SUPREME COURT OF ARIZONA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN Appellants/Petitioners, v. CATHY CARLAT, et al., Appellees/Respondents.	State 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 STATE OF ARIZONA

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INTRODUCTION

The State's arguments do not support granting the Petition for Review. The Court should reject this case as it has some of the other allegedly urgent Gift Clause cases that the State cites in its brief. In this case, the lower courts simply applied existing Gift Clause precedent and concluded that Petitioners/Appellants failed to meet their burden of proof. In doing so, there is nothing novel that requires this Court's attention. As the State urged in its amicus brief, "Courts should not be called on to second-guess every transaction entered into by the duly elected leadership of the State and its various local government entities. . ."(State Br. at 13) There is no reason for this Court to accept review in this case.

In addition, because this case sought injunctive relief and the challenged payments have been made, this is a poor vehicle for reviewing a Gift Clause issue.

ARGUMENT

I. This Moot Case is Not the Appropriate Vehicle to Address Gift Clause Issues

This case is moot. It deals with a specific agreement between the City of Peoria and two private entities. The City has completed its entire performance under the agreement, and there is nothing left to enjoin. Despite that procedural status, the State speculates (at 6) that this Court could enjoin Peoria from engaging in some hypothetical, similar agreement in the future, and therefore the case is not moot. It also does not help that Petitioners sought declaratory relief. "It is well settled that a

proceeding for a declaratory judgment must be based upon an actual controversy. . . . No proceeding lies under the declaratory judgments acts to obtain a judgment which is merely advisory or which merely answers a moot or abstract question.'" *Moore v. Bolin*, 70 Ariz. 354, 356 (1950).

The State cites *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 11 (App. 2013) to argue that the case is not moot, but in *Prutch*, an exception to mootness applied and "not all of [the] claims [we]re necessary moot" as there was a request to remove an elected official among the litigated remedies.[1] And while Arizona courts are not subject to the case or controversy requirement of the United States Constitution, they have consistently held that they will refrain from considering moot or abstract questions. *Fraternal Order of Police Lodge 2 v. Phoenix Employee Relations Bd.*, 133 Ariz. 126, 127 (1982).

Contrary to the State's arguments (at 6), this case does not present the rare occasion for the Court to apply any exception to mootness. The State argues that this is an issue of "great public importance" that is "likely to recur," citing *Sears v. Hull*, 192 Ariz. 65, 72 n. 9 (1998). But in *Sears* the Court refused to apply an exception to justiciability requirements. Indeed, the few cases in which a case proceeded despite

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[1] The other case the State cites, *Bank of New York Mellon v. De Meo*, 227 Ariz. 192, 194 ¶ 8 (App. 2011) dealt with exceptions that allow moot cases to be heard.

its mootness typically involved either the constitutionality of or the proper interpretation of a statute or rule,[2] or the constitutionality of a general regulatory procedure.[3] This case concerns no such general state policy that is likely to recur. It deals with a single city contract, and whether that contract was supported by adequate consideration and public purpose. The mootness exception does not apply.

And if, as the State asserts, there are many Gift Clause challenges working their way through the courts, a more appropriate vehicle for judicial review will likely be the subject of a future Petition for Review.

II. The State's Arguments Do Not Support This Court Addressing the Public Purpose Issue Presented in the Petition for Review.

A.R.S. § 9-500.11 authorizes the City to spend money "for and in connection with economic development activities." The Petitioners characterized one of the issues presented for review as "[d]id the Court of Appeals err by concluding . . . that economic development is a public purpose under the Gift Clause?". The Petitioners then argued (at 14-15) that this Court should grant review because "no Arizona court has ever decided whether economic development is a public purpose under the Gift Clause" and no "Arizona court has ever held that secondary, intangible, and indirect

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[2] *Big D Construction Corp. v. Court of Appeals*, 163 Ariz. 560, 562-63 (1990) (state public bid statute); *State v. Superior Court of Pima Cty*, 104 Ariz. 440, 441 (1969) (state rape statute); *Fraternal Order of Police Lodge 2*, 133 Ariz. at 127 (1982) (city employment review board rule).

[3] *Camerena v. Dep't of Public Welfare*, 106 Ariz. 30, 31 (1970) (whether due process required a pre-deprivation hearing to terminate public assistance payments).

benefits—such as economic development—satisfy the public purpose prong." The City pointed out that this case is a poor vehicle to decide whether localities spending money on economic development activities lacks a public purpose because Petitioners did not challenge the statute authorizing expenditures precisely for that purpose.

The State nowhere suggests that the contracts at issue here lack a public purpose, focusing its argument (*e.g.*, at 2) on the consideration prong of the Gift Clause analysis. Section 9-500.11(A) is relevant to the public purpose issue, not consideration. The State does not argue that this Court should review the question whether expenditures for economic development serve a public purpose under the Gift Clause. The City agrees with the State's position (at 7) that "not . . . all economic development activities violate the Gift Clause." If the Court wishes to address whether expenditures for economic development serve a public purpose, it should wait for a vehicle that challenges A.R.S. § 9-500.11.

III. This Court should not accept review to modify this Court's consideration precedent.

The City agrees with the State that the consideration prong of the Gift Clause analysis evaluates the value of the promises that the parties bargained for. The City also does not disagree with the State's examples (at 12) of how the consideration analysis might apply to contracts for educational services or homeless services. If those types of contracts were challenged, the plaintiffs would have the burden of

presenting evidence to prove that the consideration was grossly disproportionate. A challenger could not prevail by presenting no evidence of the value of those promises, which is the record in this case. *See Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 350 (1984) (holding that courts may not "assume disproportionality" and that burden is on challengers to establish it).

The State also proposes a new component to the consideration analysis that this Court should not consider. It argues (at 11) that the consideration analysis should consider "the FMV of what the private party agrees to do for or on behalf of the government payor for a public purpose, not what it agrees to do for its own private benefit." This Court's Gift Clause precedent does not include that test in the consideration analysis, nor should it. Logically, any time a private entity enters a contract with government, the private entity likely does it, at least in part "for its own private benefit." For example, a private contractor that enters a contract with a public entity to build a road enters a contract that serves a public purpose but no doubt enters the contract "for its own private benefit." The State's approach inappropriately blends the public purpose and consideration prongs in the Gift Clause test. And this Court previously rejected weighing private and public interests when evaluating whether a contract serves a public purpose. *See Turken v. Gordon*, 223 Ariz. 342, 349 ¶¶ 25-26 (2010).

The State paints a dire picture (at 11) by reviving a hypothetical used by the dissent below—a City paying a private company, and the private company agreeing to make a payment in the same amount to its CEO. But the obvious Gift Clause problem with the hypothetical is the lack of any apparent public purpose for this agreement, not the value of the consideration.

Finally, the State argues (at 13, 14) that the "grossly disproportionate" standard strikes a proper balance by allowing judicial intervention "only . . . when the evidence establishes that the government entity engaged in an 'abuse of discretion.'" The City agrees with this. Courts "should evaluate the facts independently." (State Br. at 14.) Here, the only evidence below of the fair market value of the campus branch Huntington promised was (1) the opinion of the City's experts and (2) the amounts Huntington actually expended. If Petitioners had wanted to establish a Gift Clause violation using the State's suggested method of evaluating fair market value, they had the opportunity to present evidence below. The Petitioners did not.

CONCLUSION

This case presents no novel or important issue that warrants this Court's review.

RESPECTFULLY SUBMITTED this 17th day of June, 2020.

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