Docket No. CV-20-0027-PR

IN THE SUPREME COURT OF ARIZONA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN,
Appellants/Petitioners,

v.

CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity ad Councilmember for the City of Peoria for the Mesquite District; and Bill Patena, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona,
Appellees/Respondents.

On Petition for Review of a decision of the Arizona Court of Appeals, Division One, Case No. 1 CA-CV 18-0379

BRIEF OF AMICI CURIAE OF THE ARIZONA TAX RESEARCH ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF INTEREST

The Arizona Tax Research Association ("ATRA") is a statewide taxpayer organization representing a cross-section of Arizona individuals and businesses. Organized in 1940, ATRA's mission is to ensure the efficient use of Arizona tax dollars through sound fiscal policies by critically examining governmental activities and expenditures related to taxation policy and procedures. ATRA has a strong interest in ensuring that the Arizona Constitution, particularly those provisions designed to protect taxpayer funds, is construed and applied consistent with its plain meaning and purpose. It takes seriously its responsibilities as Arizona's largest and most respected independent source of tax-policy information. ATRA's professional staff scrutinizes governmental activities and expenditures related to tax policies and procedures, and provides uncompromised research and information for taxpayers and policy makers. As a result, ATRA has filed amicus briefs in the Arizona courts on a range of tax policy issues.

ATRA is particularly interested in this case because taxpayer money should be used exclusively for public purposes. The public purpose requirement of the Gift Clause reflects the Arizona Constitution's desire to avoid public taxpayer funds being used to subsidize private enterprise. The City's provision of millions of taxpayer dollars to fund private enterprise, with virtually no control over how those

funds are used, violates the constitutional prohibition on using public funds to benefit private business.

ARGUMENT

I. THE COURT SHOULD CLARIFY ITS GIFT CLAUSE JURISPRUDENCE.

To determine whether a public expenditure violates the Gift Clause, this Court has established a two-prong test: the payment must serve a public purpose and be supported by adequate return consideration to the public entity. *See Turken v. Gordon*, 223 Ariz. 342 (2010). While this test appears straightforward, its uniform application has proven elusive. Just ten years ago, *Turken* provided significant clarification. But *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016), caused new confusion.

A. *Turken* and *Cheatham* Can Be Squared.

In *Turken*, the City of Phoenix agreed to make payments of up to $97.4 million to the developer of City North. The Court granted review "because interpretation of the Gift Clause is an issue of statewide importance." *Turken*, 223 Ariz. at 345 ¶ 9. The Court made clear that "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Id.* at 346 ¶ 14. The Court explained that "the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract." *Id.* at 348 ¶ 22. "When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Id.*

The Court also provided guidance on analyzing the adequacy of consideration. The Court explained that "consideration is what one party to a contract obligates itself to do (or to forbear from doing) in return for the promise of the other contracting party." *Id.* at 349 ¶ 31. Indirect contractual benefits don't count: "Although anticipated indirect benefits may well be relevant in evaluating whether spending serves a public purpose, when not bargained for as part of the contracting party's promised performance, such benefits are not consideration under contract law or the *Wistuber* test." *Id.* at 350 ¶ 33. Otherwise, governmental entities could pay private parties huge sums of money with no connection to real world value, all in the name of theoretical indirect benefits. Thus, when considering the adequacy of consideration, Arizona courts are only to count the "objective fair market value of what the private party has promised to provide in return for the public entity's payment." *Id.*

The Court then applied the proper Gift Clause test to the City of Phoenix's purchase of parking spaces. The Court found a public purpose because "[t]he parties agree[d] that providing parking is a legitimate public purpose . . . ." *Id.* at 348 ¶ 23. As to consideration, the Court noted that the developer would not receive funds until it achieved certain milestones with respect to retail development, but such development did not count as Gift Clause consideration because the developer was not required to engage in such development. *Id.* at 350 ¶ 37. Similarly, although

the City of Phoenix's payments were based on anticipated tax generation, this was not Gift Clause consideration because the agreement did not require the developer "to produce a penny of tax revenue for the City." *Id.* ¶ 38. The Court found, therefore, that "the only consideration flowing to the City from [the developer] under the Parking Agreement is the right to use the parking spaces." *Id.* ¶ 39. As to the value of those 3,180 parking spaces, the trial court had made no finding as to the value of the spaces and this Court would not do so on appeal. *Id.* at 351 ¶ 43. All seemed fairly clear at that point.

Then along came *Cheatham*. That case involved release time provisions in a collective bargaining agreement between the City of Phoenix and a portion of its police officers. Those provisions allowed certain officers to work for the police union while still being compensated by the City. This Court granted review, commenting that "whether the Gift Clause bars release time provisions in collective bargaining agreements for public employees is a legal issue of statewide importance." *Cheatham*, 240 Ariz. at 317 ¶ 7.

The Court, in a 3-2 decision, approved the provisions. The Court first made clear that "the release time provisions must be assessed in light of the entire MOU, including the obligations imposed not only on PLEA but also on the employees for whom it is the authorized representative." *Id.* at 320 ¶ 18. Thus, when the Court analyzed the public purpose requirement, it concluded that the agreement as a whole

served a public purpose because "[i]t procures police services for the City." *Id.* ¶ 23.

The Court took a similar tact—refusing to analyze only individual provisions—when analyzing adequacy of consideration, explaining that "when considering a Gift Clause challenge to portions of a collective bargaining agreement, we cannot consider particular provisions in isolation." *Id.* at 322 ¶ 30. The Court also made clear, consistent with common law contract principles, that performance provided by a third party could be counted as consideration provided to a public entity. Thus, the public safety services the police officers would provide under the collective bargaining agreement would count as consideration provided to the City. *Id.* ¶ 32 (citing Restatement (Second) of Contracts § 71(4) cmt. e). And the agreement passed muster because there was no "contention that the $660 million the City pays under the MOU is grossly disproportionate to the services to be provided by police officers." *Id.* ¶ 33. The Court even commented that *Turken* was irrelevant to its analysis "because here the consideration received by the City is not indirect benefits, but instead the obligations the MOU itself imposes on both PLEA and the Unit 4 officers." *Id.* at 324 ¶ 42.

Justices Timmer and Brutinel dissented. In their view, "[n]o public purpose is served by diverting officers from safeguarding the public to work almost unchecked for PLEA," particularly because the City of Phoenix had no control over how the union directed the officers on release time. *Id.* ¶ 46 (Timmer, J. dissenting).

Regarding adequate consideration, the dissent stressed that the inquiry should turn on what consideration the union promised to provide, not what the officers additionally promised. The release provisions would fail under this analysis because "the City lacks a mechanism to quantify the value of benefits it receives from the release time provisions" and no such evidence was in the record. *Id.* at 326 ¶ 53. Moreover, "[a]ny promotion of employer-employee relations fostered by the release provisions are indirect benefits that cannot constitute consideration." *Id.* ¶ 54. *Cheatham*, decided four years ago, is the Court's last word on the Gift Clause.

The court of appeals in this case incorrectly believed *Cheatham* modified the methodology for adequate consideration. For instance, the court of appeals, citing *Cheatham*, held that "the consideration Peoria received for its $2.6 million payment was not indirect, nor was it grossly disproportionate." *Schires v. Carlat*, 2020 WL 390671, *5 ¶ 23 (Ariz. Ct. App. 2020). The court of appeals also stated that "*Cheatham* instructs that we must give deference to the decision of Peoria's elected officials in assessing the adequacy of consideration and take a panoptic view of the agreements," and then found adequate consideration merely because the City had provided an expert's opinion on the total economic impact of the project. *Id.* at *4-5 ¶¶ 19-22. None of this analysis is consistent with *Turken*.

The Court should, therefore, use this case to clarify its Gift Clause jurisprudence and to square *Cheatham* with *Turken*. How can it do so?

First, neither *Turken* nor *Cheatham* provided much insight about the public purpose prong of the Gift Clause test. The parties in *Turken* stipulated to the existence of a public purpose. In *Cheatham*, the Court defined the public purpose as the provision of police services. Defined that way, there was little doubt the expenditure served a public purpose. The expenditures at issue in this case, on the other hand, do not serve a public purpose. Thus, as Petitioners establish in their brief, this case gives the Court an opportunity to further explain the outer contours of the public purpose requirement.

Second, it is clear that the analysis in *Cheatham* was materially impacted by the collective bargaining context in which the payments at issue occurred. The Court went out of its way to repeatedly emphasize the importance of that context. *See, e.g.*, *Cheatham*, 240 Ariz. at 318 ¶ 11, 322 ¶¶ 30, 31, 323 ¶ 37. That context was not present in *Turken* and it is not present here.

Third, the analysis in *Cheatham* turned largely on the Court's decision to consider the collective bargaining agreement as a whole, rather than provision by provision. Whatever one might think of that decision, the "whole contract" issue did not arise in *Turken* and it is not present in this case—Petitioners do not ask the Court to decide the propriety of only certain provisions within a larger agreement.

Fourth, the Court's conclusion in *Cheatham* was further bolstered by the value of the performance provided by the third-party police officers in determining

adequacy of consideration. That third-party consideration issue did not arise in *Turken* because the City of Phoenix did not attempt to use third-party performance as consideration, and the issue is also not present in this case.

Fifth, *Cheatham* left *Turken*'s rejection of indirect benefits as consideration undisturbed. In fact, *Cheatham* stressed that the consideration discussion in *Turken* was irrelevant. *Id.* at 324 ¶ 42. Thus, *Turken*'s holding that governmental entities cannot use indirect consideration to support private subsidies remains good law, and it dooms the agreements at issue here.

Sixth, while *Cheatham* and *Turken* both indicated that courts should defer to the elected branches in undertaking the Gift Clause analysis, neither supports that the judiciary has abdicated its role. Both decisions stressed that enforcing the Gift Clause is ultimately the province of the judiciary. *Id.* at 320 ¶ 21; *Turken*, 223 Ariz. at 346 ¶ 14. Deference doesn't appear to have played a role in *Cheatham* and the Court in *Turken* expressed serious misgivings about the parking payments despite deference. The Gift Clause provides a judicially enforceable standard, and while deference to the elected branches of government may be appropriate in close cases, deference should not stop the courts from stepping in when the payment at issue strikes at the core of the constitutional proscription. The Court should use this case to make that clear.

B. ***Turken*** **Requires Reversal.**

The City of Peoria's $2.5 million in payments to private businesses to allow them to develop private property and run a private business is a classic violation of the Gift Clause. Those payments have no public purpose. In fact, the court of appeals did not explain any public purpose for the payments. Instead, it merely repeated what the City of Peoria had explained the public purpose to be and then demurred that "[w]e cannot conclude that Peoria unquestionably abused its discretion in determining that the agreements had a public purpose." *Schires*, 2020 WL 390671 at *4 ¶ 17. The court of appeals also relied on the fact that the Arizona Legislature, through A.R.S § 9-500.11(A), statutorily permits municipalities to spend public money on economic development activities, which is contrary to *Turken*'s conclusion that the same statute is irrelevant for Gift Clause purposes. *Id.* at *3 ¶ 15.

The City of Peoria identified the public purpose for the expenditures as "promoting economic development and job growth, promoting educational activities in the STEM field, and repurposing an unused and underutilized property . . . ." *Id.* at *4 ¶ 17. The Court has never blessed any of these purposes as being public in nature. In any event, these purported purposes could be used to justify the public subsidization of nearly every private development in the State. Moreover, the economic development and educational opportunities upon which the City relies are

not available to the general public; they are only available to those who apply, are admitted, and are willing to pay over $25,000 in annual tuition.

The City's payments are also not supported by adequate consideration. Again, the City has provided approximately $2.5 million to private enterprise. Thus, the question is whether that amount is grossly disproportionate to the objective fair market value of what was promised to the City in return. *See Turken*, 223 Ariz. at 350 ¶ 33. Petitioners established below that the promises made to the City have no value because there were no return promises made. The City admitted that the only value in the record below is the purported economic impact value ($11.3 million) of the project. *See* Appellee's Answering Br. at 32 ("The only evidence in the record assigning a value to what HU and Arrowhead promised under the Agreements is the report of Bryce Cook."). The court of appeals quoted the testimony of the City's economic expert and deferred to the amount he calculated. *Schires*, 2020 WL 390671 at *5 ¶¶ 22-23. But that amount is not based on any promise that the private parties made to the City under the agreement. The private parties were not required to develop anything. Instead, if they chose to develop, they would be entitled to reimbursement. *Turken* rejected that such reimbursement arrangements provide municipalities with consideration. *Turken* also rejected the use of the economic value of the taxes to be generated by the project, which value is infinitely more concrete than the theoretical economic impact relied upon by the City in this case.

223 Ariz. at 350 ¶¶ 37-38.

Unless corrected by this Court, the current state of the law in Arizona is that a municipality can hand over any amount of taxpayer funds to private business, so long as the municipality later obtains expert testimony showing sufficient economic impact. In this case, according to the City's argument and the court of appeals' analysis, the City could have handed over more than $11.3 million to private enterprise without running afoul of the Gift Clause. In other words, the City could have provided millions of dollars in excess of the total cost of the project. That argument and analysis, therefore, is self-defeating. The application of an important constitutional restriction on governmental power should not turn on the creativity of expert opinions on economic impact. It should turn on real evidence as to the actual value of return promises made. That is the lesson of *Turken*, and the Court should grant review to reiterate it in the aftermath of *Cheatham*.

II. THE CITY'S PAYMENTS ARE INCONSISTENT WITH THE PURPOSES FOR THE GIFT CLAUSE.

Only thirteen years after ratification, the Court explained that the Gift Clause "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880 . . . ." *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (1925). Thus, the restriction "was designed primarily to prevent the use of public

funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Id*.

The Gift Clause serves several other important purposes. First, when local government subsidizes private enterprise, it decreases funds available to provide taxpayers with important governmental services, such as local infrastructure (*e.g.*, streets and parks) and public-safety (*e.g.*, police and fire). Every expenditure made by local government stems from, and is related to, a tax. If local government gives taxpayer money away to private enterprise, it increases the pressure on taxpayers to make up those funds in other ways, usually through higher taxes or fees.

Second, governmental payments to fund private enterprise distorts representative democracy. Our system of government depends on the ability of citizens to hold their elected officials accountable for governmental actions, including the expenditure of public funds. Control over the purse strings is one the most important tools a government possesses. Taxpayers have a basic, and compelling, interest in tracking the expenditure of tax revenues. *See Millett v. Frohmiller*, 66 Ariz. 339, 348 (1948) ("[L]oose control" of public funds would be "wholly foreign" to Arizona's state government.). Under Arizona's constitutional structure, the Court should seek to fulfill the framing public's intent for the Gift Clause -- to promote accountability and protect public funds.

When government officials give those funds to unelected, private

organizations, it becomes extraordinarily difficult for taxpayers and voters to determine whom to hold accountable and how to do so. A private development agreement permits cities and developers to act in concert with unchecked autonomy and in ways that voters cannot trace or control. Even politically savvy taxpayers who follow the activities of local city officials will not be permitted into negotiations between city officials and private developers, nor will specific contractual provisions ordinarily be available for review and comment prior to the meeting at which they are approved. Private development agreements will happen in isolation, most likely through consent agendas, and away from the view and knowledge of taxpayers and voters.

Third, Arizona's Constitution was "engineered to ensure that the players in the economy were in a level field, and that government would not unfairly favor particular enterprises or individuals." Rebecca White Berch, et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 474 (2012) (citation omitted). Arizona's ratifying public knew that if government officials were left free to subsidize private enterprise, the urge to do so would be overwhelming and the public fisc would suffer at the expense of the taxpaying public. The powerful and connected are significantly more likely to benefit from a system where government funds can be used to subsidize private enterprise. The only way to ensure that all citizens are on equal footing is to forbid

such payments.

When local government subsidizes private development, it also creates market distortions and sets a dangerous precedent. Private projects and developments requiring taxpayer funds for their existence are projects and developments that likely shouldn't exist in the first place, and they are projects and developments that are much more likely to fail once the government subsidy is exhausted, leaving the taxpayer holding the bag.

Moreover, the next time a developer thinks about locating or investing in the City, chances are good the developer will reasonably expect the same favorable treatment Huntington University received. The only way to avoid such a situation is for the City to better hide its private development expenditures so others don't expect similar treatment, further distorting representative democracy. But once discovered, the City only has two choices: deny the request for similar subsidies, thereby engaging in the differential treatment discussed above, or grant the request, thereby moving further away from being in the business of providing actual government services and moving further into the business of subsidizing private enterprise. The Court should put a stop to all of this by making clear that the Arizona Constitution means what it says, and that it does not allow local government to stick its citizens and taxpayers with the tab for private development.

CONCLUSION

If the citizens of Arizona desire to allow local government to subsidize private development, there is a way for them to allow such payments: constitutional amendment. Arizona's ratifying generation, however, justifiably feared that such subsidies would result in powerful interests gaining favor at the expense of the common taxpayer, and so they outlawed public payment to private interests in the Gift Clause. It is not the province of the courts to second guess that sound decision. ATRA respectfully requests that the Court grant Appellants' Petition for Review, vacate the court of appeals' opinion, and reverse the superior court's judgment.

RESPECTFULLY submitted this 14th day of May, 2020.

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