SUPREME COURT OF ARIZONA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN Appellants/Petitioners, v. CATHY CARLAT, et al., Appellees/Respondents.	Arizona Supreme Court No. CV-20-0027-PR Court of Appeals Division One No. 1 CA-CV 18-0379 Maricopa County Superior Court No. CV 2016-013699

RESPONSE TO BRIEF OF AMICI CURIAE ARIZONA TAXPAYERS RESEARCH ASSOCIATION

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INTRODUCTION

The arguments of the Arizona Tax Research Association ("ATRA") do not support granting the Petition for Review in this case. ATRA suggests that review here is necessary to "square" this Court's decision in *Turken v. Gordon*, 224 Ariz. 342 (2010) with its decision *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016). Those cases applied the same test to different facts, and this case is simply another case that applies this Court's existing Gift Clause precedent to yet another set of facts. This case presents no novel issue that warrants this Court's review, and ATRA's arguments do not suggest otherwise.

ARGUMENT

I. There Is No Conflict Between This Court's Precedents in *Turken* And *Cheatham*

ATRA's amicus brief focuses on an alleged conflict between this Court's precedent in *Turken* and *Cheatham*, but no such conflict exists. *Cheatham* did not change the two-prong Gift Clause test that this Court applied in *Turken*, which dates back to this Court's 1984 decision in *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346 (1984). *Cheatham* simply applied this long-standing test and, in a divided decision, held that City of Phoenix's payments for release time as part of the City's collective bargaining contract with the police union did not violate the Gift Clause. *Cheatham* v. *DiCiccio*, 240 Ariz. at 324, ¶ 44. The disagreement

between the majority and the dissent in *Cheatham* centered on how to properly apply the existing Gift Clause test to the contractual provision at issue in that case.

ATRA incorrectly asserts (at 8) that this Court in *Cheatham* "commented that *Turken* was irrelevant to its analysis." In *Cheatham*, this Court actually relied on *Turken* throughout as the appropriate test to apply to resolve the Gift Clause question. *Cheatham*, 240 Ariz. at 318-24 ¶¶ 10, 21, 32, 34, 42. In its consideration analysis, *Cheatham* noted that *Turken* had "clarified that indirect benefits, when 'not bargained for as part of the contracting party's promised performance,' do not satisfy the 'consideration' prong of the Gift Clause analysis." *Cheatham*, 214 Ariz. at 324 ¶ 42 (quoting *Turken*, 223 Ariz. at 351, ¶ 33). *Cheatham* went on to comment that "[i]n this respect, *Turken* is inapposite" because the issue in *Cheatham* was not indirect benefits not bargained for as part of the party's promised performance, but rather "the obligations the MOU itself imposes on both PLEA and the Unit 4 Officers." *Id*. *Turken* was thus not "irrelevant" to *Cheatham*. The facts of the cases were simply different.

ATRA (at 9) also wrongly asserts that the court of appeals here "incorrectly believed *Cheatham* modified the methodology for adequate consideration." The court of appeals merely cited *Cheatham*, this Court's most recent Gift Clause case, for the basic framework that governs the Gift Clause analysis. Op. at 8-9¶¶ 19, 23.

Nothing in the court of appeals' memorandum decision suggests that it believed *Cheatham* modified the test for consideration applied in *Turken*.

Here, the court of appeals memorandum decision correctly applies this Court's established Gift Clause precedent to the agreements at issue in this case.

II. ATRA Incorrectly Asserts That the Court of Appeals Memorandum Decision Is Inconsistent with *Turken.*

In its critique of the court of appeals' reliance on *Cheatham*, ATRA (at 9) also mischaracterizes both the court of appeals' decision in this case and *Turken*. First, it notes that the court of appeals cites *Cheatham* for the proposition that under *Cheatham*, courts "must give due deference to the decision of Peoria's elected officials in assessing the adequacy of consideration and take a panoptic view of the agreements" Op. at 9 ¶ 23. Contrary to ATRA's assertion, these principles are consistent with *Turken*. *See Turken*, 224 Ariz. at 352 ¶ 47 (requiring a panoptic view of the transaction) 349, ¶ 30 (stating an abuse of discretion standard applies for reviewing consideration). Indeed, *Cheatham* cited *Turken* for the basic principles that apply to the Gift Clause analysis. *Cheatham*, 240 Ariz. at 321-22 ¶¶ 30 (referencing the 'panoptic' view of the facts), 35 (referencing abuse of discretion standard for reviewing consideration).

ATRA then goes on to say (at 9) that the court of appeals "found adequate consideration merely because the City had provided an expert's opinion on the total economic impact of the project." This is flat wrong. The court explicitly noted that

even if it disregarded the expert's analysis, the "consideration Peoria received for its $2.6 million payment was not indirect, nor was it grossly disproportionate." Op. at 9 ¶ 23.

The court of appeals' consideration analysis is consistent with *Turken*. Under *Turken*, this analysis focuses on the value of the promises bargained for. *Turken*, 224 Ariz. at 349 ¶¶ 31, 32. The court of appeals correctly determined that the record in this case did not establish that the consideration the City received was grossly disproportionate to the value it bargained for under the Agreement. Op. at 9 ¶ 24. This is not a case about "indirect benefits" that were not bargained for in the Agreement, as in *Turken*. *See Turken*, at 349 ¶ 33 (describing the consideration as "indirect benefits" that were "not bargained for"). This case is about the value of promises actually bargained for in the Agreement.

ATRA again incorrectly asserts (at 13) that "the promises made to the City have no value because there were no return promises made." Here, there were promises made in return, as ATRA implicitly admits. Namely, Huntington University promised the City that it would open a branch campus in Peoria. The branch campus must meet specific requirements set out in the agreement, and the related contract involved promises to refurbish a vacant building in a critical area for use as the branch campus. Each of these promises were made to the City in exchange for the City's reimbursement payments. And, as the court of appeals concluded, the

evidence in the record provides no basis for finding that the consideration Peoria received was grossly disproportionate to the cost reimbursement payments promised in the agreements.

ATRA also incorrectly asserts (at 3) that Peoria provided "millions of taxpayer dollars . . . with virtually no control over how those funds are used." As the court of appeals explained, the agreements established specific requirements related to these cost reimbursement payments. Op. at 9 ¶¶ 22-23. The City did not simply "hand[] over" (ATRA Br. at 14) money to anyone.

In addition, ATRA (at 12) mischaracterizes *Turken's* analysis of A.R.S. § 9-500.11. ATRA asserts that *Turken* concluded that A.R.S. §9-500.11 "is irrelevant for Gift Clause purposes." It did not. All *Turken* said was that compliance with A.R.S. § 9-500.11 does not "automatically establish" compliance with the Gift Clause. *Turken*, 224 Ariz. at 351 ¶41. Here, A.R.S. § 9-500.11 is relevant only to the public purpose analysis. In *Turken*, as ATRA acknowledges (at 6), the parties agreed that the agreement at issue in that case served a public purpose. Section 9-500.11 authorizes municipalities to make expenditures for economic development. That statute supports the argument here that expenditures for economic development advance a public purpose. Nothing in *Turken* contradicts that analysis.

III. The Memorandum Decision Does not "Distort[] Representative Democracy."

ATRA also broadly argues (at 15-17) that this Court should prohibit public spending to "fund private enterprise" and that such spending undermines accountability and "distort[s] representative democracy." This hyperbole is unwarranted. First, the Gift Clause does not prohibit expenditures to private entities. It simply requires that expenditures serve a public purpose and that consideration is not grossly disproportionate. Second, this Court's existing Gift Clause caselaw considers the court's judicial review responsibilities as well as the necessary accountability of the political branches for their decisions. *Turken*, 224 Ariz. at 346-47 ¶ 14. This Court's existing Gift Clause test establishes appropriate judicial review standards while respecting the authority of the political branches of state and local government to make decisions within their scope of responsibility. Elected officials remain accountable for their decisions through democratic processes—if the voters of Peoria dislike the City's decisions, they can elect new leadership. ATRA's arguments do not support review in this case. The court of appeals correctly concluded that the Petitioners did not meet their burden in this case.

CONCLUSION

ATRA's amicus brief does not justify granting review in this case. The lower courts properly applied this Court's existing precedent to the evidence in the record to resolve this case.

RESPECTFULLY SUBMITTED this 8th day of June, 2020.

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