Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

BRAMLEY PAULIN; AUSTIN SHEA [ARIZONA] – 7TH STREET AND VAN BUREN LLC; AND CULVER PARK – 1129 NORTH FIRST STREET, LLC; MAT ENGLEHORN; HOPELESSLY URBAN, LLC,

Plaintiffs,

vs.

CITY OF PHOENIX, a municipal corporation of the State of Arizona; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix,

Defendants.

CASE NO.

APPLICATION FOR A TEMPORARY RESTRAINING ORDER (WITH NOTICE) AND MOTION FOR A PRELIMINARY INJUNCTION

EXPEDITED RULING REQUESTED

Pursuant to Rule 65 of the Arizona Rules of Civil Procedure, Plaintiffs Bramley Paulin and Mat Englehorn, *et al.* (Taxpayers), move for issuance of a temporary restraining order (TRO) prohibiting Defendant City of Phoenix (City) from taking any action to enforce or implement Phoenix Ordinance S-56966, and/or from providing public resources or special tax advantages to the Hubbard Street Group (Hubbard) pursuant to the Government Property Lease Excise Tax (GPLET) abatement provisions of the May 14, 2021 Disposition and Development Agreement (Hubbard Agreement or Agreement) between the City and Hubbard. Plaintiffs further move this Court for an order setting a hearing on their request for a preliminary injunction.

INTRODUCTION

In the heart of downtown Phoenix, in one of the most desirable real estate markets in the state, the City has agreed to an elaborate tax arrangement with Hubbard to enable Hubbard to avoid payment of nearly $7.9 million in property taxes that it would otherwise owe, and for which Hubbard does not provide a proportional benefit to the City or its taxpayers.

Utilizing the GPLET abatement provisions of A.R.S. § 42-6209—which are intended to apply to *government-owned* properties—Hubbard has agreed to convey to the City real property it owns (and currently pays taxes on), so that the property becomes "City property," and is consequently excluded from the tax rolls. The City will then lease the property back to Hubbard, who controls and manages the property during the lease just as it would any other for-profit business-owned property. Yet, thanks to the GPLET benefit in the Hubbard Agreement, Hubbard will pay no *ad valorem* property taxes on that property for eight years—during which other Arizona taxpayers, in Phoenix and beyond, must shoulder the difference. At the end of the eight years, the City must convey the property back to Hubbard. In other words, this arrangement provides that Hubbard's land is conveyed to the government in *form*, while in *substance* being owned and operated by a private party, for the sole purpose of evading property taxes that Hubbard would otherwise owe, and which other taxpayers must pay.

Under the Arizona Constitution's Gift Clause (Art. IX, Sec. 7), the government may not give public resources to private parties unless: (1) the expenditure is for a public purpose; and (2) the government receives in return direct, measurable consideration that is proportionate to the government outlay. *Schires v. Carlat*, 250 Ariz. 371, 374–75 ¶ 7 (2021); *Turken v. Gordon*, 223 Ariz. 342, 345 ¶ 7, 348 ¶ 22 (2010). These requirements apply not just to government expenditures of funds, but also to tax exemptions such as those at issue here. *See, e.g., Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559–60 (App. 1997) (analyzing tax exemption under the Gift Clause).

In this case, the City is giving Hubbard a tax benefit worth $7.9 million, in exchange for $525,000 in rent payments and payments of $32,000 to two local school districts. That is grossly disproportionate by any measure and violates the requirements of the Gift Clause. Additionally, because the Hubbard Project is used and operated for purely private purposes, and the City exercises inadequate supervision and control over it, the GPLET subsidy also fails to advance a public purpose.

The City signed the Hubbard Agreement, which provides the GPLET subsidy to Hubbard, even after this Court declared a nearly identical arrangement (which also provided an eight-year GPLET tax abatement to the developer of a high-rise luxury apartment building) unconstitutional under the Gift Clause. *Englehorn v. Stanton*, No. CV 2017-001742, 2020 WL 7487658 (Ariz. Super. June 19, 2020) (attached as Exhibit 7). And despite requests from taxpayer Plaintiffs in this case to modify the arrangement to comply with the Constitution, the City persisted in giving this subsidy to Hubbard even after the Supreme Court decided *Schires v. Carlat*, which clarified and strengthened the protections afforded Arizona's taxpayers under the Gift Clause.

Because the City is violating the plain requirements of the Gift Clause and has ignored guidance from this Court in similar circumstances, the City should be preliminarily and permanently enjoined from providing the GPLET subsidy to Hubbard.

FACTUAL BACKGROUND

Hubbard currently pays *ad valorem* property taxes on vacant parcels of land that it owns at the southeast corner of Sixth and Garfield Streets in downtown Phoenix. Hubbard Agreement § 103 attached as Exhibit 1. But it will no longer be required to do so after it builds a 26-story multi-family residential development called the Hubbard Project. *Id.* The cost of construction for the Hubbard Project is estimated to be $86,900,000. *Id.* Hubbard expects at least a 5.56% return on its investment in the project, but the City has agreed to increase Hubbard's profits to 6.51% through the taxpayer-financed abatement of property tax challenged herein. Hubbard's Response to City's Request for Proposals (RFP Response) attached as Exhibit 3 at 39.

Hubbard sought this benefit in a response to a City Request for Proposals for development projects in downtown Phoenix. City's Request for Proposals (RFP) attached as Exhibit 2. On October 7, 2020, the City Council approved Ordinance S-46966, which authorized the City Manager or his designee to enter into a development agreement with Hubbard. *See* Exhibit 4. On May 14, 2021, the Hubbard Agreement became effective. *See* Ex. 1 at 1. Under that Agreement, upon completion of construction, Hubbard will convey title to the City, *id.* § 103, and the City will immediately lease the Project back to Hubbard for a period of eight years. *Id.* During that eight-year lease period, the City abates all property taxes on the Project—meaning Hubbard pays no property taxes at all. *Id.* at Ex. C § 4.6. At the end of the GPLET Lease, the City conveys the Hubbard Project back to the Developer. Ex. 1 § 202.9. During the lease period, Hubbard fully controls, operates, and manages the Hubbard Project, with no oversight or control by the City. *Id.* at Ex. C § 8.1. Also, despite being a putatively "government-owned" building, the City cannot transfer title or any interest whatsoever in the Hubbard Project to any other party. Ex. 1 § 202.9. Additionally, Hubbard may terminate the lease and acquire the property *at any time and for any reason* for a $100,000 payment. *Id.* at Ex. C § 30.3.

The City entered the Hubbard Agreement to relieve Hubbard, and only Hubbard, of its existing *ad valorem* property tax burden for eight years. Hubbard and the City estimate

that the value of the property tax abatement over the course of the eight-year lease is $6,608,800. Ex. 3 at 39; Pollack Study attached as Exhibit 5 at iii. Taxpayers estimate that the value of the tax abatement at $7,891,324. *See* Declaration of Kevin McCarthy attached as Exhibit 6 ¶ 28. The difference between the two estimates is that the City anticipates no growth in the property value of the Hubbard Project, whereas Taxpayers estimate a modest growth in property value (and therefore higher property taxes). *Id.* at ¶¶ 24–26; Ex. 3 at iii.

In exchange for the $7.9 million tax abatement, Hubbard agrees to provide $525,000 in rent payments to the City, Ex. 1 at Ex. C § 3.1, and $32,000 in payments to two school districts, Ex. 1 § 309, that will be deprived of tax revenue during those eight years because of the tax abatement. The Agreement also requires Hubbard to make available 10% of the residential units for "Workforce Housing"—to any person who meets eligible income requirements—during only the lease period. *Id.* § 311. Hubbard provides no additional direct benefits to the City in the Agreement.

Plaintiffs Bramley Paulin and Mat Englehorn and their businesses are Phoenix taxpayers ("Taxpayers") responsible for paying property, sales, and other taxes. Taxpayers bear a share of the tax burden and are liable for replenishing the public coffers for unlawful government expenditures, gifts, and loans.

ARGUMENT

A party seeking a TRO and preliminary injunction must show: (1) a likelihood of success on the merits; (2) the possibility of irreparable harm if relief is not granted; (3) balance of hardships favoring the moving party; and (4) public policy weighs in favor of injunctive relief. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Courts apply a sliding scale to assess these factors, *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410–11 ¶¶ 9–10 (2006), which means that the stronger the likelihood of success on the merits, the less irreparable harm is necessary (and vice versa), *or* the presence of serious questions where the balance of hardships favors the movant *Id*. at 411 ¶ 10. But all four factors weigh in favor of granting injunctive relief here.

I. Taxpayers are likely to prevail on the merits.

A. The City's GPLET subsidy to Hubbard is grossly disproportionate to any benefit the City receives from Hubbard.

The Gift Clause forbids the City from "mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. The purposes of this Clause are to prevent the "depletion of the public treasury or inflation of public debt by [public entities] engag[ing] in non-public enterprise," *Town of Gila Bend v. Walled Lake Door Co*., 107 Ariz. 545, 549 (1971) (citation omitted), and to prevent government entities from "giving advantages to special interests," *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). The Gift Clause applies not only to direct expenditures of funds, but also to tax exemptions or rebates. *See Pimalco, supra*; *Maricopa Cnty. v. State*, 187 Ariz. 275, 280 (App. 1996). *See also Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368, 372 (1973) (The Gift Clause was "designed to prevent the economic losses of the 19th century suffered by municipal corporations which gave money, credit *or other valuable advantages* to railroads, canal companies, etc." (emphasis added; citation omitted)).

To survive a Gift Clause challenge, a transfer of public funds or the grant of a tax exemption to a private entity must (1) serve a public purpose and (2) be in exchange for adequate consideration tendered by the recipient. *Schires*, 250 Ariz. at 374–75 ¶ 7; *Turken*, 223 Ariz. at 345 ¶ 7, 348 ¶ 22. These are conjunctive requirements, so a failure of either requirement will violate the Gift Clause. *Id.*

The Hubbard Agreement fails this test—and is therefore unconstitutional—because the City receives inadequate consideration for its $7.9 million gift to Hubbard. The arrangement also fails to achieve public purpose because the favorable tax treatment inures to the exclusive benefit of Hubbard, and the City fails to exercise sufficient control over the operations of the Hubbard Project to ensure that a public purpose is accomplished.

1. The GPLET subsidy fails the consideration prong of the Gift Clause test because the City is not receiving direct benefits that are proportional to the amount of the subsidy.

The simplest way to resolve the Gift Clause claim is by conducting an analysis of the adequacy of consideration in the Hubbard Agreement. Because the consideration provided by Hubbard to the City in exchange for the GPLET subsidy is grossly disproportionate, the arrangement violates the Gift Clause.

To survive Gift Clause scrutiny, the allocation of public resources must be supported by adequate consideration. That means the recipient of public resources must make a contractual promise to give the public measurable return value that is proportionate to what it receives.[1] To resolve this part of the constitutional analysis the Court "focuses on what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires*, 480 P.3d at 644 ¶ 14. The Court must "compare the public expenditure to what the government receives under the contract." *Turken*, 223 Ariz. at 348 ¶ 22. And when it does this, the Court "*should not give deference* to the public entity's assessment of value but should instead identify the fair market value of the benefit provided to the entity and then determine proportionality." *Schires*, 250 Ariz. at 646 ¶ 23 (emphasis added). Additionally, "anticipated indirect benefits," such as economic improvement that the government may hope will result from a development project, cannot be included in this analysis. *Id.* at 645 ¶ 16. Instead, the comparison "focuses … on the objective fair market value[s]" on both sides. *Id.* at 644 ¶ 14 (citation omitted).

The question the Court must answer is therefore a simple one**: What is the Hubbard Agreement costing the City and its taxpayers, and what is the City *directly* receiving in return, based on the *objective fair market value* of both sides of the**

[1] More simply, while the government may never *give* public resources to a private party, it may *buy* things from a private party. The consideration analysis is designed to ensure that when it does so, the value of the thing the government obtains is proportionate to the value it gives up. Paying $100 for a $10 hammer, for example, would be grossly disproportionate and would equate to a gift of $90 to the seller of the hammer.

transaction? If the latter is grossly disproportionate to the former, then the arrangement is unlawful because it would amount to a gift, akin to spending $100 to buy a hammer worth only $10. In this case, the City is providing a $7.9 million subsidy for which it is receiving only $525,000 in the form of rent payments and $32,000 in payments to two local school districts. That return is grossly disproportionate.

According to the City's economic analysis, if the Hubbard Project were undertaken and completed without the GPLET subsidy, Hubbard would pay $6,608,800 in taxes over the term of the eight-year lease. *See* Ex. 5 at iii. Hubbard's estimate agrees with this. *See* Ex. 3 at 39. Taxpayers estimate is higher: their expert estimates that, absent the tax benefits of the Agreement, Hubbard would be liable for $7,891,324 in *ad valorem* property taxes over the course of the eight year lease.[2] Ex. 6 ¶ 28. The Court can decide later which estimate it finds persuasive: for purposes of this motion it suffices that all parties agree that **the public outlay in this case is between $6,608,800 and $7,891.324.**

The parties likely differ in larger degree over what the City is promised in return for this benefit, but those disagreements *are questions of law, not fact*, and in any event, are not material for Gift Clause purposes. Specifically, when entering the Hubbard Agreement, the City cited various tax payments and *indirect* benefits, such as the speculative "economic impact" of the project, as benefits that the City receives under the Agreement. But as a matter of law, these *do not* count, because Arizona courts have made clear that only *direct* benefits that are bargained for in the Agreement itself (and are not pre-existing legal duties) count as consideration. *See Turken*, 223 Ariz. at 350 ¶ 33; *Schires*, 250 Ariz. at 377 ¶ 18. The City may not rely, therefore, either on "economic impact" or Hubbard's payment of taxes to support the constitutionality of this deal.[3]

[2] The estimates differ because of anticipated growth rates in the value of the completed Hubbard Project through the duration of the lease. The City estimates that the Hubbard Project will not grow in value at all. Ex. 3 at iii. Taxpayers estimate modest growth in property value for the Hubbard Project. However, whether the Court accepts Taxpayers' estimate or the City's estimate doesn't matter here, because *either* payment is grossly disproportionate to what the City receives.

[3] The Hubbard Agreement also includes other values that do not count as consideration: (1) a one-time $100,000 "voluntary" donation from Hubbard to the Affordable Housing

There are therefore only two direct payments that Hubbard promised in the Agreement to make to the City that can count as consideration for the $7.9 million tax benefit Hubbard receives. These are: $525,000 in "rent" payments and $32,000 in payments to Phoenix Elementary School District and Phoenix Union High School District.[4] Ex. 1 § 308. Based on these payments, **in exchange for the $6.6 or $7.9 million GPLET subsidy, the City is receiving only $557,000 in direct benefits from Hubbard.** That is "grossly disproportionate" and unconstitutional under the Gift Clause, *Turken,* 223 Ariz. at 348 ¶ 22, as the chart below shows:

Consideration during GPLET Lease

Consideration	Taxpayers
Foregone property tax	- $7,891,324
Lease payments	$525,000
School district payments	$32,000
Subsidy Amount	-$7,334,324

Trust Fund and (2) $1,150,000 in estimated "Workforce Housing" units. The $100,000 donation does not count because the Agreement characterizes that payment as a "donation," not an obligation, and thus it is gratuitous. *Turken*, 223 Ariz. at 349 ¶ 31 (only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration.). The "Workforce Housing" units also do not count as consideration because the beneficiaries are individual private parties, not the public as a whole,, and their value to the public is "too indefinite to enforce, much less value." *Schires*, 250 Ariz. at 378 ¶ 21. To the extent the "donation" and "Workforce Housing" mandates are attempts to circumvent Arizona's statutory prohibitions on "inclusionary zoning," *see* A.R.S. § 9-461.16, they are also not lawful consideration. *Harris v. Runnels*, 53 U.S. 79, 80 (1851) ("A promise to do what the law forbids, is void, whether the act proposed to be done be *malum in se* or *malum prohibitum.*").

[4] The City is not receiving these latter two payments; the school districts are. And they primarily benefit the districts, not the City. Taxpayers therefore contend that they do not count as consideration to the City for purposes of the comparison of values. However, this Court in *Englehorn* found that the districts in that case were "intended, third party beneficiar[ies]," and therefore payments to school districts that are bargained for were included as consideration in that case. 2020 WL 7487658, at *3 ¶ 37.

Whether the City is giving Hubbard tax benefits in the amount of $7,891,324, as Taxpayers contend, or $6,608,800 as the City admits, either amount is grossly disproportionate to the $557,000 in objectively measurable, bargained-for contractual benefits.

But even if the Court accepts *all* the City's assumptions regarding consideration, the benefits the City gives Hubbard in the Agreement are *still* grossly disproportionate to the benefits Hubbard gives back in return.[5] Simply put, by *any* measure, the benefits Hubbard gives the City are grossly disproportionate to the public benefits the City is giving to Hubbard—which means this is an unconstitutional subsidy. *Turken*, 223 Ariz. at 350 ¶ 35.

2. Neither tax payments nor indirect, speculative "economic impact" can count as consideration under the Gift Clause.

Neither the tax payments that Hubbard is legally obligated to make to the City, nor the amorphous and speculative "economic impact" of the Hubbard Project can count as consideration under the Gift Clause.

The Supreme Court definitively ruled that tax payments are *not* consideration for Gift Clause purposes in *Schires*, 250 Ariz. at 377 ¶ 18. It said that "[a] business's obligation to pay taxes is independent of an economic development agreement" because it is a preexisting legal duty, and it is therefore "irrelevant to [Gift Clause] analysis." *Id*; *see also Turken*, 223 Ariz. at 350 ¶ 38 (tax payments are preexisting legal obligations, and therefore not consideration under the Gift Clause or ordinary contract law). Also, both *Schires* and *Turken* made clear that *anticipated* economic consequences of development—that is, hoped-for economic growth or "projected sales tax revenue" are not consideration

[5] Adding the $100,000 donation to the $557,000 would bring the total amount provided by Hubbard to the City up to only $657,000, which is still grossly disproportionate to either $6.6 million or $7.9 million outlay. And even if the Court also adds in the $1.15 million in "Workforce Housing," that would *still* bring the total up to only $1,807,000 provided by Hubbard to the City, which *is still* grossly disproportionate to even the City's low figure of $6.6 million in benefits to Hubbard, let alone to the $7.9 million that Taxpayers estimate.

under the Gift Clause because they are speculative, not objectively measurable, and not legally enforceable. *See Schires,* 250 Ariz. at 377 ¶ 16; *Turken,* 223 Ariz. at 350 ¶ 33.

In the Hubbard Agreement, the City relies on certain anticipated tax payments to count as consideration for Gift Clause purposes—and the City includes in this calculation its anticipated transaction privilege taxes on construction, transaction privilege taxes on tenant lease payments and utilities during the lease term, and anticipated sales and property tax payments that the City hopes to realize *after* the lease expires. Ex. 1 § 202.6. But *Schires* and *Turken* make crystal clear that this is not lawful. Paying taxes is a preexisting legal obligation, and therefore not consideration—and anticipated economic consequences of development (including anticipated tax revenue) are "valueless" for Gift Clause purposes. *Schires*, 250 Ariz. at 377 ¶ 16.

The Hubbard Agreement also contains an unusual "Minimum Direct Benefit" provision, which at first glance might seem to guarantee that the City will receive the full tax value of the property—but this provision does not salvage the constitutionality of the Agreement. Under that provision, Hubbard agrees that the City will receive a minimum amount of $9 million in construction taxes, tenant taxes and lease payments, and property taxes after the lease term, or—purportedly—it will make up the difference. Ex. 1 at Ex. C § 4.7. But the taxes that Hubbard "actual[ly] pay[s]," as well as the "Net Rent" that Hubbard pays, are credited against this amount. *Id.* That means the amount Hubbard owes is satisfied wholly through the payment of taxes that it *already* owes and would otherwise pay. Since "[a] business's obligation to pay taxes is *independent* of an economic development agreement," and *not* consideration under the Gift Clause, *Schires,* 250 Ariz. at 377 ¶ 18, this provision of the Agreement does nothing more than reiterate Hubbard's promise to do what it is already legally obligated to do—and that is never consideration for a contract. *J. D. Halstead Lumber Co. v. Hartford Acc. & Indem. Co.,* 38 Ariz. 228, 235 (1931) ("A promise to do something which a party is already legally obliged to do is no consideration.").

Moreover, the agreement only obligates Hubbard to pay taxes "in accordance with applicable laws," Ex. 1 at Ex. C § 4.7, which presumably includes the GPLET tax exemption itself. That means this alleged guarantee does *not* ensure that the City will receive the taxes that it would have received *absent* the tax break. Instead, it merely reiterates that Hubbard will pay whatever taxes it owes *after* it receives the tax break. Simply put, the "Minimum Direct Benefit" provision does not attempt to compensate the City for the $6,608,800 or $7,891,324 in taxes that are foregone in the Agreement. It simply pledges that Hubbard will pay the taxes it owes after those tax benefits are *subtracted* from Hubbard's tax liabilities.

The case law is clear: only direct, measurable benefits that have been bargained for count as consideration. In this case, that is between $6.6 million and $7.9 million on one side, and $525,000 in rent payments and $32,000 to school districts on the other side. That is inadequate consideration. Thus, the Hubbard Agreement results in an unlawful subsidy.

B. The GPLET subsidy fails the public purpose prong of the Gift Clause test because the tax benefit was provided to increase the profits of a private company and the City does not exercise control over the Hubbard Project.

The fact that the City does not receive adequate consideration in exchange for its GPLET subsidy to Hubbard is by itself reason to find the Hubbard Agreement unconstitutional. But in addition, that subsidy is so clearly earmarked for the self-interested benefit of a private entity that it also fails to achieve a public purpose.

It is "a core Gift Clause principle" that "[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual." *Turken*, 223 Ariz. at 347–48 ¶¶ 19–20 (citation omitted); *see also Proctor v. Hunt*, 43 Ariz. 198, 201 (1934) ("It is, of course, axiomatic that money raised by public taxation is to be collected for public purposes only, and can only legally be spent for such purposes and not for the private or personal benefit of any individual"). The Gift Clause expressly forbids the use of public funds "to foster or promote the purely

private or personal interests of any individual." *Walled Lake Door*, 107 Ariz. 545, 549 (1971).

Further, "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Turken,* 223 Ariz. at 346 ¶ 14.

While the Gift Clause forbids the City from subsidizing private enterprises, it does allow the City to give public benefits to a private entity so long as it exercises "control and supervision" over that private entity to ensure that the private entity is carrying out a public purpose with that money. *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986).

But the GPLET subsidy to Hubbard does not serve a public purpose because it was provided solely to increase the financial profits of a private party, and the City fails to exercise control over the Hubbard Project. The City awarded the GPLET benefit to increase Hubbard's private profit and to minimize risk for Hubbard's investors, so that Hubbard will construct high-rise apartments in downtown Phoenix. It did not hire Hubbard to provide any kind of public service or to build public facilities, and it did not buy property or other items from Hubbard.

In its response to the City's RFP, Hubbard estimated that the GPLET tax treatment for the Project would increase its profits from 5.56% to 6.51%, which was purportedly necessary to make the Project feasible. *See* Ex. 3 at 39. Hubbard further asserted that it "must request assistance from the City of Phoenix in order to achieve rates of return required by the market." *Id.* at 44. In other words, according to Hubbard itself there is insufficient market demand for the construction to be completed—meaning that the City's justification for spending taxpayer resources on the Project is the very fact that it is expected to be an economic loss. Yet the City ultimately approved Hubbard's request for a subsidy by providing the GPLET tax benefit. Increasing the profits of a private corporation is not a public endeavor; it is a quintessentially *private* one.

Additionally, the City exercises virtually no control over the Hubbard Project to ensure that any public purpose is accomplished. In *Kromko*, the Supreme Court made

clear that the government may only give public resources to a private entity so long as the "operations" of that entity "are … subject to the control and supervision of public officials" to ensure that public purposes are actually being carried out. 149 Ariz. at 321. That case involved a transaction between a nonprofit corporation and the Arizona Board of Regents (ABOR), in which public property was given to the corporation to operate a hospital. The court said this was constitutional only because ABOR maintained supervision and authority over the nonprofit hospital, to ensure that the nonprofit was using public resources for public healthcare purposes, instead of simply using those public resources for its own ends. 149 Ariz. at 321.

But here, the Hubbard Agreement does exactly the opposite. The City maintains no authority *whatsoever* over the operations of, or decisions pertaining to, the Hubbard Project. Hubbard is a purely private venture controlled by private parties. Indeed, the GPLET Lease itself specifies that Hubbard is "*fully and solely* responsible for the condition, construction, operation, repair, demolition, replacement, maintenance, and management of the Premises." Ex. 1 at Ex. C § 8.1 (emphasis added). It also says that Hubbard has full discretion to use the Project as a multi-family residential building and make all management decisions related to the building and its operation. *Id.* at § 8.2. The City exercises no greater control over the Project than it does over any other private landowner or private business in Phoenix.

What's more, although putatively a "government-owned" building, the City cannot transfer title or any interest whatsoever in the Hubbard Project to any other party. Ex. 1 § 202.9. And Hubbard may terminate the lease and acquire the property—which will cost $86 million to construct—at any time and for any reason, for a mere $100,000 payment. *Id.* at Ex. C § 30.3. Unlike *Kromko,* the City does not maintain any authority over the operations of the Hubbard Project, appoint any decisionmakers within the Hubbard Group, and cannot approve most transactions related to the disposition of the Hubbard Project.

In short, the Hubbard Project represents a completely private endeavor, and it is "government property" in name only. Hubbard is the constructive owner—the *de facto* owner of the property—throughout the eight-year period, notwithstanding the formal or *de jure* ownership the City employs as a means of subsidizing Hubbard. The GPLET subsidy is therefore not for a public purpose, but for a private one—which is unconstitutional. *Kromko*, 149 Ariz. at 321. Although government entities have discretion in determining what constitutes a "public purpose" under the Gift Clause, the GPLET arrangement at issue here is so plainly earmarked for private interests and public control is so lacking, that the Agreement does not survive even a deferential inquiry. The City has abused its discretion in approving the GPLET subsidy, which is unconstitutional.

II. Plaintiffs will suffer irreparable harm without an injunction.

Taxpayers will suffer irreparable injury if the City enforces S-56966 and extends a GPLET subsidy to Hubbard because Plaintiffs cannot be compensated at law for violations of their constitutional rights and duties. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the deprivation of a constitutional right "unquestionably constitutes irreparable injury"); *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." (citation omitted)); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968) (officials were injured by being forced "to choose between violating their oath [of office] and … refus[ing] to comply with [the challenged law].").

Moreover, Taxpayers cannot be adequately compensated for the impact that the GPLET Lease will have on them and their businesses, which are disproportionately burdened when the City permits some properties to enjoy a GPLET subsidy but not others. Because the full extent of these harms are not remediable by damages, they are irreparable. *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd.*, 228 Ariz. 61, 65 ¶¶ 10–11 (App. 2011).

III. The balance of hardships and public interest tips sharply in Taxpayers' favor.

When a government entity is a party to a lawsuit, it is appropriate to "consider the balance of equities and the public interest together." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).[6] Although it is not necessary for this Court to address these factors because Taxpayers have a strong likelihood of success on the merits, any violation of the Constitution is also a hardship that tips the balance in favor of Taxpayers, and enforcing the constitution is always in the public interest. *See, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (citation omitted)). Conversely, any hardship to the City would be minimal or non-existent. Indeed, even assuming the City has an "economic impact" interest in seeing the Hubbard Project completed, nearly identical high-rise residential projects have gone forward in this highly desirable area of the City in the absence of GPLET subsidies, even after such subsidies were promised but not delivered. *See Englehorn v. Stanton*, 2020 WL 7487658.

If the Hubbard Agreement is sustained, on the other hand, it would be extremely difficult to unwind the consequences of this misallocation of public resources and it would incentive the City to continue unconstitutional behavior. Indeed, this case represents the exact reason *why* enjoining constitutional violations is in the public's interest. On June 18, 2020, a judicial officer from this Court struck down a very similar GPLET subsidy from the City to the developer of a high-rise residential building under the Gift Clause. Order. The Court observed:

> If Arizona law prohibits grossly disproportional benefits to be paid to a developer, and if payments under a future GPLET agreement must more closely approximate the amount of *ad valorem* taxes, does the GPLET have any remaining usefulness to incent redevelopment? In other words, this judicial officer questions whether the death knell for the GPLET's usefulness has rung.

[6] *Flynn v. Campbell*, 243 Ariz. 76, 80 ¶ 9 (2017) ("Although a federal court's interpretation of a federal procedural rule is 'not binding in the construction of our rule,' we recognize its instructive and persuasive value and that 'uniformity in interpretation of our rules and the federal rules is highly desirable.'" (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 304 (1990)).

Id. at *10.

Yet, despite the Court's strong admonition, four months later, the City approved a nearly identical GPLET tax abatement in this case without ensuring that taxpayers receive appropriate consideration. Ex. 4. The public's interest and the balance of hardships tilts strongly in favor of Taxpayers and in granting injunctive relief.

IV. Taxpayers have met all additional requirements for preliminary relief, and no bond should be required.

Pursuant to Ariz. R. Civ. P. 65(a)(1), (d)(2), undersigned counsel certifies that they have arranged service of the Verified Complaint and this Motion to the City via service of process.

Under Rule 65(c), a plaintiff seeking preliminary relief must generally post a bond "in such amount as the court considers proper to pay." This Court, however, has discretion to waive this requirement where doing so serves the interests of justice. *In re Wilcox Revocable Trust*, 192 Ariz. 337, 341 ¶¶ 17–20 (App. 1998); *see also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir.2004) ("requiring nominal bonds is perfectly proper in public interest litigation."). Any bond in this matter should be nominal because Taxpayers are seeking in the public interest to enjoin a violation of the Constitution. As one federal court observed when interpreting Rule 56(c)'s federal counterpart, "requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate," because that would make "protection of [constitutional] rights … contingent upon an ability to pay." *Doctor John's, Inc. v. City of Sioux City*, 305 F. Supp.2d 1022, 1043–44 (N.D. Iowa 2004). These Taxpayers bring this case as concerned citizens and taxpayers seeking to vindicate the public interest. *Cf. Ctr. For Food Safety v. Vilsack*, 753 F. Supp.2d 1051, 1062 (N.D. Cal. 2010) (vacated on other grounds) (court dispensed with bond requirement where plaintiff was a "small non-profit" and "requiring the organization to pay a bond would fatality [sic] harm its ability to bring lawsuits on behalf of the public interest."). Anything

more than a nominal bond will have a chilling effect on efforts to ensure legal compliance. *Cf. Wistuber,* 141 Ariz. at 350 (Attorney fees should not be awarded "[w]here aggrieved citizens, in good-faith, seek a determination of the legitimacy of governmental actions … Courts exist to hear such cases; we should encourage resolution of constitutional arguments in court rather than on the streets."). The Court should therefore waive the bond requirement or set it at a nominal amount.

CONCLUSION

This Court should enter a temporary restraining order, set a preliminary injunction hearing on this matter as promptly as possible, and enjoin the unconstitutional allocation of public resources in the Hubbard Agreement.

DATED this 4th day of May, 2022.

GOLDWATER INSTITUTE

By: */s/ Jonathan Riches*
Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004

Attorneys for Plaintiff