

**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  
(AFSCME), LOCAL 2384,

Intervenor Defendant/Appellee.

Arizona Supreme Court  
Case No. CV-23-0130-PR

Court of Appeals, Division One  
Case No. 1 CA-CV 22-0049

Maricopa County Superior Court  
Case No. CV2019-009033

**DEFENDANTS/APPELLEES' CROSS-PETITION FOR REVIEW**

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## I. INTRODUCTION

The court of appeals incorrectly decided two important issues of law, and the court's analysis could lead to instability and confusion because it contradicts other authorities, including this Court's precedent and other appellate decisions.

First, the court of appeals found that Plaintiffs had standing based only on allegations in their complaint, even though the undisputed facts show that Plaintiffs were not injured. As the U.S. Supreme Court has explained, a plaintiff should establish standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the summary judgment stage, a plaintiff must submit evidence of an actual injury and cannot rely on mere allegations or conclusory assertions. *Id.*

Here, Plaintiffs' own testimony proves they suffered no injury. They admitted the City of Phoenix ("City") pays for "release time" with public funds. They challenged the City's release time payments because they hoped the City might reallocate the funds toward increasing their compensation, but Plaintiffs had no right to additional compensation. They admittedly received everything to which they were entitled, and they were not forced to contribute or forego any of their promised compensation to pay for release time. And Plaintiffs admitted the City had no obligation to increase their compensation if release time were eliminated, so their

requested relief was purely speculative.

The court of appeals erred by failing to apply the standard for summary judgment when deciding whether Plaintiffs had standing. This Court should accept review to clarify that, at the summary judgment stage, a plaintiff must submit evidence of an actual injury and cannot rely on mere allegations.

Second, the court of appeals erred by holding that attorneys' fees cannot be awarded under A.R.S. § 12-341.01 in constitutional cases challenging government action. Although this Court has cautioned that fees usually should not be awarded against aggrieved citizens who pursue public interest litigation, the Court has not created an absolute bar against fee awards in this context. Moreover, Plaintiffs were not aggrieved citizens pursuing public interest litigation. They filed this case as employees seeking more compensation for themselves. This case does not give rise to fears about chilling good-faith public interest litigation, and there should not be a one-way bar against fee awards in favor of the government.

The appellate court's holding conflicts with this Court's recent opinions in *AFSCME, AFL-CIO, Loc. 2384 v. City of Phoenix*, 249 Ariz. 105, 113, ¶ 33 (2020), and *Piccioli v. City of Phoenix*, 249 Ariz. 113, 119, ¶ 24 (2020). The Court should accept review to clarify that fees can be awarded in constitutional cases that arise out of contract, even when they challenge government action, especially where the plaintiffs are litigating their private pecuniary interests.

## II. ISSUES PRESENTED FOR REVIEW

1. The court of appeals decided standing based on allegations in Plaintiffs' complaint even though the undisputed facts show that Plaintiffs were not injured. Did the court err by failing to apply the summary judgment standard when Plaintiffs' standing was attacked at the summary judgment stage?

2. The court of appeals held that A.R.S. § 12-341.01 is not applicable in constitutional cases challenging government action. Did the court err by precluding fees awards in favor of the government where Plaintiffs were challenging their contractual terms of employment for admittedly personal reasons rather than pursuing public interest litigation?

## III. BACKGROUND

### A. **Plaintiffs did not pay for release time through a reduction in compensation.**

Plaintiffs contend they were forced to pay for release time against their wishes through a purported reduction in compensation. IR 9 (Plaintiffs' APP.003) ¶¶ 2-4, 33-38, 52-57, 65, 69-71. This was their only alleged injury and their entire basis for standing. Plaintiffs were not harmed by release time in any other way, and they filed this case solely to seek additional compensation for themselves – hoping the City's release time funds would go instead toward additional vacation time. IR 70 ¶¶ 105, 108-110; IR 100 ¶¶ 17-18, 32-36, 48-50, 52-55; IR 100 & 103, Ex. 8 (Gilmore's

Response to NUI No. 2); IR 100 & 103, Ex. 9 (Harder’s Response to NUI No. 2).<sup>1</sup> Plaintiffs had no other interest in this case, and they admitted their quest for more compensation would not serve any public purpose. IR 70 ¶¶ 108-110, 118, 136; IR 100 ¶¶ 17-18, 32-36.

Although the court of appeals held that Plaintiffs adequately *alleged* an injury, the court ultimately rejected their allegations based on undisputed evidence that *the City* pays for release time and Plaintiffs received everything to which they were entitled under the collective bargaining agreement (“CBA”) that governed their compensation. *Gilmore v. Gallego*, \_\_\_ Ariz. \_\_\_, 2023 WL 2979302, at ¶¶ 13-15, 18, 20-22 (App. 2023). The court held that Plaintiffs were not deprived of any right or entitlement because they had no right to additional compensation and were not compelled to support or associate with intervenor American Federation of State, County and Municipal Employees (AFSCME), Local 2384 (“Union”). *Id.* at ¶¶ 14-15, 18-22. The court’s findings mean that Plaintiffs suffered no injury.

Plaintiffs contend they were injured because release time was “charged” as part of “total compensation” under the CBA, and they contend this means their compensation was reduced to pay for release time. IR 9 ¶¶ 2-3, 33-38, 52-57. This

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<sup>1</sup> IR 100 includes Defendants’ (1) responses to Plaintiffs’ statement of facts, and (2) controverting statement of facts (“CSOF”). In this cross-petition, references to IR 100 refer to the CSOF.

theory misconstrues the meaning of “total compensation,” and Plaintiffs’ argument fails based on the undisputed facts and their own testimony.

“Total compensation” is a term of art that describes the total cost to the City to pay for a CBA. IR 70 ¶¶ 71-73. During the City’s collective bargaining negotiations with the Union, the parties exchange proposals for the upcoming CBA. *Id.* ¶ 68. Proposals that require the expenditure of City funds are known as “economic” items. *Id.* ¶¶ 69-70, 75. The City refers to the sum of all economic items (i.e., the total economic package) as “total cost of compensation” or simply “total compensation.” *Id.* ¶ 71. Thus, “total compensation” means the total cost to the City to pay for all economic items in a CBA. *Id.* ¶¶ 71-81; *see also Gilmore*, 2023 WL 2979302, at ¶¶ 13, 15.

The CBA states that “[t]he cost to the City for these release positions and release hours ... has been charged as part of the total compensation detailed in this agreement.” IR 9, Ex. 1 § 1-3(A) (Plaintiffs’ APP.050) (emphasis added). Plaintiffs admitted the City pays for release time with public funds, and they have no ownership interest in those funds. IR 9 ¶ 39; IR 70 ¶¶ 79-80, 82-83, 86-94, 127-129; IR 100 ¶¶ 23, 26, 39, 46-55.

That release time is part of the “total compensation” package does not mean Plaintiffs pay for it or that their compensation is lower because of it. Employees do not receive equal wages and benefits, and some portions of total compensation apply

to certain employees and not others. IR 70 ¶¶ 74, 84-86. Plaintiffs admitted they (1) had no interest in total compensation beyond their personal wages and benefits, (2) had no interest in the wages and benefits of other employees, and (3) did not finance their coworkers' compensation even though it was part of "total compensation." IR 70 ¶¶ 85-91, 93-94, 96; IR 100 ¶¶ 46-50, 52-55.

Finally, Plaintiffs conceded that they were not entitled to any wages or benefits other than those specified in the CBA, and they received all compensation due thereunder. IR 70 ¶¶ 87, 91, 93-94, 96, 127-129; IR 100 ¶¶ 46-50, 52-55. Plaintiffs did not pay fees to the Union, and they were not forced to support or subsidize it. IR 70 ¶¶ 91-94, 96, 141-146; IR 100 ¶¶ 20, 24, 27, 40-43, 46-47, 52-53. They also admitted that release time did not cause them to receive less than what was promised in the CBA. IR 70 ¶¶ 91, 93-94, 96, 129; IR 100 ¶¶ 46-50, 52-55. Thus, Plaintiffs are "not asserting any rights under the [CBA]" and "do not allege ... that the City, the Union, or anyone else has failed to comply with [the CBA]." IR 60 & 66, Ex. 26 & Ex. 27 (Plaintiffs' Declarations) ¶¶ 13-16.

**B. Plaintiffs admitted they were not entitled to more compensation if release time had been eliminated, and their requested relief was merely aspirational.**

If City-funded release time were eliminated, the City would meet and confer with the Union regarding the potential disposition of funds that had been allocated for release time. IR 70 ¶ 111. Ultimately, the City Council or Manager would decide

how to reallocate the funds, and there is no requirement, guarantee, or contractual obligation that the funds would be reallocated to increase wages or benefits. *Id.* ¶¶ 112-118, 125-127; IR 100 ¶¶ 13, 15, 36, 48-51, 54-55.

Plaintiffs admitted that if release time were eliminated, the City “can do whatever it wants” with the funds and could reallocate them to other purposes. IR 70 ¶¶ 113-117, 124-125; IR 100 ¶¶ 15, 50-51, 54-55. For example, the City could invest in infrastructure or expand City services. IR 100 ¶¶ 15, 36. Plaintiffs also admitted the City did not promise to increase their compensation. IR 70 ¶¶ 114, 117, 122, 125, 127-128; IR 100 ¶¶ 50-51, 54-55. Thus, the City was not obligated to increase Plaintiffs’ compensation if release time had been eliminated, and Plaintiffs were not entitled to more than what was in the CBA. IR 70 ¶¶ 112-114, 117, 120, 125-128, 136; IR 100 ¶¶ 15, 36, 47-55.

#### **IV. REASONS THE COURT SHOULD ACCEPT REVIEW OF THE ISSUES RAISED IN THIS CROSS-PETITION**

##### **A. The Court should clarify that a plaintiff has a continuing duty to establish standing throughout the case and must present evidence of an actual injury to survive a motion for summary judgment.**

The court of appeals held that Plaintiffs “adequately alleged” an injury even though the court found that Plaintiffs (1) did not pay for release time, (2) were not deprived of any compensation to which they were entitled, and (3) were not forced to support or associate with the Union. *Compare Gilmore*, 2023 WL 2979302, at ¶¶ 10-11 *with id.* at ¶¶ 13-15, 18-22. The court’s findings, which were based on

Plaintiffs' testimony and admissions, establish that Plaintiffs were not injured. *See, e.g., id.* at ¶¶ 20-22 (Plaintiffs "admit they receive all wages and benefits they are entitled to under the MOU," and "[P]laintiffs testified at their depositions they were not forced to financially support the Union and were not forced to adopt the Union's positions or viewpoints"). The court erred by analyzing standing at the summary judgment stage based on Plaintiffs' mere allegations.

The party opposing summary judgment must "set forth specific facts showing a genuine issue for trial" and "may not rely merely on allegations or denials of its own pleading." Ariz. R. Civ. P. 56(e). Thus, federal courts have held that "[w]hen the attack on standing occurs via a motion for summary judgment, the plaintiffs can no longer rest on their allegations." *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1427 (11th Cir. 1998); *see also Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008) (same).

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice .... In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts" ....

*Lujan*, 504 U.S. at 561; *see also Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 22 (2003) ("we have previously found federal case law instructive" regarding standing).

Although this Court has not yet expressly adopted this standard, the Court has indicated that "a litigant seeking relief in the Arizona courts must first *establish*

standing to sue.” *Bennett*, 206 Ariz. at 525, ¶ 19 (emphasis added). “To establish standing, we require that petitioners show a particularized injury to themselves.” *Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶ 17 (2005) (emphasis added). The Court has “denied standing to citizens seeking relief against the governor because they failed to plead and prove palpable injury personal to themselves.” *Bennett*, 206 Ariz. at 524, ¶ 16 (emphasis added). This is especially true “in actions in which constitutional relief is sought against the government.” *Id.* “A contrary approach would inevitably open the door to multiple actions asserting all manner of claims against the government.” *Id.*

Similarly, the court of appeals has held that plaintiffs lack standing when they fail to submit evidence of an injury at the summary judgment stage. *See, e.g., Blanchard v. Show Low Plan. & Zoning Comm’n*, 196 Ariz. 114, 118, ¶ 21 (App. 1999) (plaintiff lacked standing where “no evidence was presented about any particular harm ... other than the general allegations of harm contained in the complaint and the testimony of appellants’ expert about general harm to the area”); *Dail v. City of Phoenix*, 128 Ariz. 199, 202-03 (App. 1980) (plaintiff lacked standing where he “has shown neither a direct expenditure of funds generated by taxation nor an increased levy of tax”); *Burks v. City of Maricopa*, 2018 WL 3455691, at ¶ 19 (Ariz. App. 2018) (memo. dec.) (similar).

The opinion below conflicts with this authority. The Court should accept

review to clarify that a plaintiff must submit evidence of an actual injury, and cannot rely on mere allegations, to survive a motion for summary judgment.

Here, Plaintiffs admitted (1) they received all compensation to which they were entitled, (2) the City did not promise to pay, and they were not entitled to, anything more than what was in the CBA, and (3) nothing was deducted from their promised compensation to pay for release time. IR 70 at ¶¶ 79-80, 82, 87-94, 96, 114, 117, 125, 127-129; IR 100 at ¶¶ 20-21, 23, 27, 46-55. Plaintiffs also admitted they were not compelled to join, support, finance, or associate with the Union beyond their unsupported allegation that they were compelled to pay for release time. IR 70 ¶¶ 91-94, 96, 129, 139, 141-146; IR 100 ¶¶ 17-18, 20, 24, 27, 32, 35, 40-43, 46-47, 53-54. Thus, it is undisputed the City complied with its contractual obligations, and Plaintiffs were not deprived of any right or entitlement. Plaintiffs were not injured, and they do not have a personal, particularized interest in this case.

Standing also requires “a showing that the injury can be redressed by a favorable decision.” *Karbal v. Ariz. Dep’t of Revenue*, 215 Ariz. 114, 118, ¶ 19 (App. 2007). This is another fatal flaw because Plaintiffs did not have a prospective right to any hypothetical compensation increase that was never promised or set forth in the CBA. *See, e.g., Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 264, ¶¶ 11-13 (App. 2004) (employees have no reasonable expectation to be paid in manner that differs from CBA); *Abbott v. City of Tempe*, 129 Ariz. 273, 278-79 (App. 1981)

(employees only entitled to compensation set forth in contract). Plaintiffs’ purported injury could hypothetically be redressed only *if* the City *chose* to increase their personal compensation – a result they admitted was not required because nothing compelled the City to increase their compensation. IR 70 ¶¶ 111-118, 122, 125-127; IR 100 ¶¶ 10-14, 15, 33, 36, 48-52, 54-55.

As U.S. Supreme Court explained in strikingly similar circumstances:

[T]axpayers ... asserted that the Arizona statute governing mineral leases has “deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes.” ... Even if the first part of that assertion were correct, however, *it is pure speculation whether the lawsuit would result in any actual tax relief for respondents.... The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is “remote, fluctuating and uncertain,”* ... and consequently the claimed injury is not “likely to be redressed by a favorable decision” ....

....

If respondents prevailed and increased revenues from state leases were available, *maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged....* These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. *Whether the association’s claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.*

*ASARCO Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989) (cleaned up; emphasis added).

If release time were eliminated, the City Council would have unfettered discretion to reallocate the funds to other purposes. IR 70 ¶¶ 111-118, 120, 124-126, 136; IR 100 ¶¶ 15, 50-51, 54-55. As in *ASARCO*, Plaintiffs allege only speculative harm based on their subjective wishes rather than an actual, concrete injury. *See also Dail*, 128 Ariz. at 202-03 (plaintiff must “show some interest beyond a general desire to enforce the law,” and “[t]o base his standing on events that might be precipitated by the court’s determination of the merits in his favor is unacceptable”).

Finally, Plaintiffs lack standing to bring their Gift Clause claim because they were not trying to “prevent the depletion of the public treasury” or “protect public funds [from] the purely private or personal interests of any individual.” *Cf. Cheatham v. DiCiccio*, 240 Ariz. 314, 318, ¶ 9 (2016). Instead, Plaintiffs were pursuing their private pecuniary interests. They admitted this would not serve a public purpose, and they would not personally benefit if the City’s funds went to some other public purpose. IR 70 ¶¶ 108-110, 118; IR 100 ¶¶ 32-36.

**B. The Court should clarify that A.R.S. § 12-341.01 applies in constitutional cases that arise out of contract, even when they challenge government action.**

The court of appeals held that “claims challenging the constitutionality of actions of a public body, including under the Gift Clause of Arizona’s Constitution, do not qualify for an award of fees under A.R.S. § 12-341.01.” *Gilmore*, 2023 WL 2979302, at ¶ 42. This overstates the holding in *Wistuber v. Paradise Valley Unified*

*Sch. Dist.*, 141 Ariz. 346 (1984), which did not establish an absolute bar against fee awards. See *AFSCME*, 249 Ariz. at 113, ¶ 33. Instead, this Court cautioned that “[w]here aggrieved citizens, in good-faith, seek a determination of the legitimacy of governmental actions, attorney’s fees should not usually be awarded.” *Wistuber*, 141 Ariz. at 350 (emphasis added). If the Court had intended to bar fee awards, it would have said so.

The decision below conflicts with *AFSCME* and *Piccioli*, where the plaintiffs alleged that “the City diminished and impaired their vested rights to pension benefits in violation of the Pension and Contract Clauses of the Arizona Constitution ... and the Contract Clause of the Federal Constitution.” *AFSCME*, 249 Ariz. at 106-07, ¶¶ 2-5; *Piccioli*, 249 Ariz. at 115-16, ¶¶ 2-7. Thus, those plaintiffs also challenged “the constitutionality of actions of a public body,” but this Court distinguished *Wistuber* and awarded fees because the employees filed their claims “as parties to a contract rather than as aggrieved citizens.” *AFSCME*, 249 Ariz. at 113, ¶ 33; *Piccioli*, 249 Ariz. at 119, ¶ 24.

Here, Plaintiffs alleged that “[i]t is a condition of [their] public employment that they are bound by the terms of the [CBA].” IR 9 ¶¶ 50-51. Like in *AFSCME* and *Piccioli*, Plaintiffs filed this case to challenge a CBA they disliked in hopes of changing their contractual terms of employment. Plaintiffs’ only alleged injury arose out of their contractual employment relationship with the City, and their only

interest in challenging release time was based on their desire to redefine their employment contract. Plaintiffs' claims failed because they did not have a contractual right to additional compensation.

Moreover, the *Wistuber* plaintiffs were taxpayers who pursued public interest litigation as actual "aggrieved citizens." In contrast, Plaintiffs' claims were about their personal compensation as employees, and they admitted their quest for more compensation would not serve a public purpose. IR 70 ¶¶ 108-110, 118; IR 100 ¶¶ 17-18, 32-36, 48, 54. This is not a public interest case, and Plaintiffs are not "aggrieved citizens." Their circumstances are materially indistinguishable from the plaintiffs in *AFSCME* and *Piccioli*.

The court of appeals erred by interpreting *Wistuber* as creating a bar against fee awards. This Court should accept review to clarify that fees can be awarded against employees who challenge their contract of employment, subject to the superior court's discretion to weigh the relevant factors and balance equitable considerations, even when the challenge is moored to supposed constitutional claims.

## **V. NOTICE UNDER ARCAP 21.**

Defendants request attorneys' fees and costs under A.R.S. §§ 12-341 and 12-341.01.

DATED: June 16, 2023.

**SHERMAN & HOWARD L.L.C.**

By: */s/ Matthew A. Hesketh* \_\_\_\_\_

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**EXHIBIT 26**  
**PLAINTIFF'S STATEMENT OF FACTS**

## **DECLARATION OF MARK GILMORE**

I, Mark Gilmore, declare under penalty of perjury under the laws of the State of Arizona as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration and am competent to testify regarding them.

2. I am a resident of Maricopa County residing in Peoria, Arizona.

3. I am a Plaintiff in the above-captioned matter.

4. I am employed as a heavy equipment mechanic by the City of Phoenix (“City”).

As a heavy equipment mechanic, I repair and maintain trucks and other types of construction equipment.

5. I have worked for the City for 14 years.

6. It is my understanding that the terms of my employment by the City are governed in part by the Memorandum of Understanding (“2019-2021 MOU”) that the City entered with the American Federation of State, County, and Municipal Employees, Local 2384, Field Unit II (“Union”) on May 22, 2019.

7. I am not a party to the 2019-2021 MOU.

8. I am not a member of the Union.

9. I never voted to ratify the 2019-2021 MOU.

10. Because I am not a member of the Union, I could not vote for or against the 2019-2021 even if I wanted to.

11. Because of my employment by the City, I have no choice but to have my employment governed by the 2019-2021 MOU.

12. If I could retain my employment by the City without being subject to the 2019-2021 MOU, I would do so.

13. In this action, I am not asserting any rights under the 2019-2021 MOU.

14. In this action, I do not allege, and do not intend to allege, that the City, the Union, or anyone else has failed to comply with any terms of the 2019-2021 MOU.

15. I have no reason to believe that the City and the Union have failed to comply with all of the terms of the 2019-2021 MOU and will continue to do so.

16. In this action, I am not alleging a breach of contract or asserting any contractual claim against the City of Phoenix, the Union, or anyone else.

17. Rather, through this action, I am challenging the constitutionality of government action that forces me to finance union "release time" as set forth in the Plaintiffs' Second Amended Complaint.

18. I have been able to file this lawsuit only because my counsel is representing me *pro bono*; if I were required to pay fees, I could not afford to pursue this litigation.

19. The possibility of paying attorney fees in the event that I do not prevail in litigation would discourage me from seeking redress for violations of constitutional rights associated with my employment by the City.

I declare that to the best of my knowledge the foregoing is true and correct.



Mark Gilmore

DATED: 5-27-20

**EXHIBIT 27**  
**PLAINTIFF'S STATEMENT OF FACTS**

## DECLARATION OF MARK HARDER

I, Mark Harder, declare under penalty of perjury under the laws of the State of Arizona as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration and am competent to testify regarding them.
2. I am a resident of Maricopa County residing in Phoenix, Arizona.
3. I am a Plaintiff in the above-captioned matter.
4. I am employed as a heavy equipment mechanic by the City of Phoenix ("City").
5. I have worked for the City for 14 years.
6. It is my understanding that the terms of my employment by the City of Phoenix are governed in part by the Memorandum of Understanding ("2019-2021 MOU") that the City entered with the American Federation of State, County, and Municipal Employees, Local 2384, Field Unit II ("Union") on May 22, 2019.
7. I am not a party to the 2019-2021 MOU.
8. I am not a member of the Union.
9. I never voted to ratify the 2019-2021 MOU.
10. Because I am not a member of the Union, I could not vote for or against the 2019-2021 even if I wanted to.
11. Because of my employment by the City, I have had no choice but to have my employment governed by the 2019-2021 MOU.
12. If I could retain my employment by the City without being subject to the 2019-2021 MOU, I would do so.
13. In this action, I am not asserting any rights under the 2019-2021 MOU.

14. In this action, I do not allege, and do not intend to allege, that the City of Phoenix, the Union, or anyone else has failed to comply with any terms of the 2019-2021 MOU.

15. I have no reason not to believe that the City of Phoenix and the Union have complied with all of the terms of the 2019-2021 MOU and will continue to do so.

16. In this action, I am not alleging a breach of contract or asserting any contractual claim against the City of Phoenix, the Union, or anyone else.

17. Rather, through this action, I am challenging the constitutionality of government action that forces me to finance union "release time" as set forth in the Plaintiffs' Second Amended Complaint.

18. I have been able to file this lawsuit only because my counsel is representing me *pro bono*; if I were required to pay fees, I could not afford to pursue this litigation.

19. The possibility of paying attorney fees in the event that I do not prevail in litigation would discourage me from seeking redress for violations of constitutional rights associated with my employment by the City.

I declare that to the best of my knowledge the foregoing is true and correct.

  
Mark Harder

DATED: 6-10-20

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

MARK GILMORE; and MARK  
HARDER,

Plaintiffs,

v.

KATE GALLEG0, in her official  
capacity as Mayor of the City of Phoenix,  
ED ZUERCHER in his official capacity  
as City Manager of the City of Phoenix;  
and CITY OF PHOENIX,

Defendants,

And

AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL  
EMPLOYEES (AFSCME), LOCAL  
2384,

Intervenor Defendant.

Case No. CV2019-009033

**THE CITY DEFENDANTS' AND  
THE UNION'S JOINT STATEMENT  
OF FACTS IN SUPPORT OF THEIR  
MOTIONS FOR SUMMARY  
JUDGMENT ON ALL CLAIMS**

(Assigned to Hon. Daniel G. Martin)

*Oral Argument Requested*

The City Defendants and the Union submit this Joint Statement of Facts in  
support of their Motions for Summary Judgment filed concurrently herewith.

1 **I. The parties.**

2 1. Plaintiffs Mark Gilmore and Mark Harder are employed by the City of  
3 Phoenix (the “City”). Second Amended Complaint (“SAC”) at ¶¶ 5-6; City Defendants’  
4 Answer at ¶¶ 5-6; **Exhibit 3** (Frost Declaration) at ¶ 5; **Exhibit 9** (Deposition of M.  
5 Gilmore) at 24:8-9; **Exhibit 10** (Deposition of M. Harder) at 18:6-11.

6 2. Plaintiff Gilmore does not reside within the city limits of the City of  
7 Phoenix. **Exhibit 9** (Deposition of M. Gilmore) at 12:7-11.

8 3. For purposes of collective bargaining and labor relations, the City’s  
9 workforce is divided into groups of employees known as “appropriate units” or simply  
10 “units.” **Exhibit 3** (Frost Declaration) at ¶ 4; *see also* Phoenix City Code §§ 2-210(1), 2-  
11 212.

12 4. Each unit may designate an authorized employee organization to act as the  
13 representative for the unit’s employees in connection with collective bargaining and labor  
14 relations with the City. **Exhibit 3** (Frost Declaration) at ¶ 4; *see also* Phoenix City Code  
15 §§ 2-209(2), 2-210(2), 2-212, 2-214(A).

16 5. Plaintiffs both work within the unit of City employees known as Field Unit  
17 II (“Unit II”), which consists of approximately 1,500 employees. SAC at ¶¶ 5-6; City  
18 Defendants’ Answer at ¶¶ 5-6; Intervenor Defendant’s Answer at ¶¶ 5-6; **Exhibit 3** (Frost  
19 Declaration) at ¶ 5; **Exhibit 12** (Deposition of X. Frost) at 34:14-19.

20 6. Unit II includes electricians, mechanics, maintenance workers, and others  
21 who ensure the City’s processes and systems continue to operate. **Exhibit 3** (Frost  
22 Declaration) at ¶ 6; **Exhibit 9** (Deposition of M. Gilmore) at 155:9-17; *see also* Phoenix  
23 City Code § 2-212(A)(2)(b).

24 7. The City’s labor relations with Unit II are governed by the City’s Meet &  
25 Confer Ordinance. **Exhibit 3** (Frost Declaration) at ¶ 7; *see also* Phoenix City Code §§ 2-  
26 209, 2-212(A)(2)(b).

27 8. The Meet & Confer Ordinance recognizes the right of Unit II employees to  
28 organize and to be represented by an authorized employee organization (a union) in

1 connection with collective bargaining and other labor relations matters. **Exhibit 3** (Frost  
2 Declaration) at ¶¶ 7-8; *see also* Phoenix City Code § 2-209(2), 2-214.

3 9. The American Federation of State, County, and Municipal Employees,  
4 AFL-CIO, Local 2384 (the “Union”) is the authorized employee organization that  
5 represents all Unit II employees pursuant to the Meet & Confer Ordinance. **Exhibit 3**  
6 (Frost Declaration) at ¶ 9; **Exhibit 12** (Deposition of X. Frost) at 25:9-13.

7 10. The Union acts as the representative of all Unit II employees for purposes  
8 of collective bargaining and labor relations with the City, regardless of whether they are  
9 members of the Union. **Exhibit 3** (Frost Declaration) at ¶ 9; *see also* Phoenix City Code §  
10 2-210(2), 2-218.

11 11. Pursuant to the Meet & Confer Ordinance, the City and the Union engage  
12 in collective bargaining to negotiate the terms and conditions of employment for all Unit  
13 II employees, regardless of Union membership. SAC at ¶¶ 12-13; City Defendants’  
14 Answer at ¶¶ 12-13; Intervenor Defendant’s Answer at ¶¶ 12-13; **Exhibit 3** (Frost  
15 Declaration) at ¶¶ 9-10; **Exhibit 9** (Deposition of M. Gilmore) at 20:8-19; **Exhibit 7**  
16 (Deposition of R. Brown) at 31:6-9.

17 12. This collective bargaining is known as the meet and confer process, and  
18 the parties’ agreements are recorded in a collective bargaining agreement known as a  
19 Memorandum of Understanding (“MOU”) between the City and Unit II. **Exhibit 1** (2019-  
20 2021 MOU) at Section 1-1A; **Exhibit 3** (Frost Declaration) at ¶¶ 10-11; **Exhibit 12**  
21 (Deposition of X. Frost) at 21:16-25, 24:2-5; **Exhibit 7** (Deposition of R. Brown) at  
22 28:13-21.

23 13. The MOU is a contract that governs the terms and conditions of  
24 employment, including but not limited to wages and benefits, for all Unit II employees for  
25 the duration of the MOU, which typically lasts for two years. **Exhibit 3** (Frost  
26 Declaration) at ¶ 11; **Exhibit 12** (Deposition of X. Frost) at 32:25-33:7, 33:19-24:9,  
27 35:20-25.

28 14. The MOU does not become effective unless and until it is ratified by the

1 Union and is approved by a majority vote of the Phoenix City Council in open session.  
2 **Exhibit 12** (Deposition of X. Frost) at 22:6-9, 132:12-24; *see also* Phoenix City Code §§  
3 2-210(12), 2-215(C), 2-218(F), (G).

4 15. While the City and the Union meet and confer over the terms of the MOU,  
5 neither party must reach an agreement, and any agreement reached must be approved and  
6 adopted by the Phoenix City Council exercising its sole discretion. Thus, the City Council  
7 makes the final determination as to how the City's funds are allocated in connection with  
8 an MOU. **Exhibit 3** (Frost Declaration) at ¶¶ 18, 28; **Exhibit 13** (Deposition of X. Frost)  
9 at 22:2-11, 121:18-123:77, 129:6-130:2, 132:12-24; **Exhibit 14** (Deposition of E.  
10 Zuercher) at 13:11-24; *see also* Phoenix City Charter, Ch. III, § 9(A); Ch. XXV, § 14(F),  
11 (G); Phoenix City Code §§ 2-210(11), (12); 2-213; 2-215(C); 2-218.

12 16. The City benefits from engaging in the meet and confer process, in part  
13 because the City negotiates with the Union rather than separately negotiating with  
14 individual employees. **Exhibit 3** (Frost Declaration) at ¶ 12; **Exhibit 12** (Deposition of X.  
15 Frost) at 33:19-34:9, 35:20-25; **Exhibit 14** (Deposition of E. Zuercher) at 15:9-16:1.

16 17. The City also benefits from having the Union act as the labor  
17 representative for all Unit II employees because this provides the City with a defined point  
18 of contact for addressing labor relations matters and conflicts affecting Unit II employees.  
19 **Exhibit 3** (Frost Declaration) at ¶ 12; **Exhibit 12** (Deposition of X. Frost) at 54:14-55:15,  
20 56:6-9, 82:13-83:13, 156:11-22; **Exhibit 14** (Deposition of E. Zuercher) at 49:17-50:11,  
21 55:4-56:6.

22 **II. The 2019-2021 MOU benefits the City and Unit II.**

23 18. On May 22, 2019, the City and Union entered into an MOU to  
24 comprehensively govern the terms and conditions of employment for all Unit II  
25 employees for the two-year period from July 1, 2019 through June 30, 2021 (the "2019-  
26 2021 MOU"). SAC at ¶ 15; City Defendants' Answer at ¶ 15; Intervenor Defendant's  
27 Answer at ¶ 15; **Exhibit 3** (Frost Declaration) at ¶ 13; **Exhibit 14** (Deposition of E.  
28 Zuercher) at 14:19-16:1, 74:14-18; **Exhibit 7** (Deposition of R. Brown) at 28:13-24.

1           19. The City benefits under the 2019-2021 MOU by procuring the services of  
2 Unit II employees, defining their terms and conditions of employment, and confirming  
3 their agreement to not strike during the term of the contract. **Exhibit 1** (2019-2021 MOU)  
4 at Preamble, Section 1-5(A)-(B); **Exhibit 3** (Frost Declaration) at ¶ 14; **Exhibit 14**  
5 (Deposition of E. Zuercher) at 14:19-15:1.

6           20. In the Preamble of the 2019-2021 MOU, the parties also recognized that  
7 “the well-being dignity, respect, and morale of the employees of the City are benefitted by  
8 providing employees an opportunity to participate in the formulation of policies and  
9 practices affecting the wages, hours, and working conditions of their employment.”

10 **Exhibit 1** (2019-2021 MOU) at Preamble.

11           21. In the 2019-2021 MOU, the City and the Union agreed that, except as  
12 provided in the City’s Meet & Confer Ordinance or the 2019-2021 MOU, the City would  
13 not have any obligation to meet and confer regarding the terms and conditions of  
14 employment for Unit II employees during the term of the 2019-2021 MOU, which is a  
15 benefit to the City. **Exhibit 1** (2019-2021 MOU) at Section 6-7(B); **Exhibit 3** (Frost  
16 Declaration) at ¶ 14.

17           22. However, the parties still agreed to “continue to meet with affirmative  
18 willingness to resolve grievances and disputes relating to wages, hours and working  
19 conditions.” **Exhibit 1** (2019-2021 MOU) at Section 6-7(B).

20           23. In the 2019-2021 MOU, the City recognized the Union as the meet and  
21 confer agent “for the purpose of representation regarding wages, hours, and other  
22 conditions of employment for all employees in positions constituting Field Unit II.”  
23 **Exhibit 1** (2019-2021 MOU) at Section 1-1A.

24           24. In the 2019-2021 MOU, the Union confirmed its agreement to represent all  
25 Unit II employees (regardless of union membership) in the meet and confer process,  
26 grievances, and other matters relating to employment rights and obligations. **Exhibit 1**  
27 (2019-2021 MOU) at Section 1-4.

28           25. The City benefits under the 2019-2021 MOU through the Union’s

1 confirmation of its agreement to be the collective bargaining and labor representative for  
2 all Unit II employees, regardless of whether they are members of the Union. **Exhibit 3**  
3 (Frost Declaration) at ¶ 15; **Exhibit 12** (Deposition of X. Frost) at 54:14-55:15, 56:6-9,  
4 82:13-83:13, 156:11-22; **Exhibit 14** (Deposition of E. Zuercher) at 23:16-25:1, 26:12-  
5 27:3, 49:17-50:11, 55:4-56:6.

6 26. In the 2019-2021 MOU, the City recognized that it “values and benefits  
7 from the participation of Union leaders on citywide task forces and committees, Labor-  
8 Management work groups, and a variety of Health and Safety committees.” **Exhibit 1**  
9 (2019-2021 MOU) at Section 1-3(A)(1); **Exhibit 3** (Frost Declaration) at ¶¶ 15, 25.

10 27. The Union agreed to designate representatives to serve on (1) a Labor-  
11 Management Committee “to facilitate improved labor-management relationships by  
12 providing a forum for the free discussion of mutual concerns,” and (2) a Health and Safety  
13 Committee to assist the City’s efforts to provide for the health and safety of all Unit II  
14 employees. **Exhibit 1** (2019-2021 MOU) at Section 2-3(A), 2-4(B); **Exhibit 3** (Frost  
15 Declaration) at ¶¶ 15, 25; **Exhibit 9** (Deposition of M. Gilmore) at 20:8-19.

16 **III. Release time under the 2019-2021 MOU.**

17 28. As part of the 2019-2021 MOU, the City and the Union negotiated  
18 provisions to govern “release time.” **Exhibit 3** (Frost Declaration) at ¶ 19; **Exhibit 14**  
19 (Deposition of E. Zuercher) at 20:10-21:5; **Exhibit 7** (Deposition of R. Brown) at 28:13-  
20 21.

21 29. While on release time, Union members and other Unit II employees are  
22 released from their normal job duties but still paid at the same rate(s) of pay by the City to  
23 perform activities that foster and promote cooperative labor relations and provide a point  
24 of contact for addressing labor issues affecting Unit II employees. **Exhibit 3** (Frost  
25 Declaration) at ¶ 20; **Exhibit 12** (Deposition of X. Frost) at 37:20-24, 40:16-42:12, 53:5-  
26 8, 54:14-56:24, 82:13-83:13; **Exhibit 14** (Deposition of E. Zuercher) at 21:7-19, 24:1-25;  
27 **Exhibit 7** (Deposition of R. Brown) at 24:4-22.

28 30. “Release time” is paid by the City in the form of continuing to pay, at the

1 same rate(s), the wages and benefits to those Unit II employees who are either on “full-  
2 time release” or who draw from a bank of release time hours for specific reasons  
3 permitted under the MOU. **Exhibit 1** (2019-2021 MOU), Section 1-3(A); **Exhibit 3**  
4 (Frost Declaration) at ¶ 21; **Exhibit 12** (Deposition of X. Frost) at 45:9-23; **Exhibit 14**  
5 (Deposition of E. Zuercher) at 21:7-19.

6 31. The City pays for this cost of release time through public funds. **Exhibit 3**  
7 (Frost Declaration) at ¶ 21; **Exhibit 12** (Deposition of X. Frost) at 45:9-46:16, 76:23-  
8 77:18, 109:13-110:3; **Exhibit 14** (Deposition of E. Zuercher) at 21:7-19, 23:8-14.

9 32. The release time provisions in the 2019-2021 MOU, including the amount,  
10 terms, and conditions of release time, were negotiated during the meet and confer process  
11 between the City and the Union. **Exhibit 2** (Reber Declaration) at ¶ 9; **Exhibit 3** (Frost  
12 Declaration) at ¶ 19; *see also* **Exhibit 1** (2019-2021 MOU) at Preamble.

13 33. In the 2019-2021 MOU, the City and Union recognized that they had  
14 “negotiated full-time release positions, and release hours, as an efficient and readily  
15 available point of contact for addressing labor-management concerns.” **Exhibit 1** (2019-  
16 2021 MOU) at Section 1-3(A); **Exhibit 7** (Deposition of R. Brown) at 121:23-25, 122:1-4.

17 34. In the 2019-2021 MOU, the City and Union recognized that the  
18 community “benefits from harmonious and cooperative relationships between the City and  
19 its employees.” **Exhibit 1** (2019-2021 MOU) at Section 1-3(A); **Exhibit 7** (Deposition of  
20 R. Brown) at 117:3-10.

21 35. The 2019-2021 MOU provides for four full-time release positions and  
22 3,183 additional release time hours for Unit II employees. **Exhibit 1** (2019-2021 MOU)  
23 at Section 1-3(A)(1), (3).

24 36. Release time may be used for lawful union activities including, but not  
25 limited to: (a) negotiating MOUs, (b) “ensuring representation for employees during  
26 administrative investigations and grievance/disciplinary appeal meetings,” (c)  
27 “participating in collaborative labor-management initiatives that benefit the City,” (d)  
28 “serving on City and departmental task forces and committees,” (e) “facilitating

1 communication between . . . management and employees,” (f) “assisting [employees] in  
2 understanding and following work rules,” and (g) “administering the provisions of the  
3 [MOU].” **Exhibit 1** (2019-2021 MOU) at Section 1-3(A).

4 37. Release time also may be “used for authorized employees to prepare for  
5 appeals and hearings and attend Union conferences, meetings, seminars, training classes  
6 and workshops so that employees better understand issues such as City policies and  
7 practices, conflict resolution, labor-management partnerships, and methods of effective  
8 representation.” **Exhibit 1** (2019-2021 MOU) at Section 1-3(A).

9 38. In addition, “[t]he full-time release positions agree[d] to participate in [the  
10 City’s] committees and task forces,” and the Union could designate stewards to “service  
11 grievances at . . . job sites to which they are regularly assigned.” **Exhibit 1** (2019-2021  
12 MOU) at Section 1-3(A)(1), (2); **Exhibit 3** (Frost Declaration) at ¶ 15.

13 39. City employees on release time, regardless of what tasks they are  
14 performing, are required to adhere to all City policies and procedures. **Exhibit 13**  
15 (Deposition of M. Ayala) at 44:6-13, 97:1-11; *see also* **Exhibit 1** (2019-2021 MOU) at  
16 Section 1-3(A)(1).

17 **IV. Release time benefits the City and Unit II employees.**

18 40. The City benefits from the 2019-2021 MOU, including its release time  
19 provisions. **Exhibit 1** (2019-2021 MOU) at Section 1-3(A); **Exhibit 3** (Frost Declaration)  
20 at ¶¶ 22-27; **Exhibit 12** (Deposition of X. Frost) at 52:12-53:8, 54:14-56:24, 82:13-83:13,  
21 156:11-22; **Exhibit 14** (Deposition of E. Zuercher) at 24:1-25, 26:12-27:3, 54:3-18,  
22 55:22-56:6, 56:17-57:3, 58:21-61:5, 74:14-18, 87:5-20, 99:14-101:21.

23 41. Release time helps the City and the Union promote harmonious labor  
24 relations and facilitate an open dialogue about employee preferences and concerns, and it  
25 helps both the City and the Union fulfill their respective obligations under the City’s Meet  
26 & Confer Ordinance. **Exhibit 1** (2019-2021 MOU) at Section 1-3(A); **Exhibit 3** (Frost  
27 Declaration) at ¶ 22; **Exhibit 12** (Deposition of X. Frost) at 53:5-8, 54:14:56:24, 82:13-  
28 83:13; **Exhibit 14** (Deposition of E. Zuercher) at 16:24-17:16, 24:1-25, 26:12-27:3, 37:8-

1 14, 50:2-8, 56:17-57:3, 58:21-61:5, 76:16-77:12, 87:5-20, 99:14-101:21.

2 42. Release time also helps the City and the Union give effect to the Meet &  
3 Confer Ordinance’s purposes and accomplish the labor relations objectives outlined in the  
4 2019-2021 MOU, which furthers the City Council’s policies of promoting cooperation.  
5 **Exhibit 3** (Frost Declaration) at ¶ 23; **Exhibit 12** (Deposition of X. Frost) at 53:5-8,  
6 54:14-56:24; **Exhibit 14** (Deposition of E. Zuercher) at 16:24-17:16, 24:1-25, 26:12-27:3,  
7 54:3-18, 58:21-61:5, 76:16-77:12, 87:5-20, 99:14-101:21.

8 43. As recognized in the 2019-2021 MOU, release time benefits the City by  
9 providing “an efficient and readily available point of contact for addressing labor-  
10 management concerns.” **Exhibit 1** (2019-2021 MOU) Section 1-3(A); **Exhibit 3** (Frost  
11 Declaration) at ¶ 24; **Exhibit 12** (Deposition of X. Frost) at 54:14-56:24, 82:13-83:13,  
12 156:11-22.

13 44. In addition, the City benefits from release time because the Union agreed  
14 that Unit II employees who are released on a full-time basis will participate on the City’s  
15 committees and task forces. **Exhibit 3** (Frost Declaration) at ¶¶ 15, 25; **Exhibit 12**  
16 (Deposition of X. Frost) at 54:14-56:24, 82:13-83:13; **Exhibit 14** (Deposition of E.  
17 Zuercher) at 24:1-25, 54:3-18, 58:21-61:5, 87:5-20.

18 45. Without release time, City employees would still need to take time to  
19 perform the functions that they currently perform while released. City Manager Ed  
20 Zuercher testified that the City would likely spend more time tracking down employees to  
21 perform these same tasks before the current release time regime was implemented.  
22 **Exhibit 14** (Deposition of E. Zuercher) at 50:23-51:23, 53:8-20, 54:2-18, 55:22-56:6,  
23 57:22-58:3, 76:16-77:12, 87:5-20, 99:14-101:21; **Exhibit 12** (Deposition of X. Frost) at  
24 82:13-83:13, 156:11-22.

25 46. The City pays for release time based on a recognition of the benefits it  
26 receives, including a harmonious relationship with its employees, which encourages  
27 employees to “give more of their time and energy and quality to the[ir] work.” **Exhibit**  
28 **14** (Deposition of E. Zuercher) at 24:1-25, 26:12-27:3, 50:2-8, 56:17-57:3, 58:21-61:5,

1 99:14-101:21; **Exhibit 12** (Deposition of X. Frost) at 53:5-8, 54:14-56:24, 82:13-83:13,  
2 87:5-20.

3 47. Among other things, release time benefits City employees using, and  
4 receiving payment for, release time because they are being paid for their release time  
5 activities. **Exhibit 3** (Frost Declaration) at ¶¶ 20-21; **Exhibit 12** (Deposition of X. Frost)  
6 at 45:11-46:6; **Exhibit 7** (Deposition of R. Brown) at 24:10-25:2.

7 48. When Unit II employees use release time for release time activities, they  
8 are paid their regular rate of pay in their normal paychecks by the City for that time.  
9 **Exhibit 1** (2019-2021 MOU) at Section 1-3; **Exhibit 3** (Frost Declaration) at ¶¶ 20-21;  
10 **Exhibit 12** (Deposition of X. Frost) at 45:11-46:6; **Exhibit 7** (Deposition of R. Brown) at  
11 24:10-25:2; **Exhibit 9** (Deposition of M. Gilmore) at 137:21-138:12; **Exhibit 19**  
12 (Gilmore's Amended Responses to the Union's First Set of Discovery Requests) at p. 5  
13 (RFA No. 5).

14 49. Release time is used in ways that benefit all Unit II employees, including  
15 Unit II employees who are not members of the Union. **Exhibit 9** (Deposition of M.  
16 Gilmore) at 40:19-22; **Exhibit 10** (Deposition of M. Harder) at 58:18-59:19, 70:7-19,  
17 72:13-74:8, 75:4-13, 75:25-76:19, 93:12-94:15, 103:18-104:2; **Exhibit 12** (Deposition of  
18 X. Frost) at 53:5-8, 54:14-56:24; **Exhibit 14** (Deposition of E. Zuercher) at 24:1-25,  
19 26:12-27:3, 50:2-8, 54:3-18, 75:3-8; *see also* **Exhibit 7** (Deposition of R. Brown) at 25:3-  
20 22.

21 50. Plaintiff Gilmore previously used release time when serving as a witness  
22 in a grievance proceeding. Plaintiff Gilmore recalled that there were issues in the  
23 workplace caused by a former City employee and that the Union had filed a grievance on  
24 behalf of all Unit II employees. Plaintiff Gilmore testified that workplace conditions  
25 improved upon the resolution of that grievance. **Exhibit 9** (Deposition of M. Gilmore) at  
26 180:5-182:1.

27 51. Plaintiff Harder agreed that if the Union were to prevail in a grievance that  
28 improved working conditions for all of Unit II, all Unit II employees would benefit.

1 **Exhibit 10** (Deposition of M. Harder) at 76:4-19.

2 52. Plaintiff Gilmore testified that informal resolution of grievances and other  
3 employee concerns provides a benefit to both the City and employees. **Exhibit 9**  
4 (Deposition of M. Gilmore) at 27:1-18.

5 53. Plaintiff Gilmore also testified release time can help facilitate collective  
6 bargaining between the Union and the City. **Exhibit 9** (Deposition of M. Gilmore) at 27:1-  
7 18, 23:13-25.

8 54. In addition to benefitting Unit II employees, release time serves a public  
9 purpose and benefits the City in the following ways, among others: (a) reducing  
10 administrative/economic friction by making it easier to schedule and facilitate collective  
11 bargaining sessions, grievances and dispute resolution proceedings, and other labor-  
12 management meetings at more convenient times; (b) promoting labor peace and  
13 harmonious labor relations; (c) providing workers with the means to express discontent;  
14 (d) opening channels of communication between workers and management; (e) providing  
15 management with information about worker preferences; (f) identifying and potentially  
16 remedying inefficiencies in the production process; (g) developing dependable, trained,  
17 and knowledgeable representatives to help facilitate the collective bargaining process, the  
18 dispute resolution process, and the promotion of harmonious labor relations; (h)  
19 facilitating more efficient scheduling and a centralized method for collective bargaining  
20 and resolving labor disputes and issues; (i) facilitating employee service on committees  
21 and task forces; (j) gathering and providing feedback on management policies or  
22 programs; (k) informally resolving disputes outside of the formal grievance process; and  
23 (l) increasing employee satisfaction resulting in greater productivity and reduced turnover.

24 **Exhibit 1** (2019-2021 MOU) at Section 1-3(A); **Exhibit 3** (Frost Declaration) at ¶ 26;  
25 **Exhibit 9** (Deposition of M. Gilmore) at 22:12-25, 23:1-4, 26:6-27:18, 30:9-22, 39:12-14,  
26 40:8-22, 51:12-52:8, 150:16-23; **Exhibit 10** (Deposition of M. Harder) at 23:13-25, 25:5-  
27 11, 25:19-24, 26:18-22, 28:4-8, 28:21-29:6, 31:4-19, 32:1-6, 49:3-10, 51:9-14, 52:1-6,  
28 58:24-59:19, 65:13-66:7; **Exhibit 12** (Deposition of X. Frost) at 53:5-8, 54:14-56:24,

1 82:16-83:13; **Exhibit 14** (Deposition of E. Zuercher) at 16:24-17:16, 24:1-25, 26:12-27:3,  
2 37:8-14, 50:2-11, 54:3-18, 55:22-56:6, 58:21-61:5, 77:2-12, 87:5-20, 99:14-101:21;  
3 **Exhibit 11** (Deposition of Dr. Ward) at 47:2-24, 48:3-9, 54:20-21, 55:8-14, 55:24-4,  
4 56:21-57:3, 113:14-114:5; **Exhibit 6** (Expert Report of Dr. Ward) at pp. 4-6.

5 55. The City's witnesses also testified that release time pays for itself by (a)  
6 avoiding lawsuits and resolving disputes more efficiently, (b) facilitating collective  
7 bargaining with the Union, and (c) making it more efficient to schedule meetings to  
8 address labor disputes and other issues. **Exhibit 12** (Deposition of X. Frost) at 52:23-  
9 53:8, 54:14-56:24, 77:20-78:15, 79:13-25, 82:16-83:13; **Exhibit 14** (Deposition of E.  
10 Zuercher) at 24:20-25, 26:12-27:3, 53:8-56:6, 56:17-57:3, 87:5-20.

11 56. Dr. Bryce Ward testified that the existing literature about release time  
12 supports the City's opinion that release time forms an important public benefit. **Exhibit**  
13 **11** (Deposition of Dr. Ward) at 47:2-24, 48:3-9; *see also* **Exhibit 6** (Expert Report of Dr.  
14 Ward) at pp. 3-8.

15 57. Plaintiffs agreed that it is possible the City benefits from funding release  
16 time. **Exhibit 9** (Deposition of M. Gilmore) at 38:9-14; **Exhibit 10** (Deposition of M.  
17 Harder) at 23:24-24:7.

18 58. Plaintiffs' expert, Robert Brown, testified that a harmonious relationship  
19 between an employer and labor union can result in more informal problem-solving and  
20 increased communication from employees about ideas to improve organizational  
21 efficiency and other workplace concerns. **Exhibit 7** (Deposition of R. Brown) at 48:2-21.

22 59. Mr. Brown admitted that it is possible that release time could help improve  
23 the City's labor relations with Unit II. **Exhibit 7** (Deposition of R. Brown) at 56:15-23.

24 60. Mr. Brown testified that it is more efficient for the City to have collective  
25 bargaining with one union than to negotiate terms and conditions of employment  
26 separately with individual employees. **Exhibit 7** (Deposition of R. Brown) at 147:6-9.

27 61. Mr. Brown testified that release time can help augment employees'  
28 collective voice. **Exhibit 7** (Deposition of R. Brown) at 154:6-15.

1           62. Likewise, Plaintiffs testified that it is possible release time could help  
2 employees improve or express their collective voice. **Exhibit 9** (Deposition of M.  
3 Gilmore) at 42:6-8; **Exhibit 10** (Deposition of M. Harder) at 28:4-8.

4           63. Plaintiffs also concede that Unit II employees may benefit as a group from  
5 these activities, which may lead to higher employee satisfaction and help the City recruit  
6 and retain employees. **Exhibit 9** (Deposition of M. Gilmore) at 51:9-25; **Exhibit 10**  
7 (Deposition of M. Harder) at 23:13-25, 26:5-22.

8           64. Conversely, eliminating paid release time could result in adverse  
9 economic, administrative, and other consequences for the City and Unit II employees.  
10 **Exhibit 3** (Frost Declaration) at ¶ 27; **Exhibit 12** (Deposition of X. Frost) at 77:20-78:15,  
11 79:13-25, 82:16-83:13, 156:11-22; **Exhibit 14** (Deposition of E. Zuercher) at 24:20-25,  
12 26:12-27:3, 53:8-56:6, 56:17-57:3; **Exhibit 11** (Deposition of Dr. Ward) at 49:19-24,  
13 51:8-17, 76:17-77:2, 106:22-107:1; **Exhibit 7** (Deposition of R. Brown) at 65:1-22.

14           65. The adverse consequences of eliminating release time include, but are not  
15 limited to, inefficiency, less effective communication and cooperation among the City and  
16 Unit II, and lower wages and benefits for Unit II employees, including Plaintiffs. **Exhibit**  
17 **12** (Deposition of X. Frost) at 77:20-78:15, 79:13-25, 82:16-83:13, 156:11-22; **Exhibit 14**  
18 (Deposition of E. Zuercher) at 24:20-25, 26:12-27:3, 53:8-56:6, 56:17-57:3; **Exhibit 11**  
19 (Deposition of Dr. Ward) at 49:19-24, 51:8-17, 76:17-77:2, 106:22-107:1; **Exhibit 7**  
20 (Deposition of R. Brown) at 84:13-24; **Exhibit 9** (Deposition of M. Gilmore) at 67:15-18.

21           66. Plaintiff Gilmore earns \$29 per hour under the 2019-2021 MOU between  
22 the Union and the City; under the previous MOU, he earned \$27 per hour or 7.4% less per  
23 hour. **Exhibit 9** (Deposition of M. Gilmore) at 168:8-21.

24 **V. The City pays for release time under the 2019-2021 MOU.**

25           67. The cost of release time under the 2019-2021 MOU was “charged as part  
26 of the total compensation detailed in” the 2019-2021 MOU. **Exhibit 1** (2019-2021 MOU)  
27 at Section 1-3(A); **Exhibit 12** (Deposition of X. Frost) at 109:13-110:3, 123:19-124:15,  
28 129:6-130:2; **Exhibit 14** (Deposition of E. Zuercher) at 73:2-74:4, 75:16-77:12, 87:5-20.

1           68. During the meet and confer process, the City and the Union exchange  
2 proposals concerning the terms and conditions of employment to be governed under the  
3 upcoming MOU. **Exhibit 2** (Reber Declaration) at ¶ 4; **Exhibit 12** (Deposition of X.  
4 Frost) at 120:8-22.

5           69. Proposals that affect the City’s funding allocations to an employee unit are  
6 known as “economic” proposals. **Exhibit 2** (Reber Declaration) at ¶ 6; **Exhibit 12**  
7 (Deposition of X. Frost) at 47:3-13, 51:19-25, 76:23-77:18, 120:8-22.

8           70. Economic proposals are not limited to changes in employee wages, but  
9 include any proposal that would need to be paid for by the City, such as tool allowances or  
10 expenditures for equipment or infrastructure. **Exhibit 2** (Reber Declaration) at ¶ 6;  
11 **Exhibit 3** (Frost Declaration) at ¶¶ 16-17.

12           71. The City refers to the sum of all economic items in an MOU as the “total  
13 compensation” or the “total cost of compensation.” **Exhibit 3** (Frost Declaration) at ¶ 16;  
14 **Exhibit 12** (Deposition of X. Frost) at 109:13-110:3; **Exhibit 14** (Deposition of E.  
15 Zuercher) at 73:13-74:4.

16           72. The term “total compensation” is a term of art in the meet and confer  
17 process that refers to the total economic package for a particular MOU. **Exhibit 3** (Frost  
18 Declaration) at ¶¶ 16-17; **Exhibit 12** (Deposition of X. Frost) at 109:13-110:3; **Exhibit 14**  
19 (Deposition of E. Zuercher) at 73:13-74:4; **Exhibit 7** (Deposition of R. Brown) at 130:10-  
20 23; **Exhibit 10** (Deposition of M. Harder) at 21:1-22.

21           73. The total economic package means the total cost to the City to pay for an  
22 MOU. **Exhibit 3** (Frost Declaration) at ¶ 16; **Exhibit 12** (Deposition of X. Frost) at  
23 109:13-110:3; **Exhibit 14** (Deposition of E. Zuercher) at 73:13-74:4; **Exhibit 7**  
24 (Deposition of R. Brown) at 130:10-23; **Exhibit 10** (Deposition of M. Harder) at 21:1-22.

25           74. The “total compensation” does not refer to the compensation of individual  
26 Unit II employees, and Unit II employees do not share equally in the total compensation.  
27 **Exhibit 3** (Frost Declaration) at ¶ 17; **Exhibit 12** (Deposition of X. Frost) at 109:13-  
28 110:3; **Exhibit 14** (Deposition of E. Zuercher) at 75:16-77:12.

1           75. In some circumstances, there are certain economic items that would not be  
2 a part of the wages or benefits of any City employees, but they still would be included in  
3 the total compensation because they represent a cost to the City. **Exhibit 2** (Reber  
4 Declaration) at ¶ 6; **Exhibit 3** (Frost Declaration) at ¶ 17.

5           76. At the beginning of the meet and confer process, the City Council or City  
6 Manager has discretion to determine the total economic package that will be offered,  
7 subject to final approval by the City Council. **Exhibit 3** (Frost Declaration) at ¶ 18;  
8 **Exhibit 12** (Deposition of X. Frost) at 120:8-22.

9           77. The total economic package is not fixed at the beginning of the meet and  
10 confer process. Like other terms and conditions of employment, the amount of the total  
11 economic package is subject to negotiation and may change based on negotiations or  
12 changing circumstances. **Exhibit 3** (Frost Declaration) at ¶ 18; **Exhibit 12** (Deposition of  
13 X. Frost) at 109:13-110:3, 120:8-22, 121:18-124:15, 129:6-130:2, 132:12-24.

14           78. Plaintiffs admit the City may set this figure, at its discretion, similar to  
15 how the City makes other funding decisions. **Exhibit 9** (Deposition of M. Gilmore) at  
16 97:7-25, 98:1-24, 102:19-103:10; **Exhibit 10** (Deposition of M. Harder) at 43:2-25, 48:13-  
17 21.

18           79. The funding for Unit II's total compensation package comes from taxpayer  
19 dollars collected by the City. **Exhibit 9** (Deposition of M. Gilmore) at 97:7-20, 136:2-13;  
20 **Exhibit 10** (Deposition of M. Harder) at 22:3-5, 22:12-23:6.

21           80. Plaintiffs testified that the City collects taxes, those collections become  
22 City funds, and the City funds are then used to pay for the cost of the 2019-2021 MOU,  
23 including release time. **Exhibit 9** (Deposition of M. Gilmore) at 97:7-20, 127:23-25,  
24 128:19-21, 136:2-13; **Exhibit 10** (Deposition of M. Harder) at 38:25-39:4, 48:15-49:21,  
25 50:6-12.

26           81. This is consistent with testimony from the City's Rule 30(b)(6)  
27 representatives and Plaintiffs' expert. **Exhibit 8** (Deposition of T. Reber) at 57:19-21;  
28 **Exhibit 3** (Frost Declaration) at ¶ 21; **Exhibit 12** (Deposition of X. Frost) 45:11-46:16,

1 51:19-52:7; **Exhibit 7** (Deposition of R. Brown) at 22:16-18, 24:4-9.

2 82. Plaintiffs admit that they have no ownership interest in the City's tax  
3 revenue and public funds. **Exhibit 9** (Deposition of M. Gilmore) at 97:7-25, 98:1-24;  
4 **Exhibit 10** (Deposition of M. Harder) at 43:2-25, 48:13-2.

5 83. Plaintiffs also acknowledge that the City has discretion to spend public  
6 funds as it sees fit and that they have no authority to dictate or challenge the City's  
7 funding decisions. **Exhibit 9** (Deposition of M. Gilmore) at 97:7-98:24, 102:19-103:10;  
8 **Exhibit 10** (Deposition of M. Harder) at 43:2-25, 48:13-21.

9 84. The "total compensation" (i.e., the total cost to the City of the MOU) for a  
10 unit of City employees does not result in equal wages and benefits for all employees. For  
11 example, certain compensation, such as a uniform allowance or shift differential, may  
12 benefit some but not all employees within the unit. **Exhibit 3** (Frost Declaration) at ¶ 17;  
13 **Exhibit 8** (Deposition of T. Reber) at 82:7-12, 103:9-104:1; **Exhibit 12** (Deposition of X.  
14 Frost) at 109:13-110:3; **Exhibit 14** (Deposition of E. Zuercher) at 75:16-77:12; **Exhibit 7**  
15 (Deposition of R. Brown) at 73:15-74:22, 133:18-134:6; **Exhibit 9** (Deposition of M.  
16 Gilmore) at 75:14-17; **Exhibit 10** (Deposition of M. Harder) at 32:8-21.

17 85. In addition, wage increases could go to only certain employees within the  
18 unit and not others. **Exhibit 9** (Deposition of M. Gilmore) at 98:7-99:6; **Exhibit 10**  
19 (Deposition of M. Harder) at 43:6-25.

20 86. Plaintiffs admit that they may not personally benefit from increases to total  
21 compensation because such increases could be allocated to other employees. **Exhibit 9**  
22 (Deposition of M. Gilmore) at 98:7-99:6; **Exhibit 10** (Deposition of M. Harder) at 43:6-  
23 25.

24 87. Plaintiffs concede they have no interest in the "total compensation"  
25 beyond what they are entitled to receive as their personal wages and benefits under the  
26 MOU. **Exhibit 9** (Deposition of M. Gilmore) at 91:21-93:10; **Exhibit 10** (Deposition of  
27 M. Harder) at 39:19-40:15.

28 88. Although other Unit II employees' wages and benefits are part of the total

1 compensation package under the 2019-2021 MOU, Plaintiffs testified that they do not  
2 “finance” other Unit II employees’ wages because those wages are funded by the City’s  
3 taxpayer revenue. **Exhibit 9** (Deposition of M. Gilmore) at 95:5-10; **Exhibit 10**  
4 (Deposition of M. Harder) at 21:18-23:6.

5 89. Plaintiffs admitted that they do not “finance” their co-workers’ wages even  
6 though those wages are part of the total compensation package for Unit II. **Exhibit 9**  
7 (Deposition of M. Gilmore) at 97:7-20; **Exhibit 10** (Deposition of M. Harder) at 21:18-  
8 23:6.

9 90. Plaintiffs admit that they do not have an interest in their coworkers’  
10 compensation, which is part of the “total compensation.” **Exhibit 9** (Deposition of M.  
11 Gilmore) at 91:21-93:10, 97:7-16; **Exhibit 10** (Deposition of M. Harder) at 39:19-40:15.

12 91. Plaintiffs admit that no money is deducted directly from their paychecks to  
13 pay for release time under the 2019-2021 MOU. **Exhibit 18** (Harder’s Amended  
14 Responses to the City Defendants’ Second Set of Discovery Requests) at pp. 4-5 (RFA  
15 No. 6); **Exhibit 9** (Deposition of M. Gilmore) at 179:2-12; **Exhibit 10** (Deposition of M.  
16 Harder) at 47:22-25, 57:21-58:2.

17 92. Plaintiff Gilmore admits that the City pays for total compensation,  
18 including release time, through public funds. **Exhibit 9** (Deposition of M. Gilmore) at  
19 90:17-91:1, 97:7-20, 102:19-103:10, 129:10-131:13.

20 93. Plaintiff Harder admits that it is the City’s money, not his or his  
21 coworkers’ money, that is used to pay for release time. **Exhibit 10** (Deposition of M.  
22 Harder) at 38:25-39:4.

23 94. Plaintiff Harder admits that it is not his “actual compensation under the  
24 MOU that’s being used to finance release time, but some higher amount of compensation  
25 that [he] would like to have if release time were eliminated.” **Exhibit 10** (Deposition of  
26 M. Harder) at 54:10-55:1.

27 95. Mr. Brown testified that this litigation involves release time paid for by the  
28 City. **Exhibit 7** (Deposition of R. Brown) at 84:13-24.

1           96. Similarly, Plaintiffs were not deprived of or required to return any vested  
2 wages or benefits to pay for release time under the 2019-2021 MOU. **Exhibit 9**  
3 (Deposition of M. Gilmore) at 88:8-12, 136:2-7; **Exhibit 10** (Deposition of M. Harder) at  
4 48:1-4, 57:21-58:2.

5           97. Plaintiff Harder testified that he did not know how Unit II employees pay  
6 for release time despite alleging in the Second Amended Complaint that Unit II employees  
7 allegedly pay for release time. **Exhibit 10** (Deposition of M. Harder) at 38:10-18.

8 **VI. The City does not pay too much for the 2019-2021 MOU, and it receives**  
9 **sufficient consideration from employee services.**

10           98. The total cost to the City associated with the 2019-2021 MOU for the  
11 2020-2021 term year is \$168,569,000. **Exhibit 2** (Reber Declaration) at ¶ 13.

12           99. Plaintiffs do not believe individual Unit II employees are overcompensated  
13 for their work. **Exhibit 17** (Gilmore's Responses to the City Defendants' Second Set of  
14 Discovery Requests) at p. 6 (Response to RFA No. 9); **Exhibit 9** (Deposition of M.  
15 Gilmore) at 149:15-150:7; **Exhibit 10** (Deposition of M. Harder) at 61:4-12.

16           100. Plaintiffs testified that the City gets a fair amount of services from Unit II  
17 employees in exchange for Unit II's total compensation under the 2019-2021 MOU.  
18 **Exhibit 9** (Deposition of M. Gilmore) at 150:9-14; **Exhibit 10** (Deposition of M. Harder)  
19 at 61:7-25.

20           101. The annual total cost to the City for release time under the 2019-2021  
21 MOU is \$499,000. **Exhibit 2** (Reber Declaration) at ¶ 13; **Exhibit 12** (Deposition of X.  
22 Frost) at 76:23-77:18; **Exhibit 14** (Deposition of E. Zuercher) at 23:8-14 .

23           102. The total cost of release time under the 2019-2021 MOU represents 0.3%  
24 of the total economic package for Unit II for the 2020-2021 term year. **Exhibit 2** (Reber  
25 Declaration) at ¶ 13.

26           103. City Manager Zuercher explains that costing of release time is really  
27 placing a value on the time the City needs to have representatives of Unit II employees  
28 carry out the tasks that are required by the MOU and the Meet & Confer Ordinance.

1 **Exhibit 14** (Deposition of E. Zuercher) at 54:3-18, 73:9-74:4, 87:5-20.

2 104. The cost of release time to the City is the value of the “time” associated  
3 with the full-time release positions and bank of hours used to meet the City’s obligations  
4 under the MOU and Meet & Confer Ordinance to make sure that employees are properly  
5 represented in labor management relations. **Exhibit 14** (Deposition of E. Zuercher) at  
6 87:5-20, 99:5-101:8.

7 **VII. Plaintiffs have not been personally harmed by release time under the 2019-**  
8 **2021 MOU.**

9 105. Plaintiff Harder testified that he is harmed by release time in only one way,  
10 stating his belief that he would get some additional form of compensation if release time  
11 were eliminated, which is more preferable to him. **Exhibit 10** (Deposition of M. Harder)  
12 at 15:11-20, 19:14-23.

13 106. Plaintiff Gilmore alleged that he is harmed by release time because when a  
14 Union steward uses release time during part of his ordinary shift, he may have to perform  
15 the steward’s work. **Exhibit 9** (Deposition of M. Gilmore) at 69:5-22.

16 107. Plaintiff Gilmore testified that the only harm he personally suffers as a  
17 result of release time is that he may have to perform the steward’s work. **Exhibit 9**  
18 (Deposition of M. Gilmore) at 70:3-8.

19 108. Plaintiff Gilmore testified that he is seeking the elimination of release time  
20 under the 2019-2021 MOU because he would like the funding used to pay for release time  
21 reallocated to a future increase in his personal vacation hours, which he stated would serve  
22 only as a personal benefit to him and not a benefit to the public. **Exhibit 9** (Deposition of  
23 M. Gilmore) at 75:18-24, 105:6-21, 150:24-151:4, 152:7-11.

24 109. Similarly, Plaintiff Harder testified that he is seeking the elimination of  
25 release time under the 2019-2021 MOU because he believes he would receive an increase  
26 in his compensation or time off if release time were eliminated. **Exhibit 10** (Deposition of  
27 M. Harder) at 15:11-16:13, 19:14-23.

28 110. Plaintiffs also admit that, if release time were eliminated, they want release

1 time payments to be redirected to increasing their compensation rather than some public  
2 purpose. **Exhibit 9** (Deposition of M. Gilmore) at 75:18-24; **Exhibit 10** (Deposition of  
3 M. Harder) at 18:20-25.

4 111. If City-funded release time were eliminated, the City would meet and  
5 confer with the Union regarding the potential disposition of the value of the City's public  
6 funds that had been allocated for release time, subject to direction from the City Council.  
7 **Exhibit 3** (Frost Declaration) at ¶ 28; **Exhibit 12** (Deposition of X. Frost) at 122:5-  
8 123:17; 129:6-130:2, 132:12-24; **Exhibit 14** (Deposition of E. Zuercher) at 75:16-77:12,  
9 99:14-101:21; **Exhibit 10** (Deposition of M. Harder) at 18:20-25.

10 112. Ultimately, the City Council or City Manager would decide how the value  
11 of these public funds would be reallocated, and there is no requirement, contractual  
12 obligation, or guarantee that the funds would be reallocated to increasing the wages or  
13 benefits of Unit II employees. **Exhibit 3** (Frost Declaration) at ¶ 28; **Exhibit 12**  
14 (Deposition of X. Frost) at 122:24-123:17, 129:6-130:2, 132:12-24, 144:5-18; **Exhibit 14**  
15 (Deposition of E. Zuercher) at 75:16-77:12, 86:11-18, 87:5-20, 99:14-101:21.

16 113. Plaintiffs testified that the City can choose how to spend its funds however  
17 it wants. **Exhibit 9** (Deposition of M. Gilmore) at 97:21-99:6, 128:22-129:6, **Exhibit 10**  
18 (Deposition of M. Harder) at 49:7-23.

19 114. Plaintiff Gilmore testified that if the Union and City must eliminate release  
20 time under the 2019-2021 MOU, “[t]he City can do whatever it wants” with the funding  
21 previously allocated to pay for that release time. **Exhibit 9** (Deposition of M. Gilmore) at  
22 97:21-99:6, 128:22-129:6; *see also* **Exhibit 10** (Deposition of M. Harder) at 49:7-23  
23 (testifying that the City can use its tax revenue “as they need it”).

24 115. Likewise, Plaintiff Harder testified that he does not know what the City  
25 would do with the funds allocated to release time if release time were eliminated. **Exhibit**  
26 **10** (Deposition of M. Harder) at 40:17-24.

27 116. Plaintiffs acknowledged that they do not have authority to dictate or  
28 challenge how the City allocates funds or makes funding decisions. **Exhibit 15**

1 (Gilmore’s Corrected Responses to the City Defendants’ First Set of Discovery Requests)  
2 at pp. 7-8 (NUI No. 4); **Exhibit 16** (Harder’s Responses to the City Defendants’ First Set  
3 of Discovery Requests) at pp. 6-7 (NUI No. 4).

4 117. Plaintiffs acknowledged that there is no guarantee they would receive  
5 higher wages than currently provided under the 2019-2021 MOU if release time were  
6 eliminated. **Exhibit 9** (Deposition of M. Gilmore) at 97:21-99:6; **Exhibit 10** (Deposition  
7 of M. Harder) at 54:22-55:1.

8 118. Plaintiffs admit that, if release time were eliminated, they would receive  
9 no benefit if the City reallocated release time payments to some other public purpose.  
10 **Exhibit 9** (Deposition of M. Gilmore) at 72:9-73:14, 74:24-75:17; **Exhibit 10** (Deposition  
11 of M. Harder) at 45:11-16.

12 119. For example, Plaintiff Gilmore testified in his deposition that the City  
13 recently created a new deputy director position at a cost to the City of \$150,000 per year.  
14 Gilmore acknowledges that he received no benefit from this expenditure. **Exhibit 9**  
15 (Deposition of M. Gilmore) at 72:9-73:14.

16 120. Mr. Brown testified that the MOU does not require the City to provide  
17 additional compensation to Unit II employees if the release time provisions were  
18 eliminated. **Exhibit 7** (Deposition of R. Brown) at 69:7-14.

19 121. If the Union and City had negotiated to eliminate release time from the  
20 2019-2021 MOU, it would have been within the City’s discretion to determine whether to  
21 credit the economic value of the eliminated release time back to the Union as part of  
22 negotiations. **Exhibit 8** (Deposition of T. Reber) at 92:6-7, 106:19-22, 107:5-23; *see also*  
23 **Exhibit 9** (Deposition of M. Gilmore) at 72:9-73:14.

24 122. If the Union and City eliminated release time under the 2019-2021 MOU,  
25 the economic value of the eliminated release time would not necessarily or automatically  
26 result in a wage increase or additional benefits to Plaintiffs or other Unit II employees.  
27 **Exhibit 9** (Deposition of M. Gilmore) at 72:9-73:14; **Exhibit 10** (Deposition of M.  
28 Harder) at 34:9-24, 42:18-43:18; **Exhibit 8** (Deposition of T. Reber) at 70:5-25, 92:6-17,

1 106:19-22, 107:5-23; **Exhibit 11** (Deposition of Dr. Ward) at 85:5-10.

2 123. If the Union and City eliminated release time under the 2019-2021 MOU,  
3 it is possible that the economic value of the eliminated release time could result in an  
4 increase in wages or benefits to Unit II employees other than Plaintiffs. **Exhibit 8**  
5 (Deposition of T. Reber) at 70:5-25; **Exhibit 9** (Deposition of M. Gilmore) at 74:13-75:5;  
6 **Exhibit 10** (Deposition of M. Harder) at 33:22-34:8, 43:20-25; *see also* **Exhibit 7**  
7 (Deposition of R. Brown) at 73:15-74:22.

8 124. If the Union and City eliminated release time under the 2019-2021 MOU,  
9 the City could reallocate the economic value of the eliminated release time to a purpose  
10 other than Unit II's total compensation package. **Exhibit 8** (Deposition of T. Reber) at  
11 92:6-17, 107:5-23; **Exhibit 7** (Deposition of R. Brown) at 111:17-113:1; **Exhibit 9**  
12 (Deposition of M. Gilmore) at 97:21-99:6; 128:22-129:6; **Exhibit 10** (Deposition of M.  
13 Harder) at 34:18-24.

14 125. Plaintiffs testified that the City did not promise to provide them with any  
15 increase to their wages or benefits if release time were eliminated from the 2019-2021  
16 MOU. **Exhibit 9** (Deposition of M. Gilmore) at 88:20-89:2, 94:18-23; **Exhibit 10**  
17 (Deposition of M. Harder) at 40:5-15, 54:17-20.

18 126. Mr. Brown testified that the City can make "any kind of decision it wants"  
19 with respect to spending funds, and the City makes those determinations based on an  
20 assessment of relevant evidence. **Exhibit 7** (Deposition of R. Brown) at 112:17-25,  
21 113:1.

22 127. Plaintiffs testified that they are not entitled to any wages or benefits other  
23 than those specified in the 2019-2021 MOU. **Exhibit 9** (Deposition of M. Gilmore) at  
24 93:7-10, 94:18-23; **Exhibit 10** (Deposition of M. Harder) at 57:4-9; *see also* **Exhibit 7**  
25 (Deposition of R. Brown) at 31:1-5, 32:9-16.

26 128. Plaintiffs testified that they are receiving all benefits and wages they were  
27 promised under the 2019-2021 MOU. **Exhibit 9** (Deposition of M. Gilmore) at 118:24-  
28 119:2; **Exhibit 10** (Deposition of M. Harder) at 40:1-4, 54:4-8.

1            129. Plaintiffs admitted that release time is not causing them to receive lesser  
2 wages or benefits than those promised in the 2019-2021 MOU. **Exhibit 9** (Deposition of  
3 M. Gilmore) at 118:18-22; **Exhibit 10** (Deposition of M. Harder) at 54:10-15.

4            130. Mr. Brown testified that release time is not funded from employee pay  
5 deductions. **Exhibit 7** (Deposition of R. Brown) at 108:20-25, 109:1-2.

6            131. Plaintiff Gilmore testified that his hourly wage is higher under the 2019-  
7 2021 MOU than it was under the 2016-2019 MOU. **Exhibit 9** (Deposition of M.  
8 Gilmore) at 168:8-21, 169:5-8.

9            132. Plaintiff Gilmore testified that when the Union is successful in advocating  
10 for higher wages, all Unit II employees will benefit from the higher wages, not just Union  
11 members. **Exhibit 9** (Deposition of M. Gilmore) at 40:8-22.

12            133. Plaintiffs also received additional one-time payments in 2019 and 2020  
13 under the 2019-2021 MOU. **Exhibit 5** (CITY00003634); **Exhibit 9** (Deposition of M.  
14 Gilmore) at 169:9-24; **Exhibit 10** (Deposition of M. Harder) at 22:12-15, 72:3-8.

15            134. Plaintiff Harder testified that the Union's use of release time to bargain for  
16 higher wages for Unit II employees would benefit him. **Exhibit 10** (Deposition of M.  
17 Harder) at 66:4-13, 70:7-19, 72:13-73:17.

18            135. Indeed, under the 2019-2021 MOU, Unit II employees received a higher  
19 wage increase and two additional one-time payments than what the City originally  
20 proposed. *Compare* **Exhibit 4** (CITY00001265) *with* **Exhibit 5** (CITY00003634); *see*  
21 *also* **Exhibit 2** (Reber Declaration) at ¶¶ 10-11; **Exhibit 9** (Deposition of M. Gilmore) at  
22 169:9-16; **Exhibit 10** (Deposition of M. Harder) at 22:12-17.

23            136. Plaintiffs testified that it is possible they will not personally benefit from  
24 the elimination of release time. **Exhibit 9** (Deposition of M. Gilmore) at 107:22-108:9;  
25 **Exhibit 10** (Deposition of M. Harder) at 45:11-6.

26            137. Plaintiff Gilmore could not answer basic and fundamental questions about  
27 his claims and allegations. **Exhibit 9** (Deposition of M. Gilmore) at 79:10-81:15, 90:17-  
28 91:1, 97:7-20, 102:19-103:10, 106:1-108:5, 115:4-20, 129:10-131:13, 131:15-132:23,

1 145:4-11, 147:17-148:13.

2 138. Plaintiff Harder could not answer basic and fundamental questions about  
3 his claims and allegations. **Exhibit 10** (Deposition of M. Harder) at 41:11-42:17, 50:16-  
4 52:7, 55:11-56:8, 61:14-25.

5 **VIII. Plaintiffs are not compelled to join or support the Union.**

6 139. No Unit II employee is required to join the Union. SAC at ¶¶ 5-6; City  
7 Defendants' Answer at ¶¶ 5-6; **Exhibit 9** (Deposition of M. Gilmore) at 130:6-8; **Exhibit**  
8 **10** (Deposition of M. Harder) at 51:2-14.

9 140. Under Section 1-3(G) of the 2019-2021 MOU, Union members have the  
10 option to pay their union dues through a post-tax voluntary payroll deduction. Such  
11 deductions appear as itemized deductions on employees' pay statements/stubs in the same  
12 manner as any other post-payroll deduction like retirement, health insurance, FICA tax  
13 and other deductions. **Exhibit 1** (2019-2021 MOU) at Section 1-3(G)(1); **Exhibit 9**  
14 (Deposition of M. Gilmore) at 177:15-179:12; **Exhibit 10** (Deposition of M. Harder) at  
15 47:22-48:1.

16 141. Plaintiffs are not currently members of the Union. SAC at ¶¶ 5-6; City  
17 Defendants' Answer at ¶¶ 5-6; Intervenor Defendant's Answer at ¶¶ 5-6.

18 142. Plaintiffs do not pay dues or fees to the Union. **Exhibit 9** (Deposition of  
19 M. Gilmore) at 75:23, 118:14-17, 130:9-12, 178:20-179:1; **Exhibit 10** (Deposition of M.  
20 Harder) at 47:22-25, 51:2-9, 92:21-24.

21 143. Plaintiffs testified that they are not currently "forced to provide financial  
22 support to the Union" as non-members. **Exhibit 9** (Deposition of M. Gilmore) at 117:23-  
23 118:5; **Exhibit 10** (Deposition of M. Harder) at 47:19-25, 48:6-11.

24 144. Plaintiffs testified that they are not forced to adopt or endorse the Union's  
25 position or viewpoints. **Exhibit 9** (Deposition of M. Gilmore) at 130:14-22, 146:17-21;  
26 **Exhibit 10** (Deposition of M. Harder) at 51:11-18.

27 145. Plaintiff Harder testified that he is not forced to associate with the Union.  
28 **Exhibit 10** (Deposition of M. Harder) at 50:22-25.

1 146. Plaintiffs testified that their names are not attached to what the Union says  
2 or does. **Exhibit 9** (Deposition of M. Gilmore) at 131:2-4; **Exhibit 10** (Deposition of M.  
3 Harder) at 51:19-23.

4 147. When asked, Plaintiffs could not identify any specific release time  
5 activities under the 2019-2021 MOU with which they disagree that relate to their political  
6 or ideological beliefs. **Exhibit 9** (Deposition of M. Gilmore) at 121:2-10, 203:11-204:2;  
7 **Exhibit 10** (Deposition of M. Harder) at 98:7-99:2, 100:11-14.

8 148. When asked, Plaintiffs could not identify any specific release time  
9 activities that have occurred under the 2019-2021 MOU with which they disagree, other  
10 than buying lunch for employees, lobbying and “swinging deals,” promoting educational  
11 opportunities for Union members, and trying to recruit members. **Exhibit 9** (Deposition  
12 of M. Gilmore) at 198:15-199:14, 206:22-207:2; **Exhibit 10** (Deposition of M. Harder) at  
13 98:7-99:2, 100:15-102:14, 102:24-103:1.

14 149. Plaintiff Harder testified that he would not benefit personally if the City  
15 audited or tracked the use of release time under the 2019-2021 MOU. **Exhibit 10**  
16 (Deposition of M. Harder) at 46:4-16, 47:2-15.

17 150. Plaintiff Gilmore testified that he does not know whether the City’s ability  
18 to audit the Union’s use of release time would resolve his challenges to the existence of  
19 release time under the 2019-2021 MOU. **Exhibit 9** (Deposition of M. Gilmore) at 115:4-  
20 20.

21 151. Plaintiffs were previously dues-paying Union members. **Exhibit 19**  
22 (Gilmore’s Amended Responses to the Union’s First Set of Discovery Requests) at p. 4  
23 (RFA Nos. 1-3); **Exhibit 20** (Harder’s Amended Responses to the Union’s First Set of  
24 Discovery Requests) at p. 4 (RFA Nos. 1-3).

25 152. Plaintiff Gilmore was aware that the MOUs in effect when he was a  
26 member of the Union had three paid full-time release positions but did not contest those  
27 provisions or vote against ratification of the MOU although he could have done so.  
28 **Exhibit 9** (Deposition of M. Gilmore) at 158:25-159:9, 160:7-162:2.

1 153. Plaintiff Gilmore also never voiced his objection to paid release time to the  
2 Phoenix City Council while it was considering ratification. **Exhibit 9** (Deposition of M.  
3 Gilmore) at 211:13-212:8.

4 154. Plaintiff Gilmore himself utilized release time from this bank “for Local  
5 2384 authorized business” on December 1, 2010, and Plaintiff Harder received Union  
6 representation on multiple occasions. Mr. Gilmore used these release time hours to testify  
7 as a witness in a personnel proceeding and received his normal rate of pay and benefits  
8 while on release time. **Exhibit 9** (Deposition of M. Gilmore) at 180:2-181:2; **Exhibit 109**  
9 (Deposition of M. Harder) at 83:1-21, 92:25-96:7.

10 155. Plaintiff Harder was aware that the MOUs in effect when he was a  
11 member of the Union had release time provisions but did not contest those provisions or  
12 vote against ratification of the MOU, although he could have done so. **Exhibit 10**  
13 (Deposition of M. Harder) at 80:2-17.

14 156. Plaintiff Gilmore has not attempted to communicate with the Union since  
15 2017 or 2018. **Exhibit 9** (Deposition of M. Gilmore) at 25:12-26:5.

16 157. Plaintiff Gilmore admits that he is not forced to pay union dues, join the  
17 Union or adopt the Union’s position or viewpoint on issues. **Exhibit 10** (Deposition of M.  
18 Gilmore) at 129:17-131:4.

19 **IX. Plaintiffs’ expert failed to conduct any investigation into the facts and**  
20 **circumstances of the City’s labor relations with Unit II.**

21 158. Mr. Brown admitted that he did not interview representatives of the City or  
22 any Unit II employees, including Plaintiffs, and he did not conduct any investigation into  
23 (a) the City’s labor relations with Unit II, (b) whether release time has positive or negative  
24 effects for the City’s labor relations with Unit II, or (c) whether release time promotes  
25 positive labor relations between the City and Unit II. **Exhibit 7** (Deposition of R. Brown)  
26 at 34:5-25, 35:1-7, 37:6-25, 49:1-11, 53:11-25, 56:4-14, 62:8-20, 86:22-25, 88:18-21,  
27 93:2-5, 94:10-16, 102:14-17, 119:1-25, 121:18-21, 122:5-10, 124:1-17, 125:18-25, 126:5-  
28 8, 132:10-23, 149:7-19, 159:24-25, 156:1-9, 164:2-5.





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*Attorneys for the City Defendants*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

MARK GILMORE; and MARK  
HARDER,

Plaintiffs,

v.

KATE GALLEGO, in her official  
capacity as Mayor of the City of Phoenix,  
ED ZUERCHER in his official capacity  
as City Manager of the City of Phoenix;  
and CITY OF PHOENIX,

Defendants,

And

AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL  
EMPLOYEES (AFSCME), LOCAL  
2384,

Intervenor Defendant.

Case No. CV2019-009033

**THE CITY DEFENDANTS'**

**(1) RESPONSE TO PLAINTIFFS'  
SEPARATE STATEMENT OF  
FACTS IN SUPPORT OF MOTIONS  
FOR SUMMARY JUDGMENT NOS.  
1-4; AND**

**(2) CONTROVERTING  
STATEMENT OF FACTS IN  
OPPOSITION TO PLAINTIFFS'  
MOTIONS FOR SUMMARY  
JUDGMENT NOS. 1-4**

(Assigned to Hon. Daniel G. Martin)

Pursuant to Rule 56(c)(3)(B), the City Defendants submit this (1) Response to Plaintiffs' Separate Statement of Facts in Support of Motions for Summary Judgment Nos. 1-4, and (2) Controverting Statement of Facts in Opposition to Plaintiffs' Motions for Summary Judgment Nos. 1-4, which preclude summary judgment in Plaintiffs' favor.

This response and controverting statement of facts ("City CSOF") is supported by the City Defendants' Motion for Summary Judgment ("City MSJ"), the City Defendants' and Union's Joint Statement of Facts ("Joint SOF"), and the City Defendants' Motion to Exclude the Opinions and Testimony of Plaintiffs' Expert Robert Brown ("City's Motion to Exclude"), all of which are incorporated by reference.

**Response to Plaintiffs' Separate Statement of Facts**

**1. City Defendants' Response to PSOF 1**

a. Undisputed.

**2. City Defendants' Response to PSOF 2**

a. Undisputed.

**3. City Defendants' Response to PSOF 3**

a. Undisputed.

**4. City Defendants' Response to PSOF 4**

a. Undisputed.

**5. City Defendants' Response to PSOF 5**

a. Disputed in part. Defendant agrees Plaintiffs are not members of the Union and do not pay Union dues. However, Plaintiffs do not fund release time. Joint SOF ¶¶ 31, 79-83, 86-96, 103-104, 112-130, 139-146; City CSOF ¶¶ 23, 26, 39, 40, 42, 43, 46, 47, 53-54.

**6. City Defendants' Response to PSOF 6**

a. Undisputed, subject to clarification. The Union is the “authorized representative” for Unit II and serves as Unit II’s exclusive meet and confer agent pursuant to and in accordance with the City’s Meet & Confer Ordinance. Joint SOF ¶ 9; City Code § 2-210(2).

**7. City Defendants' Response to PSOF 7**

a. Objection, relevance.  
b. Undisputed, subject to clarification. The number of Union members within Unit II is subject to fluctuation.

**8. City Defendants' Response to PSOF 8**

a. Objection, relevance and PSOF, Ex. 34 lacks foundation.  
b. Undisputed.

**9. City Defendants' Response to PSOF 9**

a. Objection, PSOF, Ex. 9 lack foundation and the assertion is unsupported

1 by the evidence cited. PSOF, Ex. 9 does not establish that the Union is a  
2 “private political organization.”

3 b. Disputed in part. AFSCME is a “labor organization” or “employee  
4 organization” that exists to advocate for all workers it represents, not  
5 merely its members. Joint SOF ¶¶ 41-44, 49-53, 61-63, 99, 131-135, 154;  
6 City Code §§ 2-209, 2-210(2), 2-214.

7 **10. City Defendants’ Response to PSOF 10**

8 a. Objection, assertion unsupported by the evidence cited. The Union’s  
9 Motion to Intervene details numerous reasons why intervention was  
10 necessary, none of which were to “ensure it continued to receive ‘release  
11 time’ payments from the City of Phoenix for Unit 2 employees.”

12 b. Disputed. The Union intervened, in part, to protect its interest in enforcing  
13 the terms of the 2019-2021 MOU and to protect its interests in fulfilling its  
14 obligations under the MOU and the City’s Meet & Confer Ordinance,  
15 including but not limited to its release time provisions. Union’s Motion to  
16 Intervene at 8:3-22, 9:26-10:1, 10:22-11:6; Joint SOF ¶¶ 12-14, 19-28.

17 **11. City Defendants’ Response to PSOF 11**

18 a. Undisputed, subject to clarification. When a union is designated as the  
19 exclusive representative, it has a duty to fairly represent all employees in  
20 the bargaining unit, not merely those who voted affirmatively to be  
21 represented by the Union. City Code §§ 2-209, 2-210(2), 2-212(A), 2-214,  
22 2-217(E), 2-218; Joint SOF ¶¶ 9-11, 24-27.

23 **12. City Defendants’ Response to PSOF 12**

24 a. Undisputed, subject to clarification. It is not clear what Plaintiffs’ mean  
25 by “very broad powers,” but the Union is “authorized to participate in the  
26 meet and confer process on behalf of [Unit II] for the purpose of meeting  
27 and conferring on wages, hours and working conditions.” City Code § 2-  
28 210(2).

1 **13. City Defendants' Response to PSOF 13**

2 a. Undisputed.

3 **14. City Defendants' Response to PSOF 14**

4 a. Undisputed.

5 **15. City Defendants' Response to PSOF 15**

6 a. Objection, relevance, assertion unsupported by the evidence, and the cited  
7 deposition testimony lacks foundation to establish the assertion. Neither  
8 witness testified that there has not been a vote to certify or decertify the  
9 Union since 1976, and neither witness established knowledge of such  
10 information.

11 b. Undisputed, subject to the foregoing objections.

12 **16. City Defendants' Response to PSOF 16**

13 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
14 Frost merely stated that he could not identify any particular employees  
15 who voted to ratify the Union in 1976 and are still working in Unit II.

16 b. Disputed. The City Defendants are without sufficient knowledge or  
17 information to confirm or deny the assertions made. PSOF Ex. 6 at 28:14–  
18 29:9.

19 **17. City Defendants' Response to PSOF 17**

20 a. Undisputed.

21 **18. City Defendants' Response to PSOF 18**

22 a. Undisputed, subject to clarification. The designated agent is the Union,  
23 which may act through representatives, and is not merely one individual.  
24 PSOF Phoenix City Code §§ 2-217(E), 2-218(A), (B); Joint SOF ¶¶ 15-16,  
25 23-24.

26 **19. City Defendants' Response to PSOF 19**

27 a. Objection, relevance and assertion unsupported by the evidence. The City  
28 Code does not establish that the City will be charged with an unfair labor

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practice.

b. Undisputed, subject to clarification. The City may not engage in direct dealing with employees over the terms and conditions of employment governed by the MOU. PSOF City Code § 2-218(A); Joint SOF ¶¶ 15-16, 23-24.

**20. City Defendants’ Response to PSOF 20**

a. Undisputed, subject to clarification. The Union engages in collective negotiations with the objective of achieving desirable terms and conditions of employment for all Unit II employees, regardless of Union membership. PSOF Phoenix City Code §§ 2-210(2), 2-218(A), City Charter, Ch. III, § 9(A); Joint SOF ¶¶ 15-16, 23-24.

**21. City Defendants’ Response to PSOF 21**

a. Undisputed, subject to clarification. Plaintiffs are not forced to subsidize the Union. Joint SOF ¶¶ 82, 86-87, 90-94, 96-97, 117, 120, 125, 127-129, 142-143; City CSOF ¶¶ 23, 26, 39, 40, 42, 43, 46, 47, 53-54.

**22. City Defendants’ Response to PSOF 22**

a. Undisputed.

**23. City Defendants’ Response to PSOF 23**

a. Undisputed.

**24. City Defendants’ Response to PSOF 24**

a. Objection, assertion unsupported by the evidence cited. Mr. Frost and Mr. Ayala merely stated that Plaintiffs are bound to the MOU, they said nothing of funding release time.

b. Disputed. Plaintiffs do not fund release time. PSOF Ex. 3 at 15:9-16:1; PSOF Ex. 6 at 36:9-22; PSOF Ex. 11 at 20:9–21:18; Joint SOF ¶¶ 15, 31, 57, 79-80, 82, 86-88, 90-94, 96-97, 117, 120, 125, 127-129, 142-143; City CSOF ¶¶ 23, 26, 39, 40, 42, 43, 46, 47, 53-54.

**25. City Defendants’ Response to PSOF 25**

1 a. Undisputed.

2 **26. City Defendants' Response to PSOF 26**

3 a. Undisputed.

4 **27. City Defendants' Response to PSOF 27**

5 a. Objection, argumentative and assertion unsupported by the evidence cited.

6 The MOU speaks to the terms of release time use and says nothing about  
7 release time exclusively benefiting the Union. There is no evidence to  
8 support the assertion that release time exclusively benefits the Union, not  
9 the public. The bank of release time does not equate to two full-time  
10 positions, and there is a \$14,000 reimbursable allowance for specific  
11 training and related activities rather than a "direct payment" to the Union.

12 b. Disputed in part. The bank of release time hours does not equate to two  
13 full-time positions, and there is a \$14,000 reimbursable allowance for  
14 specific training and related activities rather than a "direct payment" to the  
15 Union. Release time benefits the City, Unit II employees, and the public  
16 in general, and fulltime release time employees do not "devote their entire  
17 time working for the Union instead of the public." PSOF Ex. 2 §§ 1-  
18 3(A)(1), (3), 6-7(A); Joint SOF ¶¶ 13-66; City CSOF ¶¶ 22, 25, 28, 29, 30,  
19 31, 44, 45.

20 **28. City Defendants' Response to PSOF 28**

21 a. Undisputed, subject to clarification. When employees use release time,  
22 they receive their regular rate of compensation, whether they are paid  
23 salary or hourly. Joint SOF ¶¶ 29-31.

24 **29. City Defendants' Response to PSOF 29**

25 a. Undisputed, subject to clarification. The annual total cost to the City to  
26 fund the release time provisions under the 2019-2021 MOU is \$499,000  
27 per year. Joint SOF ¶ 102.

28 **30. City Defendants' Response to PSOF 30**

- a. Objection, relevance and foundation. Whether the City receives a “direct cash return” is irrelevant to any issue in this case, the term is unclear and ambiguous, and the cited deposition testimony lacks foundation for the assertion.
- b. Disputed in part. It is unclear what Plaintiffs mean by a “direct cash return,” but the City receives monetary and other benefits from release time. Joint SOF ¶¶ 45, 55, 60, 64-65; *see also id.* ¶¶ 33-38, 40-44, 46-54, 56-59, 61-63, 103-104; PSOF Ex. 6 at 52:9-53:19, 54:14-55:15, 77:20-78:15, 79:13-25, 81:25-83:13.

10 **31. City Defendants’ Response to PSOF 31**

- a. Objection, assertion is vague and ambiguous. The evidence cited details the cost of the MOU, termed “total compensation,” not the forms of compensation available to all Unit II employees.
- b. Disputed in part. The cost of the MOU, including release time, is represented by the financial figure termed “total compensation.” Total compensation is a term of art that refers to the sum of all economic items in an MOU – i.e., the total cost to the City to pay for an MOU. Total compensation does not refer to the compensation of individual employees, and Plaintiffs do not have a personal interest in total compensation beyond their personal wages and benefits. PSOF Ex. 2 § 1-3(A); Joint SOF ¶¶ 67-75, 79, 84, 87-90.

22 **32. City Defendants’ Response to PSOF 32**

- a. Objection, relevance and assertion unsupported by the evidence cited. Mr. Zuercher did not state that a replacement worker must be hired to perform the duties of workers on release time.
- b. Disputed in part. The City pays the salary and benefits of each person on release time as well as the salary and benefits of other Unit II employees. There is no evidence the City hires replacement workers to “perform the

1 duties” of the worker on release time. PSOF Ex. 3 at 104:2–18; Joint SOF  
2 ¶ 48.

3 **33. City Defendants’ Response to PSOF 33**

4 a. Objection, assertion unsupported by the evidence cited. Mr. Frost testified  
5 the money *could* be redirected to Unit II employees, but that determination  
6 would be made by the City Council.

7 b. Disputed. The City Council has authority to redirect release time funds,  
8 and it is not guaranteed the City Council would redirect those funds to  
9 Unit II employees. PSOF Ex. 6 at 148:23–150:7; Joint SOF ¶¶ 82-90, 108-  
10 118, 120, 122-124. Plaintiffs concede the City could redirect the funds to  
11 other purposes if release time were eliminated. Joint SOF ¶¶ 113-120,  
12 125-127.

13 **34. City Defendants’ Response to PSOF 34**

14 a. Objection, relevance and assertion unsupported by the evidence cited. The  
15 testimony does not support the assertion that Mr. Ayala does not work in  
16 his capacity of a Senior Utility Operator because he is on release time.

17 b. Disputed in part. Mr. Ayala does not perform the functions of a Senior  
18 Utility Operator because he is currently serving as the Union President.  
19 PSOF Ex. 11 at 7:14-20, 9:11-15, 23:18-19.

20 **35. City Defendants’ Response to PSOF 35**

21 a. Undisputed.

22 **36. City Defendants’ Response to PSOF 36**

23 a. Objection, relevance and assertion not supported by the evidence cited.  
24 Mr. Ayala stated that while *he* was serving as Union Recording Secretary,  
25 *he* was on release time.

26 b. Undisputed, subject to the foregoing objections and to clarification. Mr.  
27 Ayala stated that while *he* was serving as Union Recording Secretary, *he*  
28 was on release time. PSOF Ex. 11 at 9:11-15, 9:16-25, 25:8-12.

1 **37. City Defendants' Response to PSOF 37**

- 2 a. Objection, relevance.  
3 b. Undisputed, subject to the foregoing objection.

4 **38. City Defendants' Response to PSOF 38**

- 5 a. Objection, assertion unsupported by the evidence cited. The MOU states:  
6 "Four full-time release positions, designated by the Executive Board of the  
7 Union, shall each be allowed up to 2,080 work hours per M.O.U. year,"  
8 not that the Union President must be allowed this time.  
9 b. Undisputed, subject to the foregoing objection.

10 **39. City Defendants' Response to PSOF 39**

- 11 a. Objection, assertion unsupported by the evidence cited. Mr. Ayala stated  
12 that he is staffed in a full-time release position, he did not describe how he  
13 devotes all of his time and he did not specify whether his activities only  
14 benefit AFSCME.  
15 b. Disputed in part. Mr. Ayala has not explained how he devotes all of his  
16 time and which entities are benefitted from his work. PSOF Ex. 11 at  
17 22:24–23: 19. Release time activities benefit the City, Unit II employees,  
18 and the public. Joint SOF ¶¶ 16-17, 20-27, 29, 33-34, 36-38, 40-65.

19 **40. City Defendants' Response to PSOF 40**

- 20 a. Objection, assertion partially unsupported by the evidence. Unit II  
21 employees are not generally engaged in "ordinary public-safety duties."  
22 City Code § 2-212(A)(2)(b); Joint SOF ¶ 5.  
23 b. Undisputed, subject to the foregoing objection.

24 **41. City Defendants' Response to PSOF 41**

- 25 a. Undisputed.

26 **42. City Defendants' Response to PSOF 42**

- 27 a. Objection, relevance and foundation.  
28 b. Undisputed, subject to the foregoing objections.

1 **43. City Defendants' Response to PSOF 43**

2 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
3 Ayala explained that he works with City officials throughout his day, so he  
4 does not “clock in or clock out” or file daily reports cataloging his  
5 activities.

6 b. Disputed. Mr. Ayala meets with City officials throughout his day, so  
7 oversight, supervision, and accountability are implicit in his activities.  
8 PSOF Ex. 11 at 48:2–25; PSOF Ex. 3 at 37:16–24; PSOF Ex. 6 at 18:6–11.  
9 Mr. Frost also testified that release time employees must follow the City’s  
10 rules and regulations, but there are legal limitations on the City’s ability to  
11 control release time. PSOF Ex. 6 at 61:5-23. Release time employees are  
12 expected to perform activities that foster harmonious and cooperative labor  
13 relations and further the Union’s obligations as Unit II’s meet and confer  
14 representatives under the MOU and the City’s Meet & Confer Ordinance.  
15 Joint SOF ¶¶ 29, 33-34, 36-38, 41-46, 54-55, 64-65. The MOU  
16 specifically lists lawful activities that are expected to be performed on  
17 release time, and release time employees are required to adhere to all City  
18 policies and procedures. Joint SOF ¶¶ 36-39.

19 **44. City Defendants' Response to PSOF 44**

20 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
21 Ayala explained he is required to perform particular duties, such as attend  
22 grievance meetings.

23 b. Disputed in part. While Mr. Ayala is not directed by the City with respect  
24 to each individual task performed each day, he is expected to perform  
25 certain duties and attend various meetings with the City. Mr. Ayala works  
26 with City officials, so accountability is implicit in his duties. PSOF Ex. 11  
27 at 41:21-42, 44:6-13, 48:2–25; 97:1-11; PSOF Ex. 3 at 37:16–24; PSOF  
28 Ex. 6 at 18:6–11; *see also* Joint SOF ¶¶ 36-39.

1 **45. City Defendants' Response to PSOF 45**

- 2 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
3 Ayala explained that release time employees are required to adhere to all  
4 City policies and procedures and that accountability is implicit in his  
5 duties. PSOF Ex. 11 at 41:21-42, 44:6-13, 48:2-25, 97:1-11.
- 6 b. Disputed in part. Employees on release time must follow all City policies  
7 and procedures, and Mr. Ayala testified that he is required to perform  
8 certain tasks and that accountability is inherent in his duties. Joint SOF ¶¶  
9 36, 39; PSOF Ex. 11 at 41:21-42, 44:6-13, 48:2-25, 97:1-11. Mr. Frost  
10 also testified that release time employees must follow the City's rules and  
11 regulations, but there are legal limitations on the City's ability to control  
12 release time. PSOF Ex. 6 at 59:25-61:3, 61:5-23, 61:25-62:9, 63:16-23.

13 **46. City Defendants' Response to PSOF 46**

- 14 a. Objection, relevance and assertion unsupported by the evidence cited. The  
15 City only answered that it does not control or direct activities of employees  
16 on release time and employees on release time are not required to account  
17 to the City for how release time is used.
- 18 b. Disputed in part. The City is aware of how release time is used when  
19 employees on release time work with the City, whether that be through  
20 meetings or collaborative projects. SOF ¶¶ 24, 26-27, 29, 36, 39; PSOF  
21 Ex. 11 at 48:2-25; PSOF Ex. 3 at 37:16-24; PSOF Ex. 6 at 18:6-11.

22 **47. City Defendants' Response to PSOF 47**

- 23 a. Objection, relevance and assertion unsupported by the evidence cited, and  
24 assumes facts not in evidence. Mr. Zuercher merely explained there is a  
25 chain of command where all employees have supervisors.
- 26 b. Disputed. Mr. Zuercher did not testify that Mr. Ayala operates outside of a  
27 chain of command. PSOF Ex. 3 at 32:4-25. Mr. Zuercher testified that  
28 release time employees operate within a chain of command. *Id.*

1 **48. City Defendants' Response to PSOF 48**

2 a. Objection, relevance.

3 b. Disputed in part. Mr. Ayala meets with the City and City representatives  
4 and reports to the City in that respect. He testified that he is required to  
5 perform certain tasks and that accountability is inherent in his duties.  
6 PSOF Ex. 11 at 41:21-42, 44:6-13, 48:2-25, 97:1-11; PSOF Ex. 3 at  
7 37:16-24; PSOF Ex. 6 at 18:6-11. Mr. Frost also testified that release time  
8 employees must follow the City's rules and regulations, but there are legal  
9 limitations on the City's ability to control release time. PSOF Ex. 6 at  
10 59:25-61:3, 61:5-23, 61:25-62:9, 63:16-23.

11 **49. City Defendants' Response to PSOF 49**

12 a. Objection, relevance and assertion unsupported by the evidence cited. The  
13 testimony explained that it *could* lead to a PERB charge against the City.

14 b. Disputed in part. The City's mandate that the Union President provide an  
15 accounting of his time *could* result in a PERB charge against the City.  
16 PSOF Ex. 6 at 63:16-64:15.

17 **50. City Defendants' Response to PSOF 50**

18 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
19 Ayala merely stated that he has not received an official Performance  
20 Management Evaluation since he became Union President.

21 b. Disputed in part. Mr. Ayala has not received an official Performance  
22 Management Evaluation (PME) since becoming Union President. PSOF  
23 Ex. 11 at 47:2-24; PSOF Ex. 6 at 62:11-63:14.

24 **51. City Defendants' Response to PSOF 51**

25 a. Objection, relevance.

26 b. Undisputed, subject to clarification and the foregoing objection. Top-  
27 ranked supervisory employees do not report to direct supervisors. PSOF  
28 Ex. 6 at 15:18-16:9.

1 **52. City Defendants' Response to PSOF 52**

- 2 a. Objection, relevance and the assertion is unsupported by the evidence  
3 cited.  
4 b. Disputed. Mr. Zuercher testified that release time employees have  
5 supervisors within a chain of command. PSOF Ex. 3 at 32:4-18.

6 **53. City Defendants' Response to PSOF 53**

- 7 a. Objection, relevance and the assertion is unsupported by the evidence  
8 cited.  
9 b. Disputed Mr. Zuercher testified that release time employees have  
10 supervisors within a chain of command. PSOF Ex. 3 at 32:4-18.

11 **54. City Defendants' Response to PSOF 54**

- 12 a. Objection, relevance.  
13 b. Undisputed, subject to the foregoing objection.

14 **55. City Defendants' Response to PSOF 55**

- 15 a. Objection, relevance.  
16 b. Disputed in part. Employees on release time must follow all City policies  
17 and procedures. Joint SOF ¶¶ 36, 39. Mr. Frost also testified that release  
18 time employees must follow the City's rules and regulations, but there are  
19 legal limitations on the City's ability to control release time. PSOF Ex. 6  
20 at 59:25-61:3, 61:5-23, 61:25-62:9, 63:16-23.

21 **56. City Defendants' Response to PSOF 56**

- 22 a. Objection, relevance.  
23 b. Undisputed, subject to the foregoing objection.

24 **57. City Defendants' Response to PSOF 57**

- 25 a. Objection, relevance.  
26 b. Undisputed, subject to the foregoing objection.

27 **58. City Defendants' Response to PSOF 58**

- 28 a. Objection, relevance.

1           b. Undisputed, subject to the foregoing objection.

2 **59. City Defendants' Response to PSOF 59**

3           a. Objection, relevance.

4           b. Undisputed, subject to clarification and the foregoing objection. The City  
5           has no authority to remove Mr. Ayala from his position as Union  
6           President. PSOF Ex. 6 at 65:14–66:14, 67:18–68:2.

7 **60. City Defendants' Response to PSOF 60**

8           a. Objection, relevance and the term “interfere” is vague and ambitious.

9           b. Undisputed, subject to the foregoing objections.

10 **61. City Defendants' Response to PSOF 61**

11           a. Objection, relevance and the assertion is vague and ambiguous.

12           b. Disputed. Release time is not used exclusively to support other labor  
13           groups in other cities. Joint SOF ¶¶ 24-27, 33, 36-38, 50-54.

14 **62. City Defendants' Response to PSOF 62**

15           a. Objection, relevance, the assertion is vague and ambiguous, and assertion  
16           unsupported by the evidence. Mr. Ayala merely stated that Tony  
17           Navarrete, a state senator, used the Union hall at one point and that the  
18           Union endorsed Mr. Navarrete.

19           b. Disputed. Release time is not used exclusively to support candidates for  
20           political office. PSOF Ex. 11 at 113:22– 115:8; Joint SOF ¶¶ 29, 36-38,  
21           44.

22 **63. City Defendants' Response to PSOF 63**

23           a. Objection, relevance, the cited exhibit lacks foundation, and assertion  
24           unsupported by the evidence cited. The cited evidence merely states that  
25           PEOPLE may support certain candidates.

26           b. Disputed. The cited exhibit does not does not establish that release time is  
27           used to support individuals running for office or what the Union officials  
28           know.

1 **64. City Defendants’ Response to PSOF 64**

- 2 a. Objection, assertion unsupported by the evidence cited. The MOU requires  
3 that release time may only be used for lawful purposes and employees on  
4 release time must adhere to City policies and procedures.
- 5 b. Disputed. Release time may not be used for unlawful purposes and the  
6 MOU sets forth examples of appropriate release time uses. Joint SOF ¶¶  
7 24-27, 33, 36-39, 50-54. The Union also agreed to designate  
8 representations to serve on various committees with the City and to fulfill  
9 its obligations and duty of fair representation under the MOU and the  
10 City’s Meet & Confer Ordinance. *Id.* Employees on release time must  
11 adhere to all City policies and procedures while on release time. PSOF  
12 Ex. 2 § 1-3; Joint SOF ¶¶ 36, 39. Mr. Frost also testified that release time  
13 employees must follow the City’s rules and regulations, but there are legal  
14 limitations on the City’s ability to control release time. PSOF Ex. 6 at  
15 59:25-61:3, 61:5-23, 61:25-62:9, 63:16-23

16 **65. City Defendants’ Response to PSOF 65**

- 17 a. Objection. Assertion unsupported by the evidence cited. The City  
18 witnesses only testified that they personally are unaware of any such  
19 studies.
- 20 b. Disputed. The City are unaware of any such studies but cannot confirm or  
21 deny whether such studies have been conducted. PSOF Ex. 3 at 26:5–10;  
22 PSOF Ex. 6 at 54:5–11; PSOF Ex. 8 at 34:25–35:6. Mr. Frost testified that  
23 it would be difficult to fully capture and analyze all of the benefits of  
24 release time. PSOF Ex. 6 at 53:10-19.

25 **66. City Defendants’ Response to PSOF 66**

- 26 a. Objection. Hearsay, and the assertion is vague and ambiguous because it  
27 is not clear what is meant by the term “union speech.” The assertion also  
28 is argumentative and asserts legal conclusions in violation of Rule 56. The

exhibit cited lacks foundation and does not support the assertion

1  
2 **67. City Defendants' Response to PSOF 67**

3 a. Objection, relevance.

4 b. Undisputed, subject to clarification and the foregoing objection. Union  
5 leadership determines candidate support through extensive fact gathering,  
6 not merely PEOPLE meetings. PSOF Ex. 11 at 110:9–111:6.

7 **68. City Defendants' Response to PSOF 68**

8 a. Objection, relevance and the cited exhibit lacks foundation.

9 b. Undisputed, subject to the foregoing objections.

10 **69. City Defendants' Response to PSOF 69**

11 a. Objection, relevance and assertion unsupported by the evidence cited. The  
12 Answer merely states that the City admits release time under the MOU  
13 *may be* used to engage in certain political activities.

14 b. Undisputed subject to clarification, and the foregoing objections. Release  
15 time under the MOU may be used to engage in certain political activities.  
16 PSOF Answer ¶ 18.

17 **70. City Defendants' Response to PSOF 70**

18 a. Objection, relevance and the cited exhibit lacks foundation.

19 b. Undisputed, subject to the foregoing objections.

20 **71. City Defendants' Response to PSOF 71**

21 a. Objection, relevance.

22 b. Undisputed, subject to the foregoing objection.

23 **72. City Defendants' Response to PSOF 72**

24 a. Objection, relevance.

25 b. Undisputed, subject to the foregoing objection..

26 **73. City Defendants' Response to PSOF 73**

27 a. Objection, relevance.

28 b. Undisputed, subject to the foregoing objection.

- 1 **74. City Defendants' Response to PSOF 74**
- 2 a. Objection, relevance.
- 3 b. Undisputed, subject to the foregoing objection.
- 4 **75. City Defendants' Response to PSOF 75**
- 5 a. Objection, relevance.
- 6 b. Undisputed, subject to the foregoing objection.
- 7 **76. City Defendants' Response to PSOF 76**
- 8 a. Objection, relevance and part of the assertion is unsupported by the
- 9 evidence.
- 10 b. Disputed in part, subject to the foregoing objection. The cited exhibits do
- 11 not demonstrate that Mr. Ayala attended all of the referenced calls and
- 12 meetings while on release time.
- 13 **77. City Defendants' Response to PSOF 77**
- 14 a. Objection, relevance.
- 15 b. Undisputed, subject to the foregoing objection.
- 16 **78. City Defendants' Response to PSOF 78**
- 17 a. Objection, relevance.
- 18 b. Undisputed, subject to the foregoing objection.
- 19 **79. City Defendants' Response to PSOF 79**
- 20 a. Objection, relevance.
- 21 b. Undisputed, subject to the foregoing objection.
- 22 **80. City Defendants' Response to PSOF 80**
- 23 a. Objection, relevance.
- 24 b. Undisputed, subject to the foregoing objection.
- 25 **81. City Defendants' Response to PSOF 81**
- 26 a. Objection, relevance and assertion unsupported by the evidence cited. The
- 27 cited evidence explains Mr. Ayala had one meeting with Ms. Stark on July
- 28 9, 2019.

1 b. Disputed. Mr. Ayala had one meeting with Ms. Stark on July 9, 2019.  
2 PSOF Ex. 11 at 90:15–21; PSOF Ex. 15 at ID001361 (July 9, 2019).

3 **82. City Defendants’ Response to PSOF 82**

4 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
5 Ayala explained that the Union initially supported Ms. Stark’s candidacy.

6 b. Undisputed, subject to clarification and the foregoing objections. The  
7 Union only initially supported Ms. Stark’s candidacy. PSOF Ex. 11 at  
8 91:9–13.

9 **83. City Defendants’ Response to PSOF 83**

10 a. Objection, relevance and the cited exhibits lack foundation.

11 b. Undisputed, subject to the foregoing objections.

12 **84. City Defendants’ Response to PSOF 84**

13 a. Objection, relevance

14 b. Undisputed, subject to the foregoing objection.

15 **85. City Defendants’ Response to PSOF 85**

16 a. Objection, relevance

17 b. Undisputed, subject to the foregoing objection.

18 **86. City Defendants’ Response to PSOF 86**

19 a. Objection, relevance

20 b. Undisputed, subject to the foregoing objection.

21 **87. City Defendants’ Response to PSOF 87**

22 a. Objection, relevance

23 b. Undisputed, subject to the foregoing objection.

24 **88. City Defendants’ Response to PSOF 88**

25 a. Undisputed.

26 **89. City Defendants’ Response to PSOF 89**

27 a. Objection, assertion unsupported by the evidence cited. Mr. Ayala  
28 explained the Executive Board determines which members will be on full-

1 time release time. Therefore, the Executive Board does not exclusively  
2 determine how all release time is used.

- 3 b. Disputed. The Executive Board determines which members will be on full-  
4 time release time, but the Executive Board does not dictate how the bank  
5 of release time is used. The bank of release time may be used by many  
6 different Unit II employees and for many different reasons. PSOF Ex. 11  
7 at 50:20–25; Joint SOF ¶¶ 30, 36-38, 104.

8 **90. City Defendants’ Response to PSOF 90**

- 9 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
10 Ayala explained the Executive Board could determine what positions it  
11 would or would not take regarding items before the City Counsel. The  
12 term “items” is vague and ambiguous.
- 13 b. Undisputed, subject to clarification and the foregoing objections. The  
14 Executive Board *sometimes* determines what positions it will and will not  
15 take regarding items before the City Council. PSOF Ex. 11 at 89:19–25.

16 **91. City Defendants’ Response to PSOF 91**

- 17 a. Objection, relevance, the cited exhibit lacks foundation, and the assertion  
18 is unsupported by the evidence cited. There is no evidence that this  
19 activity was performed by employees on release time.
- 20 b. Disputed. There is no evidence that this activity was performed by  
21 employees on release time.

22 **92. City Defendants’ Response to PSOF 92**

- 23 a. Objection, relevance.
- 24 b. Undisputed, subject to the foregoing objection.

25 **93. City Defendants’ Response to PSOF 93**

- 26 a. Objection, relevance
- 27 b. Undisputed, subject to the foregoing objection.

28 **94. City Defendants’ Response to PSOF 94**

- 1 a. Objection, relevance
- 2 b. Undisputed, subject to the foregoing objection.

3 **95. City Defendants' Response to PSOF 95**

- 4 a. Objection, relevance
- 5 b. Undisputed, subject to the foregoing objection.

6 **96. City Defendants' Response to PSOF 96**

- 7 a. Objection, relevance and the cited exhibit lacks foundation.
- 8 b. Undisputed, subject to the foregoing objections.

9 **97. City Defendants' Response to PSOF 97**

- 10 a. Objection, relevance and the cited exhibit lacks foundation.
- 11 b. Undisputed, subject to the foregoing objections.

12 **98. City Defendants' Response to PSOF 98**

- 13 a. Objection, relevance and the cited exhibit lacks foundation.
- 14 b. Undisputed, subject to the foregoing objections.

15 **99. City Defendants' Response to PSOF 99**

- 16 a. Objection, assertion unsupported by the evidence cited. The City answered
- 17 that release time may be used to lobby for or against legislation at the state
- 18 and local level.
- 19 b. Disputed in part. Release time *may* be used to lobby for or against
- 20 legislation at the state and local level. Release time is also used for many
- 21 other purposes. PSOF Answer ¶¶ 19; Joint SOF ¶¶ 27, 30, 33-38, 50, 54,
- 22 60-65, 104.

23 **100. City Defendants' Response to PSOF 100**

- 24 a. Objection, relevance.
- 25 b. Undisputed, subject to the foregoing objection.

26 **101. City Defendants' Response to PSOF 101**

- 27 a. Objection, relevance.
- 28 b. Undisputed, subject to the foregoing objection.

1 **102. City Defendants' Response to PSOF 102**

2 a. Undisputed.

3 **103. City Defendants' Response to PSOF 103**

4 a. Undisputed.

5 **104. City Defendants' Response to PSOF 104**

6 a. Undisputed, subject to clarification. Between November 2020 to January  
7 2021, Mr. Ayala used roughly 80% of his release time to prepare for  
8 negotiating the terms of the MOU. PSOF Ex. 11 at 74:11–17.

9 **105. City Defendants' Response to PSOF 105**

10 a. Undisputed, subject to clarification. Release time also is used for many  
11 other purposes. Joint SOF ¶¶ 27, 30, 33-38, 50, 54, 60-65, 104.

12 **106. City Defendants' Response to PSOF 106**

13 a. Undisputed, subject to clarification. Release time is used by Union  
14 members to engage in many activities, including recruitment of new  
15 members to the Union. Release time can be used for many other purposes.  
16 PSOF Answer ¶ 20; PSOF Ex. 11 at 67:3–68:24; Joint SOF ¶¶ 30, 33-38,  
17 50, 54, 60-65, 104.

18 **107. City Defendants' Response to PSOF 107**

19 a. Objection, assertion unsupported by the evidence cited. The evidence cited  
20 explains that release time may be used to engage in many activities,  
21 including the filing and processing of grievances, as well as employee  
22 participation in the grievance arbitration process.

23 b. Undisputed subject to clarification. Release time is used by Union  
24 members to engage in many activities, including the filing and processing  
25 of grievances, as well as employee participation in the grievance  
26 arbitration process. Release time may be used for many other purposes.  
27 PSOF Ex. 11 at 53:4–55:8; PSOF Answer ¶ 63; Joint SOF ¶¶ 30, 33-38,  
28 50, 54, 60-65, 104.

1 **108. City Defendants' Response to PSOF 108**

2 a. Objection, assertion unsupported by the evidence cited. The statement  
3 merely explains the Union may file a grievance against the City that  
4 alleges violations by the City of the rights accorded to the Union by the  
5 specific terms of Article 1 Section 1-3 of the MOU.

6 b. Disputed in part. The Union may file a grievance against the City that  
7 alleges violations by the City of the rights accorded to the Union by the  
8 specific terms of Article 1 Section 1-3 of the MOU. PSOF Ex. 15 at  
9 ID001417; PSOF Ex. 11 at 60:18–61:9.

10 **109. City Defendants' Response to PSOF 109**

11 a. Objection, assertion unsupported by the evidence cited. Mr. Zuercher  
12 stated that *he* was not aware of a contractual agreement. Mr. Frost stated  
13 that the Union does agree to voice employee concerns, participate in board  
14 committees, and resolve grievances.

15 b. Disputed. The Union agrees to voice employee concerns, participate in  
16 board committees, and resolve grievances. The City receives numerous  
17 benefits in exchange for the MOU. PSOF Ex. 6 at 57:2–59:21; PSOF Ex. 3  
18 at 27:5–28:11; Joint SOF ¶¶ 18-27. Release time employees are expected  
19 to perform activities that foster harmonious and cooperative labor relations  
20 and further the Union's obligations as Unit II's meet and confer  
21 representatives under the MOU and the City's Meet & Confer Ordinance.  
22 Joint SOF ¶¶ 29, 33-34, 36-38, 41-46, 54-55, 64-65. The MOU specifically  
23 lists lawful activities that are expected to be performed on release time,  
24 and release time employees are required to adhere to all City policies and  
25 procedures. Joint SOF ¶¶ 36-39.

26 **110. City Defendants' Response to PSOF 110**

27 a. Objection, lacks foundation and the assertion is unsupported by the  
28 evidence. Mr. Frost testified that he did not know whether the MOU has

1 an obligation to resolve disputes at the lowest level.

2 b. Disputed. The MOU anticipates that release time will be used to provide  
3 an “efficient and readily available point of contact for addressing labor-  
4 management concerns,” which includes among other things attempting to  
5 resolve disputes at the lowest level if possible. Joint SOF ¶¶ 33-34, 36, 38,  
6 41-43, 54.

7 **111. City Defendants’ Response to PSOF 111**

8 a. Objection, lacks foundation and the assertion is not supported by the  
9 evidence cited. Mr. Frost explained that the MOU *requires* the Union to  
10 file grievances, participate in the grievance process, and participate in  
11 boards and committees, which all provide insight into Unit II employees’  
12 problems or concerns.

13 b. Disputed. The MOU anticipates that release time will be used to provide  
14 an “efficient and readily available point of contact for addressing labor-  
15 management concerns,” which includes among other things “ensuring  
16 representation of employees,” “facilitating communication between . . .  
17 management and employees,” and “administering the provisions of the  
18 MOU.” Joint SOF ¶¶ 33-34, 36, 38, 41-43, 54. The natural consequence  
19 of release time uses results in the communication of City employee  
20 problems, concerns, and preferences. The City receives numerous benefits  
21 in exchange for the MOU. PSOF Ex. 6 at 58:17–25; Joint SOF ¶¶ 18-27.

22 **112. City Defendants’ Response to PSOF 112**

23 a. Objection, lacks foundation and the assertion is not supported by the  
24 evidence cited. Mr. Frost explained that the MOU *requires* the Union to  
25 file grievances, participate in the grievance process, and participate in  
26 boards and committees, which all provide insight into Unit II employees’  
27 problems or concerns and helps to prevent issues from escalating.

28 b. Disputed. The MOU anticipates that release time will be used to provide

1 an “efficient and readily available point of contact for addressing labor-  
2 management concerns,” which includes among other things “ensuring  
3 representation of employees,” “participating in collaborative labor-  
4 management initiatives,” “facilitating communication between . . .  
5 management and employees,” “assisting [employees] in understanding and  
6 following work rules,” and “administering the provisions of the MOU.”  
7 Joint SOF ¶¶ 33-34, 36, 38, 41-43, 54. The natural consequence of release  
8 time is to resolve some disputes before they escalate to costly grievances  
9 and higher level disputes.

10 **113. City Defendants’ Response to PSOF 113**

- 11 a. Undisputed.

12 **114. City Defendants’ Response to PSOF 114**

- 13 a. Objection. Mr. Brown’s opinions and testimony are unreliable and  
14 inadmissible under Rule 702 for the reasons set forth in the City’s Motion  
15 to Exclude.
- 16 b. Disputed. Mr. Brown’s opinions are not based on any investigation into  
17 the labor relations between the City, the Union, and Unit II. His opinion is  
18 based on other circumstances, but he admits these circumstances differ  
19 from the circumstances of this case, and he provides no basis for  
20 extrapolation. The City benefits from paid release time in numerous ways,  
21 and the City receives substantial consideration for paid release time. Joint  
22 SOF ¶¶ 16-17, 20, 23-27, 29, 33-34, 36-38, 40-46, 49-56, 64-65. Plaintiffs  
23 and Mr. Brown conceded these benefits. Joint SOF ¶¶ 57-63.

24 **115. City Defendants’ Response to PSOF 115**

- 25 a. Objection, relevance.
- 26 b. Undisputed, subject to clarification and the foregoing objection. City-paid  
27 release time was not included in the 2014-2016 MOU between the City  
28 and the Union in the same form as it was included in preceding MOUs.

1 **116. City Defendants' Response to PSOF 116**

- 2 a. Objection, relevance and assertion unsupported by the evidence cited. The  
3 MOU only explains that Unit II employees could voluntarily donate their  
4 vacation leave to release time.
- 5 b. Disputed in part. Under the 2014-2016 MOU, employees could voluntarily  
6 donate their vacation leave to release time. PSOF Ex. 7 § 1-3.

7 **117. City Defendants' Response to PSOF 117**

- 8 a. Objection, relevance and the witness testimony lacks foundation.
- 9 b. Undisputed, subject to clarification. The City Defendants do not dispute  
10 the quoted testimony. The City Defendants do not concede that the  
11 elimination of release time will automatically result in any increase in  
12 compensation. Joint SOF ¶¶ 111-125.

13 **118. City Defendants' Response to PSOF 118**

- 14 a. Objection, relevance. The 2014-2016 Wage & Benefit Package is no  
15 longer applicable because the 2014-2016 MOU has expired. The  
16 document is irrelevant because it has nothing to do with Plaintiffs' current  
17 wages and benefits.
- 18 b. Undisputed, subject for the foregoing objection. The City Defendants do  
19 not concede that the elimination of release time will automatically result in  
20 any increase in compensation. Joint SOF ¶¶ 111-125.

21 **119. City Defendants' Response to PSOF 119**

- 22 a. Objection, relevance. The 2016-2019 Wage & Benefit Package is no  
23 longer applicable because the 2016-2019 MOU has expired. The  
24 document is irrelevant because it has nothing to do with Plaintiffs' current  
25 wages and benefits
- 26 b. Undisputed, subject to the foregoing objection. The City Defendants do  
27 not concede that the elimination of release time will automatically result in  
28 any increase in compensation. Joint SOF ¶¶ 111-125.

1 **120. City Defendants' Response to PSOF 120**

- 2 a. Objection, relevance and the witness testimony lacks foundation.
- 3 b. Disputed. During the 2014-2016 MOU, release time was still used
- 4 through employee-donated vacation time, so Mr. Zuercher believed labor
- 5 relations were not impaired. PSOF Ex. 3 at 61:8–14. Mr. Frost testified
- 6 that he heard certain activities associated with labor relations were more
- 7 difficult during that time. PSOF Ex. 6 at 82:16-83:13.

8 **121. City Defendants' Response to PSOF 121**

- 9 a. Objection, relevance and the witness testimony lacks foundation.
- 10 b. Disputed. Mr. Frost testified that he heard certain activities associated with
- 11 labor relations were more difficult during that time, and he testified that
- 12 there is an administrative cost associated with that. PSOF Ex. 6 at 82:16-
- 13 83:13.

14 **122. City Defendants' Response to PSOF 122**

- 15 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.
- 16 Zuercher merely stated he could not point to a specific study of cost to
- 17 determine whether the elimination of City-funded release time resulted in
- 18 higher costs to the City.
- 19 b. Disputed. Mr. Zuercher merely stated that he is unaware of studies that
- 20 detail whether the elimination of City-funded release time resulted in
- 21 higher costs to the City. Mr. Frost testified that he heard certain activities
- 22 associated with labor relations were more difficult during that time, and he
- 23 testified that there is an administrative cost associated with that. PSOF Ex.
- 24 6 at 82:16-83:13.

25 **123. City Defendants' Response to PSOF 123**

- 26 a. Objection, relevance and the witness testimony lacks foundation.
- 27 b. Undisputed, subject to clarification. The City Defendants do not dispute
- 28 the quoted testimony. The City Defendants do not concede that the

1 elimination of release time will automatically result in any increase in  
2 compensation. Joint SOF ¶¶ 111-125.

3 **124. City Defendants' Response to PSOF 124**

- 4 a. Objection, relevance, witness testimony lacks foundation, and assertion  
5 unsupported by the evidence cited. Mr. Frost merely stated that the 2019-  
6 2021 MOU included paid release time provisions.
- 7 b. Disputed. The agreement simply reflects that the vacation hours were  
8 eliminated. Mr. Frost explained that he did not have firsthand knowledge,  
9 and he did not testify to a direct causal relationship. PSOF Ex. 6 at 103:4-  
10 104:7. The City Defendants do not concede that the elimination of release  
11 time will automatically result in any increase in compensation. Joint SOF  
12 ¶¶ 111-125.

13 **125. City Defendants' Response to PSOF 125**

- 14 a. Objection, relevance and exhibit lacks foundation.
- 15 b. Undisputed, subject to clarification. Total compensation refers to the cost  
16 of the entire MOU to the City, and the cost of the MOU includes its release  
17 time provisions. PSOF Ex. 2 § 1-3(A); PSOF Ex. 30; Joint SOF ¶¶ 67, 71-  
18 75, 79, 84. The City Defendants do not concede that the elimination of  
19 release time will automatically result in any increase in compensation.  
20 Joint SOF ¶¶ 111-125.

21 **126. City Defendants' Response to PSOF 126**

- 22 a. Objection, relevance and assertion unsupported by the evidence cited. The  
23 assertion involves a different bargaining unit, with different circumstances,  
24 and operating under a different contract. Mr. Zuercher testified that  
25 different bargaining units have different characteristics and circumstances,  
26 making it difficult to compare them. PSOF Ex. 3 at 72:7-20.
- 27 b. Disputed. Mr. Zuercher testified that different bargaining units have  
28 different characteristics and circumstances, making it difficult to compare

1 them. PSOF Ex. 3 at 72:7-20. The Firefighters MOU provides, “The  
2 Phoenix City Council has determined, and Unit 5 agrees, there are specific  
3 activities that confer a public benefit; a dual public/private purpose or an  
4 exclusively public purpose, for which up to two (2) Unit 5 (IAFF)  
5 members may be released and will perform these duties under City  
6 Business.” City Business Time is used for many of the same purposes as  
7 release time at issue here. PSOF Ex. 20 at 3-4; Joint SOF ¶¶ 30, 36-38,  
8 104.

9 **127. City Defendants’ Response to PSOF 127**

10 a. Objection, relevance and assertion unsupported by the evidence cited. The  
11 MOU says nothing about the elimination of prior provisions in favor of  
12 different provisions. The assertion involves a different bargaining unit,  
13 with different circumstances, and operating under a different contract. Mr.  
14 Zuercher testified that different bargaining units have different  
15 characteristics and circumstances, making it difficult to compare them.  
16 PSOF Ex. 3 at 72:7-20.

17 b. Disputed. Mr. Zuercher testified that different bargaining units have  
18 different characteristics and circumstances, making it difficult to compare  
19 them. PSOF Ex. 3 at 72:7-20. The Firefighters MOU provides, “The  
20 Phoenix City Council has determined, and Unit 5 agrees, there are specific  
21 activities that confer a public benefit; a dual public/private purpose or an  
22 exclusively public purpose, for which up to two (2) Unit 5 (IAFF)  
23 members may be released and will perform these duties under City  
24 Business.” City Business Time is used for many of the same purposes as  
25 release time at issue here. PSOF Ex. 20 at 3-4; Joint SOF ¶¶ 30, 36-38,  
26 104.

27 **128. City Defendants’ Response to PSOF 128**

28 a. Objection, relevance and assertion unsupported by the evidence cited. The

1 language in the MOU merely explains each employee will receive 8.5  
2 hours of additional vacation time, and nothing is said about the reason for  
3 these hours. The assertion involves a different bargaining unit, with  
4 different circumstances, and operating under a different contract. Mr.  
5 Zuercher testified that different bargaining units have different  
6 characteristics and circumstances, making it difficult to compare them.  
7 PSOF Ex. 3 at 72:7-20.

8 b. Disputed. Mr. Zuercher testified that different bargaining units have  
9 different characteristics and circumstances, making it difficult to compare  
10 them. PSOF Ex. 3 at 72:7-20. The Firefighters' MOU says nothing about  
11 the reason for employee vacation hours. The City is without sufficient  
12 information to determine why the Firefighters MOU has vacation time,  
13 and therefore, disputes the fact assertion. PSOF Ex. 20 at § 5-5.

14 **129. City Defendants' Response to PSOF 129**

15 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
16 Zuercher merely stated that he was not aware of how relations with the  
17 firefighters' union was affected after the elimination of release time. The  
18 assertion involves a different bargaining unit, with different circumstances,  
19 and operating under a different contract. Mr. Zuercher testified that  
20 different bargaining units have different characteristics and circumstances,  
21 making it difficult to compare them. PSOF Ex. 3 at 72:7-20.

22 b. Disputed. Mr. Zuercher testified that different bargaining units have  
23 different characteristics and circumstances, making it difficult to compare  
24 them. PSOF Ex. 3 at 72:7-20. The record does not establish the state of  
25 labor relations with the firefighters' union. PSOF Ex. 3 at 68:23-69:2,  
26 70:3-8, 71:18-23.

27 **130. City Defendants' Response to PSOF 130**

28 a. Objection, relevance and assertion unsupported by the evidence cited.

1 While the firefighters have received pay raises, nothing is said of the  
2 significance of those raises and how the parties negotiated those terms.  
3 The assertion involves a different bargaining unit, with different  
4 circumstances, and operating under a different contract. Mr. Zuercher  
5 testified that different bargaining units have different characteristics and  
6 circumstances, making it difficult to compare them. PSOF Ex. 3 at 72:7-  
7 20.

8 b. Disputed in part. Mr. Zuercher testified that different bargaining units  
9 have different characteristics and circumstances, making it difficult to  
10 compare them. PSOF Ex. 3 at 72:7-20. The firefighters received a raise in  
11 their most recent MOU. The record does not establish why the firefighters'  
12 union received a wage increase or what effect release time may have had  
13 on the meet and confer negotiations. PSOF Ex. 20 § 3-1.

14 **131. City Defendants' Response to PSOF 131**

15 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
16 Zuercher merely stated that he was not aware of how the Firefighters'  
17 MOU donated release time vs. paid release time affected City costs. Mr.  
18 Zuercher testified that different bargaining units have different  
19 characteristics and circumstances, making it difficult to compare them.  
20 PSOF Ex. 3 at 72:7-20.

21 b. Disputed. Mr. Zuercher testified that different bargaining units have  
22 different characteristics and circumstances, making it difficult to compare  
23 them. PSOF Ex. 3 at 72:7-20. The record does not establish whether or  
24 not the elimination of paid release time in the firefighters' MOU resulted  
25 in cost savings or higher costs. PSOF Ex. 3 at 70:10-15; Joint SOF ¶¶ 64-  
26 65.

27 **132. City Defendants' Response to PSOF 132**

28 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.

1 Zuercher did not state the City experienced savings from eliminating  
2 release time in the 2019-2021 Firefighters' MOU, and he stated he could  
3 not speak to reinvestment of the theoretical savings.

- 4 b. Disputed. Mr. Zuercher testified that different bargaining units have  
5 different characteristics and circumstances, making it difficult to compare  
6 them. PSOF Ex. 3 at 72:7-20. The record does not establish that the City  
7 experienced cost savings from the elimination of release time. PSOF Ex. 3  
8 at 70:17-25; Joint SOF ¶¶ 64-65.

9 **133. City Defendants' Response to PSOF 133**

- 10 a. Objection, relevance. Mr. Zuercher testified that different bargaining units  
11 have different characteristics and circumstances, making it difficult to  
12 compare them. PSOF Ex. 3 at 72:7-20.
- 13 b. Undisputed, subject to the foregoing objection. Mr. Zuercher testified that  
14 different bargaining units have different characteristics and circumstances,  
15 making it difficult to compare them. PSOF Ex. 3 at 72:7-20.

16 **134. City Defendants' Response to PSOF 134**

- 17 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
18 Zuercher merely state he was not aware whether the City experienced  
19 higher costs from eliminating paid release time. Mr. Zuercher testified  
20 that different bargaining units have different characteristics and  
21 circumstances, making it difficult to compare them. PSOF Ex. 3 at 72:7-  
22 20.
- 23 b. Disputed. Mr. Zuercher testified that different bargaining units have  
24 different characteristics and circumstances, making it difficult to compare  
25 them. PSOF Ex. 3 at 72:7-20. The record does not establish that the City  
26 experienced cost savings from the elimination of release time. PSOF Ex. 3  
27 at 70:17-25; Joint SOF ¶¶ 64-65.

28 **135. City Defendants' Response to PSOF 135**

- 1 a. Objection, relevance and assertion unsupported by the evidence cited. Mr.  
2 Zuercher merely state he was not aware whether the City experienced  
3 higher costs from eliminating paid release time. Mr. Zuercher testified  
4 that different bargaining units have different characteristics and  
5 circumstances, making it difficult to compare them. PSOF Ex. 3 at 72:7-  
6 20.
- 7 b. Disputed. Mr. Zuercher testified that different bargaining units have  
8 different characteristics and circumstances, making it difficult to compare  
9 them. PSOF Ex. 3 at 72:7-20. The record does not establish that the City  
10 experienced cost savings from the elimination of release time. PSOF Ex. 3  
11 at 70:17–25; Joint SOF ¶¶ 64-65.

12 **136. City Defendants’ Response to PSOF 136**

- 13 a. Objection, relevance, foundation, and assertion unsupported by the  
14 evidence cited. Mr. Zuercher merely stated he was not aware whether  
15 those cities have paid release time. Plaintiffs lay no foundation for  
16 comparing the circumstances of other cities.
- 17 b. Disputed. The record does not establish whether or not other cities have  
18 release time.

19 **137. City Defendants’ Response to PSOF 137**

- 20 a. Objection, relevance, foundation, and assertion unsupported by the  
21 evidence cited. Mr. Zuercher merely stated he was not aware whether  
22 those cities have paid release time and he was not familiar with their labor  
23 relations. Plaintiffs lay no foundation for comparing the circumstances of  
24 other cities.
- 25 b. Disputed. The record does not establish whether or not other cities have  
26 been able to achieve harmonious labor relations without release time, and  
27 even if they had, whether it is to the same level of extent as the City and  
28 also taking into consideration the differences between the cities.

1 **138. City Defendants’ Response to PSOF 138**

- 2 a. Objection, assertion unsupported by the evidence cited. Ms. Reber stated  
3 that total compensation represents the total cost of the MOU to the City,  
4 she did not say that release time is part of employee pay and benefits.  
5 b. Disputed. Release time is not part of compensation (i.e. wages and  
6 benefits). The cost of the MOU, including its release time provisions,  
7 employee pay, and other costs of the MOU are represented by the term of  
8 art “total compensation,” which describes the cost to the City of the entire  
9 MOU. PSOF Ex. 8 at 77:25–78:19, 79:21–80:15; Joint SOF ¶¶ 67, 71-75,  
10 79, 84.

11 **139. City Defendants’ Response to PSOF 139**

- 12 a. Objection, assertion unsupported by the evidence cited. Ms. Reber merely  
13 explained that she believed compensation generally refers to pensions,  
14 direct pay, deferred compensation, vacation buyback, health and dental  
15 benefits.  
16 b. Undisputed subject to clarification, employee compensation is not  
17 synonymous with the term of art “total compensation,” and that term of art  
18 does not describe the various forms of compensation and benefits received  
19 by employees. PSOF Ex. 9 at 77:25–78:19; Joint SOF ¶¶ 67, 71-75, 79,  
20 84.

21 **140. City Defendants’ Response to PSOF 140**

- 22 a. Objection, relevance and the cited testimony lacks foundation. There is no  
23 foundation laid for the cited testimony, which involved a different  
24 bargaining unit, under a different contract, at a different period in time.  
25 The testimony did not relate to Unit II or the 2019-2021 MOU. Mr.  
26 Zuercher testified that different bargaining units have different  
27 characteristics and circumstances, making it difficult to compare them.  
28 PSOF Ex. 3 at 72:7-20.

1 b. Disputed. Mr. Zuercher testified that different bargaining units have  
2 different characteristics and circumstances, making it difficult to compare  
3 them. PSOF Ex. 3 at 72:7-20. Mr. Zuercher explained that total  
4 compensation refers to the economic package and not necessarily wages  
5 and benefits, which provides additional context to the cited testimony.  
6 Similarly, Mr. Frost explained that the issue is more nuanced and that total  
7 compensation refers to the economic package. PSOF Ex. 6 at 109:13-  
8 110:3, 118:7-12, 118:14-19, 120:13-23, 122:24-124:15, 129:6-130:2,  
9 134:12-135:15. Thus, total compensation does not refer to the personal  
10 compensation of individual employees. Joint SOF ¶¶ 67, 71-75, 79, 84.

11 **141. City Defendants' Response to PSOF 141**

12 a. Objection, relevance, foundation, hearsay, and assertion unsupported by  
13 the evidence. In that 2011 article, Mr. Zuercher did not state that release  
14 time is part of employee compensation. Mr. Zuercher said, "if Union  
15 officials trade release hours for lower overall wage and benefits packages  
16 for their members, it does not end up costing the City anything extra." Mr.  
17 Zuercher's purported statement about a hypothetical illustration was not a  
18 statement on the MOU or the facts at issue here. Moreover, there is no  
19 evidence Mr. Zuercher actually made the comments attributed to him.  
20 PSOF Ex. 3 at 82:9-24.

21 b. Disputed. Mr. Zuercher did not state that paid release time is part of total  
22 compensation to all unit employees. PSOF Ex. 22 at GIL002597. Mr.  
23 Zuercher's purported statement about a hypothetical illustration was not a  
24 statement on the MOU or the facts at issue here. Moreover, there is no  
25 evidence Mr. Zuercher actually made the comments attributed to him.  
26 PSOF Ex. 3 at 82:9-24. Total compensation does not refer to the personal  
27 compensation of individual employees. Joint SOF ¶¶ 67, 71-75, 79, 84.

28 **142. City Defendants' Response to PSOF 142**

- a. Objection, assertion unsupported by the evidence cited. The evidence shows the City was aware that the language may result in a legal challenge under *Janus*, not that the City was particularly concerned that free expression was infringed upon.
- b. Disputed in part. The City generally recognized there could possibly be a legal challenge under *Janus*. PSOF Ex. 6 at 100:2–18, 138:19–139:24; PSOF Ex. 23 at CITY00000077; PSOF Ex. 24 at ID00349; PSOF Ex. 25.

**143. City Defendants’ Response to PSOF 143**

- a. Objection, assertion unsupported by the evidence cited. Mr. Frost merely stated that the City considered donated release time, rather than City-funded release time.
- b. Disputed. The City considered donated release time, rather than City-funded release time, but ultimately declined to take that action. PSOF Ex. 6 at 98:9–100:18.

**144. City Defendants’ Response to PSOF 144**

- a. Objection, assertion unsupported by the evidence cited. Mr. Zuercher merely explained the difference between donated release time and City Business Time. There was no discussion of paid release time.
- b. Disputed. The City has never performed a cost benefit analysis between City Business Time as opposed to paid release time. The City derives substantial direct benefits from City-funded release time. PSOF Ex. 3 at 43:24–45:1; Joint SOF ¶¶ 18-39.

**Controverting Statement of Facts**

1. “All Unit employees and stewards have the right to have the Union serve as their ‘meet and confer’ representative as set forth in the Meet and Confer Ordinance without discrimination or retaliation based on membership or non-membership in the Union or any other organization.” *See* Joint SOF, Ex. 1 (2019-2021 MOU) Section 1-4 (A).

1           2.       The City Code provides, “an authorized employee organization shall serve  
2 as the meet and confer agent of all public employees in the appropriate unit. Such  
3 employee organization must represent fairly and without discrimination all employees in  
4 the unit without regard to whether such employees are members of the authorized  
5 employee organization. **City CSOF, Exhibit 1** (Phoenix City Code § 2-217(e)).

6           3.       Under the 201-2021 MOU, Unit II employees received a 2.38% wage  
7 increase for FY 2019-2020, which had a total economic cost to the city of \$3,220,000. *See*  
8 Joint SOF, Ex. 2 (Reber Declaration) at ¶ 11; Joint SOF, Ex. 5 (CITY 00003634).

9           4.       Under the 2019-2021 MOU, Unit II employees received a 1.78% wage  
10 increase for FY 2020-2021, which had a total economic cost to the City of \$2,466,000.  
11 *See* Joint SOF, Ex. 2 (Reber Declaration) at ¶ 11; Joint SOF, Ex. 5 (CITY00003634).

12           5.       Under the 2019-2021 MOU, Unit II employees each received a one-time  
13 payment of \$682 during FY 2019-2020, which had a total economic cost to the City of  
14 \$1,639,000. *See* Joint SOF, Ex. 2 (Reber Declaration) at ¶ 11; Joint SOF, Ex. 5  
15 (CITY00003634).

16           6.       Under the 2019-2021 MOU, Unit II employees each received a one-time  
17 payment of \$683 during FY 2020-2021, which had a total economic cost to the City of  
18 \$1,641,000. *See* Joint SOF, Ex. 2 (Reber Declaration) at ¶ 11; Joint SOF, Ex. 5  
19 (CITY00003634).

20           7.       The wage increases and one-time payments for Unit II employees under  
21 the 2019-2021 MOU had a combined total economic cost to the City of \$8,936,000. Joint  
22 SOF, Ex. 2 (Reber Declaration) at ¶ 11; Joint SOF, Ex. 5 (CITY00003634).

23           8.       The release time provisions represented 0.28% of the total cost in  
24 *Cheatham*. *See Cheatham v. DiCiccio*, 240 Ariz. 314, 322, ¶ 33 (2016) (indicating that  
25 release time represented cost to City of \$1.7 million in relation to the MOU’s total cost to  
26 the City of \$660 million).

27           9.       In *Cheatham*, the trial court specifically found that release time “is funded  
28 100% by the City” and that “[r]elease time is funded by taxpayers, not by union dues.”

1 **City CSOF, Exhibit 2** (Under Advisement Ruling filed on June 6, 2012 in *Cheatham, et*  
2 *al. v. Gordon, et al.*, Maricopa County Superior Court Case No. CV2011-021634) at 3;

3 **City CSOF, Exhibit 3** (Under Advisement Ruling filed on April 23, 2013 in *Cheatham,*  
4 *et al. v. Gordon, et al.*, Maricopa County Superior Court Case No. CV2011-021634) at 5.

5 10. The *Cheatham* trial court also found “Since the injunctions, the City has  
6 not adjusted Unit 4 salaries to reflect the loss of release time and include that money in  
7 officers’ pay. The City acknowledges that reductions in one area of the MOU do not  
8 automatically trigger increases in officer salaries. The MOU does not require the City to  
9 increase officer salary if release time is enjoined or removed.” **City CSOF, Exhibit 4**  
10 (Under Advisement Ruling filed on January 29, 2014 in *Cheatham, et al. v. Gordon, et*  
11 *al.*, Maricopa County Superior Court Case No. CV2011-021634) at 4.

12 11. Plaintiffs’ expert agreed with the factual finding in the *Cheatham* trial  
13 court and admits that “the elimination of release time in *Cheatham* did not automatically  
14 result in a raise in employee wages.” **City CSOF, Exhibit 5** (Deposition of R. Brown) at  
15 144:21-145:3.

16 12. Plaintiffs’ expert testified he “would not say that there is an automatic  
17 correlation” between release time and employee wages and benefits, and he testified  
18 (incorrectly) that release time is not a part of employee compensation because it is not a  
19 mandatory subject of bargaining (unlike employee wages and benefits). **City CSOF,**  
20 **Exhibit 5** (Deposition of R. Brown) at 140:9-141:9.

21 13. Plaintiffs’ expert agreed that reduction in one area of the MOU do not  
22 automatically trigger increases in officer salaries and admitted that “the elimination of  
23 release time in *Cheatham* did not automatically result in a raise in employee wages. **City**  
24 **CSOF, Exhibit 5** (Deposition of R. Brown) at 143:6-19.

25 14. Plaintiffs’ expert testified that costing is “different” from compensation,  
26 and he “disagreed” that “release time is simply a redirection by employees of their  
27 compensation for the particular purpose of release time.” **City CSOF, Exhibit 5**  
28 (Deposition of R. Brown) at 140:9-24.

1           15. Plaintiffs admit that release time funds could be redirected to unrelated  
2 public purposes, such as equipment or infrastructure. **City CSOF, Exhibit 6** (Deposition  
3 of M. Gilmore) at 98:13-99:1, 105:23-25; **City CSOF, Exhibit 7** (Deposition of M.  
4 Harder) at 34:18-22.

5           16. Plaintiff Harder testified that if the city audited the activities on release  
6 time, it would not benefit him personally. **City CSOF, Exhibit 6** (Deposition of M.  
7 Harder) at 47:2-15.

8           17. Plaintiff Gilmore “asserts that he is harmed by release time because part  
9 of Plaintiff’s compensation under the MOU is being used to finance release time  
10 activities. . . . Because the City is forcing Plaintiff to finance release time activities as  
11 part of total compensation under the MOU . . . Plaintiff’s [rights] statutes are harmed.”  
12 **City CSOF, Exhibit 8** (Gilmore’s Corrected Response to the City Defendants’ First  
13 Discovery Requests) at NUI No. 2.

14           18. Plaintiff Harder asserts “asserts that he is harmed by release time because  
15 part of Plaintiff’s compensation under the MOU is being used to finance release time  
16 activities. . . . Because the City is forcing Plaintiff to finance release time activities as  
17 part of total compensation under the MOU . . . Plaintiff’s [rights] statutes are harmed.”  
18 **City CSOF, Exhibit 9** (Harder’s Response to the City Defendants’ First Discovery  
19 Requests) at NUI No. 2.

20           19. Apart from their allegation that they are compelled to associate with the  
21 Union because the Union is the exclusive representative of all Unit II employees,  
22 Plaintiffs do not allege they are forced to associate with the Union in any other way. **City**  
23 **CSOF, Exhibit 6** (Deposition of M. Gilmore) at 129:17-130:4; **City CSOF, Exhibit 7**  
24 (Deposition of M. Harder) at 50:22-52:7.

25           20. Plaintiffs admit they are not forced to join, support, or associate with the  
26 Union. **City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 129:17-130:4; **City CSOF,**  
27 **Exhibit 7** (Deposition of M. Harder) at 50:22-52:7.

28           21. Plaintiffs admit neither the City nor the Union has breached the 2019-

1 2021 MOU. *See* PSOF Ex. Nos. 26 and 27 at ¶¶ 13-16.

2 22. Mr. Gilmore testified as follows:

3 Q. Could the union attempt to advocate on behalf of Unit 2  
4 employees as a whole?

5 MR. RICHES: Objection as to form. Go ahead.

6 THE WITNESS: That is their job.

7 BY MR. HESKETH:

8 Q. That's what the union is supposed to be doing?

9 A. Correct.

10 Q. And advocate on behalf of Unit 2 employees with respect to  
11 wages?

12 A. Unit 2 employees who are members.

13 Q. But if the union were successful in advocating on behalf of  
14 union members for a higher wage increase, that would benefit all of  
15 Unit 2, would it not?

16 A. Yes, that would.

17 **City CSOF, Exhibit 6** (Deposition M. Gilmore) at 40:7-22.

18 23. Mr. Gilmore testified as follows:

19 Q. So the money that pays for release time starts off with taxpayers  
20 and then it goes to the City. Are we on the same page so far?

21 A. Yes.

22 Q. Now, take me through the ownership of that money until it pays  
23 for release time?

24 MR. RICHES: Objection as to form. Go ahead if you can.

25 THE WITNESS: Who owns the money before it goes there? Is that  
26 the question?

27 BY MR. HESKETH:

28 Q. Yeah. So it starts with taxpayers, then it goes to the City. Who  
owns the money next?

MR. RICHES: Objection as to form. Go ahead if you can.

THE WITNESS: It would go to release time, in the bank.

BY MR. HESKETH:

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Q. So it goes from taxpayers to City, straight to release time?

A. Yes.

Q. And you agree with me that the City's tax revenue does not belong to Unit 2 employees?

MR. RICHES: Objection as to form. Go ahead and answer if you can.

THE WITNESS: The tax revenue is used however they want. It's not –

BY MR. HESKETH:

Q. Yeah, that money belongs to the City, and the City gets to choose what to do with it?

A. Correct

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 128:1-129:6.

24. Mr. Gilmore testified as follows:

Q. But you're not -- you're not forced to be a member of the union, right?

A. No.

Q. You're not forced to pay dues or fees to the union, right?

MR. RICHES: Objection as to form.

THE WITNESS: No.

BY MR. HESKETH:

Q. You're not forced to adopt the union's position or viewpoints, right?

MR. RICHES: Objection as to form.

THE WITNESS: No.

BY MR. HESKETH:

Q. You're not forced to endorse the union's positions or viewpoints, are you?

MR. RICHES: Objection as to form.

THE WITNESS: A non-union member, no.

BY MR. HESKETH:

Q. Your name isn't attached to what the union says or does, right?

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A. Say that again.

Q. Your name is not attached to what the union says or does, right?

A. My name, no.

Q. Do you think someone who hears what the union says or sees what the union does will think that you have endorsed that?

MR. RICHES: Objection as to form.

THE WITNESS: I don't know.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 130:6-131:9.

25. Mr. Harder testified as follows:

Q. All right. Mr. Harder, if the union used release time to advocate for better working conditions for Unit 2, that would be a good thing for you, right?

MR. RICHES: Objection as to form.

THE WITNESS: Possibly.

BY MR. HESKETH:

Q. If the union used release time to advocate for higher wages for you, that would be a good thing for you, right?

A. Right.

Q. So if the union were using release time in those ways, that would not harm you, right?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: Right.

BY MR. HESKETH:

Q. And you don't know whether the union does use release time in those ways, right?

A. I do not.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 36:18-37:11.

26. Mr. Harder testified as follows:

Q. And some of that tax revenue is used to pay for release time?

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Q. And that money goes directly from the City to paying for release time?

MR. RICHES: Objection as to form.

THE WITNESS: As far as I know, yes.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 50:6-12.

27. Mr. Harder testified as follows:

Q. Paragraph 62 states, "When the government compels an individual to associate with others, and that compulsion leads to the monetary endorsement of political views, the message expressed must be 'viewpoint neutral.'" Did I read that correctly?

A. Yes.

Q. You're not alleging that the City is forcing you to associate with the union, are you?

MR. RICHES: Objection as to form.

THE WITNESS: No.

BY MR. HESKETH:

Q. You're not forced to be a member of the union, right?

A. No.

Q. You're not forced to pay dues or fees to the union, right?

MR. RICHES: Objection as to form. Go ahead.

THE WITNESS: No.

BY MR. HESKETH:

Q. You're not forced to adopt the union's positions or viewpoints, right?

MR. RICHES: Objection as to form.

THE WITNESS: No.

BY MR. HESKETH:

Q. You're not forced to endorse the union's position or viewpoints, are you?

A. No.

Q. Your name isn't attached to what the union says or does, right?

MR. RICHES: Objection as to form. If you understand, go ahead.

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THE WITNESS: As far as I know, no.

BY MR. HESKETH:

Q. Do you think someone who hears what the union says or see what the -- Sorry, let me back up. Do you think someone who hears what the union says or sees what the union does will think you have endorsed it?

MR. RICHES: Objection as to form.

Go ahead and answer if you can.

THE WITNESS: I don't know.

**City CSOF, Exhibit 7 (Deposition of M. Harder) at 50:16-52:7.**

28. Mr. Harder testified as follows:

Q. And we were talking about the statement on page 5 that your free expression and associational rights as well as your rights under Arizona's Right to Work statutes are harmed. Do you remember that?

A. Yes.

Q. And I asked you what that meant, and I believe your answer was that Arizona is a right-to-work state and the union doesn't provide very much benefit to you. Did I understand that correctly?

A. Right.

Q. But you agree with me that you're not forced to be a member of the union, right

A. Right, unless -- unless you need help

Q. But there are things that the union does that could benefit you, right?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: Right.

BY MR. HESKETH:

Q. For example, if the union successfully negotiates for a higher wage increase for Unit 2 employees, that would benefit you, right?

MR. RICHES: Objection as to form. Go ahead.

THE WITNESS: Right.

BY MR. HESKETH:

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Q. If there are unsafe working conditions in your workplace and the union gets the City to fix those, that would benefit you, right?

A. Right.

Q. If you have a supervisor who is giving you problems and the union addresses that situation with the City and gets the City to fix it, that would benefit you, right?

MR. RICHES: Objection as to form.

Go ahead if you can.

THE WITNESS: Right.

BY MR. HESKETH:

Q. All of those things could happen, right?

A. Could.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 58:5-59:19.

29. Mr. Harder testified as follows:

Q. And the last column indicates that the difference is that the City of Phoenix is 3.1 percent higher than the other agencies, right?

A. That's what it says.

Q. Would you agree with me that this appears to indicate that the City has increased its wages for its employees in a greater amount over this time period shown on this document than the other agencies surveyed?

A. Yes.

Q. Is it possible that the City has done that because the unions have used release time to bargain more effectively with the City?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: I don't know if they have or not.

BY MR. HESKETH:

Q. Is it possible that they may have?

A. Possible.

Q. If the union had used release time in that way, that would be good for you, right?

MR. RICHES: Objection as to form.

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THE WITNESS: Yes.

BY MR. HESKETH:

Q. Because it resulted in a wage increase for you that's higher than other cities in Arizona, right?

MR. RICHES: Objection.

Go ahead if you can.

THE WITNESS: Yes.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 65:9-66:13.

30. Mr. Harder testified as follows:

Q. Do you know whether release time could have helped the union negotiate for that higher wage increase?

MR. RICHES: Objection as to form. Go ahead.

THE WITNESS: I don't know.

BY MR. HESKETH:

Q. Could it have?

A. Possibly.

Q. And if it did, that would have been good for you, right?

MR. RICHES: Objection as to form. Go ahead.

THE WITNESS: Yes.

BY MR. HESKETH:

Q. All right. Looking further down on Exhibit 9, Do you see where it says "One-Time Costs"?

A. Yes.

Q. And do you see where it says item number A?

A. Yes.

Q. And the description for Item A is a "one-time payment of \$682 made to all full-time employees in fiscal year 2019-20"?

A. Yes.

Q. Do you see that?

A. Yes, I have.

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Q. And that was the one-time payment that we talked about earlier, right?

A. Right.

Q. And you received that payment, right?

A. Right.

Q. And to the right on Exhibit 9 of that description, under the column All Funds, do you see the figure 1,639,000?

A. Yes.

Q. That item is not on Exhibit 8, correct?

A. Right.

Q. And further down, do you see on Exhibit 9 where it has item C?

A. Yes.

Q. And the description of that item is "One-time payment of \$683 made to all full-time employees in fiscal year 2020-21"?

A. Right.

Q. And then to the right, under the column All Funds, there's the figure 1,641,000. Do you see that?

A. Yes, I do.

Q. And that is the second one-time payment that was made to Unit 2 employees under the current MOU. Is that correct?

A. Yes, it was.

Q. Did you receive that payment?

A. Yes, I did.

Q. And that item that we were just talking about, the second one-time payment in fiscal year 2020-2021, that is not shown on Exhibit 8, right?

A. Right.

Q. Is it possible that the union successfully bargained for those one-time payments that the City did not originally intend to give to Unit 2 employees?

MR. RICHES: Objection as to form. Go ahead if you can.

THE WITNESS: Possible.

BY MR. HESKETH:

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Q. Is it possible that release time helped the union do that?

MR. RICHES: Objection as to form. Go ahead if you can.

THE WITNESS: Possible.

BY MR. HESKETH:

Q. And if the union did use release time in that way, that would be a good thing for you, right?

MR. RICHES: Objection as to form.

THE WITNESS: Yes.

BY MR. HESKETH:

Q. Because you received these two payments that you wouldn't have otherwise gotten, right?

MR. RICHES: Same objection.

THE WITNESS: Right.

BY MR. HESKETH:

Q. So if release time did help the union in that way, release time has actually benefitted you by increasing your wages, right?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: Possible.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 70:7-73:17.

31. Mr. Harder testified as follows:

Q. The MOU specifies that Unit 2 employees are to be treated fairly and that individual Unit 2 employees are not to be given preferential or special treatment, right?

A. Right.

Q. So if the MOU says that a certain employee gets the benefit of, say, a shift bid, you would get that same benefit, right?

MR. RICHES: Objection as to form.

Go ahead if you can.

THE WITNESS: Right.

BY MR. HESKETH:

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Q. And if the MOU says you get to do a shift bid in a certain way, you get that benefit even though you're not a union member, right?

MR. RICHES: Sorry, just -- objection. I'm not sure I understood what you said there, Matt. Shift what?

MR. HESKETH: Shift bid.

MR. RICHES: Shift bid. Okay, I'm sorry.

Go ahead.

BY MR. HESKETH:

Q. So if the MOU says that you get to do a shift bid in a certain way, you get the benefit of that even though you're not a union member, right?

A. Right.

Q. And if the union were to prevail in a grievance, all Unit 2 employees would get the benefit of that, right?

MR. RICHES: Objection as to form.

Go ahead if you can.

THE WITNESS: Right.

BY MR. HESKETH:

Q. Including you, right?

MR. RICHES: Same objection.

You can answer.

THE WITNESS: Right.

BY MR. HESKETH:

Q. Could release time help the union prevail during a grievance?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: Possibly.

BY MR. HESKETH:

Q. If release time did help the union prevail during a grievance, that would benefit you, right?

MR. RICHES: Objection as to form. Go ahead.

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THE WITNESS: Depends on what it's on.

BY MR. HESKETH:

Q. If it allowed the union to prevail in a grievance that was related to you in some way, that would benefit you, right?

MR. RICHES: Objection as to form. If you can, go ahead.

THE WITNESS: Possibly.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 75:4-77:7.

32. Mr. Gilmore testified as follows:

Q. Okay. So you want the eight hours back and you don't want there to be any release time. Do I understand correctly?

A. Yes.

Q. Anything else?

A. No.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 105:6-11.

33. Mr. Gilmore testified as follows:

Q. So if the City were to take the money from release time and spend it on infrastructure that has a public benefit and that gives the City a relatively equal value, would that solve the gift clause claim?

...

A. I still don't know if it would.

Q. If the City did that, how would that benefit you personally?

A. It wouldn't.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 107:22-108:9.

34. Mr. Gilmore testified as follows:

Q. What about the eight hours? If you got eight hours of vacation time, how would that benefit the public?

....

A. It wouldn't -- the benefit wouldn't be for the public.

....

Q. But if you got eight more hours of vacation time, would the public get more services?

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A. Me, personally, it'd be the same.

Q. Would the cost to the public of the MOU be any less if you got eight more hours of vacation?

....

A. It'd still be the same.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 150:24-152:8.

35. Mr. Harder testified as follows:

Q. .... I understand your position, that you believe if release time were eliminated you would get a benefit from having increased time off or some other compensation-related benefit. Aside from that, would the elimination of release time benefit you in any other way?

....

A. Not that I know of.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 19:14-23.

36. Mr. Harder testified as follows:

Q. Is it possible that the City could take the money that was allocated for release time and invest in infrastructure or equipment that's used by Unit 2 employees?

A. Possibly.

Q. If it did that, would your compensation increase?

A. No.

Q. Would you benefit from that?

....

A. No.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 34:18-35:3.

37. Mr. Gilmore testified as follows:

Q. We previously talked about the term "total compensation," right?

A. Yes, previously.

Q. And Unit 2 has a total compensation under the MOU, right?

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A. Yes, they do.

Q. That total compensation, do you think that amount is too high?

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A. No. No, I don't.

Q. Okay. The City gets a fair amount of services from Unit 2 employees for the total compensation under the MOU?

....

A. Yes.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 149:19-150:14.

38. Mr. Harder testified as follows:

Q. What about the total compensation for Unit 2 as a whole, that economic package that we were talking about before, is that too much for Unit 2?

....

A. No.

Q. Does the City get a fair amount of services from Unit 2 employees in exchange for that economic package?

....

A. As far as I know, yes.

Q. The economic cost of the MOU to the City is not too high for what the City gets from Unit 2 employees?

....

A. As far as I know, yes.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 61:7-25.

39. Mr. Harder testified as follows:

Q. If we were to track ownership of the money that is eventually used to pay for release time, it starts with taxpayers, right?

MR. RICHES: Objection as to form.

Go ahead if you can.

THE WITNESS: Yes.

BY MR. HESKETH:

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Q. And then the taxpayers pay taxes and that money then becomes money of the City, right?

A. Right.

Q. And the City owns that tax revenue, right?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: Right.

BY MR. HESKETH:

Q. Then what happens to that money?

MR. RICHES: Objection as to form. Go ahead and answer if you can.

THE WITNESS: They use it as they need it.

BY MR. HESKETH:

Q. Let me make sure I understand. The City uses it to pay for release time?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: They could, but they use it to buy trucks and to pay their employees -- and to pay their employees.

BY MR. HESKETH:

Q. So the City uses its tax revenue to pay for basically everything the City does?

MR. RICHES: Objection as to form. Go ahead.

THE WITNESS: Right.

BY MR. HESKETH:

Q. And some of that tax revenue is used to pay for release time?

A. Yes.

Q. And that money goes directly from the City to paying for release time?

MR. RICHES: Objection as to form.

THE WITNESS: As far as I know, yes.

1 **City CSOF, Exhibit 7** (Deposition of M. Harder) at 48:22-50:12.

2 40. Mr. Gilmore testified as follows:

3 Q. So there is no line item showing on your current paystubs any  
4 amount being withheld for union dues. Is that correct?

5 A. Correct.

6 **City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 178:23-179:1.

7 41. Mr. Gilmore testified as follows:

8 Q. But you're not forced to adopt the union's position, right?

9 Mr. Riches: Objection as to form. Go ahead.

10 The Witness: Not the union's position, no.

11 **City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 146:17-21.

12 42. Mr. Harder testified as follows:

13 Q. You agree with me that there is not a line item deduction from  
14 your paycheck or pay stub to provide financial support to the  
union, right?

15 A. Not that I know of.

16 **City CSOF, Exhibit 7** (Deposition of M. Harder) at 47:22-25.

17 43. Mr. Harder testified as follows:

18 Q. Okay. And there is no deduction from your check for union  
19 dues anymore because you're not a member of the union anymore,  
correct?

20 A. Right.

21 Q. Okay. And there's no other deduction from your check under  
22 the 2019-2021 MOU for anything related to the union. Is that  
correct?

23 A. Yes.

24 **City CSOF, Exhibit 7** (Deposition of M. Harder) at 92:17-24.

25 44. Mr. Harder testified as follows:

26 Q. Do you know if release time might help facilitate that  
bargaining process?

27 MR. RICHES: Objection as to form. Go ahead and answer if you  
28 can.

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THE WITNESS: Yes.

BY MR. HESKETH:

Q. Yes, you know? Or yes, it could help? A. Yes, it could help.

Q. Release time could help facilitate collective bargaining?

A. Yes, it could help.

Q. If release time does help facilitate collective bargaining, would that be a good thing for the City?

MR. RICHES: Objection as to form. If you can answer, go ahead.

THE WITNESS: I don't know.

BY MR. HESKETH:

Q. Could it be a good thing for the City?

MR. RICHES: Same objection.

THE WITNESS: Possibly.

BY MR. HESKETH:

Q. Do you know whether release time helps the City communicate more efficiently or effectively with Unit 2 employees?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: No, I do not.

BY MR. HESKETH:

Q. Do you know whether release time helps the City resolve labor disputes more efficiently or effectively?

A. No, I do not.

Q. Do you know whether release time helps the City informally resolve disputes before they become grievances?

MR. RICHES: Objection as to form.

Go ahead if you can.

THE WITNESS: No, I do not.

BY MR. HESKETH:

Q. Could it help in that way?

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MR. RICHES: Same objections.

Go ahead.

THE WITNESS: I don't know.

BY MR. HESKETH:

Q. Do you know whether release time allows the City to get better information about employee preferences?

MR. RICHES: Objection as to form.

THE WITNESS: Possibly, I'm not for sure.

BY MR. HESKETH:

Q. But it could?

A. Possibly.

Q. Do you know whether other Unit 2 employees use release time to tell the City about ways the City can improve its processes?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: I do not know.

BY MR. HESKETH:

Q. Do you know whether other employees use release time to tell the City about their concerns with their working conditions?

A. I do not know.

Q. Is it possible?

A. Yes.

Q. Do you think release time benefits the union?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: Possible.

BY MR. HESKETH:

Q. If release time does benefit the union, does that mean it does not benefit the City?

MR. RICHES: Objection as to form. Go ahead if you can.

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THE WITNESS: I don't know.

BY MR. HESKETH:

Q. Is it possible that release time could benefit both the union and the City?

MR. RICHES: Same objection.

Go ahead.

THE WITNESS: Possible, but I'm not for sure though.

BY MR. HESKETH:

Q. Is it possible that the City could benefit from doing things that help or benefit the union?

MR. RICHES: Objection as to form.

Go ahead if you understand.

THE WITNESS: Possible.

BY MR. HESKETH:

Q. Do you know what employee voice is?

A. No, I do not.

Q. If I described employee voice in very general terms as the ability of employees to collectively express their views about their workplace and employment, would that be a fair assessment in your view?

A. Yes.

Q. If we use that definition, do you know whether the union helps Unit 2 employees express their employee voice?

MR. RICHES: Objection as to form.

Go ahead.

THE WITNESS: I do not.

BY MR. HESKETH:

Q. Did you say you don't know?

A. Right.

Q. Is it possible that release time helps the union facilitate Unit 2 employees expressing their employee voice?

MR. RICHES: Objection as to form.

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Go ahead.

THE WITNESS: I couldn't tell you. I don't know if it does or not.

THE COURT REPORTER: I couldn't tell you. I don't know if it does or not?

MR. RICHES: I think it was "I do not know if it does or not."

BY MR. HESKETH:

Q. If the union did tell the City about employee concerns, would that be a good thing for the City?

MR. RICHES: Objection as to form.

Go ahead if you can.

THE WITNESS: Possibly.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 23:13-28:19.

45. Mr. Gilmore testified as follows:

Q. But it is possible that an employee could go to the union before going to OSHA and address a problem with the workplace?

A. Yes, it's possible.

Q. Do you know whether release time could help improve employee voice?

A. Possibly.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 42:2-8.

46. Mr. Gilmore testified as follows:

Q. . . . But there is not a line item deduction from your paycheck to provide financial support to the union?

A. Correct.

Q. Are you receiving fewer wages or benefits than what was promised in the MOU as a result of release time?

...

A. I don't believe so.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 118:14-119:2.

47. Mr. Gilmore testified as follows:

Q. It's not that the City is forcing Unit 2 employees to take money out of what they've been guaranteed under the MOU, right?

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A. No money is taken out of me.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 136:9-13.

48. Mr. Gilmore testified as follows:

Q. What you're challenging in this case is that you would like to continue to receive an additional eight hours every year, right?

....

A. Yes.

....

Q. The City has not told you that you will get an additional eight hours every year, right?

A. Currently, no.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 88:8-89:2.

49. Mr. Gilmore testified as follows:

Q. Did the City make a commitment to pay you those eight hours?

A. No.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 94:21-23.

50. Mr. Gilmore testified as follows:

Q. So, Mr. Gilmore, the question is, are you legally entitled to anything more than the wages and benefits specified in the MOU?

A. Anything other than the MOU, no.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 93:7-10.

51. Mr. Gilmore testified as follows:

Q. And you don't know what the City would do with the money that's allocated for release time if release time were eliminated?

A. Correct, I don't know.

**City CSOF, Exhibit 6** (Deposition of M. Gilmore) at 113:8-11.

52. Mr. Harder testified as follows:

Q. Have you received all of the wages and benefits that were promised to you under the MOU?

A. As far as I know, yes.

1 **City CSOF, Exhibit 7** (Deposition of M. Harder) at 39:19-21.

2 53. Mr. Harder testified as follows:

3 Q. You agree with me that there is not a line item deduction from  
4 your paycheck or pay stub to provide financial support to the  
union, right?

5 A. Not that I know of.

6 Q. So you would agree with me that money is not being taken out  
7 of your pocket to pay for release time?

8 . . . .

9 A. Not that I know of.

10 Q. Are you receiving fewer wages or benefits than what is  
11 promised in the MOU as a result of, quote, being forced to provide  
financial support to the union, end quote?

12 . . . .

13 A. Not that I know of.

14 **City CSOF, Exhibit 7** (Deposition of M. Harder) at 47:22-48:11.

15 54. Mr. Harder testified as follows:

16 Q. It's not your actual compensation under the MOU that's being  
17 used to finance release time, but some higher amount of  
compensation that you would like to have if release time were  
eliminated, right?

18 . . . .

19 A. Right.

20 Q. The City never promised to pay you that higher amount, right?

21 . . . .

22 A. Right.

23 Q. And if release time were eliminated, there's no guarantee that  
24 you would actually receive that higher amount, right?

25 . . . .

26 A. Right.

27 **City CSOF, Exhibit 7** (Deposition of M. Harder) at 54:22-55:1.

28 55. Mr. Harder testified as follows:

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Q. You're not saying, though, that you were entitled to something more than what's set forth in the MOU, right?

A. No.

Q. And you have received everything that's set forth in the MOU, right?

A. As far as I know, yes.

Q. If release time were eliminated, you don't know whether your benefits or wages would increase, right?

....

A. Right.

**City CSOF, Exhibit 7** (Deposition of M. Harder) at 57:4-14.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of May, 2021.

**SHERMAN & HOWARD L.L.C.**

By:           /s/ Matthew A. Hesketh            
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# **EXHIBIT 8**

# **EXHIBIT 8**

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the GOLDWATER INSTITUTE**

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

MARK GILMORE; and MARK HARDER,

Plaintiffs,

vs.

KATE GALLEGRO, in her official capacity as  
Mayor of the City of Phoenix; ED  
ZUERCHER in his official capacity as City  
Manager of the City of Phoenix; and CITY  
OF PHOENIX.

Defendants,

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

Intervenor-Defendant.

Case No. CV2019-009033

**PLAINTIFF GILMORE'S CORRECTED  
RESPONSES AND OBJECTIONS TO  
CITY DEFENDANTS' FIRST SET OF  
DISCOVERY REQUESTS**

(Assigned to Hon. Daniel Martin)

Plaintiff Mark Gilmore (“Plaintiff Gilmore” or “Plaintiff”) hereby submits the following objections and responses to Defendant City of Phoenix’s (“City”) First Set of Discovery Requests.

### **LIMITATIONS ON RESPONSES**

1. Plaintiff Gilmore has not completed factual and legal development, discovery, or trial preparation. Plaintiff reserves the right to amend or supplement these responses if additional information is revealed at a later date.

2. Plaintiff Gilmore reserves the right to object to the use or admissibility at trial of any document or other response provided in these responses to the City’s First Set of Discovery Requests. Plaintiff’s answers to the discovery requests shall not be deemed to constitute an admission that the response is relevant, or is admissible as evidence at trial or in any other proceeding related to this or any matter, or that any statement or characterization in the discovery request is accurate or complete.

3. Plaintiff’s answers are made without waiver or limitation of his right to object, on grounds of competency, relevancy, materiality, privilege, confidentiality, attorney work product doctrine, attorney-client privilege, admissibility as evidence for any purpose, or any other ground, to the use of any documents or information provided in response to the discovery requests in any subsequent proceeding in, or the trial of, this or any other action.

### **GENERAL OBJECTIONS**

Plaintiff Gilmore asserts the following objections to each and every one of the City’s First Set of Discovery Requests:

1. Plaintiff hereby objects to the instructions and definitions set forth in the City's discovery requests to the extent that they purport to impose requirements beyond what is mandated by the Arizona Rules of Civil Procedure. Plaintiff's answers to each discovery request are provided in accordance with those rules.

2. Plaintiff objects to each individual discovery request to the extent that such request seeks information which is already in possession, custody or control of the City or is outside Plaintiff's possession, custody or control.

3. Plaintiff objects to the discovery requests to the extent that they are overly broad, vague, unduly burdensome and beyond the scope authorized by the court or by the Arizona Rules of Civil Procedure.

4. Plaintiff objects to the City's discovery requests to the extent they require Plaintiff to reveal information subject to the attorney-client privilege or work product doctrine.

5. Plaintiff objects to the City's discovery requests to the extent they purport to require work product of Plaintiff's attorneys or consulting experts related to litigation.

6. Plaintiff's answers set forth below are based upon information presently known to him and are therefore set forth without prejudice to Plaintiff's right to assert additional objections or supplemental answers should he discover additional documents, facts or grounds for objection. Plaintiff reserves the right to amend, modify, or supplement these responses at any time prior to trial.

7. Plaintiff objects to Instruction No. 2 to the extent it: (1) requires information that is not reasonably available to Plaintiff, and (2) demands disclosure of information protected by the attorney work-product doctrine.

8. Plaintiff objects to Instruction No. 5 because (1) it is overbroad, unduly burdensome, and disproportionate to the needs of the case, and (2) it exceeds the requirements of the Arizona Rules of Civil Procedure.

9. Plaintiff objects to Instruction No. 6 because it (1) purports to create multiple interrogatories in a single request, (2) it is overbroad, unduly burdensome, and disproportionate to the needs of the case, and (3) it exceeds the requirements of the Arizona Rules of Civil Procedure.

10. Plaintiff objects to the City's definition of "document" and "documents" because those definitions (1) purport to create multiple interrogatories in a single request, (2) are overbroad, unduly burdensome, and disproportionate to the needs of the case, and (3) exceed the requirements of the Arizona Rules of Civil Procedure.

**OBJECTIONS AND RESPONSES TO DEFENDANT CITY'S  
REQUESTS FOR ADMISSION**

**REQUEST FOR ADMISSION NO. 1:** Admit you were at one time a member of Local 2384.

**RESPONSE:** Admit.

**REQUEST FOR ADMISSION NO. 2:** Admit that on at least one occasion you had the

opportunity to vote on whether to approve of a memorandum of understanding while you were a member of Local 2384.

**RESPONSE:** Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6.

Plaintiff also objects that the phrase “had the opportunity to vote” is vague and ambiguous.

Subject to and without waiving those objections, Plaintiff admits that while he was a member of the Union, he was eligible to vote on whether to approve a memorandum of understanding.

**REQUEST FOR ADMISSION NO. 3:** Admit that on at least one occasion you voted on whether to approve of a memorandum of understanding while you were a member of Local 2384.

**RESPONSE:** Deny.

**REQUEST FOR ADMISSION NO. 4:** Admit that on at least one occasion you had the opportunity to vote on Local 2384’s business while you were a member of Local 2384.

**RESPONSE:** Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6.

Plaintiff also objects that the phrases “had the opportunity to vote” and “Local 2384’s business” are vague and ambiguous. Subject to and without waiving those objections, Plaintiff admits that while he was a member of the Union, he voted in at least one election for the Union president.

**REQUEST FOR ADMISSION NO. 5:** Admit that on at least one occasion you used or received payment as a result of release time.

**RESPONSE:** Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, , and 6.

Plaintiff also objects that the phrase “received payment as a result of release time” is vague and ambiguous. Subject to and without waiving those objections, Plaintiff admits that the Union

requested and received release time for Plaintiff's attendance at a grievance proceeding in which Plaintiff was a witness.

**OBJECTIONS AND RESPONSES TO DEFENDANT CITY'S  
NON-UNIFORM INTERROGATORIES**

**NON-UNIFORM INTERROGATORY NO. 1:** Explain and describe in detail the basis for your allegation in Paragraph 65 of the Second Amended Complaint that you “do not agree with these views.”

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 3, 4, 5, 6, 7, and 8.

Without waiving these objections, Plaintiff asserts that he does not agree with release time employees' use of release time to perform activities on behalf of the Union, including political activities, lobbying, collective bargaining, membership recruitment, and other activities that advance the Union's private interests. Political activities, lobbying, as well as certain “core issues” in the public sector, “such as wages, pensions, and benefits are important political issues” and are not viewpoint neutral. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2480 (2018). Plaintiff disagrees with having part of his compensation, which is part of total compensation under the MOU, directed to financing these activities.

**NON-UNIFORM INTERROGATORY NO. 2:** Explain and describe in detail how you are harmed by release time.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 3, 4, 5, 6, 7, and 8.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, Plaintiff asserts that he is harmed by release time because part of Plaintiff's compensation under the MOU is being used to finance release time activities. As the City admitted, "all of the release time expenditures in the 2019-2021 MOU are paid for by all Field Unit II employees, in the form of reduced wages and benefits, whether those employees belong to the Union or not." City's Answer to Pls.' Second Am. Compl. ¶ 34. Plaintiff is not a member of the Union and does not consent to "finance[ing] release time." *Id.* at ¶ 35. Because the City is forcing Plaintiff to finance release time activities as part of total compensation under the MOU, *see also id.* at ¶ 36, that Plaintiff does not consent to financing, Plaintiff's free expression and associational rights as well as his rights under Arizona's Right to Work statutes are harmed.

**NON-UNIFORM INTERROGATORY NO. 3:** Explain and describe in detail how you know that the termination of release time would result in an increase to your wages and benefits, as alleged in Paragraphs 34 and 70 of the Second Amended Complaint.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, 7, and 8.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, the termination of release time would result in an increase to wages and benefits because release time is charged as part of total compensation under the MOU. If the release time provision were eliminated, the cost of release time would be available in the form of wages and benefits to all Unit 2 employees. City's Answer to Second Am. Compl. ¶ 34. Under the MOU, "the cost to the City for these release positions and release hours, including all benefits, [are] charged as part of the total compensation detailed in this agreement." MOU § 1-3(A). The City has admitted the allegation in paragraph 34 of the Second Amended Complaint that "all of the release time expenditures in the 2019-2021 MOU are paid for by all Field Unit II employees, in the form of reduced wages and benefits, whether those employees belong to the Union or not." City's Answer to Pls.' Second Am. Compl. ¶ 34. Consequently, if those provisions did not exist, Plaintiff's "wage and benefits" would not be "reduced" in order to finance them. Likewise, the City admitted that "Plaintiffs...are required to direct part of their 'total compensation' to finance release time under the MOU." *Id.* ¶ 53. Thus, by forcing Plaintiffs to fund release time under the MOU, "funds that would otherwise be included in employees' salaries and benefits are instead paid to the Union." Pls.' Second Am. Compl. ¶ 70.

**NON-UNIFORM INTERROGATORY NO. 4:** If you allege that you have the right or authority to dictate or challenge how the City allocates funds or makes funding decisions, explain and describe in detail the source and scope of that right or authority.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving those objections, Plaintiff denies that he has “authority to dictate or challenge how the City allocates funds or makes funding decisions.” In this case, the City has already determined how to allocate funding for Unit 2 employees under the MOU. As part of that allocation, the City charges “[t]he cost to the City for these release positions and release hours, including all benefits, [are] charged as part of the total compensation detailed in this agreement.” MOU § 1-3(A).

**NON-UNIFORM INTERROGATORY NO. 5:** Explain and describe in detail the circumstances in which you used or received payment as a result of release time, including but not limited to the reasons your name appears on the document labeled as ID00126 and attached hereto as Exhibit 1.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving those objections, Plaintiff asserts that the Union requested and received release time for Plaintiff’s attendance at a grievance proceeding in which Plaintiff was a witness approximately 10 years ago. To the best of his recollection, Plaintiff was a witness in a grievance proceeding involving Jim Moody, then a Superintendent in Plaintiff’s department.

Plaintiff did not file the grievance. Instead, the Union requested that Plaintiff and other fact witnesses receive release time to testify in the proceeding.

**NON-UNIFORM INTERROGATORY NO. 6:** Explain and describe in detail why you joined Local 2384.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Plaintiff further objects that this interrogatory because it exceeds the scope of permissible discovery under Rule 26(b) and is not relevant to the claims and defenses at issue in this case. The reasons why Plaintiff originally joined the Union has no bearing on whether Plaintiff agrees to finance release time activities *now* as part of total compensation under the *current* MOU.

Without waiving those objections, Plaintiff asserts that he joined the Union because he believed at the time that the Union would represent his interests as an employee.

**NON-UNIFORM INTERROGATORY NO. 7:** Explain and describe in detail why you left Local 2384.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Plaintiff further objects to this interrogatory because it exceeds the scope of permissible discovery under Rule 26(b) and it is not relevant to the claims and defenses at issue in this case.

The reasons why Plaintiff left the Union has no bearing on whether Plaintiff agrees to finance release time activities *now* as part of total compensation under the *current* MOU.

Without waiving those objections, Plaintiff asserts that he left the Union because the Union did not represent his interests as an employee.

**NON-UNIFORM INTERROGATORY NO. 8:** For every memorandum of understanding that you voted on while you were a member of Local 2384, explain and describe in detail why you voted for or against approval of each memorandum of understanding.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Plaintiff further objects to this interrogatory because it exceeds the scope of permissible discovery under Rule 26(b) and it is not relevant to the claims and defenses at issue in this case. Whether and why Plaintiff did or did not vote on a previous MOU is not relevant to whether Plaintiff agrees to finance release time activities *now* as part of total compensation under the *current* MOU.

Without waiving those objections, to the best of his recollection, Plaintiff asserts that he did not vote on a memorandum of understanding while a member of Local 2384.

**NON-UNIFORM INTERROGATORY NO. 9:** Identify and describe in detail the specific “activities the Union engages in while utilizing release time” with which you disagree, as alleged in Paragraph 38 of the Second Amended Complaint.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, Plaintiff asserts that he does not agree with release time employees' use of release time to perform activities on behalf of the Union, including political activities, lobbying, collective bargaining, union recruitment, and other activities that benefit the private interests of the Union. Additionally, on information and belief, there are numerous release time activities that advance the interests of the Union rather than that of the City and its employees, as release time is not sufficiently tracked or monitored by the City.

**NON-UNIFORM INTERROGATORY NO. 10:** For every activity identified in your response to Non-Uniform Interrogatory No. 9, explain and describe in detail why you object to or disagree with that activity.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, Plaintiff asserts that he has not consented to the Union representing him or his interests, nor has he consented to any portion of his compensation to be used (1) to support the political views of the Union, (2) to lobby in support or opposition to legislation as determined by the Union; (3) for the Union to engage in the process of collective bargaining; (4) to recruit or retain Union members; or (5) to engage in other activities that benefit the Union in the Union's discretion.

**RESPECTFULLY SUBMITTED** this 12th day of October 2020.

/s/ Jonathan Riches

Jonathan Riches (025712)

Timothy Sandefur (033670)

Jacob Huebert (035127)

**Scharf-Norton Center for Constitutional Litigation**

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**CERTIFICATE OF SERVICE**

SERVED via email & regular mail this 12th day of October 2020, to:

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/s/ Kris Schlott  
Kris Schlott, Paralegal

**VERIFICATION**

I, Mark Gilmore, under penalty of perjury, state that the foregoing Responses and Objections to City Defendants' First Set of Discovery Requests are true to the best of my knowledge, information and belief.

Dated this \_\_\_\_ day of October, 2020.

---

Mark Gilmore

# **EXHIBIT 9**

# **EXHIBIT 9**

**Scharf-Norton Center for Constitutional Litigation at  
the GOLDWATER INSTITUTE**

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

MARK GILMORE; and MARK HARDER,

Plaintiffs,

vs.

KATE GALLEG0, in her official capacity as  
Mayor of the City of Phoenix; ED  
ZUERCHER in his official capacity as City  
Manager of the City of Phoenix; and CITY  
OF PHOENIX.

Defendants,

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

Intervenor-Defendant.

Case No. CV2019-009033

**PLAINTIFF HARDER'S RESPONSES  
AND OBJECTIONS TO CITY  
DEFENDANTS' FIRST SET OF  
DISCOVERY REQUESTS**

(Assigned to Hon. Daniel Martin)

Plaintiff Mark Harder (“Plaintiff Harder” or “Plaintiff”) hereby submits the following objections and responses to Defendant City of Phoenix’s (“City”) First Set of Discovery Requests.

### **LIMITATIONS ON RESPONSES**

1. Plaintiff Harder has not completed factual and legal development, discovery, or trial preparation. Plaintiff reserves the right to amend or supplement these responses if additional information is revealed at a later date.

2. Plaintiff Harder reserves the right to object to the use or admissibility at trial of any document or other response provided in these responses to the City’s First Set of Discovery Requests. Plaintiff’s answers are made without waiver or limitation of his right to object, on grounds of competency, relevancy, materiality, privilege, confidentiality, attorney work product doctrine, attorney-client privilege, admissibility as evidence for any purpose, or any other ground, to the use of any documents or information provided in response to the discovery requests in any subsequent proceeding in, or the trial of, this or any other action. Plaintiff’s answers to the discovery requests shall not be deemed to constitute an admission that the response is relevant, or is admissible as evidence at trial or in any other proceeding related to this or any matter, or that any statement or characterization in the discovery request is accurate or complete.

### **GENERAL OBJECTIONS**

Plaintiff Harder asserts the following objections to each and every one of the City’s First Set of Discovery Requests:

1. Plaintiff hereby objects to the instructions and definitions set forth in the City's discovery requests to the extent that they purport to impose requirements beyond what is mandated by the Arizona Rules of Civil Procedure. Plaintiff's answers to each discovery request are provided in accordance with those rules.

2. Plaintiff objects to each individual discovery request to the extent that such request seeks information which is already in possession, custody, or control of the City, or is outside Plaintiff's possession, custody or control.

3. Plaintiff objects to the discovery requests to the extent that they are overly broad, vague, unduly burdensome and beyond the scope authorized by the court or by the Arizona Rules of Civil Procedure.

4. Plaintiff objects to the City's discovery requests to the extent they require Plaintiff to reveal information subject to the attorney-client privilege.

5. Plaintiff objects to the City's discovery requests to the extent they purport to require work product of Plaintiff's attorneys or consulting experts related to litigation.

6. Plaintiff's answers set forth below are based upon information presently known to him and are therefore set forth without prejudice to Plaintiff's right to assert additional objections or supplemental answers should he discover additional documents, facts or grounds for objection. Plaintiff reserves the right to amend, modify, or supplement these responses at any time prior to trial.

7. Plaintiff objects to Instruction No. 2 to the extent it: (1) requires information that is not reasonably available to Plaintiff, and (2) demands disclosure of information protected by the attorney work-product doctrine.

8. Plaintiff objects to Instruction No. 5 because (1) it is overbroad, unduly burdensome, and disproportionate to the needs of the case, and (2) it exceeds the requirements of the Arizona Rules of Civil Procedure.

9. Plaintiff objects to Instruction No. 6 because it (1) purports to create multiple interrogatories in a single request, (2) is overbroad, unduly burdensome, and disproportionate to the needs of the case, and (3) exceeds the requirements of the Arizona Rules of Civil Procedure.

10. Plaintiff objects to the City's definition of "document" and "documents" because those definitions (1) purport to create multiple interrogatories in a single request, (2) are overbroad, unduly burdensome, and disproportionate to the needs of the case, and (3) exceed the requirements of the Arizona Rules of Civil Procedure.

**OBJECTIONS AND RESPONSES TO DEFENDANT CITY'S  
REQUESTS FOR ADMISSION**

**REQUEST FOR ADMISSION NO. 1:** Admit you were at one time a member of Local 2384.

**RESPONSE:** Admit.

**REQUEST FOR ADMISSION NO. 2:** Admit that on at least one occasion you had the opportunity to vote on whether to approve of a memorandum of understanding while you were a member of Local 2384.

**RESPONSE:** Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6. Plaintiff also objects that the phrase “had the opportunity to vote” is vague and ambiguous. Subject to and without waiving those objections, Plaintiff admits that while he was a member of the Union, he was eligible to vote on whether to approve a memorandum of understanding.

**REQUEST FOR ADMISSION NO. 3:** Admit that on at least one occasion you voted on whether to approve of a memorandum of understanding while you were a member of Local 2384.

**RESPONSE:** Deny.

**REQUEST FOR ADMISSION NO. 4:** Admit that on at least one occasion you had the opportunity to vote on Local 2384’s business while you were a member of Local 2384.

**RESPONSE:** Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6. Plaintiff also objects that the phrases “had the opportunity to vote” and “Local 2384’s business” are vague and ambiguous. Subject to and without waiving those objections, Plaintiff admits that while he was a member of the Union, he voted in at least one election for the Union president.

**OBJECTIONS AND RESPONSES TO DEFENDANT CITY’S  
NON-UNIFORM INTERROGATORIES**

**NON-UNIFORM INTERROGATORY NO. 1:** Explain and describe in detail the basis for your allegation in Paragraph 65 of the Second Amended Complaint that you “do not agree with these views.”

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 3, 4, 5, 6, 7, and 8.

Without waiving these objections, Plaintiff asserts that he does not agree with release time employees’ use of release time to perform activities on behalf of the Union, including political activities, lobbying, collective bargaining, grievance processing, membership recruitment, and other activities that advance the Union’s private interests. Political activities,

lobbying, as well as certain “core issues” in the public sector, “such as wages, pensions, and benefits are important political issues” and are not viewpoint neutral. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2480 (2018). Plaintiff disagrees with having part of his compensation, which is part of total compensation under the MOU, directed to financing these activities.

**NON-UNIFORM INTERROGATORY NO. 2:** Explain and describe in detail how you are harmed by release time.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 3, 4, 5, 6, 7, and 8.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, Plaintiff asserts that he is harmed by release time because part of Plaintiff’s compensation under the MOU is being used to finance release time activities. As the City admitted, “all of the release time expenditures in the 2019-2021 MOU are paid for by all Field Unit II employees, in the form of reduced wages and benefits, whether those employees belong to the Union or not.” City’s Answer to Pls.’ Second Am. Compl. ¶ 34. Plaintiff is not a member of the Union and does not consent to “finance[ing] release time.” Second Am. Compl. ¶ 35. Because the City is forcing Plaintiff to finance release time activities as part of total compensation under the MOU, *see also id.* at ¶ 36, that Plaintiff does not consent to financing, Plaintiff’s free expression and associational rights as well as his rights under Arizona’s Right to Work statutes are harmed.

**NON-UNIFORM INTERROGATORY NO. 3:** Explain and describe in detail how you know that the termination of release time would result in an increase to your wages and benefits, as alleged in Paragraphs 34 and 70 of the Second Amended Complaint.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, 7, and 8.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, the termination of release time would result in an increase to wages or benefits because release time is charged as part of total compensation under the MOU. Under the MOU, “the cost to the City for these release positions and release hours, including all benefits, [are] charged as part of the total compensation detailed in this agreement.” MOU § 1-3(A). The City has admitted the allegation in paragraph 34 of the Second Amended Complaint that “all of the release time expenditures in the 2019-2021 MOU are paid for by all Field Unit II employees, in the form of reduced wages and benefits, whether those employees belong to the Union or not.” City’s Answer to Pls.’ Second Am. Compl. ¶ 34. Consequently, if those provisions did not exist, Plaintiff’s “wage and benefits” would not be “reduced” in order to finance them. Likewise, the City admitted that “Plaintiffs...are required to direct part of their ‘total compensation’ to finance release time under the MOU.” *Id.* ¶ 53. By forcing Plaintiffs to fund release time under the MOU, “funds that would otherwise be included in employees’ salaries and benefits are instead paid to the Union.” Pls.’ Second Am. Compl. ¶ 70.

**NON-UNIFORM INTERROGATORY NO. 4:** If you allege that you have the right or authority to dictate or challenge how the City allocates funds or makes funding decisions, explain and describe in detail the source and scope of that right or authority.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, and 6.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving those objections, Plaintiff denies that he has “authority to dictate or challenge how the City allocates funds or makes funding decisions.” In this case, the City has already determined how to allocate funding for Unit 2 employees under the MOU. As part of that allocation, the City charges “[t]he cost to the City for these release positions and release hours, including all benefits, [are] charged as part of the total compensation detailed in this agreement.” MOU § 1-3(A).

**NON-UNIFORM INTERROGATORY NO. 5:** Explain and describe in detail why you joined Local 2384.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Plaintiff further objects that this interrogatory because it exceeds the scope of permissible discovery under Rule 26(b) and is not relevant to the claims and defenses at issue in this case. The reasons why Plaintiff originally joined the Union has no bearing on whether Plaintiff agrees to finance release time activities *now* as part of total compensation under the *current* MOU.

Without waiving those objections, Plaintiff asserts that he joined the Union because he believed at the time that the Union would represent his interests as an employee.

**NON-UNIFORM INTERROGATORY NO. 6:** Explain and describe in detail why you left Local 2384.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Plaintiff further objects to this interrogatory because it exceeds the scope of permissible discovery under Rule 26(b) and it is not relevant to the claims and defenses at issue in this case. The reasons why Plaintiff left the Union has no bearing on whether Plaintiff agrees to finance release time activities *now* as part of total compensation under the *current* MOU.

Without waiving those objections, Plaintiff asserts that he left the Union because the Union did not represent his interests as an employee.

**NON-UNIFORM INTERROGATORY NO. 7:** For every memorandum of understanding that you voted on while you were a member of Local 2384, explain and describe in detail why you voted for or against approval of each memorandum of understanding.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Plaintiff further objects to this interrogatory because it exceeds the scope of permissible discovery under Rule 26(b) and it is not relevant to the claims and defenses at issue in this case. Whether and why Plaintiff did or did not vote on a previous MOU is not relevant to whether Plaintiff agrees to finance release time activities *now* as part of total compensation under the *current* MOU.

Without waiving those objections, to the best of his recollection, Plaintiff asserts that he did not vote on a memorandum of understanding while a member of Local 2384.

**NON-UNIFORM INTERROGATORY NO. 8:** Identify and describe in detail the specific “activities the Union engages in while utilizing release time” with which you disagree, as alleged in Paragraph 38 of the Second Amended Complaint.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, Plaintiff asserts that he does not agree with release time employees' use of release time to perform activities on behalf of the Union, including political activities, lobbying, collective bargaining, union recruitment, grievance processing, and other activities that benefit the private interests of the Union. Additionally, on information and belief, there are numerous release time activities that advance the interests of the Union rather than that of the City and its employees, as release time is not sufficiently tracked or monitored by the City.

**NON-UNIFORM INTERROGATORY NO. 9:** For every activity identified in your response to Non-Uniform Interrogatory No. 8, explain and describe in detail why you object to or disagree with that activity.

**RESPONSE:**

Plaintiff incorporates and reasserts general objection numbers 1, 2, 3, 4, 5, 6, and 7.

Plaintiff further objects to this interrogatory because it is vague, overbroad, harassing, unduly burdensome, and disproportionate to the needs of the case.

Without waiving these objections, Plaintiff asserts that he has not consented to the Union representing him or his interests, nor has he consented to any portion of his compensation to be used (1) to support the political views of the Union, (2) to lobby in support or opposition to legislation as determined by the Union; (3) for the Union to engage in the process of collective bargaining; (4) to recruit or retain Union members; (5) to process grievances, or (6) to engage in other activities that benefit the Union in the Union's discretion.

**RESPECTFULLY SUBMITTED** this 9th day of October 2020.

/s/ Jonathan Riches

Jonathan Riches (025712)

Timothy Sandefur (033670)

Jacob Huebert (035127)

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**CERTIFICATE OF SERVICE**

SERVED via email & regular mail this 9th day of October 2020, to:

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**VERIFICATION**

I, Mark Harder, under penalty of perjury, state that the foregoing Responses and Objections to City Defendants' First Set of Discovery Requests are true to the best of my knowledge, information and belief.

Dated this \_\_\_\_ day of October, 2020.

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Mark Harder