

**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 2026-0013

Maricopa County Superior Court
Case No. CV2025-001929

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INTRODUCTION

This lawsuit challenges the constitutionality of the Arizona Motion Picture Production Program (“Program”)—a government subsidy to private film companies designed to encourage them to make movies in Arizona. The Legislature fashioned this “incentive” as a refundable tax credit, meaning that companies making movies in Arizona can qualify not only to have their tax liabilities reduced, but to receive a check for whatever is left over after their liabilities have been zeroed out.¹

That “incentive” violates the Arizona Constitution’s Gift Clause ([Ariz. Const. art. IX § 7](#)), which prohibits the depletion of the public treasury by allocating public resources for private enterprises, and/or the conferring of special advantages on private, special interests “by subsidy or otherwise.” *See, e.g., Schires v. Carlat*, 250 Ariz. 371, 374 ¶ 6. The payments provided under the Program do both of those things.

¹ A refundable tax credit means that the taxpayer receives a payment, issued by the state, when the taxpayer has no tax liability to offset, or in excess of any taxes which the recipient previously paid. Joseph Link, [Adopting Tax Credits: The Federal Government’s Special Need to Adopt Missouri’s Adoption Tax Credit](#), 8 Bus. Entrepreneurship & Tax L. Rev. 260, 263 (2024); [Refundable Tax Credit](#), West’s Tax Law Dictionary § R880.

Although labeled as “tax credits,” the payments provided under the Program are *not* just credits that offset a recipient’s tax liability. Instead, they function as direct payments. Here’s how refundable tax credits work:

If a taxpayer owes the government \$5,000 at the end of the year, a \$1,000 tax credit will reduce the taxpayer's liability to \$4,000. ... A refundable credit [by contrast,] is a tax credit that is able to be refunded if a taxpayer’s credit exceeds the liability. For example, if a taxpayer owes the government \$500 at the end of the year, a \$1,000 tax credit will not only reduce the taxpayer’s liability to \$0, but it will also result in a \$500 payment to the taxpayer.

[Link, *supra*](#), at 263. So, when the amount awarded under the Program exceeds the amount of taxes the beneficiary owes, Arizona writes a check to the beneficiary for the difference. Of course, if the taxes owed exceed the subsidy, then the tax liability is simply reduced accordingly. Either way, the Program violates the Gift Clause, which forbids the government from underwriting private commercial undertakings “by subsidy or otherwise.” [Ariz. Const. art. IX § 7](#).

In brief, the Legislature has appropriated \$125 million per year to fund private film production in the state, which accomplishes no public purpose and acquires no direct consideration in return. That is unconstitutional.

However, the superior court erroneously determined that Taxpayers’ claims challenging these subsidies are precluded by the Supreme Court’s decision in [Kotterman v. Killian](#), 193 Ariz. 273, 288 ¶ 52 (1999), by relying on inapposite

dicta and ignoring the context of the case’s limited holding.² That was reversible legal error.

[*Kotterman*](#) involved a charitable tax credit program that allowed taxpayers to choose how to direct their payments: they could pay the state itself or, if they wished, pay into the educational program. No public funds ever changed hands under that program—and no taxpayer received any public benefit from it; they still had to pay. Thus, the Gift Clause was not violated.

In contrast, this Program provides tax credits and even direct payments *out of the state treasury* to select private beneficiaries. And it does so for the purpose of specially enriching those private interests. That makes it a not only a clear subsidy, but a direct payment of government funds, and exactly the type of public-to-private transfer the Gift Clause was designed to prohibit.

The text of the Gift Clause is plain and unambiguous. It bans *any* form of government aid to private entities—whether it’s money, tax exemptions, or exclusive privileges—by using sweeping and unambiguous language like “donation or grant, *by subsidy or otherwise*.” [Ariz. Const. art. IX § 7](#).

² In the context of a *non-refundable*, charitable tax credit program that left the taxpayer no better off, the [*Kotterman*](#) Court said that the Gift Clause did not apply to the charitable credit because a tax “[o]ne cannot make a gift of something that one does not own.” *Id.* As discussed in detail below, the financial benefits of the Program challenged here, unlike the program in [*Kotterman*](#), are in fact things the government owns and is giving to Program participants.

Courts have consistently and strictly applied this Clause for over a century, striking down even indirect or non-monetary benefits as unconstitutional subsidies, *see, e.g., Neptune Swimming Found. v. City of Scottsdale*, 256 Ariz. 551 (2024) (low-cost use of government owned resources), and reaffirming that *all* forms of government aid to private parties, including reductions of tax liabilities and resulting refunds, are subject to Gift Clause scrutiny. *Pimalco, Inc., v. Maricopa Cnty.*, 188 Ariz. 550 (App. 1997) (refunds resulting from elimination of tax liability); *Maricopa Cnty. v. State*, 187 Ariz. 275 (App. 1996) (refunds resulting from elimination of tax liability); *cf. Rowlands v. State Loan Bd.*, 24 Ariz. 116, 123 (1922) (elimination of liability).

The refundable tax credits challenged here eliminate liabilities and give outright payments to private parties to subsidize private enterprise. So, even if it weren't for the refundable credit—which directly hands checks to beneficiaries—the Clause still applies and prohibits the subsidies the State provides under the Program.

The court below also erred in dismissing Taxpayers' claims on alternative grounds that the Complaint failed to adequately plead its facial challenge and its two as-applied challenges.

Taxpayers adequately pleaded a facial challenge by alleging that the film tax-credit program violates both prongs of the Gift Clause regardless of whether a

credit ultimately produces a refund. The statute requires the State to grant credits whenever permissive statutory criteria are met, and Defendants have no discretion to deny them. Taxpayers allege that the program always fails the consideration prong because the only required return—a film acknowledgment of Arizona—has no measurable value and is grossly disproportionate to the subsidy, and that it fails the public-purpose prong because public funds are transferred to private recipients without meaningful state control.

Taxpayers also adequately pleaded as-applied challenges to two specific credits, alleging that the subsidies primarily benefit private recipients and provide only *de minimis* public value relative to the quantifiable public funds involved. Any uncertainty about whether the credits will produce refunds stems from statutory confidentiality provisions, which prevented confirmation of that information before filing. At the pleading stage, however, Taxpayers needed only to provide fair notice of claims that, if proven, would entitle them to relief. Because [Rule 12\(b\)\(6\)](#) dismissals are disfavored before discovery, and the government may not evade Gift Clause scrutiny by withholding information necessary to value consideration, dismissal of the as-applied claims was also in error.

This Court should reverse, hold that the Gift Clause applies to all forms of taxpayer-funded subsidies, and enjoin the Program.

STATEMENT OF THE CASE

On January 15, 2025, Taxpayers filed a complaint for declaratory and injunctive relief challenging the constitutionality of the Arizona Motion Picture Production Program, codified at [A.R.S. §§ 41-1517](#), [43-1082](#), and [43-1165](#). Compl., [ROA.1](#). Taxpayers assert that the Program, on its face, violates [Article 9 Section 7](#) of the Arizona Constitution because it fails both the public purpose prong and the consideration prong of the Gift Clause analysis. [ROA.1](#) ¶¶ 125–47. Taxpayers also brought as-applied challenges against two specific Program credits: one pre-approved (MoPic-2024-004) and one post-approved (MoPic-2023-008). [Id.](#) ¶¶ 148–58. The Complaint requested declaratory and injunctive relief against the Program as a whole and against the two specific credits. [Id.](#) at 22–23.

Defendant/Appellee Board of Directors of the Arizona Commerce Authority (“ACA”) moved to dismiss the Complaint. [ROA.42](#). Defendant/Appellee Arizona Department of Revenue (“ADOR”) joined in the motion. [ROA.43](#).

ADOR initially indicated to counsel for Taxpayers that it would voluntarily refrain from processing Program subsidies during the litigation, but it reversed course in July 2025. Taxpayers subsequently moved for a preliminary injunction. [ROA.57](#).

The court below heard oral argument on September 12, 2025, *see* [ROA.76](#), and issued an Under Advisement Ruling on November 10, 2025, ordering

dismissal of Taxpayers’ Complaint and denying their motion for preliminary injunction as moot. [ROA.77](#) ep.7. The court entered final judgment on December 8, 2025. [ROA.81](#). Taxpayers timely appealed that same day.³ [ROA.82](#). The matter was subsequently transferred to this Court from Division One pursuant to [A.R.S. § 12-120\(E\)](#). [Transfer Order](#).

STATEMENT OF FACTS

The Arizona Motion Picture Production Program is the latest in a series of failed experiments to provide government aid to the film industry. [ROA.1](#) ¶¶ 29–52. Industry members lobbied extensively for the Program. [ROA.1](#) ¶ 53.⁴ It was enacted amid intense budget negotiations in a year when the Legislature was searching for ways to appropriate surplus tax dollars. *See id.* ¶¶ 54–58. The Legislature knew the Program would result in a “loss of General Fund revenue” up to \$125 million per year. *Id.* ¶¶ 60, 76.

³ Taxpayers previously filed a notice of appeal from the denial of their motion for a preliminary injunction before the final judgment was entered. [ROA.78](#). This Court dismissed that appeal for lack of jurisdiction because the denial of the preliminary injunction was unsigned. [Feb. 17, 2026 Order](#). The timely appeal from the final judgment, however, also confers jurisdiction to review the superior court’s unsigned ruling dated November 10, 2025 (filed November 13, 2025). [ROA.77](#). *See Barassi v. Matison*, 130 Ariz. 418, 422 (1981) (“[W]e hold that a premature appeal from a minute entry order in which no appellee was prejudiced and in which a subsequent final judgment was entered over which jurisdiction may be exercised need not be dismissed.”). Taxpayers’ Notice of Appeal therefore encompasses both the Final Judgment and the unsigned ruling on the denial of the preliminary injunction. [ROA.82](#).

⁴ Such quintessential rent-seeking behavior is indicative of a subsidy.

The Program is administered by the ACA and ADOR. *See, e.g.,* [id.](#) ¶¶ 62, 70, 77–78, 81–82, 97. The ACA handles pre- and post-approval for eligibility, and ADOR ultimately processes credits along with the production company’s tax return,⁵ and issues payments to beneficiaries. [Id.](#) ¶¶ 70, 81–82.

Film companies must meet certain qualifications to claim refundable tax credits. Those criteria are discrete and narrow. [Id.](#) ¶¶ 64–68, 83–88, 102–04. If a film company “use[s] a qualified production facility” in Arizona, *e.g.,* [A.R.S. § 41-1517\(B\)\(1\)](#), or “primarily” films a movie “at a practical location” in Arizona, *e.g.,* [A.R.S. § 41-1517\(B\)\(2\)](#), then the state *must* provide the subsidies. *See* [A.R.S. §§ 41-1517\(G\)–\(H\)](#), [43-1082\(A\)](#), [43-1165\(A\)](#). In exchange, the statute merely requires that film companies include an acknowledgment that the film was shot or produced in Arizona. That’s it.

If the film company satisfies the statute criteria for the subsidy—i.e., the company uses an Arizona production facility or shoots the film “primarily” in Arizona—the state must award the company a refundable credit. *See* [A.R.S. §§ 41-1517\(G\)–\(H\)](#), [43-1082\(A\)](#), [43-1165\(A\)](#).

⁵ [A.R.S. §§ 43-1082](#) and [-1165](#) are parallel provisions that make Program credits available to a “motion picture production company” (as defined in [A.R.S. § 41-1517](#)), regardless of whether the company files income tax documents as an individual or as a corporation.

Film companies are not contractually obligated to provide anything in return for the subsidy. Indeed, tax credit **recipients are not even required to actually release or distribute any subsidized film** to receive the credit or tax payment. [ROA.1](#) ¶ 110.

Taxpayers are two Arizona income taxpayers whose tax dollars pay for the Program subsidies and who have a legal obligation to replenish the public coffers for unlawful disbursements. [Id.](#) ¶¶ 1, 3–4, 146. *See also* [ROA.56](#). They allege that the Program’s authorizing statutes facially violate the Gift Clause, and that two specific credits (one pre- and one post-approved by the ACA)⁶ violate the Gift Clause as applied. [ROA.1](#) ¶¶ 125–58.

STATEMENT OF THE ISSUES

1. Did the trial court err in holding that the Gift Clause does not apply to a government program that grants refundable tax credits—including direct payments of public funds—to private film companies?

⁶ The identity of the applicants are unknown to Taxpayers at this time because Defendants have withheld all information gathered from applicants pursuant to [A.R.S. § 41-1517\(J\)](#). However, the ACA assigns “Priority Placement Numbers” and has released the amounts pre- and post-approved for the two challenged credits. The preapproval letter for the credit designated MoPic-2023-008 can be found at [ROA.2](#) ep.291–92. The post-approval letter for MoPic-2023-008 is located at [Id.](#) ep.317–18. And the preapproval letter for MoPic-2024-004 is located at [Id.](#) ep.308–9. MoPic-2023-008 was preapproved for up to \$464,582, and ultimately post-approved for \$394,113. [Id.](#) ep.291–92, 317–18. MoPic-2024-004 has been pre-approved for up to \$1,220,624. [Id.](#) ep.308–9.

2. Does the program at issue violate the Gift Clause when it provides government subsidies to private film companies that are not required to provide any objectively valued (or valuable) return benefit to the State?

STANDARD OF REVIEW

The dismissal of a complaint is reviewed *de novo*. [*State ex rel. Brnovich v. Arizona Bd. of Regents*](#), 250 Ariz. 127, 130 ¶ 7 (2020). “Dismissal is appropriate only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.” [*Id.*](#) (cleaned up).

The Court, “looking only to the pleadings, ... must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts.” [*Id.*](#) (cleaned up). “A complaint’s exhibits, or public records regarding matters reference in a complaint, are not ‘outside the pleading,’ and courts may consider such documents” when reviewing a [Rule 12\(b\)\(6\)](#) motion. [*Coleman v. City of Mesa*](#), 230 Ariz. 352, 356 ¶ 9 (2012).

Challenges to the constitutionality of statutes are also reviewed *de novo*. [*State v. Burke*](#), 238 Ariz. 322, 325 ¶ 4 (App. 2015).

ARGUMENT

The Gift Clause forbids the government from “mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.” [Ariz. Const. art. IX § 7](#). The purposes of this Clause are: (1) to prevent the “depletion of

the public treasury or inflation of public debt by [public entities] engag[ing] in non-public enterprise,” [*Town of Gila Bend v. Walled Lake Door Co.*](#), 107 Ariz. 545, 549 (1971) (citation omitted), and (2) to prevent government entities from “giving advantages to special interests.” [*Wistuber v. Paradise Valley Unified Sch. Dist.*](#), 141 Ariz. 346, 349 (1984). 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)).

These requirements apply both to direct government expenditures, and to the elimination of liabilities owed to the state, including tax liabilities. See, e.g., [*Pimalco*](#), 188 Ariz. at 559-60 (tax exemption and refund); [*Maricopa Cnty.*](#), 187 Ariz. at 279-81 (App. 1996) (refund of lawfully collected tax revenue); [*Rowlands*](#), 24 Ariz. at 123 (legislation effectively eliminating liability to the state). See also [*Texas & New Orleans Ry. Co. v. Galveston Cnty.*](#), 161 S.W.2d 530, 532 (Tex. App. 1942), [*aff’d*](#), 169 S.W.2d 713 (Tex. 1943) (prospective indemnification of a business’s future tort liability was an unconstitutional gift).

To survive a Gift Clause challenge, a transfer of public funds or a grant of a valuable tax benefit to a private entity must (1) serve a public purpose and (2) be in exchange for objectively valued adequate consideration tendered by the recipient. [*Schires v. Carlat*](#), 250 Ariz. 371, 374–75 ¶ 7 (2021); [*Turken*](#), 223 Ariz. at 345 ¶ 7,

348 ¶ 22. These are conjunctive requirements, so a failure of either requirement will violate the Gift Clause. *Id.* The Program fails both.

I. The trial court erred in concluding that Taxpayers’ claims are precluded by *Kotterman*, and that refundable tax credits are not subject to the Gift Clause.

Despite these clear and longstanding requirements, the superior court relied on dicta and a misreading of the relevant holding in [Kotterman](#), 193 Ariz. at 288 ¶¶ 51–52 (1999), to find that “tax credits are not gifts subject to Gift Clause analysis.” [ROA.77](#) ep.5.⁷ This was plain error.

[Kotterman](#) did not categorically exclude tax credits from Gift Clause scrutiny, and cases decided both before and after that decision make plain that the Gift Clause applies to *all* forms of government subsidies, including the refundable tax payments at issue here. [Kotterman](#) was simply addressing a different subject.

A. The Court’s decision in *Kotterman* was based on the absence of special interest enrichment, which is present here.

[Kotterman](#) involved a program called the STO program,⁸ which allowed taxpayers to make their payments either directly to the state or into a special

⁷ The trial court’s various descriptions of [Kotterman](#)’s holding are inconsistent. Sometimes the court says the holding covers all tax credits, but other times says it only covers “tax credits that reduce tax liability.” [ROA.77](#) ep.5. And sometimes the court below says that tax credits are not “subject to Gift Clause analysis,” *id.*, while saying elsewhere that tax credits merely are not “barred by,” *id.*, or “do not violate,” *id.* ep.6, the Gift Clause. None of the trial court’s characterizations of [Kotterman](#) capture both its context and proper scope.

⁸ STO stands for School Tuition Organization.

charitable organization that provided scholarships to students. That program involved (1) *non*-refundable tax credits for (2) individual donations to (3) private charitable organizations (4) that advance broad educational purposes, and which (5) did not reduce the taxpayer's liability in any degree.

The question arose whether the STO program violated the Gift Clause, and the court said it did not. It explained:

Under article IX, § 7, the state shall not “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.” We have upheld giving when the state action served a public purpose and adequate consideration was provided for the public benefit conferred. This constitutional provision was historically intended to protect against the “extravagant dissipation of public funds” by government in subsidizing private enterprises such as railroad and canal building in the guise of “public interest.” Such “evils” do not exist here. Neither do we agree with petitioners that a tax credit amounts to a “gift.” One cannot make a gift of something that one does not own.

193 Ariz. at 288 ¶¶ 51–52 (citations omitted).

In other words, the Supreme Court's Gift Clause analysis in [*Kotterman*](#) turned on whether the program at issue subsidized favored private interests. The Court recognized that a central purpose of the Clause is to prevent the enrichment of private interests at public expense. It concluded that the STO program did not implicate that concern because it was a broadly available charitable program that allowed taxpayers to choose how to direct their funds and did not involve a direct state subsidy.

The opposite is true here. Subsidizing the movie industry is precisely the kind of action the framers of the Gift Clause sought to prohibit. The Clause was adopted in response to the economic calamities of the nineteenth century, when municipal governments granted “money, credit or other valuable advantages” to favored private enterprises such as railroads and canal companies. [Nelson](#), 109 Ariz. at 372.

Indeed, tax exemptions and similar tax-based subsidies were a common form of government favoritism in the years before Arizona’s Constitution was adopted. After decades of costly boondoggles during the territorial era—particularly subsidies for railroad development—Arizonans adopted a Constitution that forbids such subsidies in all their forms. To ensure the prohibition could not be easily circumvented, the framers included the sweeping language “by subsidy or otherwise” in the Gift Clause.⁹ See John D. Leshy, [The Making of the Arizona Constitution](#), 20 Ariz. St. L.J. 1, 11–12 (1988); Timothy Sandefur, [The Origins of the Arizona Gift Clause](#), 36 Regent U. L. Rev. 1, 43–58 (2024).

⁹ The first draft of the Clause would have applied solely to appropriations of public money. Goff, ed., [Records of the Arizona Constitutional Convention](#) 1266 (1991). The framers rejected that draft, in part out of a concern that it would allow tax exemptions for railroads. Sandefur, [supra](#), at 54. Instead, they adopted the comprehensive language that prohibits aid to private businesses “by subsidy or otherwise.” Moreover, the 1891 proposed constitution, which was never adopted, expressly allowed for tax exemption subsidies, [id.](#) at 49–51, and the 1910 framers chose *not* to follow that model. [Id.](#) at 52–53.

The movie subsidy Program raises precisely the same constitutional concerns as the railroad subsidies that animated the Clause's adoption. It eliminates tax liabilities for—and in many cases directly transfers taxpayer funds to—a narrow class of private beneficiaries. Selectively erasing tax obligations, and even writing checks to favored private companies, in order to subsidize their business necessarily depletes the public treasury or inflates the public debt.

The superior court, however, focused myopically on the last sentence of *Kotterman* quoted above, and reasoned that if the government eliminates a private party's current or prospective debt to the state, that cannot be a subsidy because the money in question has not yet passed into the government's hands, and since the government does not yet “own” the money in question, it cannot make a “gift” of it.

That was a misreading of [*Kotterman*](#). First, taken in context, it's clear that the [*Kotterman*](#) court was saying that the STO program worked by allowing taxpayers, when making their payments, to direct their payments to a private party instead, and therefore that the taxpayers weren't getting anything and the government wasn't giving anything it either possessed or had a right to possess in the future. Indeed, under that program, the taxpayers did not get to keep their money, as the film companies do in this case. Instead, they still had to part with their funds.

Second [*Kotterman*](#) did not say—and it would be absurd to say—that the government can eliminate liabilities owed to it without transgressing the constitutional prohibition on subsidies. Again, Arizona courts have held the opposite for many decades. In [*Duke v. Yavapai County*](#), 24 Ariz. 567, 573 (1923), the county paid a private party’s tax liability for him—which the Supreme Court said violated the Gift Clause. In [*Puterbaugh v. Gila County*](#), 45 Ariz. 557 (1935), the legislature barred collection of a debt owed to the state. The court said this was “a direct violation” of the Gift Clause. *Id.* at 561. And, as discussed in greater detail below, Arizona courts continue to so hold. See [*Maricopa Cnty.*](#), *supra*; [*Pimalco*](#), *supra*.

To reiterate: the taxpayer in [*Kotterman*](#) was not specially enriched; indeed, she ended up no better off financially; the STO program merely allowed her to decide where her money would go. Nor was the government making a donation. The contribution came from the taxpayer’s private funds, not from the State. If anyone made a gift, it was the taxpayer—not the government. What’s more, the State was a passive actor. The government did not select beneficiaries, determine the amount of the benefit, or decide when it would be paid. It simply allowed taxpayers to redirect their own money.

Here, the opposite is true on every point. The State selects which film companies receive the subsidy, determines how much they receive, and pays the

subsidy when their credit exceeds their tax liability. That is not a passive tax mechanism. It is a government-directed transfer of public wealth in a way that is directly contrary to the purpose of the Gift Clause that animated the Court’s decision in [Kotterman](#). This, in other words, is a subsidy.

B. *Kotterman* involved a nonrefundable credit.

The next and most obvious distinction is that [Kotterman](#) involved a *nonrefundable* tax credit. The program challenged there allowed taxpayers to reduce their tax liability by directing their own money to a qualifying STO. In other words, taxpayers—not the State—decided how to allocate their own funds. The Court emphasized that the money at issue never passed through the state treasury; it was simply a *redirection* of privately owned funds. 193 Ariz. at 285 ¶ 36.

By contrast, the film production credits at issue here are *refundable*. If the credit exceeds the company’s tax liability, the State writes a check from public funds. Unlike in [Kotterman](#), money *does* leave the treasury. That is the definition of a direct government expenditure that is plainly subject to Gift Clause scrutiny.

The superior court disregarded the obvious distinction between refundable and non-refundable credits when it asserted that “[Kotterman](#) considered the possibility [that] tax credits would result in a refund.” [ROA.77](#) ep.5–6. But [Kotterman](#) made no such finding. The portion of the opinion cited by the Superior

Court addressed a different issue entirely. In that passage, the court responded to a concern raised in the dissent that a taxpayer who claimed the state tuition credit might also take a charitable deduction for the same contribution on a federal tax return. 193 Ariz. at 287 ¶ 48. That observation has nothing to do with whether a refundable tax credit constitutes a public expenditure for purposes of the Gift Clause. The question in [Kotterman](#) was whether directing one’s own private funds to an STO—through a nonrefundable credit that never passed through the state treasury—implicated the Gift Clause. The court concluded that it did not.

Here, by contrast, the credit is *refundable*. When the credit exceeds a company’s tax liability, the State pays the difference with public funds. The superior court’s reliance on [Kotterman](#) therefore rests on a misunderstanding of what that decision actually said—and, more importantly, what it did not.

C. The Superior Court’s reading of *Kotterman* is at odds with the constitutional text.

The Gift Clause unequivocally prohibits government subsidies to private entities. It provides that the state shall not “ever ... make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.” [Ariz. Const. art. IX § 7](#). This sweeping language—“the strongest prohibition ever devised against government subsidies to private businesses,” [Sandefur](#), *supra* at 55—leaves no doubt that the Clause applies to *all* forms of public aid, regardless of how they are labeled or structured.

The Clause’s text is unambiguous. A “donation” is “[t]he act of giving something, esp. money, to help a person or an organization.” [Donation](#), Black’s Law Dictionary (12th ed. 2024). A “subsidy” is “[a] grant, usu[ally] made by the government, to any enterprise whose promotion is considered to be in the public interest ... subsidies are usu[ally] indirect. They may take the form of ... *tax breaks*.” [Subsidy](#), *id.* (emphasis added).¹⁰ The phrase “by subsidy or otherwise” comprehensively forbids government aid to private enterprise, under any pretext or in any form.

The trial court’s decision ignores the constitution’s plain text, making no effort to reconcile [Kotterman](#) with the language of [Article IX Section 7](#).

D. The trial court’s decision ignores more than a century of case law finding that the Gift Clause applies to subsidies of all kinds, including the elimination of debt and favorable tax treatment.

For over a century, courts have applied the Gift Clause to declare *all* forms of subsidies—whether direct cash payments or not—unconstitutional. The Clause has been applied to debt forgiveness, below-market leases, and in-kind aid. *See, e.g.,* [Rowlands](#), 24 Ariz. at 123 (eliminating debt was an unconstitutional subsidy); [Puterbaugh](#), 45 Ariz. at 564 (elimination of debt was “clearly a donation” in

¹⁰ The second edition of *Black’s*, published the same year Arizona’s Constitution was written, defined “subsidy” as financial aid given to “any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for state aid, because likely to be of benefit to the public.” *Subsidy*, Black’s Law Dictionary 1117 (2d ed. 1910).

violation of the Gift Clause); [*City of Tempe v. Pilot Props., Inc.*](#), 22 Ariz. App. 356, 362 (1974) (below-market-rate leases of government property violates the Gift Clause); [*Neptune Swimming Found.*](#), 256 Ariz. at 560 ¶ 28 (“Granting a private enterprise exclusive use of City-owned property, *even absent a monetary cost to the City*, constitutes an expenditure for Gift Clause purposes.” (emphasis added)).

That is obviously correct. The elimination of a liability is the equivalent to the granting of an asset. [*United States v. Kirby Lumber Co.*](#), 284 U.S. 1, 2–3 (1931). That is why Arizona courts have said that eliminating tax liabilities in order to subsidize a private undertaking can also be an unconstitutional gift. In [*Maricopa County*](#), *supra*, and [*Pimalco, Inc.*](#), *supra*, the government eliminated tax liabilities for private parties, and courts analyzed whether certain tax benefits qualified as gifts. (Although those exemptions passed muster, the Court held that the Gift Clause *did* apply.¹¹) See also [*Englehorn v. Stanton*](#), No. CV2017-001742,

¹¹ In [*Maricopa County*](#), the court specifically rejected the argument that the Gift Clause did not apply where a change in the law resulted in tax refunds, as opposed to merely reducing tax collections:

The flaw in appellants' reasoning is that it draws no distinction between legislative measures that result in tax benefits that take effect prospectively and those that annul closed taxing transactions in order to confer tax benefits retroactively. In the first category, the taxing entity forgoes revenues that it could have chosen to collect in the future by changing its laws prospectively so the taxpayers' obligation to pay never arises. In the second category, however, the taxing entity

2020 WL 7487658 (Ariz. Super. Ct., June 19, 2020) (finding certain tax subsidies unconstitutional).¹²

In short, whenever the government gives *anything* of value to a private entity for non-public reasons, or fails to receive in return something of comparable value, it is engaged in subsidizing—which violates the Gift Clause. And as our Supreme Court has emphasized time and again, in Gift Clause challenges courts must examine “the realities of the transaction,” [Turken](#), 223 Ariz. at 345 ¶ 8 (citation omitted), and “overlook neither the forest nor the trees.” [Gilmore v. Gallego](#), 258 Ariz. 38, 44 ¶ 26 (2024).

As a practical matter, this Program’s credits deplete the public treasury in exactly the same way as direct appropriations: every dollar offset against a private company’s tax liability is one less dollar available for public use, and every

modifies its laws to impose on itself an obligation to refund revenues that it collected lawfully in the past. The operation of [the statute at issue] falls into the second category and thus constitutes a transaction that implicates the Gift Clause. Cf. [Rowlands. State Loan Bd. of Arizona](#), 24 Ariz. 116, 207 P. 359 (1922) (invalidating statute forgiving interest due on state-owned mortgages).

187 Ariz. at 280.

¹² Other states, too, have held that the elimination of tax liability can be an unconstitutional subsidy. See [City of Ojai v. Chaffee](#), 140 P.2d 116, 120 (Cal. App. 1943); [Eyers Woolen Co. v. Town of Gilsum](#), 146 A. 511, 515–16 (N.H. 1929); [City of Bayonne v. Palmer](#), 217 A.2d 141, 160–61 (N.J. Super. Ct. Ch. Div. 1966) (citing cases).

refundable payment is drawn directly from taxpayer funds.¹³ ADOR admits this in an annual report that it must produce pursuant to state law.¹⁴ As explained on ADOR’s website:

Tax expenditures are provisions within the law designed to encourage certain kinds of activity or to aid taxpayers in certain categories. These provisions are generally known as exemptions, exclusions, deductions, subtractions, **credits** and preferential rates. **Such provisions result in a loss of tax revenues, thereby reducing the amount of revenues available for state (and, in some circumstances, local) programs. In effect, the fiscal impact of implementing tax expenditure would be similar to a direct expenditure of state funds.**¹⁵

Yet the trial court refused to examine the realities behind Program credits. Instead, it overlooked key differences (i.e., ignored the “trees”) regarding the credits at issue here and the ones at issue in [Kotterman](#), and, for the first time, extended that case’s holding “to credits that can result in a refund.” [ROA.77](#) ep.6. As a result, the court below ignored the *entire* Gift Clause analysis, and most of its binding precedents, opining that “[t]his Court does not need to decide whether the State receives adequate consideration for the tax credit,” let alone engage the public purpose analysis, because of [Kotterman](#). *Id.* ep.4. That’s ignoring the forest.

¹³ By contrast, the tax credit in [Kotterman](#), did *not* “ earmark[] funds from ‘the general revenue of the state’ for an identified purpose or destination.” 193 Ariz. at 287 ¶ 45 (citation omitted).

¹⁴ See [A.R.S. § 42-1005\(A\)\(4\)](#).

¹⁵ [ROA.75](#) ep.9 (emphasis added).

It's no secret why the film Program exists. It's there to subsidize one private industry at taxpayer expense. That's all. That's categorically different than what occurred in [Kotterman](#), and taking a sentence or two out of context to reach a result contrary to the text, history, and precedential caselaw of the Gift Clause runs afoul of the Supreme Court's instruction to meaningfully scrutinize subsidies in all their forms.¹⁶

The core logic of [Kotterman](#)'s limited¹⁷ holding is that the State cannot give away resources it does not own. 193 Ariz. at 288 ¶ 52. But if the State cannot give away what it does not own, it follows that it *can* give away resources it *does* own or has a legal claim to—and doing so violates the Gift Clause when the transfer lacks a public purpose or proportionate consideration in return. That is exactly what happens here. The Program's credits give away something the government *does* own: they authorize the direct transfer of public funds to private recipients

¹⁶ Indeed, in the superior court's opening sentence, the court describes "tax credit *subsidies* claimed through the Arizona Motion Picture Production Program ... and ... related payments." [ROA.77](#) ep.1 (emphasis added).

¹⁷ The trial court characterized the brief Gift Clause analysis in [Kotterman](#) as referencing prior portions of the opinion discussing whether the STO tax credit amounted to an appropriation of public money for purposes of the Religion Clauses. [ROA.77](#) ep.4 ("referencing its prior analysis"). But the court below ignored key limitations on that earlier analysis, which cabined its conclusions to the specific facts of the case. See [Kotterman](#), 193 Ariz. at 297 ¶ 45 (limiting analysis to "*this* credit" and "*this* statute" (emphasis added)). Extending that case beyond those limits to a distinguishable credit and statutes was reversible error.

whose credits exceed their tax liabilities. [A.R.S. §§ 43-1082\(F\), 43-1165\(F\)](#); *see also* [A.R.S. § 42-1118](#).

Importantly, the Program also wipes out *previously incurred* tax liabilities.¹⁸ That structure explains why both *pre-* and *post-*approvals are required: recipients must first complete their in-state film production projects, thereby incurring tax liabilities, before obtaining the credit to cancel tax obligations on prior-year returns. *See, e.g.,* [A.R.S. §§ 41-1517\(H\), 43-1082\(A\), 43-1082\(D\)\(4\)–\(5\)](#). While the government did not “own” the money at issue in [Kotterman](#), it *does* “own” a tax liability. And it’s axiomatic that decreasing someone’s liabilities is equivalent to increasing her assets. *See, e.g., Kirby Lumber Co.*, 284 U.S. at 2–3. In other words, this is a situation where the government is forgiving an *ascertained debt that’s owed to it*. That’s the equivalent of a gift—and triggers Gift Clause scrutiny.

¹⁸ Here, income derived from film production may be taxable *before* the credit applies. *See, e.g., Helvering v. Horst*, 311 U.S. 112, 115–16 (1940) (income taxable when realized); [A.R.S. § 43-102\(A\)\(4\)](#) (taxable income intended to be subject to taxation “wherever derived”); [A.R.S. §§ 43-1001, -1101](#) (Arizona taxable income starts with federal adjustable gross income for the taxable year (for individuals), or federal taxable income (for corporations), then is modified by additions, subtractions, and deductions, *but not credits*); [Stearns v. Arizona Dep’t of Revenue](#), 212 Ariz. 333, 335 ¶ 12 (App. 2006) (explaining general operation of those statutes and distinguishing “taxable income” from “ultimate tax liability”). *Cf.* [A.R.S. §§ 43-1021\(16\), -1121\(24\)](#) (adding any motion picture production costs deducted from federal taxable income back into the calculation of Arizona taxable income). That means the Program zeroes out a *particular debt* to the government. Thus, even ignoring the “refundable” aspect of the credits (which plainly implicate the Gift Clause as direct expenditures of taxpayer funds) the Program adds to the film companies’ bottom line—i.e., subsidizes them.

That’s why this case most closely resembles cases like [*Maricopa County*](#), *supra*. There, the county challenged a statute that allowed certain property owners who had previously been taxed at a non-agricultural rate to obtain retroactive agricultural classification if they later submitted the required certification. If the assessor determined that the property qualified under state law, the property would be revalued for the tax year in question and the owner would receive a certificate of revaluation—either refunding excess taxes or forgiving taxes already owed.

The State advanced arguments there nearly identical to those accepted by the superior court here: that the Gift Clause did not apply, and that applying it would imperil routine tax policy. The court rejected that contention and held that the Gift Clause did apply because the statute operated retroactively to relieve taxpayers of liabilities they had already incurred. The same principle applies here.

The court reached a similar conclusion in [*Pimalco*](#), 188 Ariz. at 559, when it applied Gift Clause scrutiny to legislation that significantly reduced property taxes on leased tribal lands. Again, the court recognized that such tax relief falls within the Gift Clause’s scope.

Taken together, [Maricopa County](#) and [Pimalco](#) demonstrate that—even outside the context of refundable credits—the Gift Clause applies when government action eliminates previously incurred tax liabilities.¹⁹

That is precisely what occurs here. Private film companies must first incur tax liabilities through their production activities. Only after those liabilities arise may they claim the credit. The program then wipes out the tax obligation—and if the credit exceeds the liability, the State pays the difference with public funds.

In other words, the program challenged here is not merely the State foregoing some abstract, potential future revenue. It's the State *forgiving actual, incurred tax debts*. And, again, zeroing out a debt to the state can and often does violate the Gift Clause, as Arizona courts held in [Puterbaugh](#), [Rowlands](#), [Maricopa County](#), and [Pimalco](#). Worse yet, in cases where a film tax credit exceeds the film company's tax liability, the State is literally paying money out of the treasury to fund the difference.

¹⁹ That's not to say that the elimination of a liability that has not yet been incurred can never be a subsidy. In [Texas & New Orleans Ry. Co.](#), *supra*, the government prospectively promised to indemnify a railroad for negligence liability for the next 999 years in order to subsidize its construction of a rail line to the county. 161 S.W.2d at 532. That, the court said, was an unconstitutional gift. *Id.* at 531. It's unnecessary to resolve that question here, however, since the film Program (a) involves writing checks to participants—direct expenditures of public funds—and (b) waives tax liabilities already incurred, triggering Gift Clause scrutiny under [Maricopa County](#) and [Pimalco](#).

In sum, reading [*Kotterman*](#) to immunize all tax credits from Gift Clause scrutiny—regardless of their structure, and particularly refundable credits like the one at issue here—would conflict with the Constitution’s text, the Clause’s history, [*Kotterman*](#)’s own reasoning, and other Gift Clause precedents. The Gift Clause applies to the subsidies challenged in this case, and those subsidies violate the Clause.

II. The film production subsidies at issue violate the Gift Clause.

To distinguish unconstitutional gifts from constitutional purchases, the Supreme Court has established a two-part test: a transfer of public funds or the grant of a valuable benefit to a private entity must (1) serve a public purpose and (2) be in exchange for objectively valued adequate consideration tendered by the recipient. [*Neptune Swimming Found.*](#), 256 Ariz. at 559 ¶ 25. These are conjunctive requirements, so a failure of either requirement will violate the Gift Clause. The Program fails both.

A. The Program doles out credits and payments without requiring direct, proportionate consideration in return.

This case can most easily be resolved on the adequacy of consideration prong alone, because the film subsidies “so clearly flunk [that] more demanding” test. [*Gilmore*](#), 258 Ariz. at 47 ¶ 39. To survive Gift Clause scrutiny, the allocation of public resources must be supported by adequate consideration. [*Id.*](#) That means

the recipient must give the public in exchange some value that is direct, and objectively proportionate to what it receives.²⁰

To resolve this part of the analysis, a court “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.” [Schires](#), 250 Ariz. at 376 ¶ 14. The court must “compare the public expenditure to what the government receives.” [Turken](#), 223 Ariz. at 348 ¶ 22. And when it does this, the court “should not give deference to the public entity’s assessment of value but should instead identify the *fair market value* of the benefit provided to the entity and then determine proportionality.” [Schires](#), 250 Ariz. at 378 ¶ 23 (emphasis added). Additionally, “anticipated indirect benefits”—such as economic improvement that the government hopes may result from some private undertaking—cannot be included in this analysis. [Id.](#) at 377 ¶ 16. Instead, the comparison “focuses ... on the objective fair market value[s]” on both sides. [Id.](#) at 376 ¶ 14 (citation omitted).

The question this Court must answer is therefore a simple one: **What do Program credits cost the state and its taxpayers, and what is the state *directly***

²⁰ The consideration analysis is designed to ensure that when government buys things, the purchase price doesn’t work as a concealed gift. Paying \$100 for a \$10 hammer, for example, would be grossly disproportionate and would equate to a gift of \$90 to the seller of the hammer.

receiving in return for them, measured by the *objective fair market value* of that return? If the value of what the state receives is disproportionate to what it spends, the arrangement is unlawful because it amounts to a gift, akin to spending \$100 to buy a hammer worth only \$10.

Here, the state provides up to \$125 million annually in subsidies to movie companies, yet it receives *nothing* of comparable fair market value in return. A mere acknowledgment that a film was shot or produced in Arizona carries no measurable value—or, at best, is wildly disproportionate to the public expense—especially given that a film company is *not required* to even release the film in order to obtain the credit. See [ROA.1](#) ¶ 110; [ROA.2](#) ep.269.

The statutes authorizing the Program require the state to provide substantial public subsidies to private filmmakers who “simply promise[] to engage in their respective private businesses.” [Schires](#), 250 Ariz. at 377 ¶ 16. If a film company merely “use[s] a qualified production facility” in Arizona, *e.g.*, [A.R.S. § 41-1517\(B\)\(1\)\(a\)](#), or “primarily” films a movie “at a practical location” in Arizona, *e.g.*, [A.R.S. § 41-1517\(B\)\(1\)\(b\)](#), then the state *must* provide the subsidies. See [A.R.S. §§ 41-1517\(G\)-\(H\)](#), [43-1082\(A\)](#), [43-1165\(A\)](#).

This arrangement is nearly identical to the one the Supreme Court declared unconstitutional in [Schires](#). In that case, the City of Peoria provided a \$2.6 million subsidy to a private university so that the university would locate its campus in

Peoria rather than some other location. 250 Ariz. at 374 ¶¶ 2–4. The City defended that subsidy by arguing that the university would not have located its campus in Peoria but for the public aid, and that locating the campus in Peoria would result in positive economic impact to the city. *Id.* at 377 ¶¶ 16–18. The court rejected both arguments. It held that “[i]t makes no difference that [the university] would not have opened a campus in Peoria ... absent public funding.” And that the supposed “economic impact” from the project “is an ‘anticipated indirect benefit’ that is valueless” under the consideration prong of the Gift Clause. *Id.* ¶¶ 16–17.

The same is true here. The apparent purpose of the Program is so that film production facilities will operate in Arizona, rather than another state.²¹ The idea is that in so doing, the companies may stimulate the economy generally. But neither justification is constitutionally relevant, and neither qualify as consideration under the Gift Clause. *Schires*, 250 Ariz. 377 ¶¶ 16–17. Thus, the purported benefits the Program supposedly offers are “valueless”—and that makes the state subsidies unconstitutional.

²¹ See Ariz. Sess. Laws 2022, Ch. 387, at 28 (see [ROA.2](#) ep.223) (Legislature’s purpose and intent was “to create a competitive motion picture production industry presence and market in this state that will develop a substantial motion picture production industry workforce and encourage major capital investment in qualified production facilities in this state, and ... to provide a program that creates long-term economic benefits to this state, including the development of high-paying employment opportunities for residents of this state”).

This case is more extreme than [Schires](#), in fact, because in that case, the recipient of the subsidy was at least contractually obligated to operate, *see id.* at 374 ¶ 3, whereas here, there is no requirement that subsidy recipients ever actually release or distribute any film created as a result of the Program. *See* [ROA.1](#) ¶ 110; [ROA.2](#) ep.269. The state may end up subsidizing films that no one will ever see—and, naturally, if no one sees the film, no one will see the credits. In such cases, even assuming that a “filmed in” credit can constitute a benefit to the state, that benefit will be nonexistent. And it is settled law that where there are no enforceable controls in place to ensure that a public program actually accomplishes the public good it’s supposed to accomplish, that program is unconstitutional under the Gift Clause. [Schires](#), 250 Ariz. at 378 ¶ 21; *cf.* [Kromko v. Arizona Bd. of Regents](#), 149 Ariz. 319, 321 (1986).²²

But even assuming some films will be released, and that somebody will see a line in the credits, it’s still impossible to quantify the fair market value of this.

Professor Michael Thom of the University of Southern California’s Sol Price

²² In [Kromko](#), the court held that a government program subsidizing the operation of a hospital was constitutional because “its operations are still subject to the control and supervision of public officials,” 149 Ariz. at 321, who would ensure that the hospital was serving the general public. *Accord*, [Gilmore](#), 258 Ariz. at 47 ¶ 38 (government-funded program must be under government’s “direct control and supervision” to ensure public purpose is accomplished). The lack of any statutory requirement that a film receiving subsidies actually be released for public viewing is alone sufficient to doom the Program under the Gift Clause.

School of Public Policy, who is an expert on film subsidy programs and their economic impact, testified below that “it is reasonable to assign **no fair market value** to a filming location acknowledgment” in the end credits of Arizona-based motion picture productions. [ROA.57](#) ep.38 (emphasis added). Dr. Thom explained that any purported advertising or tourism benefits from a film acknowledgment to the state must rest on a string of speculative assumptions. Namely, a viewer would have to observe the acknowledgment, understand its meaning, and plan travel to the state that he or she would not have otherwise taken in order for the state to see *any* benefit from such an acknowledgment. [Id.](#) ep.37. What’s more, a film produced in Arizona must actually have an Arizona-based setting (as opposed to being filmed in-state but set elsewhere). As a result, “[a]ny induced tourism ... is no more than a marginal increase over what would transpire without an acknowledgment, which is insufficient to justify the program’s cost.” [Id.](#) ep.38.

Additionally, the statutory requirement to “maintain the motion picture production company’s production labor positions in this state,” [A.R.S. § 41-1517\(B\)](#), carries no fair market value. See [ROA.57](#) ep.38–39. “Economic development,” including potential private job creation or “stimulus” to the local economy, do not count as consideration for Gift Clause purposes, because they are (a) indirect rather than direct public benefits, (b) speculative and unmeasurable,

and (c) not actually mandated by an enforceable contract. [Schires](#), 250 Ariz. at 376–77 ¶¶ 15–17. In short, hoped-for economic improvement is not enough.²³

Neither is anticipated tax revenue from hoped-for economic improvement, because the obligation to pay taxes is a pre-existing duty, and therefore a promise by the recipient of public funds to pay taxes does not count as consideration for purposes of the Gift Clause test. [Id.](#) at 377 ¶ 18; [Turken](#), 223 Ariz. at 350 ¶ 38.

Simply put, by *any* measure, the subsidies that companies receive from the Program are grossly disproportionate to the indirect and speculative “benefits” that they purportedly provide to taxpayers in exchange. This means the Program as a whole, and the specific subsidies challenged here, are unconstitutional.

B. The Program’s credits and payments serve no cognizable public purpose because the state maintains inadequate control or supervision over how the funds are spent.

Not only does the Gift Clause require that the government get something back for its payments (or its elimination of liabilities) that is of proportionate value, but also the thing the government is paying for must actually serve a public, rather than a private benefit. [Turken](#), 223 Ariz. at 347–48 ¶¶ 19–20 (“Public funds are to be expended only for ‘public purposes’ and cannot be used to foster or

²³ These hopes are misguided, anyway. Professor Thom, citing various peer-reviewed studies, testifies that “motion picture industry incentives do not create a significant number of jobs (if any),” and that, “unequivocal[ly,] ... tax incentives for the motion picture industry are revenue-negative.” [ROA.57](#) ep.39. *See also* [ROA.1](#) ¶¶ 60–61; [ROA.2](#) ep. 225–27, 229–34.

promote the purely private or personal interests of any individual.” (citation omitted, modifications adopted)); *see also* [Proctor v. Hunt](#), 43 Ariz. 198, 201 (1934) (“It is, of course, axiomatic that money raised by public taxation is to be collected for public purposes only, and can only legally be spent for such purposes and not for the private or personal benefit of any individual”).

In other words, the Gift Clause expressly forbids the use of public funds “to foster or promote the purely private or personal interests of any individual.” [Walled Lake Door](#), 107 Ariz. at 549. The government may not subsidize private commercial undertakings, such as, for example, “assisting a company to embark in the manufacture of linen fabrics.” [City of Tombstone v. Macia](#), 30 Ariz. 218, 223 (1926).

Although courts defer to some degree to the government’s assertion that its expenditures (or its elimination of liabilities) serve a public purpose, that deference is limited, because “determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary.” [Turken](#), 223 Ariz. at 346 ¶ 14.

One “essential criterion in determining [a] public purpose” is whether the recipient of the public benefit is under the “direct control and supervision” of the government, to ensure that qualitatively *public* purposes actually are being accomplished with those funds. [Gilmore](#), 258 Ariz. at 47 ¶ 38; [Kromko](#), 149 Ariz. at 321. But as noted earlier, there are no such controls here.

Under the Program, the state relinquishes control and supervision over the allocation of public funds after they are transferred to private film companies. Once a company meets the (meager) criteria to qualify for a subsidy, the state *must* provide it, and the state then has no say *whatsoever* as to how those funds will be used. [A.R.S. § 41-1517\(G\)–\(H\)](#) (the ACA “*shall* issue” preapproval letters to qualified applicants and “*shall* provide” post-approval to companies that have met the eligibility requirements (emphasis added)); *id.* [§§ 43-1082\(A\), -1165\(A\)](#) (ADOR “*shall*” determine the credit amount according to the statutory formulae (emphasis added)).

The consequence is that film companies can use these public resources²⁴ to add to their bottom lines without serving *any* public function. The companies can use these taxpayer resources for private profit, to pay employee bonuses, or in any other way the company sees fit. Indeed, subsidy recipients are not even obligated to release a film. True, the ACA administers the pre- and post-approval processes, and ADOR reviews tax filings for compliance, but those duties are ministerial. Once an applicant demonstrates compliance with the statutory criteria—which

²⁴ To emphasize: not only do recipients receive a reduction of taxes already owed, but if the credit is of greater amount than the taxes owed, the state sends the recipient a check for the difference—a direct payment of public money. “Refundable” is therefore something of a misnomer. Qualifying production companies can receive payments from the state *even if they have never paid a dime in state income taxes*. See [A.R.S. §§ 43-1082\(F\), -1165\(F\)](#) (“...or if there are no state income taxes due ...”).

generally means the company is merely promising to do what it already does by making films²⁵—neither the ACA nor ADOR have discretion to deny the applicant a subsidy. As a result, there is simply *no* control or supervision over the allocation of taxpayer resources to ensure that a public purpose will be accomplished.

Thus, the Program expends millions of dollars in taxpayer funds with no government control or supervision over how those funds are spent. That is not adequate control or supervision under the public purpose prong of the Gift Clause test.

Because the state exercises no control or supervision over the use of tax credit monies, including refundable payments, the Program does not serve a public purpose. It violates the Gift Clause for this reason as well.

Of course, the production of for-profit entertainment movies by private companies is simply not a public purpose. It’s a “purely private or personal interest[.]” [*Walled Lake Door*](#), 107 Ariz. at 549. The production of films for profit is a major private industry, like the manufacture of linen fabric, [*Macia*](#), 30 Ariz. at 222–23, is a private enterprise, and not a public purpose. Nothing in the statute requires that the films produced with the subsidies be instructional or educational

²⁵ In [*Schires*](#), the Supreme Court explained that when subsidized parties “simply promise[] to engage in their respective private businesses” or “to invest in their own businesses,” they are “provid[ing] no bargained-for direct benefit” to the public body, and such “obligations” therefore don’t count as consideration under the Gift Clause. 250 Ariz. at 377–78 ¶¶ 16, 20.

videos, or films for government use, or for purposes of informing the public—or even that the movies actually be released for people to see. The Program is simply a subsidy to private, for-profit companies.

III. The trial court erred in concluding that Taxpayers did not adequately plead their Gift Clause claims.

Each of Taxpayers’ claims easily satisfy Arizona’s pleading requirements. *See generally* [Cullen v. Auto-Owners Ins. Co.](#), 218 Ariz. 417, 419 ¶¶ 6–7 (2008); [Ariz. R. Civ. P. 8\(f\)](#) (“Pleadings must be construed so as to do justice.”). The court below erred in concluding otherwise.

A. Taxpayers adequately pleaded their facial challenge, whether a film company receives a refund or not.

The superior court misconstrued Taxpayers’ facial challenge when it concluded that “Plaintiffs do not claim that the credits offered through the Program will always result in a refund, so their facial challenge must fail.” [ROA.77](#) ep.6. That misunderstands the nature of Taxpayers’ claim. Taxpayers allege, and argued below, that Program credits—whether refundable or not—*always* violate *both* prongs of the Gift Clause analysis.

The reason is straightforward. The statute mandates the application of a tax credit whenever a film company satisfies the statutory criteria, which are exceptionally permissive. For example, if a company merely “use[s] a qualified production facility” in Arizona, [A.R.S. § 41-1517\(B\)\(1\)\(a\)](#), or “primarily” films a

movie “at a practical location” in Arizona, [*id.* § 41-1517\(B\)\(1\)\(b\)](#), the State must provide the subsidy. See [*id.* §§ 41-1517\(G\)-\(H\)](#), [43-1082\(A\)](#), [43-1165\(A\)](#).

Defendants have no discretion to deny or limit the credits once those statutory conditions are satisfied.

Consistent with that structure, Taxpayers allege that the Program will always fail the consideration prong of the Gift Clause. [ROA.1](#) ¶¶ 137–43. If a film company uses an Arizona production facility, or films a movie primarily in Arizona, the company receives the subsidy. The *only* “consideration” the statute requires is that the film acknowledge it was shot or produced in Arizona.

Taxpayers allege that this acknowledgment is “valueless under the consideration prong of the Gift Clause,” [*Id.*](#) ¶ 140, or at a minimum, that value is “grossly disproportionate to any tax credit under the program.” [*Id.*](#) ¶ 141 (emphasis added)²⁶—and that allegation must be accepted as true at this stage.

Taxpayers also allege that the Program “expends public resources in the form of refundable tax credits to private individuals and corporations for personal and private interests.” [ROA.1](#) ¶ 130. They further allege that neither ACA nor ADOR has discretion to deny credits when statutory eligibility requirements are

²⁶ Because the un rebutted evidence shows that these film acknowledgments have “no fair market value,” [ROA.57](#) ep.38, there can never be a circumstance in which the consideration received by the public is proportionate to the subsidy provided—regardless of whether the credit is refundable or whether the subsidy is relatively small.

met. [*Id.*](#) ¶¶ 130–31. And because the State exercises no meaningful control or supervision over the funds awarded to Program beneficiaries, Taxpayers allege that the public-purpose prong of the Gift Clause is always violated. [*Id.*](#) ¶¶ 133–34. These allegations alone are sufficient for the facial challenge to survive a [Rule 12\(b\)\(6\)](#) motion.

The superior court’s error appears to stem from its mistaken view that [*Kotterman*](#) stands for the proposition that tax credits are categorically exempt from Gift Clause scrutiny. See [ROA.77](#) ep.6. But [*Kotterman*](#) does not sweep so broadly, for reasons explained above. Even if we take [*Kotterman*](#)’s Gift Clause holding out of context, and read it at its broadest possible level, it would still only establish that tax credits *may* survive Gift Clause scrutiny—not that they are *immune* from it.

Actually, [*Kotterman*](#), far from concluding that tax credits are qualitatively immune from the Gift Clause, actually *applied* the Gift Clause framework to the nonrefundable tax credits at issue there, analyzing the program under the constitutional text and relevant precedent. 193 Ariz. at 288 ¶¶ 51–52. And, as mentioned earlier, many other Gift Clause cases confirm that the Clause applies to a wide range of government benefits, including tax refunds, [Maricopa County](#), *supra*; [Pinalco](#), *supra*, and to government actions that impose *no* direct monetary cost on the public treasury. [Neptune Swimming Found.](#), 256 Ariz. at 560 ¶ 28 (2024).

The Program therefore cannot evade constitutional scrutiny just because it operates through tax credits. The Gift Clause applies, and Taxpayers have adequately alleged that the statutes establishing the Program facially violate that provision.

B. Taxpayers adequately pleaded their as-applied challenges to MoPic-2024-004 and MoPic 2023-008.

The trial court also erred in concluding that Taxpayers failed to adequately plead their as-applied challenges to MoPic-2024-004 (a pre-approved credit) and MoPic-2023-008 (a post-approved credit).

When reviewing an as-applied challenge, courts must examine the specific facts and circumstances to determine whether it is unconstitutional as applied to the plaintiffs. See [*Center for Arizona Policy, Inc. v. Arizona Sec’y of State*](#), 258 Ariz. 570, 586 ¶ 49 (App. 2024).

The court below dismissed Taxpayers’ as-applied challenges in part on the mistaken premise that the Complaint doesn’t allege the challenged credits will result in refunds to the specific film production companies claiming them. [ROA.77](#) ep.6–7. But a refund is not the only way the credits may violate the Gift Clause. The constitutionality of the credits must be evaluated in light of the surrounding facts and circumstances.

If the credits do not serve a public purpose, the Gift Clause is violated. The Complaint alleges that both credits are “primarily for the personal or private

purposes of the recipient.” [ROA.1](#) ¶¶ 151, 156. The Complaint also incorporates the factual allegations that the State fails to maintain adequate control or supervision over Program funds. *See supra*; [ROA.1](#) ¶¶ 131–34. Those allegations are incorporated by reference into both as-applied claims. *Id.* ¶¶ 148, 154.

The Complaint likewise adequately alleges that the challenged credits fail the consideration prong of the Gift Clause. Taxpayers allege that the only anticipated “direct” benefit—film credit acknowledgements—and any purported indirect benefits “are objectively valueless or of *de minimis* or unquantifiable fair market value,” while the value of the tax credits is readily quantifiable. *Id.* ¶¶ 152–53, 157–58. The pleading specifically alleges that “[t]he \$394,113 provided by Arizona taxpayers under MoPic-2023-008” and “[t]he \$1,220,624 provided by Arizona taxpayers under MoPic-2024-004”²⁷ are “grossly disproportionate to any

²⁷ The trial court also appears to have dismissed the as-applied challenge to MoPic-2024-004—the pre-approved credit—for lack of jurisdiction under [Rule 12\(b\)\(1\)](#), based on a perceived lack of ripeness. *See ROA.77* ep.6–7. But Appellees did not argue ripeness below. Instead, they argued that Taxpayers lacked taxpayer standing, [ROA.42](#) at 12–14—a position squarely foreclosed by longstanding Arizona precedent. *See Ethington v. Wright*, 66 Ariz. 382, 386 (1948); *Dail v. City of Phoenix*, 128 Ariz. 199, 202 (App. 1980); *Secrist v. Diedrich*, 6 Ariz. App. 102, 104 (1967); *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 433 (App. 1979); *see also ROA.47* ep.14–17.

It is true that standing and ripeness are related doctrines. But ripeness does not require a person to “await the consummation of threatened injury.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). And under Arizona law, a case is ripe when “there is an actual controversy between the parties.” *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280 ¶ 36 (2019).

direct benefits received or to be received by the public in exchange for the refundable tax credit.” [Id.](#) ¶¶ 153, 158.

These allegations are not merely conclusory. *See, e.g., Coleman*, 230 Ariz. at 356 ¶ 9. They are grounded in provable facts, including the value of the credits (what the public gives up), the objective fair market value—or lack thereof—of the alleged benefits (what the public receives in return), and the structure and purpose of the Program’s subsidies.

Nothing in the law requires Taxpayers to show *which particular companies* will receive subsidies, especially at the pre-discovery stage. All that the rules require is that the Complaint “contain a ‘short and plain statement of the claim showing that the pleader is entitled to relief’”—a statement sufficient to “‘give the opponent *fair notice* of the nature and basis of the claim and indicate *generally* the type of litigation involved.’” [Cullen](#), 218 Ariz. at 419 ¶ 6 (citation omitted, emphasis added). One reason that’s the rule is precisely for situations like this—

That standard is plainly satisfied here. Arizona courts have long held that taxpayers have standing to challenge even the *threat* of an unconstitutional expenditure of public funds. *See Ethington*, 66 Ariz. at 386–87; *Secrist*, 6 Ariz. App. at 104. Because the threatened expenditure of public resources is itself sufficient to confer taxpayer standing, it likewise establishes the existence of a justiciable controversy. Accordingly, the as-applied challenge to the pre-approved credit *is* ripe for judicial review, and dismissal under [Rule 12\(b\)\(1\)](#) was error.

where it is impossible for a plaintiff to know all the details prior to discovery.²⁸

Here, due to the Program’s statutory confidentiality provisions ([A.R.S. § 41-1517\(J\)](#)), Taxpayers could not possibly have known when they filed the Complaint whether the specific credits would ultimately result in refunds. Indeed, that remains unknown today. As a result, Taxpayers and their counsel could not certify, consistent with their obligations under [Ariz. R. Civ. P. 11\(b\)](#), that refunds were likely to occur in *those specific instances*, or that evidentiary support for such refunds would likely emerge. But they are not required to do that.

What Taxpayers could allege and did allege—based on knowledge, information, and belief formed after reasonable inquiry—is that the Program as a whole, and the two challenged credits in particular, violate the Gift Clause because they lack a public purpose and are not structured to produce proportionate consideration. The Complaint and its sixteen exhibits more than suffice to provide “fair notice of the nature and basis of the claim[s].” [Cullen](#), 218 Ariz. at 419 ¶ 6 (citation omitted). They also show that Taxpayers would be entitled to relief if the alleged facts prove true. See [Ariz. R. Civ. P. 8\(a\)\(2\)](#).

Nor can the Gift Clause be evaded simply by withholding subsidy information from the public. The Supreme Court has made clear that the

²⁸ That plaintiffs must have an opportunity to substantiate well-pleaded allegations through discovery is one reason [Rule 12\(b\)\(6\)](#) dismissals are disfavored under Arizona law. See, e.g., [State ex rel. Corbin v. Pickrell](#), 136 Ariz. 589, 594 (1983).

government may not avoid Gift Clause scrutiny “by providing insufficient detail to permit valuation.” See [Schires](#), 250 Ariz. at 378 ¶ 21. Yet that’s precisely the effect of the statute’s confidentiality provisions here.

Limited discovery regarding the identity of the credit claimants, the amounts of the credits, and whether refunds will issue is therefore appropriate. By dismissing the claims before Taxpayers could obtain information relevant to their well-pleaded allegations, the trial court committed reversible error.

IV. The Court should enjoin Defendants from providing credits under the Program.

In addition to declaratory relief under [A.R.S. § 12-1832](#), Taxpayers are also entitled to an injunction against the Program because: (1) they prevail on the merits; (2) damages are inadequate; (3) the balance of hardships tips in their favor; and (4) public policy favors them. [Brown v. City of Phoenix](#), 258 Ariz. 302, 308 ¶ 17 (App. 2024).

For reasons given above, the subsidies provided under the Program violate the Gift Clause. Taxpayers should therefore prevail on the merits of their central claims.

Taxpayers will also be irreparably harmed if ADOR is permitted to process credits and issue the subsidies under the Program. That’s because Taxpayers cannot be compensated at law for violations of their constitutional rights and duties. See [Elrod v. Burns](#), 427 U.S. 347, 373 (1976) (the deprivation of a constitutional right

“unquestionably constitutes irreparable injury”); [*Am. Trucking Ass’n v. City of L.A.*](#), 559 F.3d 1046, 1059 (9th Cir. 2009) (“[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.” (citation omitted)); [*Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*](#), 392 U.S. 236, 241 n.5 (1968) (officials were injured by being forced “to choose between violating their oath [of office] and ... refus[ing] to comply with [the challenged law].”). Because the Program and its expenditures violate the Constitution, Taxpayers face irreparable injury absent an injunction.

What’s more, once the individual credits are processed, Taxpayers have no mechanism by which they can compel private parties to *return* the money to replenish the public coffers should completed expenditures later be found unconstitutional. Thus, Taxpayers’ constitutional claims with respect to the individual credits will be effectively extinguished once the subsidies are issued.

When a government entity is a party to a lawsuit, it’s appropriate to “consider the balance of equities and the public interest together.” [*California v. Azar*](#), 911 F.3d 558, 581 (9th Cir. 2018).²⁹ Although it is not necessary for this Court to address these factors (because Taxpayers have a strong likelihood of

²⁹ See [*Flynn v. Campbell*](#), 243 Ariz. 76, 80 ¶ 9 (2017) (“Although a federal court’s interpretation of a federal procedural rule is ‘not binding in the construction of our rule,’ we recognize its instructive and persuasive value and that ‘uniformity in interpretation of our rules and the federal rules is highly desirable.’” (quoting [*Orme Sch. v. Reeves*](#), 166 Ariz. 301, 304 (1990))).

success on the merits), any violation of the Constitution is also a hardship that tips the balance in favor of Taxpayers, and enforcing the Constitution is always in the public interest. *See, e.g., Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” (cleaned up)).

Appellees, by contrast, face no significant hardship by not processing Program credits. ADOR voluntarily refrained from doing so for months before reversing course. *See ROA.57* ep.2–3; *ROA.60* ep.1. Thus, the balance of equities favors Taxpayers. Their rights under the Gift Clause are being violated, and they face the risk of greater injury to the public funds in which they have an equitable interest³⁰ if ADOR proceeds with its plans to hand out their money to private recipients. Indeed, their as-applied claims could well be extinguished should ADOR process those credits and issue payments.

Enjoining the Program is also in the public interest. The public policy of this state is expressed first and foremost in its constitution, which prohibits subsidies and other gifts of public resources. *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 412 ¶ 8 (2014) (“We discern public policy from our constitution.”).

³⁰ Taxpayers have “equitable ownership of [public] funds,” and “illegal expenditures made or threatened by a public agency” constitute injury to taxpayers which they have standing to enjoin. *Rodgers v. Huckelberry*, 247 Ariz. 426, 429 ¶ 11 (App. 2019) (citations omitted).

Conversely, *failure* to enjoin the Program would incentivize unconstitutional behavior by government entities.

The balance of hardships and the public interest each favor Taxpayers and injunctive relief.

CONCLUSION

The decision below should be *reversed* and the Program enjoined.

NOTICE UNDER RULE 21(A)

Appellant requests attorney fees and costs pursuant to [A.R.S. §§ 12-341, 12-348\(A\)\(7\), 12-1840](#), and the private attorney general doctrine.

Respectfully submitted this 16th day of March 2026 by:

/s/ Parker Jackson

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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 Plaintiffs-Appellants' Opening Brief appears in proportionally spaced type of 14 points, is double spaced using a Roman Font, and contains 11,617 words, excluding the table of contents and table of authorities.

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