IN THE COURT OF APPEALS
STATE OF ARIZONA
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.	Arizona Court of Appeals Case No. 2 CA-CV 2025-0451 -and- Case No. 2 CA-CV 2026-0013 Maricopa County Superior Court Case No. CV2025-001929

PLAINTIFFS/APPELLANTS' RESPONSE TO ARIZONA CHAMBER OF COMMERCE & INDUSTRIES AMICUS BRIEF

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INTRODUCTION

The amicus brief of the Arizona Chamber of Commerce and Industry (Chamber Br.) makes two points: first, that the Legislature has broad discretion when adopting tax laws (which is not in dispute here) and, second, that it isn't clear that Appellants ("Taxpayers") seek declaratory and injunctive relief on the grounds that the Program is unconstitutional both in its entirety and as applied. But Taxpayers pleaded, and assert on appeal, that the Program is unconstitutional both facially and as applied, because it extends valuable benefits to a targeted class of companies for the purpose of aiding their private businesses.

ARGUMENT

I. The Legislature's discretion is limited by the Constitution—including the Gift Clause.

The Chamber argues that the Legislature enjoys "great discretion when enacting tax law." Chamber Br. at ep.9. Nobody disputes that. But the Legislature's discretion is always "[s]ubject to constitutional limitations," *Waddell v. 38th St. Partnership*, 173 Ariz. 137, 140 (Tax Ct. 1992), and that includes the Gift Clause.

Nor does anyone dispute that the Legislature may establish tax credits. Obviously, it can. But if the Legislature "give[s] or loan[s] its credit in the aid of, or make[s] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation"—as it has in this case—that's unconstitutional, even if done in the guise of a "tax credit." Ariz. Const. art. IX § 7. After all, even when

exercising its taxing power, the Legislature "cannot do indirectly what it cannot do directly." *State v. Yuma Irrigation Dist.*, 55 Ariz. 178, 184 (1940).

Arizona courts have already repeatedly held that the elimination of tax liabilities can be unconstitutional gifts in certain circumstances. In *Maricopa County v. State*, 187 Ariz. 275, 280 (App. 1996), and *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559-60 (App. 1997), this Court reviewed the constitutionality of laws that sought to relieve private parties of tax liabilities. The Court analyzed both for Gift Clause violations. Although it found that both passed muster—because they served public purposes and were proportionate in value to what the state got in return—the point is clear: the Gift Clause *does apply* to the elimination of tax liabilities.

Here, the Program eliminates tax liabilities. The "credit" is calculated in such a way as to determine a film company's actual tax liability—i.e., the amount the company would actually owe absent the subsidy. That amount represents a legal liability to the state created by the tax code—not a mere hypothetical potential future value—and the "credit" is then applied to it to relieve the company of an actual liability. *See* Reply Br. at 20–21 (citing *Stearns v. Arizona Dep't of Revenue*, 212 Ariz. 333, 335 ¶ 12 (App. 2006)). If the "credit" more than consumes that liability, a "refund" (here, a "direct outlay" of State funds, Amicus Brief of Senate President Peterson at ep.20) issues. Because both functions grant "valuable

advantages" to private entities, Program credits are subject to evaluation under the Gift Clause—meaning they must (a) be for a public purpose, and (b) acquire something for the public that's of proportionate market value. *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973) ("valuable advantages" are subject to the Gift Clause); *see also Neptune Swimming Found. v. City of Scottsdale*, 256 Ariz. 551, 560 ¶ 28 (2024) ("An expenditure governed by the Gift Clause [includes] … debt forgiveness.").

Because the Program here fails that two-part test—as Taxpayers explain in their briefs—it's unconstitutional.

The Chamber points to "numerous tax credits" that exist in state law. Chamber Br. at ep.10. To begin with, that isn't a valid argument: "a challenged law does not become constitutional simply because it has company." *Lopez-Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054, 1079 n.10 (9th Cir. 2013) (Fisher, J., dissenting), *rev'd on other grounds*, 770 F.3d 772 (9th Cir. 2014); *see also Bayh v. Sonnenburg*, 573 N.E.2d 398, 415 (Ind. 1991) ("unconstitutional acts do not become constitutional through age or repetition."). But even so, the constitutionality of the credits to which the Chamber refers is obviously not before

the Court, and it's quite possible that some, if not all, of them may pass constitutional muster based on their unique structure and application.[1]

Like Appellees, the Chamber cites Section 43-1183, which provides credits to people who contribute to school tuition organizations. As this Court knows, the constitutionality of that program was challenged in *Kotterman v. Killian*, 193 Ariz. 273 (1999), and the Supreme Court upheld it on the grounds that the state wasn't giving anything to taxpayers. *See id.* at 288 ¶¶ 51-52. The reason was because the valuable benefits that the scholarship organizations received *did not come from the state*; they came directly from the taxpayers, who were the ones making the choices (and whose ultimate financial liability was not eliminated by the credit). Under that program, "[t]he decision-making process [was] completely devoid of state intervention or direction and [that] protect[ed] against [any] government 'sponsorship, financial support, and active involvement.'" *Id.* at 281 ¶ 20 (citation

[1] The Chamber claims that its own "studies confirm" that the qualified facility tax credit in particular "results in tremendous return-on-investment in Arizona." Chamber Br. at ep.8. Yet the brief doesn't actually cite to any such studies, nor are they in the record. Still, even if the claim were true, "return on investment" is not synonymous with "consideration" for Gift Clause purposes. Nor does the possibility of some sort of "return," standing alone, satisfy the public purpose prong. There must still be adequate public supervision and control to ensure any such purpose—if valid—is met.

omitted). Consequently, there was "no money [in] … the state's control" to be given out in the first place. *Id.* at 285 ¶ 36.[2]

Here, the situation is the opposite: the decision-making process is thoroughly state-involved, and the Program is *all about* the state's sponsorship and financial support[3]—that's the whole purpose of the Program. Unlike the program in *Kotterman*, participants in this Program have their liabilities eliminated by the State. Indeed, unlike in *Kotterman*, participants in the Program will get a check drawn on the State treasury if the amount of the "credit" exceeds their tax liability. In *Kotterman*, there was no gift, because the State wasn't giving away anything that belonged to it. *Id.* at 288 ¶ 52. Here, there *are* gifts because the State *is* giving away something that belongs to it—it is waiving participant's liabilities (which counts as an "expenditure," *Neptune*, 256 Ariz. at 560 ¶ 28), something the State

[2] The Chamber's claims that Taxpayers "don't ask this Court to distinguish *Kotterman*" and are instead "ask[ing] this Court to ignore *Kotterman*," are ridiculous. Chamber Br. at ep.13. Taxpayers have thoroughly briefed *Kotterman* and its distinguishability (or, to be more precise, its reconcilability). The Chamber, by contrast, simply ignores cases such as *Pimalco* and *Maricopa Cnty.*, that directly contradict their position.

[3] As for "active involvement," there isn't much of that—because under this Program there is no "control and supervision [by] public officials" to prevent "private gain or exploitation of public funds"—and that only renders the Program even more unconstitutional. *Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321 (1986). Even in the pre- and post-approval processes, there is nothing that guarantees how the ultimate payouts are spent. *See, e.g.,* OB at 43-44.

can only accomplish by virtue of its sovereignty[4]—and thereby conferring a financial benefit on participants for the express purpose of aiding their private, commercial undertakings. That is certainly a "subsidy." *See Black's Law Dictionary* 1117 (2d ed. 1910).[5] It is just as certainly unconstitutional.

To make the point, it isn't necessary to comb through every tax credit the Chamber and the Defendants cite in their briefs. There might indeed be some that are unconstitutional under the Gift Clause, but many are likely not. That determination would depend on the particular circumstances. All this Court needs to decide is whether the elimination of a tax liability and any resulting "refunds" are exempt from the Gift Clause—they are not—and whether the Program here (a) serves a public purpose—it does not—and (b) acquires something for the general public which is of proportionate market value—it does not.

The Chamber, like Appellees, asserts that *Kotterman* established that tax credits "are not subject to" Gift Clause scrutiny. Chamber Br. at ep.5. This is false.

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[4] In *State ex rel. Corbin v. Superior Ct.*, 159 Ariz. 307, 310 (App. 1988), this Court found that the government gave a gift to private entities when it enabled them to benefit financially from the State's "unique ability as a public agency to borrow money at a lower rate of interest than a private party would have to pay." This alone is sufficient response to the Defendants' recitation of the line from *Kotterman* about the state not "owning" the tax benefits that participants in this Program enjoy. Here, the State certainly does *own* the credits—and the cash some participants will receive. (Because the State already collected that cash from other, actual taxpayers. *See, e.g.,* Reply Br. at 20 n.5; Petersen Am. Br. at ep.13.)

[5] https://archive.org/details/BlacksLaw2dEd/page/1117/mode/2up.

All *Kotterman* said is that the STO credit program at issue there did not *violate* the Gift Clause or other constitutional provisions. 193 Ariz. at 292 ¶ 72. *See also* OB at 20-26, 31-32 & n.17; Reply Br. at 13-22.

The Supreme Court has warned against overreading precedent in such a manner: "Before applying the doctrine of *stare decisis*, a court must first identify the legal principle entitled to respect." *Town of Gilbert Prosecutor's Off. v. Cownie ex rel. Cnty. of Maricopa*, 218 Ariz. 466, 471 ¶ 22 n.5 (2008) (citation omitted). In other words, "before applying stare decisis, a court must first determine just what that case purports to establish." *Id.* (cleaned up). When a prior case "simply did not address the issue presented" in a current case, *id.*, it's inappropriate to extrapolate "a court's statement on a question not necessarily involved in the [prior] case." *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81 (1981).

In *Town of Gilbert*, the Court found "good reasons not to over-read" a prior case "as holding that a homeowner is entitled to restitution for all amounts paid to an unlicensed contractor *regardless of any benefits the homeowner received*." 281 Ariz. at 471 n.5 (emphasis added). The Court explained, "Over-reading a decision can be corrosive to the rule of law because it may lead a court to ignore concerns not present in the earlier case and to embrace conclusions that are contrary to common sense or experience." *Id.* That case illustrated the point because treating the prior case as dispositive "could [have] lead to results that [were] contrary to the

language of the [controlling] statute, which contemplate[d] that victims [would] recover their losses, not a windfall." *Id.* The parallel here is clear. Overreading *Kotterman* would be corrosive because there are concerns present here that were "not present in the earlier case," resulting in a diction that is "contrary to common sense," *id.*, and to the state's experience with the Gift Clause. Taxpayers have no quarrel with *Kotterman* correctly understood. But the Chamber, like Appellees, take its wording out of context and ignore the pivotal distinctions between the program at issue there, and the Program at issue here.

II. The Court should decline the Chamber's invitation to make a political, rather than a legal, decision.

The Chamber suggests that the Court need not concern itself about potential abuses of the taxing power because the Legislature can be trusted to "repeal a tax credit that is no longer in the best interest of the state, or [to] amend tax credits when prudence suggests." Chamber Br. at ep.11. But this case isn't about the "prudence" of these tax credits. It's about their *constitutionality.* Prudential decisions are *policy* decisions—matters for the Legislature. But *constitutional* lines are policed by the courts. What the Court said in *Arizona Independent Redistricting Comm'n v. Brewer,* 229 Ariz. 347, 355 ¶ 34 (2012), is equally applicable here: "[t]aken to its logical conclusion, the [Chamber's] argument would preclude courts from reviewing any law…. But it is well settled that when one with standing challenges a duly enacted law on constitutional grounds, the judiciary is the

department to resolve the issue." The Chamber points to no example of the Legislature repealing a tax credit on the grounds that it was *unconstitutional*, and indeed it is for just that reason that the *Schires* court rejected the idea of judicial deference in Gift Clause cases. *See Schires v. Carlat,* 250 Ariz. 371, 378 ¶ 23 (2021). So for this Court to decline to enforce the Gift Clause, and to instead to simply trust the Legislature to do the right thing, would be "to abdicate judicial responsibility," *Summerfield v. Superior Court*, 144 Ariz. 467, 479 (1985), and indeed, to act based on political, rather than constitutional, considerations.

In fact, the Chamber itself makes an essentially *political,* rather than *legal* argument throughout its brief. For example, it emphasizes its belief that tax subsidies are "some of the state's biggest economic motivators." Chamber Br. at ep.6-7. But subsidies only motivate recipients—they *dis*incentivize non-recipients, creating innate political and economic tensions as well as economic inefficiencies. *See, e.g.,* AFEC Am. Br. at ep.19-20. It's precisely these tensions that led the framers of Arizona's Constitution to adopt the Gift Clause to forbid the government from creating "economic motivators" in the form of subsidies and other gifts. *See, e.g., Kotterman,* 193 Ariz. at 288 ¶ 52; Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1, 7 (2024) ("As political attention in nineteenth century America shifted toward projects for 'internal improvements,' the public became increasingly concerned about the ways in which

public financing of economic development could unjustly and imprudently redistribute wealth.").

III. Plaintiffs' requested relief is quite clear.

A. This is a facial and as-applied case.

The Program is unconstitutional both facially and as-applied. *See, e.g.,* OB at 12-13, 45-52; Reply Br. at 11-12, 25-30. It is unconstitutional because it gives participants valuable benefits—including, but not limited to, actual checks drawn from the state treasury—without acquiring anything of proportionate value in return, and without advancing a public purpose.[6] The "refundable" nature of the Program—i.e., the fact that participants can actually get money handed to them from the state—certainly highlights the nature of the "evils" that exist here, *Kotterman*, 193 Ariz. at 288 ¶ 52, and makes plain that the Program involves *direct* government expenditures (although even the elimination of a debt is an

[6] The Legislature knew in advance that the Program would cause a "loss of General Fund revenue due to the tax credits" that "could eventually be as great as the maximum [annual amount] permitted under the bill," and that it would cost more (at least in the short term) than any "dynamic revenue impact" (i.e., increased tax collections from any new business activity). Compl. ¶ 60; Compl. Ex. 8 at ep.225. *See also* Petersen Am. Br. at ep.19 & n.6. Taxpayers agree with the Senate President that such deliberate subsidization being "integrated into the statutory design" supports the facial claim. *Id.* at ep.18. The fiscal note he mentions was quoted in and attached as an exhibit to the Complaint, Compl. ¶ 60; Compl. Ex. 8, so even if the Court does not take judicial notice of it, *see* Petersen Am. Br. at ep.19 n.6, it must be taken as true and all reasonable inferences therefrom drawn in Taxpayers' favor at this stage.

"expenditure" for Gift Clause purposes, *Neptune*, 256 Ariz. at 560 ¶ 28). But even absent the refundability of the Program, it would still be unconstitutional, because (a) no public purpose is served,[7] and (b) the value participants acquire, through the nullification of their tax liabilities, far exceeds the (non-existent) value the state receives in return.

The proper relief, therefore, is to declare the Program facially invalid, as Taxpayers have clearly and repeatedly requested. *See, e.g.,* Compl. at ep.22; OB at ep.52. There are no circumstances under which it can operate constitutionally, because under the Program's statutory criteria, participants will never deliver to the state anything of value equivalent to the benefits they receive, and because the Program will never serve a public purpose. *See State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018) (articulating standard for facial challenge). Moreover, because these are legal, rather than factual, matters, this Court can and should remand for entry of judgment in Taxpayers' favor. *Cf. Schires*, 250 Ariz. at 379 ¶ 26 (appellate court remanding Gift Clause case with instructions to enter judgment for taxpayers); *Rodgers v. Huckelberry*, No. 2 CA-CV 2021-0072, 2022 WL 14972042, at *7 ¶27 (Ariz. App. Oct. 26, 2022) (same).

[7] Recall that the public purpose prong of the test requires that there be adequate "control and supervision [by] public officials" to prevent "private gain or exploitation of public funds." *Kromko*, 149 Ariz. at 321. Since that is absent here, the Program fails the public purpose prong as well as the consideration prong.

But Plaintiffs have also pleaded that the Program is unconstitutional as applied. *See* Compl. ¶¶ 148-58. So even if the Court were to find that it is possible for the Program to be administered in a constitutionally adequate manner in some circumstances, it cannot be with respect to MoPic-2023-008 and MoPic-2024-004, and therefore the proper action would be to reverse with respect to Counts 2 and 3 and let the case proceed so that the parties can develop a proper factual record, including on the "give" and the "get" of the Program.[8]

B. The Court can and should enter an injunction to preserve its jurisdiction.

Finally, the Chamber objects to Taxpayers' request for an injunction to prevent the Defendants from making the unconstitutional payments to Program participants, claiming that injunctive relief is not necessary to preserve this Court's jurisdiction. Chamber Br. at ep.14. That isn't true. Once the State issues a credit or sends a check to a Program participant, it will likely be impossible for the State to recover those funds, and there is no legal mechanism for Taxpayers to claw back illegal payments on the State's or the public's behalf, whether in court or otherwise. That risks rendering the case moot, at least with respect to some of the

[8] The Chamber also claims that the as-applied challenges must fail because Taxpayers "never allege that the challenged credits have resulted in a refund." Chamber Br. at ep.12. That argument is refuted in the Opening Brief at 13, 48-52, the Reply Brief at 11-13, 25-33, and the Amicus Brief of President Petersen at ep.18.

Taxpayers' claims—and such mootness would deprive the Court of jurisdiction. Thus, an injunction is warranted[9] to prevent the loss of jurisdiction and to prevent irreparable harm to Taxpayers.

That's just what happened in *Rodgers v. Huckelberry*, 247 Ariz. 426 (App. 2019). There, taxpayers alleged that Pima County violated the Gift Clause through a project whereby the County spent taxpayer money to construct a headquarters building for a private company. Part of the case involved the County's hiring of contractors. But because the contractors had been fully paid by the time the Court considered the case, the Court dismissed those claims as moot. *See id.* at 430–31 ¶¶ 18-21. The Court advised future litigants seeking to avoid such a result to pursue injunctive relief before the challenged payments are completed—precisely what Taxpayers are doing here. *Id.* at ¶¶ 20-21. Thus it's not only proper, but highly desirable that this Court enjoin expenditures under this Program while this litigation proceeds, so as to preserve in full Taxpayers' relief.

[9] The Chamber overstates its assertion that Taxpayers' Opening Brief doesn't seek reversal of the trial court's decision denying a preliminary injunction. *See* Chamber Br. at ep.14. The Opening Brief expressly requests that the Court "reverse … and enjoin the Program." OB at 13. It also explains that the appeal "encompasses both the Final Judgment and the unsigned ruling on the denial of the preliminary injunction," *id.* at 15 n.3, and walks through the factors for injunctive relief. *Id.* at 52–55. The Reply Brief clarifies that Taxpayers seek both a preliminary injunction (if the Court believes additional litigation is necessary) and a permanent injunction (if the Court concludes that the Program is facially unconstitutional). Reply Br. at 36 & n.16.

CONCLUSION

This Court should enjoin any expenditure of funds under the Program, and should *reverse* with instructions to enter judgment for Taxpayers on their facial claims.

Respectfully submitted this 8th day of September 2026 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Response to Arizona Chamber of Commerce & Industry's Amicus Brief appears in proportionally spaced type of 14 points, is double spaced using a Roman Font, and contains 3,433 words, excluding the table of contents and table of authorities.

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