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 PUBLIC INTEGRITY ALLIANCE

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INTRODUCTION

The arguments of the Public Integrity Alliance ("PIA") do not support granting the Petition for Review in this case. PIA suggests that review here is necessary because the court of appeals "implicitly abrogated" this Court's precedent in *Turken*. Not so. PIA warns about "perilous potentialities" (at 3) without any evidence or citation to the record in this case. This concern is without merit. The Court of Appeals applied this Court's existing Gift Clause precedent to new facts. This case does not present any novel issue that warrants this Court's review, and PIA's arguments do not suggest otherwise.

ARGUMENT

I. PIA Misconstrues the Facts of This Case and the Law.

PIA's argument simply ignores language from this Court's *Turken* decision. The *Turken* Court made it clear the consideration analysis under the second prong of the Gift Clause test turns on what is actually bargained for between the parties. "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. . ." *Turken v. Gordon,* 223 Ariz. 342, 350 ¶ 33 (2010) (emphasis added). This key portion is cited to and adopted in this Court's decision in *Cheatham v. DiCiccio,* 240 Ariz. 314 (2016).

PIA incorrectly asserts (at 2) that "Peoria received precisely *nothing* in return for the $2.6 million. . .". Here, there were promises made in return, as PIA 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.

This consideration was directly bargained for, and under *Turken*, the value of this promise must be measured against the consideration the City paid. PIA argues that this consideration has "no quantifiable worth at all to Peoria" but ignores the evidence in the record that shows that it *did* have a quantifiable fair market value. Contrary to PIA's gloss (at 3), this case is not about "private entities' investments in their private properties" but about Peoria attracting new business to Peoria. Nor is this 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" those which were "not bargained for"). The clear text of *Turken* (which

PIA omits) mandates that the actually bargained for promises be treated as consideration under the Gift Clause. This is precisely what the lower courts did.

II. The Court of Appeals' Decision Will Not Undermine the Gift Clause.

PIA argues (at 3-5) about vague "perilous potentialities" that will result if the Court of Appeals is not reversed. PIA cites (at 4) a study from the Office of Auditor General to attempt to say there is a widespread problem but concedes that the study does not actually examine local government's economic development agreements, as are at issue here. Nor does PIA claim that these types of agreements are inherently unconstitutional—instead, it explicitly disavows (at 4) any such argument. And PIA acknowledges (at 4) that courts are "neither constitutionally compelled nor institutionally equipped to parse the terms of every government contract for perfect parity." Nowhere does PIA suggest that the economic development agreement at issue here posits any novel question of law, or that this particular case will provide any guidance to lower courts or local governments at a general level.

PIA states (at 5) without evidence or citation that public officials have "little incentive" to bargain aggressively for municipalities' interests. Public officials answer to elected officials who answer to voters. That is more than enough incentive to bargain aggressively for the benefit of the municipality. Even if true, it is not a legal basis for this Court to invalidate such agreements. Voters are more than capable of voting out public officials who fail to adequately protect taxpayer funds. The fact

that the referendum power may not apply (a question that will not be resolved in this case) to these agreements is irrelevant to the analysis under the Gift Clause. If the voters are not happy with these agreements as PIA suggests they might be, they can express that policy choice at the ballot box.

The courts below performed the judiciary's proper role, precisely as PIA calls for. The courts examined the record evidence of the objective fair market value of the promises made by the private entities to Peoria. The entirety of this evidence was (1) the City's expert report and (2) the actual cost of building the new campus. Relying on the expert report, the superior court found that the consideration could not be said to be grossly disproportionate to what the City paid. The Court of Appeals affirmed, citing both pieces of record evidence. This is the precise approach called for in *Turken*. *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.").

CONCLUSION

PIA'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 17th day of June, 2020.

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