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 PETITION FOR REVIEW

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 Hickman, City Attorney, No. 022406
Amanda Sheridan, Senior Assistant City Attorney, No. 027360
OFFICE OF THE CITY ATTORNEY CITY OF PEORIA
8401 West Monroe Street
Peoria, Arizona 85345
(623) 773-7330
caofiling@peoriaaz.gov

Attorneys for Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

As part of its economic development program, the City of Peoria agreed to provide limited cost reimbursements for specified expenses as consideration for a private university's agreement to, among other things, open a branch campus within Peoria and meet certain agreed upon performance measures. Applying this Court's precedent, the lower courts correctly determined that Petitioners failed to establish that the City's payments violated the Arizona Constitution's Gift Clause, Article IX, Section 7.

Although Petitioners cast their petition as raising novel questions of Arizona law, the result below was squarely controlled by this Court's precedent. This Court should not accept review in this case to consider Petitioners' claim that economic development is not a public purpose, particularly when that argument would invalidate a statute that explicitly authorizes municipal governments to spend money precisely for that purpose. Nor should this Court should accept review to entertain Petitioners' arguments that would have this Court alter its precedent to create a special, limited definition of consideration for the Gift Clause. Their arguments, unsupported by this Court's precedent, would eliminate from

the consideration analysis the value of bargained for promises, such as a promise to open a university in Peoria, unless the promises result in the City's receipt of cash or the City's acquisition of some asset or the performance of some service directly for the City as an entity. Contrary to established precedent, Petitioners' approach ignores the true bargained for consideration and unnecessarily restricts policy makers' ability to enter agreements with private parties to benefit the communities they serve. Significantly, Petitioners failed to present any evidence of the value of the promises that the City had bargained for under the agreements, arguing only that the promises made to the City had no value at all.

Twice in the past decade, this Court has reached important conclusions under the Gift Clause. First, in *Turken*, it held that consideration for the purpose of the Gift Clause means the same thing it does in ordinary contract law: what one party to a contract promises to do in exchange for the other party's promise. *Turken v. Gordon*, 223 Ariz. 342, 349 ¶ 31 (2010). This holding was reaffirmed in *Cheatham v. DiCiccio*, which stated that the obligations an agreement placed on a private party were consideration, and that courts took a panoptic view of the transaction. *Cheatham v. Diccio*, 240 Ariz. 314, 324 ¶ 42 (2016). And both cases reaffirmed the longstanding test the Gift Clause

imposes. A transaction is evaluated under the Gift Clause for (1) whether the public expenditure has a public purpose, with significant deference to the public body approving the expenditure, and (2) whether the consideration for the transaction is grossly disproportionate, also with deference to the public body's determinations. *Id.* at 318 ¶ 10. Unless a public body has unquestionably abused its discretion, an expenditure made by the public body is generally entitled to deference. *Id.*

The Petition presents no legal issue that warrants this Court's review. The Court of Appeals' memorandum decision correctly affirmed the superior court's decision granting the City summary judgment because Petitioners failed to prove the City had abused its discretion as to either consideration or public purpose. Petitioners' claimed issues of first impression are fully controlled by this Court's prior gift clause jurisprudence. The Court should deny the petition for review.

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that the City had not abused its discretion in determining that the agreements related to a private university establishing a campus in Peoria served a public purpose?

2. Did the Court of Appeals correctly determine, based on *Turken*, 223 Ariz. at 349 ¶ 31, that Petitioners failed to establish that the City's bargained for consideration under the agreements relating to a private university opening a branch campus in Peoria was grossly disproportionate to the cost reimbursement payments the City agreed to make under those agreements?

FACTS AND PROCEDURAL BACKGROUND

In October 2016, Petitioners filed a lawsuit against the City and the Mayor and City Council, arguing that two agreements entered into by the City violated the Gift Clause. (IR 1.) The complaint challenged (1) an agreement between the City and Huntington University (the "HU Agreement") wherein the City agreed to reimburse certain expenses incurred by HU in connection with its promise to open a satellite campus in Peoria, and (2) an agreement between the City and Arrowhead Equities, LLC (the "Arrowhead Agreement") wherein the City agreed to reimburse certain tenant improvement costs incurred by Arrowhead in converting its space into a suitable facility for HU's Peoria campus. The Complaint alleged that the Agreements violate the Gift Clause, lacking both a legitimate public purpose and adequate consideration.

The City prevailed on summary judgment (IR 79), and the court of appeals affirmed that decision in a memorandum decision. Op. ¶ 1.

Peoria's Economic Development Implementation Strategy

Arizona expressly authorizes city and towns to utilize financial incentives to promote economic development within their boundaries. *See* A.R.S. § 9-500.11; Op. ¶ 2. Subject to that authority, the Peoria City Council enacted an Economic Development Implementation Strategy ("EDIS") in 2010. Op. at 3 ¶ 2. The EDIS identified "business activities and industries desirable to the City" and authorized the "creation and implementation of an economic development incentive and investment program that sets forth in detail the types of public incentives and investments that the City is authorized and willing to make . . . in furtherance of retaining existing businesses and attracting certain targeted businesses and industries identified in the EDIS as desirable to Peoria." *Id.*

The City supplemented this economic development strategy with an Economic Development Incentive and Investment Policy ("EDIIP") which identified industries involving "higher education" and "the use of high technology or innovative new technologies" as targeted industries. *Id.* at 3 ¶ 3. In addition, in order to attract development to a specific area known as

the P83 District, Peoria adopted the P83 Program, under which certain property owners could apply for a matching funds grant from Peoria for internal improvements, subject to certain conditions. *Id.* at 3 ¶ 4.

The HU and Arrowhead Agreements

Both the HU and Arrowhead Agreements (collectively, the "Agreements")[1] were approved by the City in the context of its established economic development policies and programs. Under the Agreements, HU and Arrowhead are eligible for certain cost reimbursements from the City if certain benchmarks are met. Op. at 4 ¶ 6.

As part of the implementation of the EDIIP, the City began exploring the possibility of HU opening a campus in Peoria. Op. at 3 ¶ 5. These discussions culminated in the execution of the HU Agreement. Op. at 4 ¶ 6. Under the Agreement, HU would receive a maximum of $1,875,000 over three years from the City if it opens a campus in Peoria and meets certain performance thresholds. *Id.* In exchange, HU has committed to invest at least $2.5 million over the same period to the development of its Peoria

[1] In both the superior court and the court of appeals, the Agreements were analyzed by both parties and the courts as a single transaction for Gift Clause purposes.

campus, to not engage in any similar project with any other Arizona municipality over the next seven years, to participate in "economic development activities" with Peoria, and to meet several performance thresholds. *Id.*

As part of effectuating its promise to open a satellite campus in Peoria, HU entered into a lease agreement with Arrowhead for certain space owned by Arrowhead within the P83 District. *Id.* at 4 ¶ 8. Arrowhead promptly applied for a grant under the P83 Program. *Id.* The City and Arrowhead then entered into the Arrowhead Agreement, wherein the City will reimburse Arrowhead a maximum of $737,596 if it meets all performance thresholds. *Id.*

Both Agreements, although separately executed, were together designed to produce one thing – an operational HU campus in Peoria. There is no dispute that HU would not have opened a Peoria campus without the Agreements. *Id.*

During this litigation, the City hired an expert – Bryce Cook -- to analyze the value of what was promised to the City by HU and Arrowhead. *Id.* at 5 ¶ 9. Mr. Cook opined that the appropriate way to measure the value of the promises made by HU and Arrowhead is to measure the economic

impact that occurs within the city limits as a result of opening and operating the HU Peoria campus. *Id.* at 9 ¶ 22. Mr. Cook conducted such an analysis and concluded that "the economic value of the promise to operate a branch campus of HU in the City . . . including the promises to repurpose the building for the campus, is $11.3 million." *Id.* As both the trial court and court of appeals concluded, based on the record in this case, Petitioners did not meet their burden to establish that the Agreements violate the Gift Clause.

REASONS TO DENY THE PETITION

I. This case presents no important issue concerning the public purpose prong of the Gift Clause.

Petitioners argue that this Court should take this case because they have identified at least 12 other contracts that "fall within the scope of this case" and because "local governments frequently subsidize business in hopes that these businesses will stimulate the local economy." Pet. at 8-9. That local governments adopt policies to support their local economies is unsurprising. The Legislature has expressly authorized municipal governments, such as the City, to "appropriate and spend public monies for and in connection with economic development activities." A.R.S. § 9-

500.11(A). That municipalities are acting according to the express statutory authority offered by A.R.S. § 9-500.11(A) raises no constitutional concern.

As a threshold matter, Petitioners' argument that expenditures for economic development serve no public purpose necessarily calls into question the constitutionality of A.R.S. § 9-500.11(A) which specifically authorizes those expenditures. Yet Petitioners do not purport to challenge the constitutionality of that statute and did not comply with A.R.S. § 12-1841(A)'s requirements that apply to constitutional challenges of state laws. The lack of compliance with A.R.S. § 12-1841(A) precludes any finding that the public spending on economic development authorized by A.R.S. § 9-500.11(A) violates the Gift Clause. A.R.S. § 12-1841(C) (statute may not be ruled unconstitutional where State was not provided with an opportunity to be heard on the issue, and "the court shall vacate" any decision to that effect at the State's request). If the Court wishes to consider whether economic development expenditures serve a public purpose, it should wait for a procedurally appropriate vehicle that squarely places A.R.S. § 9-500.11(A)'s constitutionality before it.

Apart from that significant procedural defect, their claim that the Agreements serve no public purpose fails under this Court's precedent. 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[.]" *Cheatham*, 240 Ariz at 320 ¶ 21 (quoting *Turken*, 223 Ariz. at 349 ¶ 28). "For Gift Clause purposes, a public purpose is lacking 'only in those rare cases in which the governmental body's discretion has been unquestionably abused.'" *Cheatham*, 240 Ariz. at 320 ¶ 21 (quoting *Turken*, 223 Ariz. at 349 ¶ 28).

The public purpose analysis has repeatedly emphasized that governmental bodies can act in the general welfare when engaging in activities similar to the statutorily authorized economic development spending here. *See, e.g., Industrial Development Authority of Pinal County v. Nelson*, 109 Ariz. 368, 371-73 (1973) (holding that there was a public purpose in issuing bonds in order to loan money to private company to purchase and install air pollution facilities, and noting that the issuance of bonds for industrial development was consistent with the gift clause).

As the court of appeals recognized, the City determined that bringing HU to the City "would be 'of great value to the city'" by "promoting economic development and job growth, promoting educational opportunities in STEM field, and repurposing an 'unused or underutilized

propert[y]' in the P83 District." Op. at 7 ¶ 17. And the City was acting pursuant to its authority to spend monies "for and in connection with economic development activities." A.R.S. § 9-500.11(A).

As this Court's precedents squarely compel, and in light of the deference afforded policy decisions of elected officials under the Gift Clause, economic development is an acceptable public purpose, and as Petitioners fail to directly challenge A.R.S. § 9-500.11(A), this Court should decline the invitation to declare public spending on economic development unconstitutional in this case

II. This case presents no important issue concerning the adequacy of consideration prong of the Gift Clause.

The Court of Appeals correctly affirmed the trial court's decision that Petitioners failed to establish that City's reimbursement payments were grossly disproportionate to the value of the promises the City bargained for in the Agreements.

Petitioners argue that this case presents an issue of "first impression" because "no Arizona court has ever decided the issue" of whether a "private business's promise to operate with a city's boundaries . . . and a business's promise to renovate its own property" can be adequate consideration under

the Gift Clause. Pet. at 11. This Court's existing Gift Clause caselaw, however, provides the necessary gui dance to resolve the consideration issue in this case, and this Court should deny review.

This Court adopted its test for whether a public contract violates the Gift Clause in *Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346 (1984). Under *Wistuber*, a governmental expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that "is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity." *Id.* at 349 (internal quotations omitted).

This Court further addressed the "consideration" requirement under the Gift Clause analysis in *Turken*. There, this Court instructed that courts should look at the fair market value of what is directly contracted for when evaluating consideration. 223 Ariz. at 350 ¶ 33. *Turken* looked towards contract law for the "settled meaning" of consideration, relying on the definition set out in *Schade v. Diethrich*, 158 Ariz. 1, 8 (1988). *Turken*, 223 Ariz. at 349 ¶ 31. Under *Turken* and *Schade*, 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 (*quoting Shade*, 158 Ariz. at 8);

accord Restatement (Second) of Contracts § 71 (1981). While contract law rarely considers the adequacy of the consideration, this Court has required this evaluation under the Gift Clause "because paying far too much for something effectively creates a subsidy from the public to the seller." *Turken*, 223 Ariz. at 350 ¶ 32.

In *Turken*, the City of Phoenix argued that the consideration it received in exchange for access to certain parking spaces at a new mixed-use development was the anticipated tax revenue the development would generate. *Id.* at 350 ¶ 33. This Court rejected that approach holding that "[a]lthough 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.* (emphasis added). Performance of undisputed legal duties, such as the anticipated increased tax revenue in *Turken*, are thus not consideration for a transaction. Restatement (Second) of Contracts § 73. But this does not mean a party's bargained for performance can be dismissed as "indirect."

There is no dispute regarding what consideration HU and Arrowhead are providing the City in exchange for the reimbursement payments. HU

will open a university campus—an industry the City per its duly enacted policy wants to attract—in Peoria; Arrowhead will renovate its property so its suitable for the campus; and HU will refrain from entering similar agreements with other Arizona cities and will also assist Peoria with other economic development efforts. Op. at 9 ¶¶ 22-23 (identify the consideration the City received as the "promise[] to open a Peoria campus," to "convert a building in the P83 district into a campus," and "to forbear from engaging in similar projects with any other Arizona municipality for seven years."); at 12 ¶ 32 (Morse, J., dissenting) (identifying the provision of the university as a consideration), 13 ¶ 34 (Morse, J., dissenting) (identifying the agreement to forgo similar deals as consideration). Despite Petitioners' repeated dismissals of this consideration as "a private university's investment in its own campus," HU's agreement to operate in Peoria was specifically bargained for in the Agreement, and HU and Arrowhead were obligated to satisfy specified performance obligations to receive cost reimbursement payments from the City.

The dissent's disagreement in the court of appeals centered on whether the City had presented adequate evidence of the *value* of this consideration that could be balanced against the reimbursement payments to determine

whether the incentive payments were "grossly disproportionate to what [the City] will receive." *See Turken*, 223 Ariz. at 350 ¶ 39. At the trial court, the City's expert opined that the appropriate way to measure the fair market value of the HU campus that the City bargained for was to determine the economic impact of having the campus within City's limits. Op. at 9 ¶ 22. The City's expert concluded that the "the value of the promise to operate a branch campus of HU in the City of Peoria, including the promise to repurpose the building for the campus is $11.3 million." As the majority below noted, alternatively, the value of HU's promise to open a campus in Peoria could also be estimated based on HU's "substantial obligation to develop and open a new campus in Peoria at a minimum cost of $2.5 million and to help Peoria with economic development activities." Op. at 9 ¶ 23. With either approach, the value of the promises is not grossly disproportionate.

Petitioners argue that the value of the City's promises in the Agreements is zero because any value of having HU in Peoria is an indirect benefit that is not consideration. This is incorrect. The City bargained for HU to operate a campus in Peoria and for related commitments. The question for the consideration analysis under *Turken* is what the value of

these promises is and whether the value is grossly disproportionate to what the City would pay under the agreement. See *Turken*, 223 Ariz. at 350 ¶ 39. Petitioners failed to offer *any* evidence as to the value of the Agreements promises, instead insisting they must be valued at zero based on their theory that any value is an indirect benefit that is not consideration.

In doing so, Petitioners (and the dissent below) ignore that Petitioners bear the "burden of overcoming the presumption" of constitutionality. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387 ¶ 33 (2013) (quoting *Eastin v. Broomfield,* 116 Ariz. 576, 580 (1977)); *see also State v. Boehler*, 228 Ariz. 33, 35 ¶ 4 (App. 2011) ("A party challenging an ordinance bears the burden of establishing its invalidity."). It is Plaintiffs' burden to present evidence to establish that the consideration is grossly disproportionate. As the lower courts concluded, Petitioners failed to meet their burden to prove that the Agreements lacked adequate consideration under *Turken*.

In addition, in a footnote (n. 6), Petitioners suggest the Court should retreat from the holding in *Wistuber*- reaffirmed in both *Cheatham* and *Turken*—that the adequacy of consideration is reviewed by courts for abuse of discretion. *See Wistuber*, 141 Ariz. at 349 (holding that courts examine whether consideration "is not so inequitable and unreasonable that it

amounts to an abuse of discretion, thus providing a subsidy to the private entity"); *Turken*, 223 Ariz. at 349 ¶ 30 (same); *Cheatham*, 240 Ariz. at 322 ¶ 35 ("[C]ourts must give due deference to the decisions of elected officials."). Petitioners also suggest in this footnote that the Court should cease deferring to governments as to public purpose. In effect, they want to place courts, not elected officials, as the body which decides in the first instance whether *any* government expenditure is appropriate and to review all government spending decisions de novo. The Court should not entertain this offer.

III. The Payments Petitioners Challenged Have Been Made.

This case also does not warrant this Court's review because the payments Petitioners challenge have been made. (Ex. 1.) A decision from this Court would simply be an advisory opinion. In their complaint, Petitioners sought declaratory and injunctive relief to prohibit the payments under the Agreements. (IR 1, ¶¶ 59-63.) They never sought a preliminary injunction to block the payments. Because there are no payments to enjoin, the action is moot. *E.g., Rodgers v. Huckelberry,* 247 Ariz. 426, 430-31 ¶¶ 18-21 (App. 2019). Although courts have discretion to consider matters that are moot, this is another reason this Court should decline review in this case.

CONCLUSION

The Court should deny the petition.

RESPECTFULLY SUBMITTED this 8th day of May, 2020.

OSBORN MALEDON, P.A.

By /s/ Mary R. O'Grady

Mary R. O'Grady
Emma J. Cone-Roddy
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012

Vanessa Hickman
Amanda Sheridan
OFFICE OF THE CITY ATTORNEY
CITY OF PEORIA
8401 West Monroe Street
Peoria, Arizona 85345

Exhibit No. 1

Mary R. O'Grady, 0011434
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

Attorneys for Appellees/Respondents

ARIZONA SUPREME COURT

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 as 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

Arizona Supreme Court
No. CV-20-0027-PR

Court of Appeals
Division One
No. 1 CA-CV 18-0379

Maricopa County
Superior Court
No. CV2016-013699

DECLARATION OF AMBER COSTA

the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona,

Appellees/Respondents.

I, Amber Costa, hereby declare and state as follows:

1. I am the Economic Agreement Coordinator for the City of Peoria.

2. As part of my responsibilities, I am familiar with the Agreements between the City of Peoria and Huntington University that are the subject of *Schires v. Peoria*, and the implementation of those agreements.

3. All City of Peoria payments to Huntington University and Arrowhead Equities, LLC required under the Agreements have been paid.

4. No additional payments to Huntington University or Arrowhead Equities, LLC are required.

5. The City of Peoria's agreement remains in place to ensure Huntington University's compliance with its requirements under the Agreement.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 5/7/20.

Amber Costa