ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

Gilmore v. Gallego,
CV-23-0130-PR

PARTIES:

Petitioners:	Mark Gilmore and Mark Harder (the "**Petitioners**")
Respondents:	Kate Gallego in her official capacity as Mayor of the City of Phoenix; Jeff Barton in his official capacity as City Manager of the City of Phoenix; and the City of Phoenix (collectively, the "**City**")
Intervenors:	American Federation of State, County and Municipal Employees (AFSCME), Local 2384 (the "**Union**")
Amici:	American Federation of Teachers Free Enterprise Club Freedom Foundation Grand Canyon Legal Center Laborers' International Union of North America Liberty Justice Center National Education Association National Right to Work Legal Defense Foundation, Inc. Service Employees International Union Heidi Shierholz State of Arizona

FACTS:

Petitioners are mechanics who are members of the City's Unit II for collective bargaining purposes. Since 1976 the Union has been the exclusive representative for Unit II bargaining regarding wages, hours, and working conditions.

Every two years the City and Union negotiate these terms of employment in a lengthy memorandum of understanding ("**MOU**"). The 2019 MOU, similar to prior MOUs, contained provisions governing what is called "release time," which are hours during which City employees who are Union members do not perform their City job duties but are instead paid their normal wages to perform work on behalf of the Union; this work can include things such as:

> ensuring representation for employees during administrative investigations and grievances/disciplinary appeal meetings with management; participating in collaborative labor-management initiatives that benefit the City and the members; serving on City and departmental task forces and committees; facilitating effective

> communication between City and Department management and employees; assisting members in understanding and following work rules; and administering the provisions of the Memorandum of Understanding.

The terms of the MOU state that the release time provisions provide "an efficient and readily available point of contact for addressing labor-management concerns" between the City and the Union.

The 2019 MOU created four full-time positions for Union members, two banks of release time to be used by other Union members, and a fund for reimbursing Union members for attending schools, conferences, workshops, and training. The annual cost to the City for this release time "is about $499,000, or about 0.31% of the City's annual $169 million payment required under the MOU." *Gilmore v. Gallego*, 255 Ariz. 169, 173 ¶ 5 (App. 2023).

In October 2019, the Petitioners sued the City, arguing that the release time provisions violated the Arizona Constitution because they constituted compelled speech and association, violated Arizona's right-to-work laws, and violated the Gift Clause of the Arizona Constitution, art. 9, § 7. The complaint sought declaratory and injunctive relief. The Petitioners contended that the expenditures for release time in the MOU were paid for by all Unit II employees, whether or not those employees were members of the Union. The Union intervened as a defendant and all three parties eventually sought summary judgment.

The trial court entered a brief ruling granting judgment to the defendants. In its entirety, the ruling stated:

> Plaintiffs' claims based on compelled speech, freedom of association and right-to-work all fail because the undisputed facts demonstrate that Plaintiffs do not fund release time, and Defendants are correct as a matter of law that there is no basis for Plaintiffs' alternative theory that they are forced to associate with [the Union]'s release time activities.
>
> Plaintiffs' claims based on the gift clause fail because under the controlling authority of *Cheatham v. DiCiccio*, [240 Ariz. 314 (2016)] the release time provisions in the MOU serve a public purpose and, even assuming that the objective criteria test set forth in *Schires v. Carlat,* [250 Ariz. 371 (2021)] applies, the consideration is not grossly disproportionate so as to constitute a subsidy.

The Petitioners timely appealed.

The court of appeals rejected the Petitioners' argument that the trial court had erred in finding that they did not fund release time. The court held that it was the City that paid for release time and that individual City employees did not "pay for release time out of the *employees*' personal compensation." *Gilmore*, 255 Ariz. at 175 ¶ 13.

The court of appeals distinguished *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016), a prior case raising similar claims under the City's 2010–12 MOU with the Union. The MOU in *Cheatham* had stated that "release time 'has been charged as part of the total compensation contained in this agreement *in lieu of wages and benefits*,'" but that "italicized language is not

contained in the MOU at issue here." *Gilmore*, 255 Ariz. at 176 ¶ 17. And, the court of appeals noted that in *Cheatham*, a City negotiator "'testified, without contradiction, that if the City had not agreed to pay for release time, the corresponding amounts would have otherwise been part of the total compensation available' to the applicable City," but there was "no such evidence in the record" here. *Id.*

Because the court of appeals agreed with the trial court that the Petitioners did not fund release time out of their compensation, the court held that the Petitioners' free speech, free association, and right to work claims "under Arizona's Constitution fail." *Id.* ¶ 19. And, the court rejected Petitioners' position that the release time provisions were akin to the "agency fees" that the Supreme Court held violated the First Amendment in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018); according to the court, the Petitioners were "not forced to make any payment to the Union, in any respect" because "release time is paid by the City, not by deductions from Unit II employees' wages." *Gilmore*, 255 Ariz. at 175 ¶ 14.

As for the Gift Clause of the Arizona Constitution, the court of appeals noted that Arizona applies a "two-pronged test to determine whether a public entity's expenditure violates the Gift Clause, first focusing on whether the action being challenged serves a public purpose and, if so, then focusing on whether the value received by the public is far exceeded by the consideration paid." *Id.* ¶ 25. The court of appeals unanimously agreed that the release time provisions served a public purpose as required by the Gift Clause. *See id.* at 178 ¶ 28.

However, the court of appeals split on whether the value received by the public through the release time provisions in the MOU was far exceeded by the consideration paid by the City. The majority held that prior decisions by this Court, including *Cheatham* and *Schires*, required the court to take a "panoptic view" of the "MOU overall." *Id.* at 181 ¶ 40. Under such a view, the majority held that the Petitioners had "not shown that the cost to the City of the paid release time is grossly disproportionate or far exceeds the value of what the Union and Unit II employees have agreed to provide to the City in return." *Id.* The majority thus held that "the release time provisions in the MOU serve a public purpose and are supported by sufficient consideration" and that the trial court "did not err in concluding the MOU does not violate the Gift Clause" of the Arizona Constitution. *Id.* ¶ 41.

The dissent, in contrast, would have held that the release time provisions were "negotiated separately" from the remainder of the MOU and that the MOU was not "one agreement," but rather "two agreements house in one document." *Id.* at 183 ¶¶ 48, 50 (Bailey, J., dissenting). According to the dissent, the "release time provisions are in a stand-alone agreement with the union," not the City's employees. *Id.* ¶ 50. The dissent would have held that by removing "the language linking the release time payments and the employees' compensation," the City had made it so that "the release time provisions were not bargained for as part of the employees' compensation package." *Id.* at 184 ¶ 52. Thus, the dissent viewed the parties' "contractual arrangement" here as "markedly different" from that in *Cheatham*. *Id.* ¶ 53. The dissent would have held that the release time provisions were "not supported by adequate consideration," because the "cost to the City for release time far exceeds the value of the direct benefits the City receives in return," and that they violated the Gift Clause. ¶ 53.

The Petitioners then sought review in this Court. This Court granted review to address the rephrased issues listed below.

ISSUES:

1. Does release time violate Petitioners' free speech, free association, and Right to Work rights?

2. Do the challenged release time provisions violate the Gift Clause?

CONSTITUTIONAL PROVISION:

Arizona Constitution article IX, § 7, known as the "Gift Clause," provides: "Neither the state, nor any county, city, town, municipality, or other subdivision of the state 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."

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