly restrictive and costly building  
8 laws and regulations that drive up the cost of housing. The HBACA is a staunch advocate  
9 for affordable housing, and its goals for affordable housing are adversely and directly  
10 affected by the enactment of Gilbert’s service tax.

11 12. Defendant Town of Gilbert is a municipal corporation located in Maricopa  
12 County.

13 13. On October 22, 2024, the Gilbert Town Council was comprised of  
14 Defendants Mayor Peterson, Vice Mayor Anderson, and Councilmembers Kathy Tilque,  
15 Chuck Bongiovanni, Yung Koprowski, Bobbi Buchli, and Jim Torgeson.

16 14. Defendant Arizona Department of Revenue is an agency of the State of  
17 Arizona responsible for collecting Gilbert’s TPT tax, including the service tax challenged  
18 here. Plaintiffs are informed and believe, and on that basis allege, that the Arizona  
19 Department of Revenue will expend tax dollars executing its statutory duty to collect and  
20 administer the service tax.

21 15. Jurisdiction over this action and its claims is provided by Ariz. Const. art.  
22 VI, § 14, A.R.S. §§ 12-123, 12-1801, and 12-1831.

23 16. Venue is proper pursuant to A.R.S. § 12-401.

#### 24 **GENERAL ALLEGATIONS**

25 17. On October 22, 2024, the Gilbert Town Council adopted Ordinance No.  
26 2918, approving an increase to Gilbert’s TPT taxes.

27 18. Under the Ordinance, the Gilbert general TPT, or sales tax rate, increases  
28 from 1.5% to 2.0%.

1           19. Under the Ordinance, the tax rate on hotels and other transient lodging  
2 businesses as set out in Gilbert Municipal Code § 58-444 increases from 1.5% to 2.0%.

3           20. Under Gilbert Municipal Code § 58-444, the increased 2.0% tax rate is  
4 applied to “the gross income from the business activity upon every person engaging or  
5 continuing in the business of operating a hotel charging for lodging and/or lodging space  
6 furnished to any person ... .”

7           21. Plaintiff Barth is subject to the increased 2.0% tax rate when he rents his  
8 Property as a short-term rental.

9           22. Plaintiff Barth has rented and will continue to rent his Property as a short-  
10 term rental, which is considered a “hotel” or other “transient lodging” within the meaning  
11 of § 58-444, and thus Plaintiff Barth is subject to the increased TPT sales tax for the rental  
12 and lease of hotels and short-term rental properties in the Ordinance.

13           23. Under the Ordinance, the tax rate on Transient Lodging has also increased  
14 from 2.8% to 5.0% as set out in Gilbert Municipal Code § 58-447.

15           24. Under Gilbert Municipal Code § 58-447, the increased 5.0% tax rate is  
16 applied to “the business activity of any hotel engaging or continuing within the Town in  
17 the business of charging for lodging ... .”

18           25. When Plaintiff Barth rents his Property as a short-term rental, it is  
19 considered a “hotel” within the meaning of § 58-447, and Plaintiff Barth is therefore  
20 subject to the increased tax rate on Transient Lodging.

21           26. Plaintiff Barth has rented and will continue to rent his Property as a short-  
22 term rental and is thus subject to the increased Transient Lodging tax in the Ordinance.

23           27. Plaintiff Barth rents out a one-bedroom, one-bathroom “in-law suite”  
24 attached to his primary residence. The rental property provides supplemental income for  
25 his family to make ends meet.

26           28. Plaintiff Barth was issued a license for his rental property by the Town of  
27 Gilbert on November 16, 2023. His license is active and current.

1           29.    When Plaintiff Barth rents his Property as a short-term rental, he is  
2 performing a “service” within the meaning of Article IX § 25 of the Arizona Constitution.

3           30.    As a resident and taxpayer of Gilbert and short-term property owner,  
4 Plaintiff Barth is subject to the Gilbert TPT and Transient Lodging tax.

5           31.    Plaintiff Barth is responsible for paying the increased tax levy in the  
6 Ordinance.

7           32.    Plaintiff Barth has rented his property since the increased TPT and Transient  
8 Lodging Taxes became effective and has paid or caused to be paid the applicable taxes at  
9 the increased rate.

10          33.    Plaintiff Barth is informed and believes, and on that basis alleges, that the  
11 increased TPT and Transient Lodging taxes also impairs his short-term rental business  
12 because it makes his short-term lodging more expensive for customers who have cost-  
13 effective lodging options available outside of Gilbert.

14          34.    Plaintiff HBACA is comprised of member subdivision developers and home  
15 builders who provide construction contracting services in Gilbert.

16          35.    Under the Ordinance, the tax rate on “construction contracting” as set out in  
17 Gilbert Municipal Code § 58-415 increases from 1.5% to 2.0%.

18          36.    Under Gilbert Municipal Code § 58-415, the increased 2.0% tax rate is  
19 applied to “the gross income from the business upon every construction contractor  
20 engaging or continuing in the business activity of construction contracting within the  
21 Town.”

22          37.    The increased TPT tax rate under the Ordinance applies to “prime  
23 contractors.” *See* A.R.S. § 42-5075(R)(10) (“a contractor who supervises, performs or  
24 coordinates ... [the] development or improvement, including the contracting ...”).

25          38.    Prime contractors and others engaged in “construction contracting” are  
26 paid, and therefore taxed, by the gross income of their services derived from undertaking  
27 or overseeing a wide range of activities performed on real property and real property  
28 improvements.

1           39. Prime contractors and others, including members of Plaintiff HBACA,  
2 engage in “construction contracting” within the meaning of Gilbert Code § 58-415, and—  
3 by definition and in operation—offer a “service” within the meaning of Article IX § 25 of  
4 the Arizona Constitution.

5           40. Members of Plaintiff HBACA engage in and will continue to engage in  
6 “construction contracting” activities within the meaning of Gilbert Municipal Code § 58-  
7 415, and their services are therefore taxed at a higher rate under the Ordinance.

8           41. Plaintiffs are informed and believe, and on that basis allege, that the increase  
9 of the TPT tax rate on “construction contracting” causes financial hardship to its members  
10 and contributes to rising housing prices.

11           42. A member of Plaintiff HBACA has remitted TPT payments under the  
12 Ordinance, and members will continue to remit such payments under the Ordinance.

13           43. Under the Ordinance, the tax rate on “speculative builders” as set out in  
14 Gilbert Municipal Code § 58-416 increases from 1.5% to 2.0%.

15           44. Under Gilbert Municipal Code § 58-416, the increased 2.0% tax rate is  
16 applied to “the gross income from the business activity upon every person engaging or  
17 continuing in business as a speculative builder within the Town.”

18           45. The increased TPT tax rate under the Ordinance applies to “speculative  
19 builders.” *See* Gilbert Municipal Code § 58-416.

20           46. Speculative builders are real property owners who improve the real property  
21 themselves, or contract through others, to improve real property. *See* Speculative Builder,  
22 Arizona Department of Revenue (last visited Dec. 27, 2024).<sup>2</sup>

23           47. Speculative Builders are paid, and therefore taxed, on the gross income of  
24 their services derived from undertaking or overseeing a wide range of activities performed  
25 on real property and real property improvements.

26           48. Members of Plaintiff HBACA are engaged in business as “speculative  
27 builders” within the meaning of Gilbert Code § 58-416, and—by definition and in

28 \_\_\_\_\_  
<sup>2</sup> <https://azdor.gov/transaction-privilege-tax/contracting-guidelines/speculative-builder>.

1 operation—offer a “service” within the meaning of Article IX § 25 of the Arizona  
2 Constitution when engaging in those services.

3 49. Members of Plaintiff HBACA engage in and will continue to engage in  
4 business as “speculative builders” within the meaning of Gilbert Municipal Code § 58-  
5 416, and their services are therefore taxed at a higher rate under the Ordinance.

6 50. Plaintiffs HBACA are informed and believe, and on that basis allege, that  
7 the increase of the TPT tax rate on “speculative builders” causes financial hardship to its  
8 members and contributes to increased housing prices.

9 **DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS**

10 51. An actual and substantial controversy exists between Plaintiffs and  
11 Defendants as to their respective legal rights and duties. Plaintiffs contend that the  
12 increase of tax rates on services violates the Arizona Constitution. Plaintiffs are informed  
13 and believe, and on that basis allege, that Defendants contend otherwise. Accordingly,  
14 declaratory relief is appropriate.

15 52. Plaintiffs have and must continue to pay taxes that they contend violate the  
16 Arizona Constitution. The constitutional violation alone causes irreparable harm to the  
17 Plaintiffs. Plaintiffs also continue to suffer harm and, unless the taxes on services are  
18 enjoined, declared unlawful, or otherwise prohibited by the Court, Defendants will  
19 continue to impose, enforce, and collect taxes on services as described herein, which  
20 results in irreparable injuries to the Plaintiffs. Plaintiffs have no plain, speedy, or adequate  
21 remedy at law for such injuries. Accordingly, declaratory and injunctive relief is  
22 appropriate.

23 **COUNT I**

24 **Violation of Ariz. Const. Art. IX § 25**  
25 **TPT Tax Increase (Gilbert Municipal Code § 58-444) and**  
**Transient Lodging Tax Increase (Gilbert Municipal Code § 58-447)**

26 53. Plaintiffs re-allege and incorporate by reference each and every preceding  
27 allegation of this Complaint.  
28

1           54.     On October 22, 2024, the Gilbert Town Council approved an increase in the  
2 Town's TPT sales tax on services through Ordinance No. 2918, including short-term  
3 rental and construction contracting services.

4           55.     Arizona voters approved Proposition 126 in November 2018, amending the  
5 Arizona Constitution to provide the following:

6  
7           The state, any county, city, town, municipal corporation, or other political  
8 subdivision of the state, or any district created by law with authority to impose  
9 any tax, fee, stamp requirement, or other assessment, ***shall not impose or***  
10 ***increase any sales tax, transaction privilege tax, luxury tax, excise tax, use***  
11 ***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***  
does not repeal or nullify any tax, fee, stamp requirement, or other assessment  
in effect on December 31, 2017.

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

13           56.     The constitutional text is clear on its face and "logically capable of only one  
14 interpretation." *AFSCME, Loc. 2384 v. City of Phoenix*, 213 Ariz. 358, 363 ¶ 15 (App.  
15 2006).

16           57.     The term "service" includes a broad range of covered enterprises, including  
17 taxing activities that do not produce "goods." It includes, but is not limited to, useful labor  
18 that does not produce a tangible commodity.

19           58.     The term "service" generally encompasses activities of and businesses in the  
20 hospitality industry, including hotels, restaurants, bars, and the like.

21           59.     The Ordinance's increase of the TPT sales tax on hotels and other transient  
22 lodging businesses as set out in Gilbert Municipal Code § 58-444 is an increase in tax on  
23 services within the meaning of Article IX § 25 of the Arizona Constitution.

24           60.     The Ordinance's increase of the tax rate on Transient Lodging as set out in  
25 Gilbert Municipal Code § 58-447 is an increase in tax on services within the meaning of  
26 Article IX § 25 of the Arizona Constitution.

27           61.     As a resident and taxpayer of Gilbert, and as a short-term property owner,  
28 Plaintiff Barth is subject to the Gilbert TPT and Transient Lodging tax.



62. Plaintiff Barth has rented and will continue to rent his Property as a short-term rental and is thus subject to the increased TPT sales tax rate on hotels and other transient lodging businesses as set out in Gilbert Municipal Code § 58-444.

63. Plaintiff Barth has rented and will continue to rent his Property as a short-term rental and is thus subject to the increased tax rate on Transient Lodging as set out in Gilbert Municipal Code § 58-447.

64. The Ordinance violates Article IX § 25 of the Arizona Constitution, and Plaintiff Barth is entitled to declaratory and injunctive relief with respect to the increased taxes on services under the Ordinance.

**COUNT II**  
**Violation of Ariz. Const. Art. IX § 25**  
**TPT Tax Increase on Construction Contractors (Gilbert Municipal Code § 58-415)**  
**and**  
**TPT Tax Increase on Speculative Builders (Gilbert Municipal Code § 58-416)**

65. Plaintiffs re-allege and incorporate by reference each and every preceding allegation of this Complaint.

66. The Ordinance’s increase of the TPT tax on “construction contracting” as set out in Gilbert Municipal Code § 58-415, is an increase in tax on services within the meaning of Article IX § 25 of the Arizona Constitution.

67. Members of Plaintiff HBACA are engaged in “construction contracting” and will continue engaging in “construction contracting” within the meaning of Gilbert Municipal Code § 58-415.

68. Members of Plaintiff HBACA receive their gross income from, and are therefore taxed on, their services in undertaking or overseeing a wide range of activities performed on real property and real property improvements that constitute “construction contracting” within the meaning Gilbert Municipal Code § 58-415.

69. The Ordinance's increase in the TPT tax on persons engaging in business as a "speculative builder" as set out in Gilbert Municipal Code § 58-416 is an increase in tax on services within the meaning of Article IX § 25 of the Arizona Constitution.

70. Members of Plaintiff HBACA are engaged in business as “speculative builder[s]” and will continue engaging in business as “speculative builder[s]” within the meaning of Gilbert Municipal Code § 58-416.

71. Members of Plaintiff HBACA receive their gross income from, and therefore are taxed on, their services in undertaking or overseeing a wide range of activities performed on real property and real property improvements that constitute business as a “speculative builder” within the meaning of Gilbert Municipal Code § 58-416.

72. Members of Plaintiff HBACA therefore experience an increased tax on the “services” they provide under the Ordinance, within the meaning of Article IX § 25 of the Arizona Constitution. A member of Plaintiff HBACA has remitted TPT payments under the Ordinance, and members will continue to remit such payments under the Ordinance.

73. The Ordinance violates Article IX § 25 of the Arizona Constitution, and Plaintiff HBACA is entitled to declaratory and injunctive relief with respect to the increased taxes on services under the Ordinance.

## REQUEST FOR RELIEF

For its relief, Plaintiffs respectfully request that this Court take the following actions:

- A. Enter a judgment pursuant to A.R.S. § 12-1831 declaring that Sections 58-415, 58-416, 58-444, and 58-447 of the Gilbert Municipal Code as amended by Ordinance No. 2918 enacting taxes on services violate Article IX § 25 of the Arizona Constitution;
- B. Preliminarily and permanently enjoin Defendants from enforcing taxes on services in Sections 58-415, 58-416, 58-444, and 58-447 in the Gilbert Municipal Code as amended by Ordinance No. 2918;
- C. Award Plaintiffs attorney fees and costs pursuant to A.R.S. § 12-348, A.R.S. § 12-341, and the private attorney general doctrine; and
- D. Award such further relief as may be just and equitable.

1                   **RESPECTFULLY SUBMITTED** this 10th day of March 2025.

2  
3   **GOLDWATER INSTITUTE**

4   /s/ Stacy Skankey

5   Jonathan Riches (025712)  
6   Stacy Skankey (035589)  
7   Adam Shelton (038252)  
8   Scharf-Norton Center for  
9   Constitutional Litigation at the  
10    **GOLDWATER INSTITUTE**  
11    500 E. Coronado Rd.  
12    Phoenix, Arizona 85004  
13    *Attorneys for Plaintiff*

14  
15   **CERTIFICATE OF SERVICE**

16                   **ORIGINAL E-FILED** this 10th day of March, 2025, with a copy delivered via the ECF  
17                   system to:

18                   Andrew G. Pappas  
19                   Mary O'Grady  
20                   Michael Moorin  
21                   **OSBORN MALEDON**  
22                   2929 N. Central Ave., Ste. 2000  
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27                   *Counsel for Town of Gilbert Defendants*

28                   Scot Teasdale  
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30                   2005 N. Central Ave.  
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32                   Scot.teasdale@azag.gov  
33                   *Counsel for Defendant Arizona Department of Revenue*

34                   /s/ Kris Schlott  
35                   Kris Schlott, Paralegal

## ORDINANCE NO. 2918

AN ORDINANCE OF THE COMMON COUNCIL OF THE TOWN OF GILBERT, ARIZONA, AMENDING THE TOWN TAX CODE TO INCREASE THE GENERAL TRANSACTION PRIVILEGE TAX RATE FROM ONE AND ONE-HALF (1.5%) PERCENT TO TWO PERCENT (2%); AMENDING THE TOWN TAX CODE TO INCREASE THE TRANSACTION PRIVILEGE TAX RATE OF THE ADDITIONAL TAX ON TRANSIENT LODGING TAX CLASSIFICATION FROM TWO AND EIGHT-TENTHS PERCENT (2.8%) TO FIVE PERCENT (5%); WITHDRAWING MODEL OPTION #15 TO IMPOSE A LOCAL USE TAX; SETTING A USE TAX RATE OF TWO PERCENT (2%) AND ADOPTING LOCAL OPTION #JJ; PROVIDING FOR SEVERABILITY; AND DESIGNATING AN EFFECTIVE DATE OF JANUARY 1, 2025.

NOW, THEREFORE, BE IT ORDAINED by the Common Council of the Town of Gilbert, Arizona, as follows:

### Section I. Increasing TPT Rates

The tax rate provided in each of the following sections of the Town tax code is hereby increased from one and one-half percent (1.5%) to two percent (2%):

Section 58-405	Advertising.
Section 58-410	Amusements, Exhibitions, and Similar Activities.
Section 58-415	Construction Contracting: Construction Contractors.
Section 58-415.1	Liability for MRRA Amounts Equal to Retail Transaction Privilege Tax Due.
Section 58-416	Construction Contracting: Speculative Builders.
Section 58-417	Construction Contracting: Owner-Builders Who Are Not Speculative Builders.
Section 58-425	Job Printing.
Section 58-427	Manufactured Buildings.
Section 58-435	Publishing and Periodicals Distribution.
Section 58-444	Hotels.
Section 58-445	Rental, Leasing, and Licensing for Use of Real Property.
Section 58-450	Rental, Leasing, and Licensing for Use of Tangible Personal Property.
Section 58-455	Restaurants and Bars
Section 58-460	Retail Sales: Measure of Tax; Burden of Proof; Exclusions.

Section 58-462	Retail Sales: Food for Home Consumption.
Section 58-470	Telecommunication Services.
Section 58-475	Transporting for Hire.
Section 58-480	Utility Services.

Section II. Increasing the TPT Rate on Transient Lodging

The tax rate provided in Section 58-447 of the Town tax code, Additional Tax on Transient Lodging, is hereby increased from two and eight-tenths percent (2.8%) to five percent (5%).

Section III. Adopting Local Use Tax

The Town establishes a local Use Tax by withdrawing its current selection of Model Option #15 of the Model City Tax Code and thereby incorporating Article VI of the MCTC into the Town tax code. That certain document known as "The 2025 Use Tax Amendments to the Tax Code of the Town of Gilbert", three copies of which are on file in the office of the Town Clerk of the Town of Gilbert, Arizona, which document was made a public record by Resolution No.4515 of the Town of Gilbert, Arizona, is hereby referred to, adopted and made a part hereof as if fully set out in this ordinance.

Section IV. Establishing the Use Tax Rate

A tax rate of two percent (2%) is hereby provided in new Section 58-610, Use tax: imposition of tax; presumption, and Local Option #JJ of the Model City Tax Code is hereby selected providing an exemption in new Section 58-660(z), Use tax: exemptions, from the Town Use Tax for purchases made by the Town to preclude redundancy and unnecessary delay.

Section V: Severability

If any section, subsection, sentence, clause, phrase or portion of this Ordinance or any part of these amendments to the Town tax code adopted herein by reference, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions thereof.

Section VI: Effective Date

The provisions of this ordinance shall be effective on and after January 1, 2025.

PASSED AND ADOPTED by the Common Council of the Town of Gilbert, Arizona, this 22nd day of October, 2024 by the following vote:

AYES: ANDERSON, BONGIOVANNI, BUCHLI, KOPROWSKI, TILQUE, TORGESON

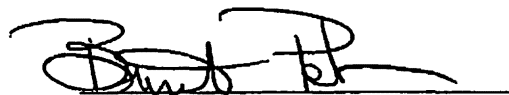
NAYS: PETERSON

ABSENT: \_\_\_\_\_

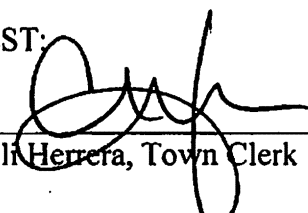
EXCUSED: \_\_\_\_\_

ABSTAINED: \_\_\_\_\_

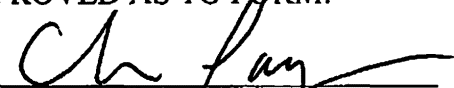
APPROVED this 22nd day of October, 2024.

  
Brigitte Peterson, Mayor

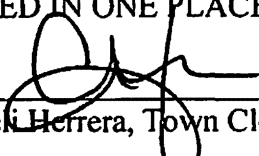
ATTEST:

  
Chaveli Herrera, Town Clerk

APPROVED AS TO FORM:

  
Christopher W. Payne, Town Attorney

I, CHAVELI HERRERA, TOWN CLERK, DO HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE ORDINANCE NO. 2918 ADOPTED BY THE COMMON COUNCIL OF THE TOWN OF GILBERT ON THE 22ND DAY OF OCTOBER, 2024, WAS POSTED IN ONE PLACE ON THE 23<sup>rd</sup> DAY OF OCTOBER, 2024.

  
Chaveli Herrera, Town Clerk