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 AMICUS CURIAE AMERICANS FOR PROSPERITY

Mary R. O'Grady (011434)
Emma Cone-Roddy (034285)
OSBORN MALEDON, P.A.
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012
(602) 640-9000
mogrady@omlaw.com
econe-roddy@omlaw.com

Vanessa P. Hickman, City Attorney (022406)
Amanda C. Sheridan, Senior Assistant City Attorney (027360)
Saman J. Golestan, Assistant City Attorney (031710)
OFFICE OF THE CITY ATTORNEY CITY OF PEORIA
8401 West Monroe Street
Peoria, Arizona 85345
(623) 773-7330
caofiling@peoriaaz.gov

Attorneys for Appellees/Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The arguments of Americans for Prosperity ("AFP") do not support granting the Petition for Review in this case. AFP suggests that review here is necessary because Peoria got "nothing" in return for its payment (at 1). The record below shows AFP's contention is false. AFP also provides a public policy argument against economic development agreements generally, without citation to the record or evidence below, and effectively seeks to change this Court's longstanding two-part test for Gift Clause compliance. The policy arguments are irrelevant to the issues pending before this Court, and there is no reason to change this Court's Gift Clause test. Court should deny the petition.

ARGUMENT

I. AFP's Policy Arguments Do Not Inform the Legal Issues in This Case.

The first half of AFP's Amicus Brief is dedicated to policy arguments relying on social science research. AFP suggests (at 2) that the academic studies it cites cast doubt on the effectiveness of "targeted economic development" spending by governmental entities. The sum of AFP's argument appears to be that the City is unlikely to achieve the public goods it sought when it entered the bargain with Huntington University. AFP's policy arguments do not support granting review in this case.

First, this case should be resolved based on the record and the law, which is precisely what the lower courts did. It should not be resolved based on policy arguments about the effectiveness of various approaches to economic development. If relevant to their case, Petitioners could have attempted to incorporate concepts in academic literature in their expert reports, which the City could have addressed. At this phase of the litigation, amici's extraneous policy arguments are simply irrelevant. Policy arguments about the best approach to local economic development are more appropriately directed to local policy makers rather than this Court.

Second, some of amici's policy arguments are contrary to the record in this case. For example, AFP argues (at 5) that academic literature shows that companies generally make relocation decisions regardless of municipal incentives. The record here, however, establishes that Huntington University would not have opened a branch campus in Peoria without the Agreements at issue in this case. (Appellee's Appendix in Ct. App. at APP103.)

II. AFP Ignores This Court's Precedent Regarding Public Purpose

This Court has "repeatedly emphasized that the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government, which are directly accountable to the public. We find a public purpose absent only in those rare cases in which the governmental body's discretion has been 'unquestionably abused.'" *Turken v. Gordon*, 223 Ariz. 342,

349 ¶ 28 (2010) (internal citations omitted). Whether benefits of an agreement are direct or indirect is irrelevant to whether an agreement serves a public purpose. *See Turken*, 223 Ariz. at 349 ¶ 25 (stating "our cases, however, do not draw this bright line"). Amici ignore these principles.

Arizona law also does not require that an Agreement's benefits be "tangible" to serve a public purpose. For example, this Court approved of expenditures for cities to join the Arizona Municipal League, recognizing the value of joining this organization to learn how other cities are addressing similar problems. *City of Glendale v. White*, 67 Ariz. 231, 240 (Ariz. 1948). The tangible vs. intangible distinction amici want to introduce is no different than the direct vs. indirect distinction that this Court explicitly rejected in *Turken.* The Court should not accept review to revise its precedent regarding public purpose.

AFP appears to object to using incentive payments to organizations, such as Huntington University, as part of a City's economic development program. That philosophical position does not undermine the public purpose served by these expenditures. The benefits Peoria and all of its citizens receive from economic development and the introduction of new business into the City satisfies the public purpose prong. *See* Op. ¶ 17 (identifying public purposes as "promoting economic development and job growth, promoting educational opportunities in the STEM field, and repurposing an "unused or underutilized property[y]" in the P83 District").

The Gift Clause's boundaries to economic development expenditures are established through the consideration analysis, not the public purpose analysis.

III. AFP's Academic Studies Cannot Substitute for the Evidentiary Record in this Case

AFP argues (at 15) that the consideration the City is receiving—namely that Huntington will open and operate a branch campus in Peoria, that Huntington will not enter a similar agreement with other Arizona municipalities, and that Huntington will participate in economic development activities— should be valued at "'zero' dollars." AFP's argument fails for several reasons.

First, APF argues (at 12-13) that the articles they cite "reveal[]" that there is "no benefit" to the public of targeted economic development. The articles reveal no such thing. AFP's articles do not consider the specifics of the agreements at issue here. They cannot substitute for the evidentiary record in this case and the superior court's factual findings. *See Turken*, 223 Ariz. at 351 ¶¶ 42-43 (placing obligation on superior courts to evaluate the value of what was actually bargained for and stating "[w]e are not finders of fact, and our intuitions as to proportionality, however strong, cannot substitute for specific findings of fact."); *see also Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 350 (1984) ("We will not assume disproportionality of consideration.")

Nor is AFP correct when it characterizes the consideration (at 13) as "[a] private firm's commitment to spend money on itself." Rather, as the courts below

recognized, the primary consideration is that Huntington "promised to open a Peoria campus." Op. at ¶ 22. The City also received a commitment of exclusivity. While AFP claims it "is impossible to assign any value to that commitment without considering what Peoria gains by having the college here and not in Glendale next door." That assertion, however, is not evidence. The value of bringing the Huntington Campus to Peoria specifically was precisely the evidence Peoria's expert presented below.

Finally, AFP argues (at 14) that Huntington's commitment to engage in certain economic development activities fails as consideration because it is illusory, claiming it has "no specification of terms." In fact, the specific economic development activities are described in Huntington's agreement with the City. Huntington's was required to participate in economic development activities aimed at attracting certain industries to Peoria, "including the development of customized work force development plans and programs" and participating in meetings with prospects, developing training programs "to meet workforce development needs" and marketing activities. (Appellee's Appendix in Ct. App. at APP093.)

AFP's attempt to dismiss all of the bargained for consideration contradicts this Court's precedent. As this Court explained in *Turken*, consideration is a "performance or return promise that is bargained for . . . in exchange for the promise of the other party." *Turken*, 223 Ariz. at 349 ¶ 31 (internal citations omitted). AFP's

arguments that the consideration the City bargained for are worth nothing is a philosophical position, not a position supported by the evidentiary record in this case.

CONCLUSION

AFP'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 18th day of June, 2020.

CITY OF PEORIA, OFFICE OF THE CITY ATTORNEY

By /s/ Saman J. Golestan

Saman J. Golestan
Vanessa P. Hickman
Amanda C. Sheridan
8401 West Monroe Street
Peoria, AZ 85345

Mary R. O'Grady
Emma J. Cone-Roddy
OSBORN MALEDON, P.A.
2929 North Central Avenue, Ste. 2100
Phoenix, AZ 85012

Attorneys for Appellees/Respondents