IN THE SUPREME COURT

STATE OF ARIZONA

DARCIE SCHIRES, *et al.*, Appellants/Petitioners, v. CATHY CARLAT, *et al.*, Appellees/Respondents.	No. CV-20-0027-PR Court of Appeals No. 1 CA-CV 18-0379 Maricopa County Superior Court Case No. CV2016-013699

BRIEF OF *AMICUS CURIAE* PUBLIC INTEGRITY ALLIANCE IN SUPPORT OF THE PETITIONERS[1]

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[1] Pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(1)(A), this brief is filed with the written consent of the parties.

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The Public Integrity Alliance ("PIA") respectfully submits this brief as *amicus curiae* in support of the Petition for Review. If left undisturbed, the Court of Appeals' ruling would vitiate this Court's landmark opinion in *Turken v. Gordon*, 223 Ariz. 342 (2010), and derogate a foundational constitutional safeguard designed to align the incentives of public officials to the interests of the voters whom they serve.

INTEREST OF *AMICUS CURIAE*

PIA is a nonprofit corporation headquartered in Arizona that is organized and operated for the purpose of promoting social welfare, pursuant to section 501(c)(4) of the Internal Revenue Code of 1986, as amended. Because its issue advocacy and pursuit of the public interest frequently entails exposing corruption, official misconduct and improper uses of taxpayer money, PIA is acutely interested in ensuring that Article IX, Section 7 of the Arizona Constitution (hereafter, the "Gift Clause") remains what the Framers intended it to be: a robust constraint on the conscription of public resources for private ends.

ARGUMENT

I. The Court Should Grant Review Because the Court of Appeals Implicitly Abrogated This Court's Precedents and Incorrectly Decided an Important Question of Constitutional Law

No municipality "shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." ARIZ. CONST. art. IX, § 7. Underlying this proposition is the principle that a governmental body contracting away public property to a private party must receive "'consideration' which is

not 'so inequitable and unreasonable that it amounts to an abuse of discretion,' thus providing a subsidy to the private entity." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984) (internal citations omitted). Thus, as this Court reaffirmed in *Turken*, "[w]hen a government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." 223 Ariz. at 348, ¶ 22. *Turken*'s critical insight, however, was that the consideration required by the Gift Clause cannot consist of merely any articulable "benefit" (*e.g.*, increased tax receipts) that the government may someday reap as a consequence of the transaction. Rather, "analysis of adequacy of consideration for Gift Clause purposes focuses instead on the objective fair market value of what the private party has promised to provide in return for the public entity's payment." *Id.* at 350, ¶ 33.

Here, the City of Peoria has received precisely *nothing* in return for the $2.6 million in taxpayer reimbursements that it has promised to Huntington University and Arrowhead Equities, LLC. The "objective fair market value," *id.*, to Peoria of promises by *private* entities to invest in their own *private* property and businesses is zero. Huntington University's putative "obligation to develop and open a new campus in Peoria," Op. at p. 9, ¶ 23, carries no quantifiable worth at all to Peoria taxpayers, who will acquire no ownership or other legal interest in the property, or even enjoy public access to the facilities constructed on it. The City's mere subjective desire to see the private investment occur and its aspirations for the "economic development" it may incidentally engender do not

imbue in it any "objective fair market value" ***for the City***. *See Turken*, 223 Ariz. at 350, ¶¶ 33, 35 (noting that incidental "indirect benefits," such as sales tax receipts, "are not consideration under contract law," and adding, as an illustrative example, that paying a contractor "far more than the fair market value for [a] repair [to city owned property] plainly would be a subsidy to the contractor"); *see also Fairfield v. Huntington*, 23 Ariz. 528, 536 (1922) ("In all those case in which the appropriation of the public funds of the state has been upheld upon this ground the state has received some benefit as a state, or the claimant has suffered some direct injury 'under circumstances where in fairness the state might be asked to respond'—where something more than a mere gratuity was involved.").

In short, by concluding that private entities' investments in their private properties constitutes cognizable "consideration" to the City of Peoria in exchange for its disbursements of public funds, the Court of Appeals' judgment is irreconcilable with—and, if left undisturbed, threatens to entirely enervate—this Court's opinion in *Turken*.

II. The Court of Appeals' Decision Will Substantially Undermine a Vital Constitutional Protection Against the Misuse of Taxpayer Resources

Embedded in the Court of Appeals' opinion are perilous potentialities that will reverberate far beyond the confines of this particular case. At all levels of government, taxpayer-backed "incentives" designed to spur economic development are dispensed to private entities with increasing regularity. A 2015 audit found that the Arizona Commerce Authority in fiscal year 2014 entered into more than $25 million in grant agreements, many

of which were with private companies, and approved more than $11 million in various tax credits and incentives during the same period. *See* Office of the Auditor General, *Performance Audit and Sunset Review: Arizona Commerce Authority*, Report No. 15-112 (September 2015), *available at* https://www.azauditor.gov/sites/default/files/15-112_Report.pdf. Not reflected in these sums are additional public resources doled out pursuant to "economic development" agreements between local governments and private parties, which, as the Petition notes, are relatively commonplace in Arizona. *See* Petition at 9.

To be sure, this is not to suggest that all or even most of these programs or arrangements necessarily contravene the Gift Clause. Further, the judiciary is neither constitutionally compelled nor institutionally equipped to parse the terms of every government contract for perfect parity. *See Turken*, 223 Ariz. at 348, ¶¶ 21-22 (noting that courts will intervene only "[w]hen government payment is grossly disproportionate to what is received in return" in a bilateral exchange, or the disbursement is not for a cognizable "public purpose"). Rather, the point is that as various species of economic development incentives proliferate and consume ever-greater quantities of taxpayer dollars, fidelity to the Gift Clause is necessary to ensure that these programs do not devolve into impermissible subsidies to private businesses.

In one of its earliest expositions of the Gift Clause, this Court recounted that it "represents the reaction of public opinion to the orgies of extravagant dissipation of public

funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (1925) (quoting *Thaanum v. Bynum Irrigation Dist.*, 232 P. 538 (Mont. 1925)).

Importantly, however, the Gift Clause precludes not only the willful misuse of public resources, but also subsidies born of benevolent intentions. Animating the Gift Clause is a preoccupation with the moral hazard that inevitably afflicts government officials' stewardship of public resources. This danger assumes particular salience in the context of governmental dealings with private parties. Because such contractual arrangements are often complex, arcane, and extend over periods of many years or even decades, the public officials responsible for negotiating or authorizing them often have little incentive to bargain aggressively with the benefitted private party for commensurate return consideration. In addition, economic development agreements at least arguably enjoy immunity from the voters' veto, thus leaving them insulated from a vital mechanism of democratic accountability. *Cf. Respect Promise in Opposition to R-14-02-Neighbors for a Better Glendale v. Hanna*, 238 Ariz. 296, 303, ¶ 26 (App. 2015) (holding that city's litigation settlement agreement was not a legislative act that could be the subject of a voter-initiated referendum).

The Gift Clause is the only remaining institutional safeguard that aligns the actions of government officials with the taxpayers' long-term interest in the appropriate conservation of public resources. By effectively negating the constitutional requirement that governmental bodies must receive in their contractual dealings "objective fair market value" that is at least not "grossly disproportionate to what is received in return," *Turken*, 223 Ariz. at 348, 350, ¶¶ 22, 33, the Court of Appeals has felled a key pillar of the Gift Clause, to the detriment of Arizona taxpayers. This Court's intervention is necessary to correct such a consequential error.

CONCLUSION

For the foregoing reasons, the *amicus* respectfully requests that the Court grant the Petition for Review and vacate the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 29th day of May, 2020.

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