

**McEwen, et al. v. Board of Directors of the Arizona Commerce  
Authority, et al. – Backgrounder**

Date Filed: January 15, 2025

Last Step: Filed Complaint in Maricopa County Superior Court

Next Step: Move for Preliminary Injunction

**Executive Summary**

The Arizona Motion Picture Production Program (“Program”) subsidizes the film industry up to \$125 million each year in refundable tax credits for films made primarily in state. “Refundable” means that if a film company qualifies for more in credits than they owe in taxes, the state cuts them a check for the difference.

The Arizona Constitution’s Gift Clause prohibits the transfer of public funds to private entities without a public purpose or without adequate consideration. Despite this constitutional prohibition, the Program allocates substantial taxpayer resources to private companies without serving a valid public purpose and for which Arizona’s taxpayers do not receive direct benefits in return. In fact, the primary “benefit” owed to the state for receiving a film tax subsidy is an acknowledgement in the credits that the movie was filmed in the state. But that sort of “benefit” is too speculative and amorphous to count as consideration under the constitution. What’s more, producers don’t even have to release or distribute their films to receive a subsidy, so these handouts may pay for films that no one will ever watch, or credits no one will ever see.

The Goldwater Institute represents two Arizona taxpayers in a lawsuit challenging the Program, and two of its largest pending subsidies, under the state constitution. Taxpayer dollars must be reserved for government functions, not movies or other private endeavors.

**Background**

Arizona has tried propping up the movie industry before. In the 1990s, the Legislature appropriated funds to the then-Department of Commerce for “[m]otion picture development.”<sup>1</sup> A transaction privilege tax refund program for qualifying motion picture production companies was enacted, expanded, and ultimately repealed.<sup>2</sup> Then, in the early 2000s, the Department of Commerce recommended an incentive program to try and compete with other states that began

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<sup>1</sup> 1991 Ariz. Sess. Laws Ch. 287 Sec. 12.

<sup>2</sup> See, e.g., 1992 Ariz. Sess. Laws Ch. 96; 1993 Ariz. Sess. Laws Ch. 104; 1995 Ariz. Sess. Laws Ch. 98 (1st Reg. Sess.).

doling out taxpayer dollars to filmmakers.<sup>3</sup> The Legislature responded in 2005 with a transferable income tax credit program for qualified motion picture production in Arizona.<sup>4</sup> “Transferable” meant that recipients could sell or transfer the credit to others, but the state did not pay companies directly. To check to see if films met the criteria, the state paid Department of Commerce bureaucrats to screen (i.e., watch) the movies for eligibility. This program, by the Department of Commerce’s own admission, ultimately cost the state millions of dollars with little to show for it.<sup>5</sup> The Legislature allowed the program to expire in the wake of the Great Recession, and repeated efforts to extend, revive, or otherwise implement movie-related tax incentives failed for more than a decade.

Then, in 2022, when the Legislature found itself in control of a \$5.3 billion surplus,<sup>6</sup> film industry members and lobbyists engaged in extensive communications with legislators and officials of the Arizona Commerce Authority (“ACA”)—the successor to the Department of Commerce—about reviving a tax incentive program. After a prior bill, SB1708,<sup>7</sup> stalled, the Legislature used a strike-everything amendment to pass the Arizona Motion Picture Production Program through HB2156.<sup>8</sup> This occurred late in the 2022 legislative session, as budget negotiations neared their conclusion, and the Governor allowed the bill to become law without signing it. Prior to passage, legislative staff admitted they did not know the exact fiscal impact of the Program,<sup>9</sup> but said it could ultimately lead to a loss of state revenue up to the full amount of the subsidies allowed under the program<sup>10</sup>— \$125 million annually once fully in effect.

The statutes implementing the Program—A.R.S. §§ 41-1517, 43-1082, & 43-1165—create a sliding scale of credits based on how much money a motion picture production company spends on a project. For companies that spend up to \$10 million in qualified production costs, they may receive a credit of 15% of those costs. Between \$10 million and \$35 million in qualified production costs results in a 17.5% credit, and companies spending over \$35 million can receive a 20% credit. An additional 2.5% is available for production labor costs related to positions held by Arizona residents if approved by the ACA. Another 2.5% is credited if the company uses a qualified in-state production facility or films primarily at a practical location and meets other in-

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<sup>3</sup>*Analysis of the Film and Video Industry in Arizona*, Ariz. Dep’t of Commerce (Dec. 2004), <https://azmemory.azlibrary.gov/nodes/view/136881>.

<sup>4</sup> 2005 Ariz. Sess. Laws Ch. 317.

<sup>5</sup>*Motion Picture Production Tax Incentives Program*, Ariz. Dep’t of Commerce (2008), <https://azmemory.azlibrary.gov/nodes/view/136032>.

<sup>6</sup> Jim Small, *Arizona Budget Surplus Grows to \$5.3 Billion*, AZMirror (Apr. 7, 2022), <https://azmirror.com/briefs/arizona-budget-surplus-grows-to-5-3-billion/>.

<sup>7</sup> SB1708 Bill History, <https://apps.azleg.gov/BillStatus/BillOverview/77703?Sessionid=125>.

<sup>8</sup> HB2156, <https://www.azleg.gov/legtext/55leg/2R/laws/0387.pdf>.

<sup>9</sup> SB 1708 Fiscal Note, JLBC (Mar. 8, 2022), <https://www.azleg.gov/legtext/55leg/2R/fiscal/SB1708.DOCX.pdf>.

<sup>10</sup> Amended Fact Sheet for H.B. 2156, Ariz. State Senate, Fifty-Fifth Legislature, Second Reg. Sess., [https://www.azleg.gov/legtext/55leg/2R/summary/S.2156APPROP\\_ASPASSED\\_COW.pdf](https://www.azleg.gov/legtext/55leg/2R/summary/S.2156APPROP_ASPASSED_COW.pdf).

state requirements. Lastly, 2.5% is available “if the motion picture production is produced and filmed in association with a long-term tenant of a qualified production facility.”<sup>11</sup>

The Program has a preapproval process and a postapproval process that filmmakers must navigate before receiving a credit. Film companies apply for preapproval before the film is made (paying up to 2% of the credit amount in fees), and for postapproval after the film has been shot. If the ACA postapproves the tax credit, the company claims it on their tax return, which is processed by the Arizona Department of Revenue. Companies must provide an acknowledgement in the credits that the project was filmed in Arizona, but the film does not have to be released or distributed to remain qualified to receive a subsidy.<sup>12</sup>

As of December 31, 2024, the ACA had preapproved at least 16 tax credits, the largest of which was over \$1.2 million. They had also postapproved at least six tax credits, the largest of which was just under \$400,000. Goldwater’s lawsuit challenges the constitutionality of the entire program, as well as the largest preapproved and largest postapproved credits specifically.

### Legal Analysis

Article 9, Section 7 of the Arizona Constitution (the “Gift Clause”) provides that neither the State nor any of its political subdivisions “shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.” The Gift Clause applies not only to money but also to other valuable advantages such as tax credits or exemptions.<sup>13</sup> “This constitutional provision was historically intended to protect against the ‘extravagant dissipation of public funds’ by government in subsidizing private enterprises ... in the guise of ‘public interest.’” *Kotterman v. Killian*, 193 Ariz. 273, 288 ¶ 52 (1999) (citation omitted).<sup>14</sup>

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<sup>11</sup> It is unclear whether this is in addition to or in lieu of one of the 2.5% credits previously mentioned.

<sup>12</sup> See Notice of Adoption of Rule No. 23-01, Ariz. Commerce Auth. (May 17, 2023), [https://www.azcommerce.com/media/5rsnisfd/notice-of-adoption\\_mopic\\_rule-23-01\\_corrected-final.pdf](https://www.azcommerce.com/media/5rsnisfd/notice-of-adoption_mopic_rule-23-01_corrected-final.pdf).

<sup>13</sup> *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559–60 (App. 1997) (applying test to retroactive tax refund); *Maricopa Cnty. v. State*, 187 Ariz. 275, 280–81 (App. 1996) (same); See also *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368, 372 (1973) (The Gift Clause was “designed to prevent the economic losses of the 19th century suffered by municipal corporations which gave money, credit or other valuable advantages to railroads, canal companies, etc.” (emphasis added; citation omitted)).

<sup>14</sup> *Kotterman*, without substantial analysis, suggests that *nonrefundable* tax credits may not violate the Gift Clause because the state does not “own” money it has not yet collected. 193 Ariz. at 288 ¶ 52. That is probably incorrect, but even if true, that conclusion does not apply here because these film tax credits are *refundable*.

A public expenditure violates the Gift Clause unless (1) the expenditure serves a public purpose and (2) reflects adequate consideration.<sup>15</sup>

#### Public Purpose Prong

A government expenditure does not advance a public purpose if it is used “to foster or promote the purely private or personal interests of any individual.” *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986) (citation omitted). A public entity’s “direct control and supervision” over the use of public resources is “an essential criterion in determining public purpose.” *Gilmore v. Gallego*, 552 P.3d 1084, 1093 ¶ 38 (Ariz. 2024).

The Arizona Motion Picture Production Program expends public resources in the form of refundable tax credits to private individuals and corporations for personal and private interests—namely, financing private film productions and related expenditures, including private profit. Neither the ACA nor ADOR have discretion to deny approval or issuance of a credit to a motion picture production company if statutory eligibility requirements are met. Once a refundable tax credit is awarded, the state has no control or supervision over how the resources are used by a motion picture production company. The tax credit provisions of the Arizona Motion Picture Production Program fail the public purpose requirement of the Gift Clause because they are earmarked exclusively for the primary benefit of private parties over which the state exercises insufficient control or supervision.

#### Consideration Prong

“[A public] expenditure violates the Gift Clause if ‘the value to be received by the public is far exceeded by the consideration being paid by the public.’” *Schires*, 250 Ariz. at 376 ¶ 13 (quoting *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984)). The consideration analysis “focuses on what the public is giving and getting from an arrangement and then asks whether the ‘give’ so far exceeds the ‘get’ that the government is subsidizing a private venture in violation of the Gift Clause.” *Schires*, 250 Ariz. at 376 ¶ 14. For Gift Clause purposes, only direct benefits to the public from a private party’s promised performance count as consideration—anticipated indirect benefits such as general economic development or projected tax revenue do not. *See id.*; *Turken*, 223 Ariz. at 350 ¶ 33. “Analysis of adequacy of consideration for Gift Clause purposes focuses on the objective fair market value of what the private party has promised to provide in return for the public entity’s payment.” *Schires*, 250 Ariz. at 376 ¶ 14 (cleaned up).

The Arizona Motion Picture Production Program was designed to subsidize private film production in the hope that there would be economic and other *indirect* benefits. Under the Program, companies provide an acknowledgement in the film credits that the production was filmed in Arizona. But the objective fair market value of an acknowledgement in the film credits that the production was filmed in Arizona is “too indefinite to enforce, much less value.” *Id.* at 378 ¶ 21. Consequently, the credit acknowledgement is valueless under the consideration prong

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<sup>15</sup> *Turken v. Gordon*, 223 Ariz. 342, 345 ¶ 7, 348 ¶ 22 (2010); *Schires v. Carlat*, 250 Ariz. 371, 374–76 ¶¶ 7, 13–14 (2021).

of the Gift Clause. Additionally, because films do not even have to be released or distributed for film companies to receive a tax credit, the acknowledgement may never appear in a film or be viewed by the public before a film company receives a subsidy under the Program. To the extent the acknowledgment credit has any objective fair market value—it does not—that value is grossly disproportionate to any tax credit awarded under the Program.

By releasing motion picture production companies from the obligation to pay taxes and by the State foregoing the collection of income taxes—and “refunding” (i.e., donating) any remaining credit amount above a company’s otherwise-owed income tax obligation—the state grants unconstitutional subsidies and donations to private individuals and corporations. Through the Arizona Motion Picture Production Program, the state gives funds and other valuable advantages to private special interests, depletes the public treasury, distorts the market, and provides donations, grants, and/or subsidies to motion picture production companies in violation of the Gift Clause. If the program isn’t stopped, Arizona taxpayers will bear the burden of replenishing state coffers for public funds gifted by the state to private individuals and corporations.

### **Case Logistics**

The Goldwater Institute represents Arizona taxpayers Deborah McEwen and Jan Mittelstaedt.

The Board of Directors of the Arizona Commerce Authority and its members, in their official capacities, as well as the Arizona Department of Revenue are the defendants in this case.

The case was filed in the Superior Court of Arizona in and for Maricopa County on January 15, 2025.

### **The Legal Team**

**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.

**Parker Jackson** is a Staff Attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation, where he focuses on taxpayer protection, free speech, associational rights, government transparency, education, and election-related issues.