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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

HOWARD MECHANIC, an Arizona Resident; and RALPH HESS, an Arizona Resident, Plaintiffs, vs. STATE OF ARIZONA, a body politic; KIMBERLY YEE, in her official capacity as Arizona State Treasurer, Defendants, and PRESCOTT FRONTIER DAYS, INC., Intervenor-Defendant.	Case No. CV2023-009364 **BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Assigned to The Honorable Scott Blaney)

INTRODUCTION

This revised amicus brief focuses on Plaintiffs' Gift Clause cause of action as articulated in their current motion for summary judgment, as well as the Intervenor-Defendant's current motion for summary judgment, both filed September 25, 2024.[1]

Both motions turn on the same question: does the appropriation challenged here mandate that the Treasurer distribute the funds, no strings attached?—in which case Plaintiffs' case is

[1] Amicus's previously filed brief also addressed the State's Motion for Judgment on the Pleadings. Since no new briefing was ordered regarding that motion, it is not directly addressed here.

ripe, and this Court can proceed to decide the Gift Clause cause of action—or, does the relevant language of SB 1720[2] instead assume, as Defendants claim, that the Arizona State Treasurer's Office (ASTO) will attach, so to speak, its *own* strings to those funds?—conditions that might ensure compliance with the Gift Clause—in which case the Court should wait to see what strings get attached.

The answer is that ASTO does *not* have legal authority to impose conditions on the appropriation. Defendants' argument to the contrary would require the Court to construe SB 1720 § 118 as delegating authority to the Treasurer. But courts presume *against* such delegations; instead, the legislature must, when delegating such authority, do so in "clear, evident, and unmistakable" language. *Phoenix Ry. Co. of Ariz. v. Lount*, 21 Ariz. 289, 299 (1920). No such language exists in SB 1720 § 118(2). It confers no authority on the Treasurer (or anyone else) to decide the circumstances in which it may exercise discretion with respect to distributing the money—let alone to decide what the recipient of the funds must give the state in return (which would be quite a remarkably broad discretion, indeed).

What's more, despite the Defendant State of Arizona's attempt to make it seem like ASTO routinely attaches regulatory strings to grants or legislative appropriations, the facts appear to be otherwise. *See* Plaintiffs' Controverting Statement of Facts ¶¶ 54 –61, 68–78. Defendants' argument rests entirely on a chain of inferences—inferences that clash both with the actual text of the statutes on which they rely and with general principles of Arizona law.

Whatever the extent of the Court's obligation to presume the constitutionality of a statute, the Court is not required, or even permitted, to manufacture delegation of extensive discretionary authority to rescue a statute from constitutional infirmities. *Cf. Qasimyar v. Maricopa Cnty*., 250 Ariz. 580, 588 ¶ 26 (App. 2021) (courts should not adopt construction that "add[s] words to the statute that are not there" (citation & internal marks omitted)). Consequently, the basic premise of the Defendants' position—that the Treasurer can take action to remedy the constitutional defects in the Legislature's appropriation—fails. Intervenor-Defendant's motion should be denied, and Plaintiffs' motion should instead be granted.

[2] Defendants refer to this as the "Feed Bill."

ARGUMENT

Defendants' arguments can be stated syllogistically: a) if the state imposes sufficient conditions on an expenditure, that expenditure can satisfy the Gift Clause; b) although SB 1720 § 118(2) imposes no conditions on the appropriation, the *Treasurer* might do so; c) therefore, it's possible that the appropriation will satisfy the Gift Clause.

This argument fails because the second premise presumes a delegation of authority to ASTO to establish the criteria for the distribution of the money—but no such delegation appears in SB 1720 § 118 or any other law, either explicitly or implicitly.

I. The Court cannot presume that the Legislature delegated power to the Treasurer to place novel conditions on the appropriation, and when the Legislature does delegate, it must provide clear standards.

Courts in Arizona and elsewhere presume against interpreting a statute as a delegation of authority to an administrative agency. Instead, the party claiming such delegation exists must show clear legislative language to that effect. *See, e.g., Roberts v. State*, 253 Ariz. 259, 268 ¶ 30 (2022) ("[T]he Supreme Court limits the exercise of legislative power by the executive branch on major policy questions to instances where a statute 'plainly authorizes' executive agency action." (citation omitted)); *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 113 ¶ 59 (App. 2004) (courts "will not infer the grant of authority" from the legislature to an agency "beyond the 'clear letter of the statute.'" (citation omitted)); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (requiring "a clear mandate" for delegation); *United States v. Williams*, 691 F. Supp. 36, 46 (M.D. Tenn. 1988) ("Congress must provide a clear statement that it is delegating the power to regulate.").

Nothing in SB 1720 provides any clear or plain delegation of authority to ASTO to establish criteria for the expenditures in Section 118. It simply says the amounts "are appropriated … for the following," and directs the Treasurer "to distribute" the funds to the specified recipients.

Defendants are therefore inferring that SB 1720 either leaves open or gives the Treasurer authority to fashion conditions or regulations for the distribution and use of the funds. Yet they

point to nothing in SB 1720 itself that says so. Instead, they point to a different statute: A.R.S. § 41-2702.[3] But Section 41-2702 is far too broadly worded to justify such an inference.

That Section provides how "grant[s]"[4] shall be awarded; it provides, first, that state governmental units must create a "request for grant applications"—essentially a public announcement that proclaims that the governmental unit is willing to consider applications for grants—and, second, that this public announcement must include certain information for the benefit of potential applicants, such as "the total amount of available funds" and where those funds come from; whether only one grant is available or whether multiple grants are available; the due date; and—relevant here—"[t]he criteria or factors under which applications will be evaluated for an award and the relative importance of each criteria [*sic*] or factor." A.R.S. § 41-2702(B)(6).

It is this subsection—*and this subsection alone*—on which the Defendants build their *entire* argument: that ASTO can establish the "factors" which will be "evaluated" before, say, a nonprofit organization that operates a rodeo at the Yavapai County fairgrounds may be issued the $15.3 million.

This argument fails for three reasons.

First, it's a commonplace rule that "legislatures do not 'hide elephants in mouseholes.'" *Carter Oil Co., Inc. v. Ariz. Dep't of Revenue*, 248 Ariz. 339, 345 ¶ 19 (App. 2020) (citation omitted). If the Legislature actually intended Section 118 of SB 1720 to create a new *grant program*, administered by the Treasurer, whereby ASTO can set criteria by which it will decide which applicants are constitutionally eligible for $15.3 million and declare what consideration an applicant must provide in return, the Legislature would have done so "notoriously … not surreptitiously." *Id.* (citation omitted). It would at least have said so. Instead, SB 1720 merely says that the Treasurer must "distribute" the money "to a nonprofit volunteer organization that

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[3] *See* State's Opposing Statement of Facts at 4:9–10. *See also id.* at 3:22; 5:16, 23; 8:8 (referencing A.R.S. § 41-2701 *et seq.*).

[4] A "grant" is defined in A.R.S. § 41-2701 as "the furnishing of financial or other assistance, including state funds or federal grant funds, by any state governmental unit to any person for the purpose of supporting or stimulating educational, cultural, social or economic quality of life."

operates a rodeo at the Yavapai county fairgrounds." A far more straightforward reading of this language is that it simply commands the disbursement of money to the entity described.

In *Roberts, supra*, the Supreme Court rejected a notably similar argument: that the Legislature had implicitly authorized the Arizona Department of Administration ("ADOA") to incorporate federal labor standards into Arizona law by regulation. The statute at issue there provided for the amount of compensation to be awarded "if by the person's job classification overtime compensation is mandated by federal law." 253 Ariz. at 266 ¶ 19 (quoting A.R.S. § 23-392(A)(1)). ADOA argued that this phrase "*implicitly*" empowered it to adopt federal statutory and regulatory standards, *id.* ¶ 20, but the court found this inference unwarrantable because it was "highly unlikely that the legislature would choose to bestow sweeping regulatory authority upon an agency in such an oblique and indirect fashion." *Id*. at 269 ¶ 37.[5]

Here, Defendants' inference is even less plausible, because SB 1720 § 118 contains *no* language, not even oblique or indirect language, that empowers the Treasurer to establish a grant process for the receipt of the millions of dollars in question. On the contrary, it directs the Treasurer "to distribute" the funds "to" the entities referenced—that's all. It does not give the Treasurer (or any other executive branch official or agency) power to decide *whether* to make the awards, or to refuse to make the awards, or to impose *conditions* on the awards.

Second, Defendants' inference isn't just implausible given the language of the statutes—and thus far less than Defendants must show, given the presumption against delegation—but it also conflicts with the requirements of Arizona delegation law. When the legislature does delegate authority to an agency, it must also "surround[]" that authority with "standards, limitations, and policies" to limit the agency's discretion. *Hernandez v. Frohmiller*, 68 Ariz. 242,

[5] Indeed, the Legislature has been scrupulous in guarding its lawmaking authority when delegating any power to an administrative agency. *See, e.g.,* A.R.S. § 41-1030(D) ("An agency shall not: 1. Make a rule under a specific grant of rulemaking authority that exceeds the subject matter areas listed in the specific statute authorizing the rule. 2. Make a rule under a general grant of rulemaking authority to supplement a more specific grant of rulemaking authority. 3. Make a rule that is not specifically authorized by statute."). To infer a broad delegation here, especially outside the formal rulemaking process, would be illogical given the other limited statutory authorizations for agency action.

255 (1949). These standards need not be a "specific formula," *Ethridge v. Ariz. State Bd. of Nursing*, 165 Ariz. 97, 104–05 (App.1989), but they must be sufficiently definite to "guide [the agency's] action." *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114 (1953). Yet there are, of course, *no* such guides in Section 118 of SB 1720—no standards, limitations, or policies whatever. It cannot, therefore, be presumed that the statute delegates authority to the Treasurer.

Contrast that with other sections of SB 1720, which show that when the Legislature *did* intend to delegate authority to an agency to create a grant program, it knew how to do so—and it used the appropriate express language that limits administrative discretion. For example, Section 1 includes a provision relating to homelessness. It directs the Department of Housing to use "the monies appropriated for the homeless services grant pilot to establish a grant program for cities, towns and counties in this state for homeless services programs designed to reduce homelessness," and goes on to guide the Department in how to set criteria for grants: "Eligible programs must allow homeless individuals to be compensated for daily work, offer a daily remuneration rate and help participants to access support services. Participating cities, towns and counties must provide a dollar-for-dollar local match …" etc. Section 77, too, provides that "[o]f the amount appropriated in the law enforcement retention initiatives line item, $1,000,000 shall be used for a law enforcement recruitment and retention grant program," and goes on to explain in detail the conditions on which grants may be provided: "Resource providers must have coaches with backgrounds in law enforcement who have been trained in coaching with the best practices for law enforcement coaching from current or former federal bureau of investigation national academy instructors and must…" etc.

But *no* such detail—no reference to a "grant program" and no language guiding administrative discretion in setting grant criteria—appears in Section 118; that section does not refer to a grant program in any way, and does not give guidance to ASTO in setting grant criteria. This is a strong indication that the legislature did not contemplate the Treasurer creating any such program or criteria in the first place.

Third, as Plaintiffs have observed, Defendants' inference also conflicts with past history: ADOA never implemented any such program, or issued any requests for proposal or

procurement documents, when a strikingly similar appropriation was made in 2023. *See* Plaintiffs' Statement of Facts ¶¶ 39–53. And ASTO, prior to this lawsuit, never treated such appropriations as authorizing either the creation of a grant program or the imposition of criteria to satisfy the Gift Clause. *See* Plaintiffs' Controverting Statement of Facts ¶¶ 54–61, 68–78. In fact, ASTO expressly and repeatedly *disclaimed* such authority. *Id.* ¶¶ 57–58. *See also id.* ¶¶ 68–73.

True, there's one sense in which SB 1720 does include *extremely specific* guidelines: it directs the Treasurer "to distribute" the funds in question to "a nonprofit volunteer organization that operates a rodeo at the Yavapai county fairgrounds." But this instruction is *contrary* to Defendants' argument that SB 1720 silently authorizes ASTO to set criteria for grants—because if the latter were true, that would also imply that ASTO has power to withhold the funds if no applicant satisfies the criteria. But that flies in the face of SB 1720 § 118, which plainly requires the expenditures to be made. The simpler and more logical reading is that the Legislature was simply directing the Treasurer "to distribute" the funds *tout court*.

Certainly SB 1720 does not contain the kind of "standards, limitations, and policies" required by cases like *Frohmiller*, 68 Ariz. at 255. For one thing, instructions to give money to specific recipients are not "policies" or "standards" at all, because they are not generally applicable.[6] More importantly, the Defendants claim that SB 1720 delegates power to the Treasurer to establish "criteria or factors under which applications will be evaluated for award and the relative importance of each criteria or factor," under A.R.S. § 41-2702(6)—but SB 1720 provides no standards, limitations, or policies for the Treasurer to follow when *establishing these criteria or factors*. If the legislature intended to give the Treasurer power to draft rules for deciding who gets the money, it would have provided some framework specifying what kinds of rules the Treasurer should draft.

[6] The difference between a standard (or rule, or policy) and a command is that the former is a general formula, whereas a command is an order directing a particular person to do a particular thing. *See* H.L.A. Hart, *The Concept of Law* 18–25 (1961). The directive in Section 118(2) is certainly a command, and not a standard, rule, formula, or policy.

In short, the Defendants' inference that SB 1720 delegates authority to ASTO conflicts with (1) the longstanding rules that all delegations of power must be clearly authorized by plain language of the statute, *Roberts*, 253 Ariz. at 268 ¶ 30, and (2), that such delegation "must be corralled in some reasonable degree and must not … permit[] [the agency] to range at large and determine for itself the conditions under which a [grant] should exist and [give the grants] it thinks appropriate," *Marana Plantations, Inc*., 75 Ariz. at 114, and with (3) both the actual language of SB 1720 and Title 41, Chapter 24 of the Arizona statutes.

II. The Defendants' delegation theory would give ASTO power it cannot exercise.

An additional problem with Defendants' inference is that it presumes that SB 1720 authorizes ASTO to create criteria to ensure the *constitutionality* of grants. Arizona agencies, however, don't have power to resolve constitutional problems with legislation. *Est. of Bohn v. Waddell*, 174 Ariz. 239, 249 (App. 1992).

The Gift Clause requires that an expenditure (a) accomplish a public purpose—meaning, it must obtain some good or service that is "for the general good of all the inhabitants," and not "merely for gain or for private objects," *City of Tombstone v. Macia*, 30 Ariz. 218, 224 (1926) (citation omitted)—and (b) obtain consideration, the value of which must be proportionate to the expenditure—that is, the government must "get" something proportionate to what it "gives." *Schires v. Carlat*, 250 Ariz. 371, 376 ¶ 14 (2021).

If Defendants were correct, the Treasurer would be empowered to decide whether government funding for, say, a rodeo qualifies as a public purpose, whether its value to the public is proportionate to $15.3 million, and then whether ASTO can draft rules, not contemplated by the Legislature, that impose obligations on recipients to ensure that, in ASTO's view, the Gift Clause is satisfied.

That cannot be correct, for at least three reasons.

First, the amounts to be distributed are fixed by Section 118 of SB 1720, meaning that ASTO certainly cannot have any power to decide to give the rodeo $7 million or $10 million instead of $15.3 million, and to cut a check accordingly. It can only give $15.3 million. (Nor could the Treasurer decide that, actually, the rodeo gives the public $30 million in value and

should receive *more* than $15.3 million). Since the $15.3 million amount is inflexibly set by SB 1720, ASTO cannot act on any constitutional judgment regarding the "give"/"get" comparison that *Schires* mandates as part of Gift Clause law. 250 Ariz. at 376 ¶ 14.

Second, if ASTO *could* act on such constitutional judgment, that would mean it could also decide how much consideration from the rodeo is enough to render the $15.3 million appropriations constitutional or unconstitutional—and that would necessarily include the power to decide *not to make the appropriation at all* if it decides that spending $15.3 million on a rodeo doesn't serve a public purpose, or that the rodeo doesn't provide adequate return to the state. Yet the statute plainly does not authorize that.

True, every branch of government, and every government official, has an independent, mandatory obligation to comply with the Constitution. *See* Ariz. Const. art. II § 32; *Oakland Paving Co. v. Hilton*, 11 P. 3, 9 (Cal. 1886). But that does not mean agencies can create new rules, not authorized by statute, to divert funds from the Legislature's unconstitutional purpose to some other, purportedly constitutional purpose that the agency considers more appropriate. Such an interpretation would give agencies a roving commission to do whatever they believe the Constitution permits, in violation of the Constitution's Separation of Powers Clause. Instead, ASTO's obligation in case of constitutional doubt is either to seek declaratory relief itself, or to refuse to disburse the funds on the grounds that they are an unconstitutional gift (while acknowledging that it is acting in a manner not contemplated by the statute). But here, ASTO is doing neither: it is simply claiming that it has implied authority to draft rules that effectively rewrite the legislation to make it (in the Treasurer's eyes) constitutional. That is far beyond the scope of administrative law. "While agencies may have authority to interpret statutes, they do not have authority to rewrite them." *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 240 (6th Cir. 2019).

Ultimately, the focus of this Court's constitutional scrutiny should not be on the Treasurer or her office. Rather, it is the *Legislature* that violated the Gift Clause by appropriating the

public's tax dollars to a private nonprofit entity without articulating a public purpose and without securing proportionate consideration in return.[7]

III. The appropriations violate the Gift Clause.

The appropriations fail both the public purpose and consideration requirements of the Gift Clause.

Analyzing an expenditure under the Gift Clause is simple: the government can *buy* goods or services, but cannot *give away* money or other valuable advantages to private parties, or financially aid private entities "by subsidy or otherwise."[8] Ariz. Const. art. IX § 7. An expenditure is a gift if it serves a private, instead of a public interest, or if it's so disproportionate to the value received (i.e., an overpayment) such that it is effectively a gratuity.

In making the proportionality comparison (the "give" / "get" comparison), the Court may only compare the expenditure with the value that the private party "*obligates* itself to [provide] (or to forebear from doing) in return for" that expenditure. *Turken v. Gordon*, 223 Ariz. 342, 349 ¶ 31 (2010) (emphasis added). But there is *nothing* in the rodeo appropriation that requires the receiving nonprofit to provide *anything* in return for the $15.3 million. Instead, Section 118 merely directs the Treasurer "to distribute" the funds to the recipient. That's unlawful because absent direct, *obligatory* consideration promised by the recipient in return for the public expenditure, there can be no lawful consideration.[9] *Cf. Schires*, 250 Ariz. at 378 ¶ 21 (no obligation? no consideration).

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[7] The Legislature did not enact legislation authorizing the Treasurer to enter into an agreement with a private organization to fulfill a public purpose subject to negotiable conditions. Had it done so, Defendants' ripeness argument would be stronger and a separate, final agreement would likely be required before filing suit. But that's part of the problem here: the Legislature didn't require *any* agreement. Defendants' ripeness argument therefore fails, as the appropriation itself is final state action reviewable for compliance with the Gift Clause.

[8] The phrase "by subsidy or otherwise" is a broad catch-all provision, found in no other state Constitution, that renders the Arizona Gift Clause the nation's most comprehensive prohibition on government aid to private undertakings. *See* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1, 38–43, 57–58 (2024).

[9] Even if the Treasurer could impose conditions on the appropriation or otherwise secure constitutionally adequate consideration from the recipient, the anticipated "grant agreement" provisions cited by Defendants ("scope of work," "programmatic report," "audit," "document retention policy," requiring records to be "subject to inspection … and produceable upon

Additionally, while courts interpret "public purpose" broadly, it does have limits. Most relevant here is the *adequate control* rule: if the government pays a private entity to do something (or hires it), then the government must maintain "control and supervision" over the recipient to ensure that it actually provides the public good it was paid to provide, and to prevent "private gain or exploitation of public funds." *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986).

This requirement is common sense; without it, a private entity could pretend to engage in a public function, but upon receiving a grant, switch the funds to its own private purposes. That is why in *Gilmore v. Gallego,* 552 P.3d 1084 (Ariz. 2024), the Supreme Court found payments to be unconstitutional gifts where the government retained no power of "direct control [or] supervision" over how the funds were spent. *Id.* at 1093 ¶ 38.

The public oversight requirement is longstanding, and found in the jurisprudence of many other states, too. *See, e.g., State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 612 (Idaho 1959) (payment to utility companies for relocation expenses was unconstitutional where state retained no control over recipients to ensure they spent funds for that purpose); *State ex rel. Wash. Nav. Co. v. Pierce Cnty*., 51 P.2d 407, 411 (Wash. 1935) (invalidating a contract with ferry service because government retained no control over operation of the company or its equipment); *Washingtonian Home of Chi. v. City of Chi.*, 41 N.E. 893, 895 (Ill. 1895) (invalidating grant to an alcohol treatment facility because "no State control over the institution is provided for … . [The institution] owe[s] no dut[y] to the public or the state.").

Earlier this year, the Texas Court of Appeals said a government expenditure was an unconstitutional gift because of the lack of oversight. In *Corsicana Industrial Foundation, Inc. v. City of Corsicana*, 685 S.W.3d 171 (Tex. App. 2024), the agreements between local governments and a private business did not advance a public purpose because the agreements "failed to include provisions allowing [the government] to retain control over the funds to ensure

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request," "tracking … total expenditures," and additional reporting on metrics, *see* Intervenor-Defendant's MSJ at 5), even taken together, would almost certainly be grossly disproportionate to the large amount of the appropriation. No one, including Defendants, honestly believes the Legislature meant to pay the rodeo organization $15.3 million for little more than access to their records.

that the public purposes are accomplished and to protect the public's investment." *Id.* at 185. The agreements contained "no termination provision" or any other mechanism whereby the government could "change any terms, or seek reimbursement," or reclaim its money in the event that "the public purposes are no longer being achieved." *Id.* at 185.[10] And absent meaningful control over the recipient's use of public funds, the court concluded that no *public purpose* was being served by the expenditure.

The same is true here. As Plaintiffs detail on pages 9–10 of their Motion, the grants lack provision for the public oversight that is necessary to ensure that a recipient of public funds actually puts those funds to public purposes. Absent such guarantees, the grants are unconstitutional gifts.

CONCLUSION

Defendants presume that SB 1720 does not actually impose an expenditure mandate that can be assessed for its constitutionality, but instead only authorizes ASTO to establish a grant program for a nonprofit volunteer organization that operates a rodeo at the Yavapai Conty Fairgrounds. That argument rests on a series of inferences that conflicts with Arizona precedent, with the language of several statutes, and with actual practice. Defendants' motion for summary judgment should therefore be *denied*, and Plaintiffs' summary judgment motion should be *granted.*

RESPECTFULLY SUBMITTED this 14th day of November 2024.

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[10] The agreement allowed the government to review the documents regarding the transaction, but "[t]he right to mere document review does not provide authority to address irregularities." *Id*.

CERTIFICATE OF SERVICE

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