OFFICE OF THE ARIZONA ATTORNEY GENERAL
STATE OF ARIZONA

KRIS MAYES
ATTORNEY GENERAL

January 16, 2024

VIA EMAIL

Scott Roney, General Counsel
Arizona Commerce Authority
100 N. 7th Ave., Suite 400
Phoenix, Arizona 85007
[redacted]

Re: Public Monies Complaint concerning the Arizona Commerce Authority's CEO Forums
Investigation No. PM2023-0028

Dear Mr. Roney,

The Arizona Auditor General forwarded its September 2023 Sunset Review of the Arizona Commerce Authority ("ACA") to the Attorney General's Office for review of the CEO Forums program. We have determined that the CEO Forums, as they have existed in prior years and as planned for this year, violate Article IX, Section 7 of the Arizona Constitution because they involve an impermissible gift to corporate executives and do not create concomitant public value that is cognizable under governing Gift Clause precedent.

I. Factual Background

The ACA was established to "provide private sector leadership in growing and diversifying the economy of this state, creating high quality employment in this state through expansion, attraction and retention of businesses and marketing this state for the purpose of expansion, attraction and retention of businesses." A.R.S. § 41-1502(A). One "element of the ACA's marketing strategy" is a multiday "CEO Forum" to which a "limited number" of corporate executives are invited. (ACA Nov. 20, 2023 Responses at 1–2.) The CEO Forums offer invited executives premium packages to marquee sporting events and informational sessions with Arizona leaders.

For example, the four-day 2023 CEO Forum was organized around Super Bowl LVII and the Waste Management Phoenix Open. (CEO Forum Itinerary 2-8-23.) Representatives from 66 private businesses and their guests attended, and the Forum cost $2,087,562. (Ariz. Auditor Gen.

Sunset Rev. at 19–20.)[1] The ACA paid for attendees' accommodation, in-state transportation, and tickets to the Waste Management Phoenix Open VIP Skybox, an NFL Owner's Party, a Super Bowl LVII VIP Tailgate Party, the Super Bowl Experience, a private viewing suite at the Super Bowl LVII, and concerts associated with the Super Bowl and Waste Management Phoenix Open. (CEO Forum Itinerary 2-8-23; 2023-15_AZSBHC CEO Forum Agreement A1 (8-2-22).) Some attendees also received theater tickets. (CEO Forum Expense Detail 2022, 2023.) Attendees also received four game tickets and two parking passes to a regular season football game, two invitations to a lunch with NFL leadership, and four tickets to the Super Bowl Host Committee's VIP Golf Tournament, none of which were part of the CEO Forum event schedule. (2023-15_AZSBHC CEO Forum Agreement (4-4-22); CEO Forum Itinerary 2-8-23.) The program also included panels and meals with the governor, a United States senator, ACA board members, Arizona university presidents, and other Arizona leaders. (CEO Forum Itinerary 2-8-23.)

Other Forums were less grandiose. The 2015 through 2022 CEO Forums were planned around the Waste Management Phoenix Open. Representatives from 13 private businesses and their guests attended the 2018 CEO Forum, which cost $90,004. (Ariz. Auditor Gen. Sunset Rev. at 19–20; CEO Forum Attendees FY18-FY23.) Representatives from 16 private businesses and their guests attended the 2019 CEO Forum, which cost $88,315. (Ariz. Auditor Gen. Sunset Rev. at 19–20; CEO Forum Attendees FY18-FY23.)[2] Representatives from 15 private businesses and their guests attended the 2020 CEO Forum, which cost $104,400. (Ariz. Auditor Gen. Sunset Rev. at 19–20; CEO Forum Attendees FY18-FY23.) Representatives from eight private businesses and their guests attended the 2022 CEO Forum, which cost $76,222. (Ariz. Auditor Gen. Sunset Rev. at 19–20; CEO Forum Attendees FY18-FY23.) Although the details varied from year-to-year, attending executives and guests generally received tickets to an ACA-funded viewing suite with alcohol and food, tickets to "an outdoor nightclub/concert venue next to the golf tournament," lodging, in-state transportation, and branded incidentals like sunscreen, hats, wine glasses, and sunglasses. (*See generally* Ariz. Auditor Gen. Sunset Rev. at 17–18; A. Auditor General Documentation.) Like the 2023 CEO Forum, prior years' Forums included panels and meals with state government and business leaders. (*See, e.g.*, Waste Management Phoenix Open 2019 Itinerary (2019 agenda).)

The ACA estimates that it will spend over $1,000,000 on two 2024 Forums, one planned around the NCAA Final Four basketball tournament and the other planned around the Waste Management Phoenix Open. (CEO Forums Budgets.)

Each invited company receives two participant slots but one hotel room. (*See, e.g.*, 2023-15_AZSBHC CEO Forum Agreement A1 (8-2-22) (providing 140 event tickets but 70 double-occupancy hotel rooms).) Many invited executives bring a personal "guest," not a "colleague." (*See* B. 2-7 (list of ticket recipients.) The ACA states that "invitees are more likely to participate"

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[1] The accounting of the ACA and the Auditor General differ, and this letter uses the Auditor General's Sunset Review. Any difference in the calculations is immaterial to our analysis.

[2] For the 2019 Forum, one ACA list shows that 14 businesses attended. (B. 2-7.) Another shows that 16 businesses attended. (CEO Forum Attendees FY18-FY23.)

when they can invite a personal guest and "having an accompanying participant present improves the overall experience for attendees." (ACA Nov. 20, 2023 Responses at 1.)

For each CEO Forum since 2015, the ACA purchased tickets for the Waste Management Phoenix Open that went unused. In 2018, unused tickets cost the ACA $32,733.33. (CEO Forum Expenses 2018, 2019, 2020.) In 2019, unused tickets cost the ACA $24,833.33. (*Id.*; ACA Dec. 19, 2023 Responses at 6 (noting sale of unused tickets for $8,500).) In 2020, they cost $32,883.33. (CEO Forum Expenses 2018, 2019, 2020; ACA Dec. 19, 2023 Responses at 6 (noting sale of unused tickets for $450).) In 2022, they cost $23,333.33. (CEO Forum Expense Detail 2022, 2023; 2022 Reimbursement.) In 2023, the ACA donated some portion of tickets costing $62,600; the rest were apparently unused. (CEO Forum Expense Detail 2022, 2023; 2023 Reimbursements.)[3]

The stated goal of the CEO Forums is to "influence a company's decision in selecting Arizona as the location for relocation or expansion" of business. (ACA Dec. 19, 2023 Responses at 4.) Invitees include (1) "companies with active projects still evaluating multiple states," (2) companies that are "considering expansion plans, but the company does not yet have a defined project," and (3) companies "that are likely to have a project in the future" as shown by "rapid growth, significant funding raise, a large customer in or near Arizona, media coverage exposing challenges in an existing location, or other similar factors." (ACA Nov. 20, 2023 Responses at 2.) For the first time in 2023, the ACA invited (4) "venture capital firms based on their track record of investments in ACA's targeted industry sectors as well as the size of the fund and stature of the firm." (*Id.*)

Not all of the invitations bring a business's project to Arizona. CEO Forums since 2018 have hosted 136 executives representing 118 businesses (not including guests). (Ariz. Auditor Gen. Sunset Rev. at 19.) Those companies have made 27 nonbinding commitments to expand or relocate projects to Arizona, which the ACA says has resulted in "over 15,000 projected new jobs and more than $3.25 billion in [projected] capital investment." (Project Certifications; ACA Nov. 20, 2023 Responses at 3.) The ACA admitted that "it is difficult to attribute direct causation" between a business's attendance at the CEO Forum and its decision to locate a project in Arizona. (ACA Dec. 19, 2023 Responses at 5.)

But the ACA does not solely measure an event's success based on whether a project was ultimately "closed/won" in Arizona. Instead, the ACA envisions its CEO Forum marketing as a "funnel." The broadest end of the "funnel" is contact with target companies; the narrowest is a

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3 We calculated the cost of unused tickets by subtracting the amount of money the ACA recouped from reselling tickets to the Waste Management Phoenix Open from the value of the tickets purchased but designated as "[n]ot part of Forum" in the ACA's expense details. (CEO Forum Expense Detail 2022, 2023; CEO Forum Expenses 2018, 2019, 2020.) In 2023, the ACA sold $17,400 worth of tickets and donated a suite for a day. (Reimbursements.) In 2022, it sold $10,000. (Reimbursements.) In 2020, it claims (without documentation) to have sold $450, and in 2019, it claims (again without documentation) to have sold $8,500. (ACA Dec. 19, 2023 Responses at 4.)

project commitment in Arizona. The ACA assesses success of the CEO Forum by determining whether it moved companies along the "funnel," which it describes as follows:

- Reached "the targeted audience and [drove] interest in the event" because a recipient acknowledged an invitation.
- Met "peak attendance capacity with companies that meet program requirements and criteria."
- Taught attendees about "Arizona's unique value proposition and unmatched quality of life" leaving attendees "educated, inspired, and with a positive perception of the event and Arizona."
- Encouraged a company to "consider Arizona as a potential location for the project."
- Enabled additional "next steps including scheduling project-specific meetings with the client."
- Secured "a project 'closed/won' in Arizona."

(ACA Dec. 19, 2023 Responses at 3–4.)

After a sunset review of the ACA, the Arizona Auditor General referred the CEO Forums to the Attorney General's Office for review of "whether public monies were spent in accordance with the gift clause." (Ariz. Auditor Gen. Sunset Rev. at 24.)

II. The Gift Clause

Article IX, Section 7 of the Arizona Constitution ("Gift Clause") provides that the state and its localities may not "make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Provisions like the Gift Clause exist in many states, and were "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. When the private corporations failed in their obligations, the municipalities were required to pay the obligations from public treasuries." *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368, 372 (1973). As our Supreme Court has put it,

> The Gift Clause 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 businesses.

Turken v. Gordon, 223 Ariz. 342, 346 ¶ 10 (2010) (cleaned up).

Thus, the Gift Clause prevents "the depletion of the public treasury or inflation of public debt by a public entity engaging in non-public enterprises, or by giving advantages to special interests," *Schires v. Carlat*, 250 Ariz. 371, 374 ¶ 6 (2021) (cleaned up), and provides that public funds "cannot be used to foster or promote the purely private or personal interests of any individual," *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986) (cleaned up).

Arizona courts have developed a two-pronged test "to determine whether a public entity has violated the Gift Clause. First, a court asks whether the challenged expenditure serves a public purpose. If not, the expenditure violates the Gift Clause, and the inquiry ends. If a public purpose exists, the court secondarily asks whether the value to be received by the public is far exceeded by the consideration being paid by the public."[4] *Schires*, 250 Ariz. at 374–75 ¶ 7 (cleaned up).

Once a public purpose has been found, the question is whether the public's "'give' so far exceeds the 'get'" as to be a "give away" of public monies. *Id.* at 376 ¶ 14 (citation omitted). The second prong therefore avoids the dissipation of public funds by overpayment for the value received. *See Turken*, 223 Ariz. at 350 ¶ 33. Put another way, if "government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Id.* at 348 ¶ 22.

Our Supreme Court recently clarified that unlike "an enforceable promise" to provide "goods or services," generalized economic gain is an "anticipated indirect benefit that is valueless under [the] second prong." *Schires*, 250 Ariz. at 377 ¶ 16 (cleaned up). That is because "private business will usually, if not always, generate some economic impact and, consequently, permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause." *Id.* at ¶ 17. In other words, Arizona Supreme Court precedent dictates that the Gift Clause prohibits a public entity from paying a private business just to relocate or operate in a particular geographic area.

Consistent with the case law, Attorney General Opinions emphasize that even when there is no contracted-for exchange, the focus is on whether "(1) the use is for a public purpose, and (2) the value of the public money or property is not so much greater than the value of the benefit received by the public that the exchange of the one for the other is disproportionate." Ariz. Att'y Gen. Op. I97-003 at *2. An expenditure "made to benefit the health of specific persons instead of the community as a whole" is subject to the typical rule that "the Gift Clause is violated when the consideration, compared to the expenditure, is so inequitable and unreasonable that it amounts to an abuse of discretion." Ariz. Att'y Gen. Op. I20-007 at *7–8 (cleaned up). This does not prohibit the government from giving nominal gratuities for a public purpose. For example, public entities

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[4] The Gift Clause analysis of "social safety net programs" is distinct, and "may instead focus on whether anyone who qualifies for public assistance may obtain it and whether large numbers of persons do qualify." Ariz. Att'y Gen. Op. I20-007 at *7 (cleaned up); *see also Turken*, 223 Ariz. at 348 ¶ 22 n.4 (giving the example of "direct assistance to the needy"). The CEO Forums do not provide public assistance and are "highly targeted," so this analysis is inapplicable. (*See* ACA Nov. 20, 2023 Responses at 1.)

can permissibly purchase employee recognition awards of nominal value. Ariz. Att'y Gen. Op. I97-003 at *2. And school districts may properly issue cash awards "as a token acknowledgement" of a student's academic achievement. Ariz. Att'y Gen. Op. I90-072 at *2.

III. The CEO Forums violate the Gift Clause.[5]

A. The CEO Forums are not exempt from the Gift Clause.

During our investigation, the ACA asserted that the CEO Forums were exempt from the Gift Clause. We find no basis for this assertion.

As noted, the purpose of the Gift Clause is to prevent the government from giving away public assets to private businesses. *See Turken*, 223 Ariz. at 346 ¶ 10; *Indus. Dev. Auth.*, 109 Ariz. at 372. To that end, the Gift Clause prohibits the state from making "any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. Thus, the state cannot give away land, water rights, or public funds, for example. Nor can it transfer those assets for grossly inadequate consideration.

During our investigation, the ACA appears to have made two arguments for the CEO Forums' purported exemption from the Gift Clause: (1) that the Gift Clause does not apply to marketing and event hosting, and (2) that the Gift Clause applies only to transactions, and not to gifts. Both arguments are entirely unsupported by the text and purpose of the Gift Clause. By its terms, the Gift Clause does not exempt particular activities (such as marketing) or types of transactions (such as gifts). And there is no reason to think that the Gift Clause, which was meant to curb corporate welfare, would not be implicated so long as the government did not even try to obtain any contractual benefits in return for a gift of public funds. Gratuities can violate the Gift Clause because the "state may not give away public property or funds; it must receive a *quid pro quo*, which, simply stated, means that it can enter into contracts for goods, materials, property and services." *Yeazell v. Copins*, 98 Ariz. 109, 112 (1965).

B. The CEO Forums have a public purpose.

Our Office finds that the ACA did not "unquestionably abuse its discretion" in determining that the CEO Forums have a public purpose. *Schires*, 250 Ariz. at 376 ¶ 12. The "primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government." *Turken*, 233 Ariz. at 349 ¶ 28. The ACA's mission includes "marketing this state for the purpose of expansion, attraction and retention of businesses." A.R.S. § 41-1502(A). And the ACA has reasonably asserted that the CEO Forum program is an "element of the ACA's marketing strategy." (ACA Nov. 20, 2023 Responses at 1.) Programs, like the CEO Forums, that are intended to grow the State's economy have a public purpose. *See Indus. Dev. Auth.*, 109 Ariz. at 373 (financing industrial development "is an expenditure in the public

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[5] The analysis in this letter is (and must be) based on current case law. It is not meant to be a commentary on whether current case law is correct and does not attempt to anticipate future developments in the law.

interest"); *see also Schires*, 250 Ariz. at 376 ¶ 11 (giving the examples of "increasing the city's tax base" and "increasing employment opportunities for residents"); *Turken*, 223 Ariz. at 349 ¶¶ 26–27 (similar). Thus, the CEO Forums meet the first prong of the Gift Clause test.

C. The CEO Forums provide gifts to executives without any corresponding public benefit cognizable under Gift Clause jurisprudence.

The CEO Forums fail the second prong of the Gift Clause test because they give valuable benefits to a limited class of private persons without receiving any legally cognizable benefit in return.

The Gift Clause generally requires that the government receive proportional consideration for its expenditures. *Turken*, 223 Ariz. at 350 ¶ 32. The "relevant consideration consists of direct benefits that are bargained for as part of the contracting party's promised performance, and does not include anticipated indirect benefits." *Schires*, 250 Ariz. at 376 ¶ 14. The question is "what the private party has promised to provide in return for the public entity's payment." *Turken*, 223 Ariz. at 350 ¶ 33. Paying taxes "applicable to all" is not consideration, *id.* at 350 ¶ 38, but is instead "an indirect benefit that is irrelevant" to the Gift Clause analysis, *Schires*, 250 Ariz. at 377 ¶ 18. Likewise, "anticipated economic impact" is "valueless" under the second prong. *Id.* at 377 ¶¶ 16–17. Businesses inherently generate taxes and stimulate the economy, so "permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause," even if the private ventures would not exist without public funds. *Id.* at ¶ 17.

Thus, under governing precedent, government cannot "spend[ ] public funds to induce a private [business] to open" in the state or city if the sole benefit to the government is the anticipated economic benefit or tax revenues of the business operating there. *Id.* at 373, 377 ¶¶ 1, 16–18. And if the government cannot pay a business to move to that city or state, then surely it cannot give the business gratuities to *think* about moving to that city or state. But that is what the CEO Forums do. Their "ultimate goal is to influence a company's decision in selecting Arizona as the location for relocation or expansion." (ACA Dec. 19, 2023 Responses at 4.) That is simply an attempt to induce attending executives to "engage in their respective private businesses." *Schires*, 250 Ariz. at 377 ¶ 16. The CEO Forums produce no public benefit that counts under the Gift Clause.

The ACA's "funnel" measure of success demonstrates that the CEO Forums provide at most incidental benefit to the state. The ACA assesses whether its invitations reached "the targeted audience." (ACA Dec. 19, 2023 Responses at 3.) But a "connection with a company contact" is of illusory value even under the ACA's terms—generating "interest in the event" does not equate to interest in developing projects in Arizona. (*Id.*)

The ACA's responses to our Office's inquiries demonstrate that it expends considerable funds on simply achieving attendance at the CEO Forums even though there is no public benefit from an executive's private "changing perception and increasing sentiment" about Arizona. (*Id.*) Indeed, the rationale for allowing executives to bring guests unaffiliated with their company is that "invitees are more likely to participate" and "having an accompanying participant present improves the overall experience." (ACA Nov. 20, 2023 Responses at 1.) Whether the ACA met "peak attendance" with "qualified companies" might lead to "awareness, sentiment, and preference" for Arizona from those companies. (ACA Dec. 19, 2023 Responses at 3.) But those feelings provide the state with no cognizable economic value for Gift Clause purposes.

Executives' attendance at the CEO Forum and their private preference for Arizona begin generating *incidental* public value only because of other components of the ACA's "funnel." In determining the CEO Forums' success, the ACA evaluates whether "a company consider[ed] Arizona as a potential location for the project," whether the ACA held "project-specific meetings with the client," and whether a company chose Arizona for "relocation or expansion." (ACA Dec. 19, 2023 Responses at 4.) But that is "no different than a hamburger chain promising to operate in Peoria . . . in hope of stimulating the local economy." *Schires*, 250 Ariz. at 377 ¶ 17. Under governing Gift Clause jurisprudence, "[i]t makes no difference" whether the CEO Forums caused a company to create a project in Arizona. *Id.*

Because the CEO Forums involve the mere hope of an Arizona-based project, the argued-for public benefit is even more tenuous than the public benefit asserted in transactions that have been found to violate the Gift Clause. Even transactions that have violated the Gift Clause involve some promise. *See, e.g., id.* at 377 ¶ 19 (involving obligations "to spend at least $2.5 million," to "refrain from opening" in some Arizona cities, to assist with "economic development activities," and "to make tenant improvements"); *Turken*, 223 Ariz. at 351 ¶ 43 (expressing doubt about the proportionality in an exchange of 3,180 parking spaces for $97.4 million). But the ACA counts non-binding commitments to locate a project in Arizona as "project wins." (ACA Dec. 19, 2023 Responses at 4.)

Indeed, the question the ACA asks "[a]fter the program" is whether "a company *consider[ed]* Arizona as a potential location for the project." (ACA Dec. 19, 2023 Responses at 4 (emphasis added).) And some companies are invited to CEO Forums without even an expectancy of a project. One category of invitee to the CEO Forums are companies "that are likely to have a project in the future." (ACA Nov. 20, 2023 Responses at 2.) Venture capital firms are invited for "their track record of investments in ACA's targeted industry sectors as well as the size of the fund and stature of the firm," the belief that a firm is a "valuable relationship for Arizona to establish" or the fact that it can "make introductions" to others. (ACA Nov. 20, 2023 Responses at 2; ACA Dec. 19, 2023 Responses at 7.) And for its upcoming 2024 CEO Forums, the ACA is considering invitations to companies identified as "[n]on ACA Project; Company within a high-impact, target sector; Top 100 company worldwide in [certain industries]." (CEO Forums 2024 Invite Considerations.)[6] Each of these categories of invitee is defined by the fact that there is no contemplated project.

The Gift Clause is violated when the public grossly overpays for what it receives. *See Turken*, 223 Ariz. at 350 ¶ 34 (giving the example of a sewer-line repair for which the government paid $5 million but should have paid only $5,000). The CEO Forums confer significant benefits

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6 It is not clear what differentiates a "[n]on ACA Project" from an "[a]ctive ACA Project." (CEO Forums 2024 Invite Considerations.)

on private-sector executives in the hopes of increasing the chances that businesses will bring a project to Arizona. But the ACA's command of a CEO's time and attention is "valueless" under the Gift Clause inquiry when the most it will result in is a company's promise to engage in its own business. *See Schires*, 250 Ariz. at 377 ¶ 16. Under binding Arizona Supreme Court authority, the public has grossly overpaid.

In sum, the Gift Clause does not permit the ACA to justify the CEO Forums with the tax revenues, job creation, or capital expenditure that business attendees create. Attendees are under no obligation "to produce a penny of tax revenue," and projected tax revenue is not "consideration under contract law or the *Wistuber* test." *Turken*, 223 Ariz. at 350 ¶¶ 33, 38 (cleaned up). Nor is "the value of all goods, services, and increased labor income to households produced" as a result of the project. *Schires*, 250 Ariz. at 376–77 ¶¶ 15–16 & n.1. And even if the ACA could rely on such incidental benefits as a constitutional matter, the ACA admits that all of the "commitments" it has secured are non-binding. "A private business will usually, if not always, generate some economic impact and, consequently, permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause." *Id.* at 377 ¶ 17.[7]

IV. Conclusion

As they currently exist, the CEO Forums violate the Gift Clause of the Arizona Constitution. The current structure of the CEO Forums confers significant value on invited private executives and their guests without obtaining any value cognizable under the Gift Clause. Although the ACA could lawfully hold future Forums that confer nominal value on attendees, it has not shown that its upcoming 2024 Forums come anywhere close to meeting that requirement. The ACA should not hold future CEO Forums that violate the Gift Clause, and the Attorney General will seek to enjoin any future illegal payment of public monies. A.R.S. § 35-212(A)(1). **Within 7 days, please provide confirmation to my Office that you will comply with this letter.**

Sincerely,

KRIS MAYES
Arizona Attorney General

cc: Lindsey A. Perry, Arizona Auditor General

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[7] *Schires* also raises questions about the propriety of the ACA's grantmaking under the Gift Clause. *See, e.g.*, A.R.S. § 41-1545.02 (permitting grant agreements with companies that meet "performance targets" and requiring findings related to tax revenue, job creation, capital expenditure, growth of existing businesses, and other evidence of economic development). That issue is beyond the scope of this investigation. The Attorney General's Office will open a separate investigation into that issue.