

**IN THE SUPREME COURT
STATE OF ARIZONA**

MARK GILMORE; and MARK
HARDER,

Plaintiffs / Appellants,

v.

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
CITY OF PHOENIX,

Defendants / Appellees,

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, LOCAL 2384,

Intervenor-Defendant / Appellee.

Supreme Court

No. _____

Court of Appeals, Division One

No. 1 CA-CV 22-0049

Maricopa County Superior Court

No. CV 2019-009033

PLAINTIFFS/APPELLANTS' PETITION FOR REVIEW

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INTRODUCTION

This case challenges the legality of a government practice called “release time” whereby the City of Phoenix (“City”) employs four full-time City employees, and pays the equivalent of two other full-time employees, *not* to perform the government jobs they were hired to perform, but instead to work for a private entity—the American Federation of State, County, and Municipal Employees, Local 2384 (“AFSCME” or “Union”). That is unconstitutional for one of two reasons: either the City is forcing *Petitioners* themselves to pay for the Union’s speech—which violates *Petitioners*’ right not to be forced to subsidize speech they disagree with—or the City is forcing *taxpayers* to pay for the Union’s activities, in which case, the arrangement is a subsidy to the Union, which violates the Constitution’s Gift Clause.

While on release time, “released” employees don’t discharge public responsibilities; they engage in political activities—including endorsing candidates for elected office and lobbying for and against policy proposals before the City Council—as well as recruiting new members and conducting other activities that advance the Union’s private interests. *See* APP.035–39 ¶¶ 62–108.

The City pays for this by forcing City employees, including *Petitioners*, to pay for it—even if those employees don’t belong to the Union, and even if they object to supporting these activities. APP.032 ¶ 31–33. The City does so under a

Memorandum of Understanding (“MOU”) between the City and the Union, where release time is expressly funded as part of “total compensation” allocated to employees. *Id.*; APP.042–43 ¶¶ 140–41.

Consequently, City employees within “Unit 2,” including Petitioners, are forced to fund release time as a condition of employment, even if they are not Union members, don’t pay dues, and have never consented to fund release time. That violates their freedom of speech—which includes the right not to be forced to fund speech one disagrees with, [Janus v. AFSCME](#), 138 S. Ct. 2448, 2486 (2018); [Brush & Nib Studio, LC v. City of Phoenix](#), 247 Ariz. 269, 283 ¶ 52 (2019)—as well as their rights against compelled association and Arizona’s Right to Work protections. [Ariz. Const. art. XXV](#); [A.R.S. §§ 23-1301–1307](#). Cf. [May v. McNally](#), 203 Ariz. 425, 428–29 ¶¶ 16–17 (2002) (compulsory association with ideological speech violates free association rights).

The court below said Petitioners are *not* forced to pay for release time—and thus their free speech rights are not violated—because the City itself, not the employees, pays for release time. Opinion ¶ 15. That was reversible error, both because this Court said otherwise in [Cheatham v. DiCiccio](#), 240 Ariz. 314, 319 ¶ 14 (2016), and because the MOU itself says release time is funded from employee’s compensation, APP.032 ¶¶ 31–32, APP.042–43 ¶¶ 140–41, a fact reinforced by the record, which shows that Petitioners were forced to fund release

time in the form of lower compensation (specifically eight fewer hours of vacation leave). APP.040 ¶ 117.

But even if it were true that the City itself funds release time, there is still an unconstitutional gift of public resources. [Ariz. Const. art. IX, § 7](#). That’s because the Union is not contractually obligated to give the City any direct benefits in exchange for the funding in question. On the contrary, released employees work on the Union’s behalf, not on the City’s. That means the City does not “get” anything in exchange for what it “gives” as required by [Schires v. Carlat](#), 250 Ariz. 371, 376 ¶ 14 (2021).¹

The majority below found that the City receives sufficient consideration because release time is provided to all Unit 2 employees in exchange for those employees’ services. Opinion ¶¶ 31, 38. The dissent found, however, that “the release time provisions are not supported by adequate consideration,” Opinion ¶ 53, and that the majority erred in concluding that the money for release time comes from a compensation package that Unit 2 employees bargained for. Since that isn’t true, the labor of those employees cannot be the “consideration” received in exchange for release time. *Id.* ¶ 49.

¹ The City also exercises insufficient control over the use of release time to ensure that any public purpose is actually accomplished. *Cf. Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986). The court below erroneously held that such control is not constitutionally required. Opinion ¶ 28.

In short, the MOU’s release time provisions were negotiated as a separate benefit, not as part of employee compensation—and that means the court must test those provisions for public purpose and adequate consideration, just as in [*Wistuber v. Paradise Valley Unified School District*](#), 141 Ariz. 346, 348 (1984). It fails that test, because release time is not a benefit Unit 2 employees get in exchange for work, or something of value that the City receives; it’s a benefit the Union enjoys, and uses for its own private interests, but which is paid for with public funds. Thus, even under [*Cheatham*](#), it is an unconstitutional gift.

The error below creates confusion over the proper application of existing Gift Clause precedent—confusion manifested in the disagreement between the majority and dissent. This Court should grant review to clarify these pressing constitutional questions on an issue that affects government employees and taxpayers throughout Arizona.

ISSUES PRESENTED

1. Does release time violate Petitioners’ free speech, free association, and Right to Work rights because the City forces them to fund Union speech and activities as a condition of employment without affirmative consent?
2. Do the challenged release time provisions violate the Gift Clause because they primarily benefit a private organization, and the City does not receive direct, contractually obligatory benefits in exchange for its release time payments?

FACTS

Release time is a practice that provides paid time off to City employees to engage in Union activities—indeed, to *work for* the Union, rather than the City. Some release time employees work *full-time* for the Union, meaning they report to Union headquarters—not to a City office—and their work schedules and activities aren’t supervised, directed, or controlled by the City, even though the City pays them as regular, full-time employees. APP.033 ¶¶ 43–45, APP.034 ¶¶ 48, 51–54, APP.036 ¶¶ 71–73. Other release time employees use a paid bank of hours to perform Union activities at the direction and control of the Union, not the City. APP.031–32 ¶ 27; APP.034 ¶ 56.

This practice is established by an MOU between the City and the Union. Under the MOU, the Union receives four full-time release employees, and the equivalent of two other full-time employees through a bank of hours, as well as other direct payments and release time benefits. APP.031–32 ¶ 27. These employees do not work for the City, however. Instead, “released” employees engage in political activities, including meeting with and endorsing candidates for elected office, participating in meetings of the Union’s Political Action Committee, and lobbying the City Council. APP.036–37 ¶¶ 71–87; APP.035–36 ¶¶ 67–68. They also use release time to recruit new members, APP.006 ¶ 20; APP.018 ¶ 20; APP.168 at 67:3–68:24, file grievances against the City, APP.164–65 at 53:4–55:8;

APP.022 ¶ 63, engage in collective bargaining, APP.019 ¶ 24, APP.169 at 70:2-19, support labor organizations in other cities, APP.177–78 at 105:5–106:18, and engage in other activities that advance the Union’s interests.

The City exercises no meaningful oversight over, or supervision of, employees on full-time release, and they face no public accountability. Released employees report to the Union’s offices, not City offices. APP.034 ¶ 54. They set their own schedules and direct their own activities. APP.033 ¶ 43. Nobody with the City gives them daily duty assignments, monitors their performance, or places prohibitions on their activities. APP.033 ¶¶ 44–45. Released employees aren’t required to report or otherwise account for their time to the City. APP.034 ¶ 48. Every other City employee faces *some* work performance evaluation, but no such evaluation is conducted for release time employees. *Id.* ¶ 50. And while every other public employee in the City has a direct supervisor, full-time release employees simply have *no* City supervisor. *Id.* ¶¶ 51–53.

The reason is simple: these employees actually work for the Union, not the City.

The cost of these and other release time benefits under the MOU is \$998,000, or \$499,000 per year. APP.032 ¶ 29. That amounts to roughly \$647.21

per Unit 2 employee. APP.029 ¶ 7.² Under the MOU, “[t]he cost to the City for these release positions and release hours, including all benefits, has been charged as part of the total compensation detailed in this agreement.” APP.032 ¶ 31; APP.050 § 1-3(A).

But the employees do not actually get this amount. Instead, the City gives it to the Union. Petitioner Harder,³ for example, is an equipment mechanic who, for over 15 years, has worked for the City maintaining trucks and other types of construction equipment. APP.029 ¶¶ 2–3. He’s part of “Unit 2,” which consists of employees who provide skilled labor services to the City. Petitioner Harder is not a member of the Union and does not wish to subsidize it or its activities, or to be associated with it in any way. *Id.* ¶ 5; APP.031 ¶ 21. He’s forced to subsidize release time, however, because funding allocated in the MOU for his services are spent on release time instead—and the MOU gives him no way to either opt into or out of funding release time. *Id.* ¶ 24.

The Union has not promised to provide any direct benefits to the City in exchange for the \$998,000 release time payment. APP.039 ¶¶ 109–12. Indeed, it has not obligated itself, contractually or otherwise, to provide *any* benefits in return

² By comparison, the Union receives only \$331,474 in paid union dues from its own members. *Id.* ¶ 8.

³ Petitioner Gilmore, also a heavy equipment mechanic, was recently medically retired from City employment. Petitioner Harder is still employed by the City. They are referred to throughout collectively as “Petitioners.”

for release time. *Id.* ¶ 109. On the contrary, under the MOU’s release time provisions, the Union expressly promises *nothing* but to “engage in lawful *union* activities,” *id.*; APP.050 § 1-3(A)(1)—not to give the City anything for that money. And although the City argues that release time helps with labor relations, it has never even tried to determine whether that’s true, or what value, if any, the City gets in return for the money it gives. APP.039–40 ¶ 113, APP.035 ¶ 65.

ARGUMENT

The lower court’s decision revolved around the question of who pays for release time: Petitioners or the City? The majority determined that the City pays for release time, which meant that Petitioners’ free expression, association, and Right to Work rights aren’t violated. Opinion ¶¶ 19–22. That was wrong for three reasons: (1) this Court already held that release time is paid for by each *individual* employee, [Cheatham](#), 240 Ariz. at 318–19 ¶ 14,; (2) the MOU expressly says Petitioners fund release time “as part of ... total compensation,” APP.050 § 1-3(A); and (3) the City and the Union have *always* treated release time as individual employee compensation. APP.040 ¶ 117; APP.041 ¶ 123. Since Petitioners are forced to pay for release time, their speech, association, and Right to Work rights are violated.

But even if release time is *not* paid out of Petitioners’ compensation, then it is an unlawful subsidy to the Union, because the Union gets nearly \$1 million, but

gives *no* direct, contractually obligatory benefit to the City in exchange. That is, the City pays the salaries of several full-time government employees, but receives no services in return. The “give” exceeds the “get.” [Schires](#), 250 Ariz. at 376 ¶ 14.

In short, if release time *is* part of Petitioners’ compensation, it violates Petitioners’ free expression, association, and Right to Work rights. If release time is *not* part of Petitioners’ compensation, it violates the Gift Clause. Either way, it’s unconstitutional.

I. Petitioners are compelled to fund release time, which violates their free expression, associational, and Right to Work protections.

The majority below concluded that release time does not violate Petitioners’ free speech, associational, and right to work protections because “[t]he City—not Unit II employees—pays for release time under the MOU.” Opinion ¶ 15. That was reversible error for three reasons.

First, this Court held in [Cheatham](#) that “release time is a component of the overall compensation package,” and is paid “[i]n lieu of increased hourly compensation or other benefits ... *per unit member*.” 240 Ariz. at 318–19 ¶ 14 (emphasis added).⁴ The lower court erred in disregarding this clear holding.

⁴ Not only was that the holding of this Court, but the City argued in *Cheatham* that release time is paid for out of employee compensation. See [Cheatham v. DiCiccio](#), 238 Ariz. 69, 72 ¶ 8 (App. 2015), *vacated*, 240 Ariz. 314 (2016). For that reason, they should be estopped from denying that release time is paid for out of the

Second, the MOU itself says release time is paid for out of compensation. The majority below acknowledged that “the Cheatham MOU [was] remarkably similar to the MOU here,” Opinion at ¶ 37, but nevertheless concluded that because this MOU lacks the phrase “in lieu of wages and benefits,” the release time payments are now no longer funded by Petitioners as was true in Cheatham. *Id.* at ¶ 17. But Arizona courts don’t rely on magic words in Gift Clause cases—they look at “[t]he reality of the transaction,” Ariz. Ctr. Law in Pub. Int. v. Hassell, 172 Ariz. 356, 368 (App. 1991). The MOU says “[t]he cost to the City for these release time positions and release hours, including all benefits, has been charged as part of the total compensation.” APP.050 § 1-3(A). That language is controlling because “a court must give effect to [a] contract as it is written, and the terms or provisions of the contract, where clear and unambiguous, are conclusive.” Shattuck v. Precision-Toyota, Inc., 115 Ariz. 586, 588 (1977). And that language means what it says: the City pays *compensation* to *all* Unit 2 employees, and the funding for release time comes from *that*. The Court of Appeals’ formalistic reliance on the removal of six magic words from the MOU was “overly technical” and failed to attend to “[t]he reality of the transaction.” Wistuber, 141 Ariz. at 349. Because the MOU expressly pays for release time out of total Unit 2

Petitioners’ compensation. See State v. Towerly, 186 Ariz. 168, 182 (1996) (“Judicial estoppel prevents a party from taking an inconsistent position in successive or separate actions.”).

compensation, Petitioners are paying for the cost of release time—and thus they are being forced to fund speech they disagree with in violation of their free speech rights.

Third, the record shows that Defendants have always treated release time as individual employee compensation. This is most obviously true because every Unit 2 employee, including Petitioners, had eight hours of vacation leave⁵ *deducted from their pay* to fund the release time expenditures in this MOU. APP.041 ¶ 123. In other words, Defendants *did* treat release time as *individual* compensation to each employee, including Petitioners.

Because the release time provisions force Petitioners to fund the Union’s speech and political activities without their affirmative consent, they violate Petitioners’ rights against compelled speech. *See Janus*, 138 S. Ct. at 2486 (“Neither an agency fee *nor any other payment* to the union may be deducted from a nonmember’s wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmatively consents to pay.” (emphasis added)). They also violate Petitioners’ rights against compelled association and Arizona’s Right to Work protections, because Petitioners are forced as a condition of employment to be associated with the Union and its activities. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Brush & Nib*, 247 Ariz. at 282 ¶ 47 (a

⁵ Valued at \$647.21 per employee over the course of the MOU.

violation of First Amendment principles “necessarily implies” a violation of Arizona’s broader free expression principles); [*AFSCME Local 2384 v. City of Phoenix*](#), 213 Ariz. 358, 367 ¶ 23 (App. 2006) (Arizona’s Right to Work laws forbid the City from “requir[ing] that any person participate in *any form or design* of union membership.”).

The lower court erred on the threshold question of whether Petitioners fund release time, and consequently, whether the practice violates their free expression, association, and Right to Work protections. This Court should grant review and find that it does.

II. If release time is not paid for by Petitioners, it is a gift to the Union.

But even if release time is *not* funded by Petitioners, then it is an unconstitutional gift to the Union. The Gift Clause forbids government subsidies to private associations by requiring (1) that all public expenditures serve a public purpose and (2) that public entities receive adequate consideration in exchange for public funds. [*Schires*](#), 250 Ariz. at 374–75 ¶ 7. In this case, paid release time primarily serves the Union’s interests, and the City receives insufficient consideration because it receives no direct, contractually obligatory benefits in exchange for the release time payments.

The majority below found that the City receives adequate consideration for release time because release time must be viewed as one element in the overall

MOU, and since the City receives the services of all Unit 2 employees in exchange for the MOU, the release time provisions are constitutional. Opinion ¶¶ 38-40. The dissent, by contrast, found that “the City’s payments for release time are wholly separate from their agreement with the Unit II workers,” *id.* at ¶ 50, and therefore *those provisions* must be subjected to the Gift Clause test on their own. The dissent is correct.

Courts must take a “panoptic view” of a challenged transaction in any Gift Clause case. *Cheatham*, 240 Ariz. at 320 ¶ 18.. “Panoptic” means “all-seeing ... [i]ncluding everything visible in one view.” *Merriam-Webster’s Collegiate Dictionary* 794 (11th ed. 1995). It means not blinding oneself to “[t]he reality of the transaction ... in terms of [public] purpose and consideration.” *Hassell*, 172 Ariz. at 356. And the reality of *this* transaction is that release time is a benefit the Union gets under the MOU to advance its own private interests without returning reciprocal, objectively valued benefits to the City. Only the court of appeals’ “overly technical” reliance on the omission of six words from the MOU led it to conclude otherwise. *Cheatham*, 240 Ariz. at 318 ¶ 10.

Wistuber concerned a Gift Clause challenge to paid release time where a teacher was released from teaching duties to work for a union. This Court did not evaluate adequacy of consideration based on the services rendered by *all teachers* the union represented. Rather, it asked whether the “sums required to be paid by

the District” were “so disproportionate as to invoke the constitutional prohibition.” 141 Ariz. at 350. In other words, the Court tested release time itself for public purpose and consideration. *Id.* at 348. It should do the same here.

What’s more, the record shows that the release time provisions in this case were negotiated and paid for individually, *not* as a total package. The City diverted eight hours of vacation time that Petitioners once received, but no longer receive, to fund the release time provisions in this MOU. APP.041 ¶ 123; SAPP.149–50 at 41:7–42:1. In other words, the Defendants negotiated *separately* for those provisions and made a *discrete* trade for them. As a factual matter, release time *was* separately negotiated as a gift to the Union—so, as the dissent observed, Opinion at ¶ 50, it should be evaluated separately under the Gift Clause.

By considering release time as just a small part of a larger contract, the lower court created a loophole through which every government entity can now jump. Under its reasoning, *any gift or subsidy is permissible as long as it is embedded within a larger contract*. If the City gave a \$1 million home to the Union’s president from which to conduct release time business, but did so as part of an \$800 million contract,⁶ that would not be a gift *at all* under the decision below. That’s obviously wrong—and contravenes the Gift Clause’s goals, which

⁶ Approximately what Phoenix spent on police employment in 2022.

are to prevent (1) “the depletion of the public treasury or inflation of public debt;” and (2) “giving advantages to special interests.” [Schires](#), 250 Ariz. at 374 ¶ 6.

This Court should also grant review to make clear that an illegal gift hidden within a larger contract is still illegal.

RULE 21(a) NOTICE

Petitioners request costs and attorney fees pursuant to [A.R.S. § 12-341](#) and the private attorney general doctrine.

CONCLUSION

The Court should grant the petition and reverse the decision of the Court of Appeals.

Respectfully submitted May 18, 2023 by:

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