ARIZONA COURT OF APPEALS
DIVISION TWO

DEBORAH HEWITT, *et al.*, Plaintiffs/Appellants, v. BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY, *et al.*, Defendants/Appellees.	No. 2 CA-CV 26-0013 Maricopa County Superior Court No. CV2025-001929

BRIEF OF *AMICUS CURIAE* ARIZONA STATE SENATE PRESIDENT WARREN PETERSEN[1]

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[1] This brief is filed pursuant to A.R.C.A.P. 16(b)(1)(B) because the *amicus* is "an officer . . . of the State of Arizona."

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Pursuant to A.R.S. § 12-1841, Warren Petersen, in his official capacity as the President of the Arizona State Senate, respectfully submits this brief as *amicus curiae* in support of the Appellants. The refundable tax credits—*i.e.*, payments of taxpayer funds—created by the Arizona Motion Picture Production Program, *see* A.R.S. §§ 41-1517, 43-1082, 43-1165 (the "Program"), are a quintessential subsidy; they constitute the direct transfer of public dollars from the State's treasury into the hands of private companies, unconditioned on any reciprocal exchange of value. The Appellants accordingly have stated a valid claim that the Program contravenes Article IX, Section 7 of the Arizona Constitution (the "Gift Clause").

INTRODUCTION

President Petersen concurs with the arguments set forth in the Appellants' briefing, but writes to underscore three specific points.

First, far from derogating the separation of powers, the Court's invalidation of the Program would vindicate it. While President Petersen appreciates the Appellees' purported solicitude for judicial restraint, the Gift Clause embodies a limitation on the elected branches; it subordinates transient political impulses to a transcendent respect for the sanctity of property rights, and the principle that public resources cannot be deployed for private gain.

Second, the Appellees and the trial court largely conflate tax exemptions and tax subsidies, amalgamating all "credits, deductions, and exemptions" into a unitary

concept of "tax policy," which they argue is an exclusively "legislative function." Ans. Br. at 10, 30. But this formulation elides critical economic and constitutional distinctions. When the government merely refrains—by extending an exemption, deduction, or offset—from taxing any or some portion a citizen's private property, the Gift Clause generally is not implicated. A refundable tax credit, by contrast, does not merely leave private property with its owner; it affirmatively transfers public funds to businesses that already have had their tax liability extinguished. Cloaking a handout of public resources in the rhetorical veneer of 'tax relief' does not and cannot alter its intrinsic character as a subsidy. The Appellees' professed aversion to judicial oversight of these expenditures obscures that more insidious dangers lie in allowing semantic sleights to defeat constitutional guarantees.

Third, the trial court predicated its dismissal of Appellants' complaint in part on the notion that "the credits offered through the Program will [not] always result in a refund." Ruling at 6. In addition to misapprehending the nature of a facial constitutional challenge, the trial court's reasoning elides that the Program is, by its design, a liability in the State's ledger. Indeed, the legislative history of an earlier iteration of the bill establishing the Program documented the projected losses its refundable credits would inflict on the state budget. Given the Program's inherent structure as an expenditure of state funds, the Appellants' complaint easily states a viable (and in fact compelling) Gift Clause claim.

INTEREST OF THE *AMICUS CURIAE*

Warren Petersen is the President of the Arizona State Senate. The complaint challenges the constitutionality a state statute, *see* 2022 Ariz. Laws ch. 387, and Arizona law provides that the President of the Senate is "entitled to be heard" and "may file briefs" "[i]n any proceeding in which a state statute . . . is alleged to be unconstitutional." A.R.S. § 12-1841(A), (D).

ARGUMENT

I. Rigorous Enforcement of the Gift Clause Comports With the Separation of Powers

"In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it." *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342 ¶ 5 (1999). Embedded in this statement are the two cardinal axioms of republican government. As the branch bearing a direct representative nexus to the people, the Legislature "may in the exercise of the sovereign powers of the state, enact any law its discretion may dictate." *Roberts v. Spray*, 71 Ariz. 60, 69 (1950). But even that expansive authority is modulated by the Constitution's structural constraints on the elected branches. If a legislative enactment veers outside one of these guardrails, it is the "courts' core constitutional authority and duty to ensure that the Arizona Constitution is given full force and effect." *Ariz. Sch. Bds. Ass'n., Inc. v. State*, 252 Ariz. 219, 225 ¶ 22 (2022); *see also Ariz. Indep. Redistricting*

Comm'n., 229 Ariz. 347, 355 ¶ 35 (2012) (emphasizing that it is the judiciary's "duty to interpret and apply the constitutional limits" and maintain "the delicate balance our constitutional framework requires among the branches of government").

While judicial review may seem superficially in tension with legislative supremacy, these two constitutional pillars support the same ultimate end: the liberty of the individual citizen and the security of his property. "The separation of powers doctrine 'protect[s] one branch against the overreaching of any other branch,' and is 'part of an overall constitutional scheme to protect individual rights.'" *Cook v. State*, 230 Ariz. 185, 187 ¶ 6 (App. 2012) (quoting *State v. Prentiss*, 163 Ariz. 81 (1989)). When a court enforces a stricture on the exercise of government power, it fortifies the structural underpinnings of the democratic process.

The Gift Clause encapsulates this equilibrium between legislative discretion and judicially enforceable rights. Public bodies and officers can claim no title to the land, credit, or other assets of their polity; they merely hold those resources in trust for the ultimate locus of sovereignty in Arizona: the people. *See generally San Carlos Apache Tribe v. Superior Court ex rel. Cnty. of Maricopa*, 193 Ariz. 195, 215 ¶ 52 (1999). While taxation is, of course, the lifeblood of government's existence, it carries with it perilous potentialities for property rights and individual freedom. For that reason, even the Legislature's generally "plenary power over

taxation" is "[s]ubject to constitutional limitations." *Waddell v. 38th St. P'ship*, 173 Ariz. 137, 140 (Tax. Ct. 1992).

To be sure, the policy decisions of whom or what to tax, the amount or rate of such levies, and the purposes for which the resulting revenues should be disbursed are entrusted largely to the Legislature's judgment. But constitutional safeguards, such as the Gift Clause, that forbid abusive enrichments of favored private actors at taxpayers' expense are paramount. The judiciary honors—rather than undermines—the separation of powers by enforcing them. *See, e.g.*, *Ariz. Sch. Bds. Ass'n*, 252 Ariz. at 225 ¶ 22 (invalidating budget bills that the court found did not comply with the Constitution's single-subject and titling provisions, explaining that "[t]he responsibility of determining whether the legislature has followed constitutional mandates that expressly govern its activities is given to the courts—not the legislature"); *Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415, 419–20 ¶ 17 (2014) (holding that dispute over whether Legislature's enactment of alleged new tax complied with constitutional supermajority requirements was justiciable, notwithstanding the potential availability of "alternative political remedies").

In short, while the Appellees are correct that the Legislature possesses expansive latitude to craft tax policy, that leeway ends where the Constitution begins. The Gift Clause lays down an inviolable line: the State may ***never*** "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." If a state outlay—whether denominated a "refundable tax credit" or anything else—traverses that boundary, the Court may and must say so. "When the judiciary fails to interpret and enforce constitutional rights and limits, it shrinks from its central duty and drains the Constitution of its intended meaning." *State v. Maestas*, 244 Ariz. 9, 16, ¶ 30 (2018) (Bolick, J., concurring).

II. Refundable Tax Credits for Film Production Are "Subsidies" Within the Meaning of the Gift Clause

A "refundable tax credit" entitles the recipient to a payment of public funds from the government, independent of and without regard to the recipient's actual tax liability. It is, as a matter of law and common sense, a "subsidy," within the meaning of the Gift Clause.

Skirting past these critically distinctive attributes of refundable tax credits, the Appellees sweep them in with what they characterize as an undifferentiated panoply of tax exemptions, deductions, and offsets. *See* Ans. Br. at 24. Proceeding from that flawed premise, they shrug off the notion that tax code machinations could ever implicate the Gift Clause, declaring that because the state does not own "the future taxable income of its citizenry," the State "gives nothing away by not collecting" these funds. *Id.* at 29. It is, of course, one thing for the State to simply leave money or property in the hands of its original owner. For example, the Supreme Court upheld a non-refundable tax credit that allowed taxpayers to offset up to $500 of

their income tax liability by donating to school tuition organizations. *See Kotterman v. Killian*, 193 Ariz. 273 (1999); *see also* A.R.S. § 43-1089 (1998). Importantly, the credit could only reduce an extant tax liability. Because the State never possessed or had a ripened legal claim to those funds—and the taxpayers still had to part with the funds (by donating to a student tuition organization) to receive the tax break anyway—no "gift" of government resources could have occurred. *See id.* at 621 ¶ 52.

A "refundable tax credit," such as that established by the Program, carries a far different complexion. The appellation itself is something of a misnomer because it implies that the credit merely reduces a pre-existing tax liability. But the hallmark of a "refundable" tax credit is that "it is paid in cash when a tax unit has no . . . income tax liability to offset." Lily L. Batchelder, Fred T. Goldberg, Jr., and Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 33 (2006). Notwithstanding the Appellees' attempt to confound them with tax deductions or exclusions, refundable credits are unique in a key—and, for Gift Clause purposes, dispositive—respect. Whereas a person who has no tax liability to offset "does not obtain any benefit or assistance" from a deduction, a refundable tax credit program—in which any "unused credit [is] paid to the taxpayer"—is "the equivalent of a direct expenditure program." Stanley S. Surrey,

Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 HARV. L. REV. 705, 723–24 (1970).

The normative justifications for refundable tax credits vary. Some defend their supposed capacity to incentivize ostensibly desirable social or economic decisions, as well as their relative ease of administrability. *See* Batchelder, *et al.*, *supra*, at 31–32. But they also carry shrewd political utility. Because the lexicon of "tax credits" is more mellifluous to many voters' ears than the terminology of "handouts," interest groups and their allies devising new subsidies often are tempted to "seek the cloak of the tax code" in "the hope that opponents of a generous social welfare state will not find out what we are doing." Dennis J. Ventry, Jr., *Welfare By Any Other Name: Tax Transfers and the EITC*, 56 AM. U. L. REV. 1261, 1266 (2007).

"[I]n all Gift Clause cases, courts must probe the reality of transaction." *Gilmore v. Gallego*, 258 Ariz. 38, 46 ¶ 34 (2024). And here, cosmetic political nomenclature cannot alter the inescapable fiscal and practical reality that refundable credits represent direct, redistributive expenditures of government funds (*i.e.*, revenues collected from other citizens) to the claimant taxpayer. *See* Ventry, *supra* at 1278 (commenting that, "whether we want to admit it or not," the federal refundable Earned Income Tax Credit "operates as a welfare program in terms of its economic effect," despite being administered through the tax system).

Courts can and should heed this distinction when assessing whether a "tax credit" is a *de facto* transfer of public funds from the government to a private person. Several bankruptcy courts, for example, have held that while non-refundable tax credits do not qualify as "public assistance benefits" (which are usually exempt from the bankruptcy estate), refundable credits—by virtue of their character as direct transfer payments—do. *See, e.g.*, *In re Koch*, 299 B.R. 523, 527 (Bankr. C.D. Ill. 2003); *In re Johnson*, 480 B.R. 305, 315 (Bankr. N.D. Ill. 2012) ("The refundable nature of the Adoption Tax Credit for tax year 2011 is the key factor in this case. A refundable tax credit, like a payment, can be refunded to the taxpayer by the Internal Revenue Service. In contrast, a nonrefundable tax credit is a credit that can reduce income tax liability to zero, but any remaining credits are not refunded to the taxpayer." (internal citations omitted)); *accord In re Hardy*, 787 F.3d 1189, 1196 (8th Cir. 2015).[2] The point is that, when assessing the legal status of a given transaction, courts cannot permit tendentious labels to displace objective economic facts.

[2] In marked contrast to the recipients of (for example) the federal Earned Income Tax Credit and similar refundable credits, private motion picture corporations are not susceptible to any plausible characterization as a needy or economically disadvantaged community. *Compare Humphrey v. City of Phoenix*, 55 Ariz. 374, 387 (1940) (finding slum clearance project to benefit low income residents constitutional).

The import of the Appellees' position—*i.e.*, that the government can bypass the Gift Clause merely by funneling a direct payment through an individual or company's tax return—would exalt form over substance and enervate the Gift Clause as a meaningful check on government profligacy. *See Gillmore*, 258 Ariz. at 44 ¶ 26 (emphasizing that, when assessing a program or transaction for compliance with the Gift Clause, the court "should overlook neither the forest nor the trees").

Viewing this case through the prism of recent precedents illuminates the danger. The Supreme Court in *Turken v. Gordon* held that the City of Phoenix violated the Gift Clause when it promised a developer up to $97.4 million in city funds in return for constructing parking facilities on private property. 223 Ariz. 342, 351 ¶ 42 (2010). Under the Appellees' reasoning, however, the State could have consummated an economically identical transaction but evaded the Gift Clause simply by permitting the developer to claim a "refundable tax credit" equal to $97.4 million (or more) for constructing the same parking spaces. Similarly, the government cannot pay a private university to construct a campus for its own students' use. *Schires v. Carlat*, 250 Ariz. 371 (2021). But if the Appellees' theory of the Gift Clause prevails, it is hard to see what would stop the government from simply restructuring the same windfall as "refundable tax credit."[3] The

[3] Taking the hypothetical a step further, if (as in *Schires*) the beneficiary was already tax exempt, the government could simply impose a nominal new tax, and then

constitutionality of a disbursement of taxpayer funds does not and should not pivot on such artificial distinctions and fiscal optical illusions.

Finally, the trial court's effort to extract from *Kotterman* some purported ratification of refundable tax credits finds little to sustain it. According to the trial court, *Kotterman* regarded as constitutionally irrelevant the possibility that the non-refundable tax credit at issue could be "applied in a way that would result in a 'profit' for individual taxpayers." Ruling at 6. Preliminarily, as the trial court acknowledged, the quote is plucked from a portion of the opinion that is unrelated to the Gift Clause. *Id.* More to the point, the majority opinion was responding to the dissent's suggestion that "an Arizona taxpayer might be able to make a profit by taking both the state tuition credit and a charitable deduction on the ***federal*** return." *Kotterman*, 193 Ariz. at 287 ¶ 48 (emphasis added). In other words, the "profit" in this scenario was not (and could not have been) inherent in the non-refundable Arizona tax credit itself, but rather resulted from its incidental interplay with a federal tax benefit.

For Gift Clause purposes, the whole hypothetical is something of a *non sequitur*. The locus of a Gift Clause claim is loss to Arizona's state or local public treasuries, not "profit" to an individual or business. *See Pimalco, Inc. v. Maricopa*

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extinguish it for politically favored universities by extending a tax credit that is "refundable" up to the amount of the desired payout.

County, 188 Ariz. 550, 559 (App. 1997) (noting that the Gift Clause is not necessarily violated "[e]ven if particular persons or organizations benefit"). A facially constitutional Arizona law (*e.g.*, a non-refundable deduction from taxable income) cannot mutate into a Gift Clause violation by virtue of its relationship to a federal law that independently provides freestanding tax benefits. The question at hand in this case, which the *Kotterman* court never addressed even in *dicta*, is whether a *refundable* tax credit—*i.e.*, Arizona's payment of this State's public funds to a person in excess of that person's actual tax liabilities, without any return consideration—constitutes an unconstitutional subsidy.

In sum, in deciding this appeal, the Court should "keep before [it] two principles, (a) the provisions of the constitution prevail over any legislative action, and (b) what the legislature is prohibited from doing directly it may not do indirectly." *Miners & Merchants Bank v. Bd. of Sup'rs of Cochise Cnty.*, 55 Ariz. 357, 359 (1940). A respect for the coordinate branches does not require the judiciary to indulge semantic and accounting gymnastics. A "refundable tax credit" payable to select private business is—legally, practically, and economically—a subsidy.[4]

[4] A transfer can avoid classification of a "subsidy" under the Gift Clause if the recipient provides adequate bargained-for return consideration. *See Turken*, 223 Ariz. at 348 ¶ 21. The Appellants, however, have adequately pleaded that the largesse conferred by the Program on private film production companies is grossly disproportionate to whatever token consideration they furnish to the State in return. *See* ROA 1 ¶¶ 135–144.

III. By Its Design, the Program Inflicts Pecuniary Losses on the State

The Appellants pleaded a sufficient facial challenge to the Program because the subsidy it confers is intrinsic to the statute itself and exacts quantifiable pecuniary losses to the State. In dismissing their claim, the trial court asserted that "Plaintiffs do not claim that the credits offered through the Program will always result in a refund." Ruling at 6. At least three flaws, though, afflict that reasoning.

First, as the Appellants have explained, they allege that the credits conferred by the Program "*always* violate *both* prongs of the Gift Clause analysis," Op. Br. at 45, regardless of which film production companies do or do not benefit. Further, Appellants' claim is premised in part on their contention that the credits do not serve any cognizable public purpose. *Id.* at 41–45. As courts have recognized in other constitutional contexts, because an improper purpose is an inherent attribute of a statute, it can engender a valid facial challenge, even if the law is otherwise susceptible to valid applications. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) ("Our Establishment Clause cases involving facial challenges . . . have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose.").

Second, and more fundamentally, the Program's legal and functional character as a subsidy is integrated into the statutory design. The law on its face commits the State to disbursing the subsidy to an eligible applicant, irrespective of

the applicant's actual tax liability. *See* A.R.S. §§ 43-1082(A), 43-1165(A). The Program's status as a fiscal liability was known at the time of its enactment. The vehicle for the Program's ultimate adoption was House Bill 2156 in the Second Regular Session of the Fifty-Fifth Legislature. *See* 2022 Ariz. Laws ch. 387. Earlier in the same session, however, Senate Bill 1708 proposed substantively identical legislation. The Joint Legislative Budget Committee ("JLBC"), which provides research and recommendations "relating to the state budget, revenues and expenditures of the state, [and] future fiscal needs," A.R.S. § 41-1272(A)(1), prepared a fiscal note analyzing S.B. 1708. Although noting the possibility of revenue-generating "ripple effects" in the form of "induced economic impacts,"[5] JLBC concluded that the Program likely would produce "[a] loss of General Fund revenue due to the tax credits." Fiscal Note, SB 1708, Fifty-Fifth Legislature, Second Regular Session (2022), *available at* https://tinyurl.com/e63nwmdd.[6]

The upshot is that the Program is structurally and conceptually an expenditure of state funds. And this liability is not an accounting abstraction, akin to tax receipts foregone because the State "declin[ed] to collect potential revenue from its citizens."

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[5] Even if they are ultimately realized, these "indirect benefits" are not cognizable return consideration for Gift Clause purposes. *See Schires*, 250 Ariz. at 377 ¶¶ 17–18.

[6] The Court can and should take judicial notice of the JLBC's fiscal note. *See Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012) (taking judicial notice of JLBC publication).

Kotterman, 193 Ariz. at 288 ¶ 50. Rather, it entails the direct outlay of General Fund monies that are in the State's custody and control and that otherwise would be available for public uses. The euphemistic nomenclature of "tax credits" cannot camouflage "the reality of the transaction." *Gilmore*, 258 Ariz. at 46 ¶ 34. The Program is innately, functionally, and fiscally a subsidy.

Finally, even if unresolved factual questions concerning particular recipients of the Program's benefits and the credits' relationship to these recipients' preexisting tax liabilities were material, the trial court erred in dismissing the complaint. The Appellants' well-pleaded allegations that the Program causes state funds to be paid to private persons without any return consideration and not in pursuance of a public purpose encapsulate a valid Gift Clause claim. Factual unknowns or future contingencies concerning a law's specific fiscal effects do not foreclose a justiciable controversy. *See Fann v. State*, 251 Ariz. 425 (2021). There, taxpayers challenged a newly enacted voter-approved statute that defined certain new tax revenues as "grants," and hence exempt from the Constitution's budget cap on school districts' spending. The plaintiffs argued that the putative exemption was unconstitutional and that the new revenues would cause school districts' expenditures to exceed the constitutional ceiling. The law's defenders countered that "the factual record is not sufficiently developed to determine definitively whether spending [the new] revenues will run afoul of the" constitutional spending limit and that, depending on

the annual revenues generated, "the Act may be unconstitutional in some years, it could be constitutional in others." *Id.* at 432, 438, ¶¶ 13, 43. These variables did not, however, preclude the court from reaching and deciding the plaintiffs' constitutional claims, which included a facial challenge, even though it also remanded for additional fact-finding. *Id.* at 440–41 ¶ 54.

The point is that a taxpayer plaintiff states a valid claim when he alleges that an enacted and extant statute on its face authorizes or directs subsidies of public funds to private persons in violation of the Gift Clause. *See generally Ethington v. Wright*, 66 Ariz. 382, 387 (1948) (affirming "the right of a taxpayer to question expenditure of state funds on any grounds of illegality or unconstitutionality of the enactment calling for their expenditure"). The Appellants' complaint in this case easily clears "the minimal requirements of Arizona's notice pleading standard." *Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 514 ¶ 15 (2021). The trial court erred in dismissing it.

CONCLUSION

The Court should reverse the trial court's judgment.

RESPECTFULLY SUBMITTED this 6th day of August, 2026.

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ARIZONA COURT OF APPEALS
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The foregoing *Brief of Amicus Curiae Arizona State Senate President Warren Petersen* was electronically filed via the Court's electronic filing system on this 6th day of August, 2026 with:

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ARIZONA COURT OF APPEALS
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DEBORAH HEWITT, *et al.*, Plaintiffs/Appellants, v. BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY, *et al.*, Defendants/Appellees.	No. 2 CA-CV 26-0013 Maricopa County Superior Court No. CV2025-001929 **CERTIFICATE OF COMPLIANCE**

1. This Certificate of Compliance concerns an *amicus curiae* brief, and is submitted under Rule 14(a)(4) and Rule 16.

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,867 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14(a)(4).

DATED this 6th day of August, 2026.

/s/Thomas Basile
Thomas Basile