ARIZONA SUPREME COURT

MARK GILMORE; and
MARK HARDER,
Plaintiffs / Appellants

v.

KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; and CITY OF PHOENIX,
Defendants / Appellees,

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2384,
Intervenor-Defendant / Appellee.

Arizona Supreme Court
No. CV-23-00130-PR

Arizona Court of Appeals Div. One
Case No. 1 CA-CV 22-0049

Maricopa County Superior Court
Case No. CV 2019-009033

INTERVENING DEFENDANT/APPELLEE'S OPPOSITION TO PLAINTIFFS/APPELLANTS MARK GILMORE AND MARK HARDER'S PETITION FOR REVIEW

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I. INTRODUCTION

On the basis of this Court's established precedent and the record currently before it, the courts below each correctly rejected Petitioners' contention that there were state constitutional or statutory violations. The record demonstrates that the Petitioners are not forced to subsidize and associate with the American Federation of State, County and Municipal Employees, Local 2384 ("AFSCME" or "Union") by virtue of City-funded paid release time.[1] The Court of Appeals also rejected Petitioners' argument that City-funded release time violates Arizona's Right to Work laws. The record is uncontroverted that Petitioners are not subsidizing the Union with their own funds nor are they being forced to associate with it. Plaintiffs themselves confirmed this through their testimony. The Court of Appeals panel unanimously rejected their claims that the release time provisions violated the Arizona Constitution's right to expression and association and Arizona's Right to Work laws.

The Court of Appeals majority also rejected Petitioners' Gift Clause (Ariz. Const. art. IX, § 7) claim based on undisputed facts establishing no violation of the Arizona Constitution. Release time furthers important purposes for the City, its

[1] The release time is negotiated at arm's length between the City of Phoenix ("City") and the Union and set forth in a Memorandum of Understanding ("MOU") pursuant to the requirements of the City of Phoenix Meet and Confer Ordinance, Phoenix City Code ("P.C.C.") § 2-209 *et. seq.* ("Ordinance").The Ordinance is set forth in the Union's Answering Brief and Appendix on Appeal at UAPP. 132-146.

citizens and its employees. The City receives a direct benefit in exchange for the dollars spent on paid release time during the MOU term. Citing *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346 (1984); *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016) and *Schires v. Carlat*, 250 Ariz. 371, 375, ¶ 17 (2021), the Court of Appeals Opinion correctly applied the law and this Court's precedents based on the undisputed material facts in the record and found no Gift Clause violation.

There are no sound reasons for this Court to grant review to consider issues previously decided multiple times by this Court. There is ample precedent on the issues; there is no basis for limiting or overturning this Court's clear precedent and no conflicting Court of Appeals decisions, and the case was correctly decided based on the record and the law. *See* Ariz. R. Civ. App. P. 23(d). The Union requests that the Petition for Review be denied.

II. THIS COURT SHOULD DENY REVIEW

A. Stare Decisis Militates Against Granting the Petition for Review

There is no reason for this Court to grant review to consider legal issues previously decided on multiple occasions by this Court – especially given the undisputed facts in the record. This Court has recognized that public policy is advanced through reliance on prior established precedent. "The stare decisis doctrine cautions courts against overruling a prior opinion unless the reasons underlying it no longer exist or the opinion was clearly erroneous or manifestly wrong. The doctrine is rooted in the public policy that people should be able to rely on judicial precedent

to know their rights and order their conduct accordingly." *Laurence v. Salt River Project Agric. Improvement & Power Dist.*, 255 Ariz. 95, ¶ 17 (2023) (citations and internal quotations omitted). This Court has also recently stated, "[w]e are mindful of the importance of stare decisis and do not lightly overrule precedent and do so only for compelling reasons." *Arizona Free Enter. Club v. Hobbs*, 253 Ariz. 478, 484, ¶ 17 (2022) (citations omitted). Furthermore, this Court has observed, from time to time that "any departure from stare decisis 'demands special justification.'" *Laurence,* 255 Ariz. at 95, ¶ 18 (citing *State v. Hickman*, 205 Ariz. 192, 200, ¶ 37 (2003) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); *Young v. Beck*, 227 Ariz. 1, 6, ¶ 22 (2011) (stating the Court will not overturn prior case law for "mere disagreement" but "will overturn long-standing precedent only for a compelling reason" (quoting *State v. McGill*, 213 Ariz. 147, 159, ¶ 52 (2006)). There is no reason, let alone a compelling one, to overturn prior precedent upon which the Court of Appeals relied.

Mere belief that a case was wrongly decided does not warrant granting review. "While the phrase 'special justification' defies simple definition, it does require more than that a prior case was wrongly decided." *Hickman*, 205 Ariz. at 200 ¶ 37, (citing *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring)). "But it is not just the narrow holdings of our prior cases that are entitled to respect under the doctrine of stare decisis. Rather, deference should also properly extend to the Court's core rationale, the reasoning essential to the result in the prior case."

Town of Gilbert Prosecutor's Office v. Downie ex rel. Cnty. of Maricopa, 218 Ariz. 466, 473, ¶ 32 (2008) (Hurwitz, J. dissenting) (citing *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 66–67 (1996)).

The legal principles this Court has repeatedly stated for adhering to precedent is present here. *Wistuber* and *Cheatham* are longstanding precedent and as the Court of Appeals found, *Cheatham* is in many ways substantially similar to the facts here. This Court has revisited *Cheatham* and clarified its holding in *Schires*. Petitioners present no compelling reason for revisiting either decision, especially given the undisputed facts in this record. Both the Superior Court and the Court of Appeals adhered to this Court's instructions in *Schires* and applied those principles to the undisputed facts in the case. The fact that Petitioners are unhappy with the outcome does not warrant review by this Court.

B. Facts Relevant to the Court of Appeals Opinion

The facts and procedural history relevant to the Court of Appeals Opinion ("Op.") are set forth in the Opinion, at ¶¶ 2-6, not in the misleading and mischaracterized assertions set forth in the Petition which contain glaring omissions of undisputed material facts upon which the Court of Appeals based its well-reasoned opinion. The Court of Appeals recites the facts as follows:

> Individuals who work for the City are in different units for collective bargaining. Unit II consists of employees engaged in skilled trades, such as mechanics, electricians and maintenance workers. *See* Phoenix City Code Art. XVII (P.C.C.) § 2-212(A)(2)(b) (2023).1 The City's ordinances recognize the right of units to organize and designate an

> authorized employee representative to collectively bargain with the City for "wages, hours and working conditions." P.C.C. §§ 2-210(2), 2-209(2), 2-214(B). Starting in 1976, the Union has been Unit II's authorized employee representative. During that time, the Union has acted as the exclusive representative for all Unit II employees, no matter if they belong to the Union. Of the approximately 1,500 employees in Unit II, 671 are Union members.
>
> Every other year, the City and the Union collectively bargain the terms of an agreement for Unit II employees. The resulting collective bargaining agreement is set forth in a Memorandum of Understanding, or MOU. An MOU contains the terms of employment for Unit II employees, including wages and benefits. After the City and the Union agree to an MOU, it is submitted to the City Council for approval. P.C.C. §§ 2-210(12), 2-215(C). If the City Council approves, the MOU becomes effective. P.C.C. § 2-215(C).
>
> In 2019, the City and the Union agreed to, and the City Council approved, an MOU for Unit II employees for July 1, 2019, to June 30, 2021. This MOU, which is about 60 pages long, includes provisions governing what the parties call "release time." *See* MOU § 1-3(A). "While on release time, Union members and other Unit II employees are released from their normal job duties but still paid at the same rate(s) of pay by the City" to perform other activities. The MOU states release time provides "an efficient and readily available point of contact for addressing labor-management concerns" between the City and the Union.

Op. at ¶¶ 2, 3, 4.

Overlooking these facts, Petitioners attempt to sidestep a material undisputed fact that is succinctly set forth in the Opinion (in which the dissent concurred) regarding the funding of release time:

> The MOU in *Cheatham* said release time "has been charged as part of the total compensation contained in this agreement *in lieu of wages and benefits*." 240 Ariz. at 319 ¶ 14 (emphasis added). The italicized language is not contained in the MOU at issue here. Moreover, in *Cheatham*, "[o]ne of the City's negotiators testified, without

> contradiction, that if the City had not agreed to pay for release time, the corresponding amounts would have otherwise been part of the total compensation available" to the applicable City unit. *Id.* at 318–19 ¶ 14. In this case, there is no such evidence in the record.

Op. at ¶ 17.

Completely omitting any acknowledgement of these facts and arguing that the Court of Appeals was somehow being merely "formalistic" or "overly technical." Pet. at 10, Petitioners attempt to entice this Court to find that the employees pay for release time by relying on *Cheatham* and the fact that the MOU in *Cheatham* said release time was paid "in lieu of wages and benefits." Op. at ¶ 15. But the MOU between AFSCME and the City is the MOU at issue here and simply cannot be construed as suggesting that Petitioners somehow pay for release time. The absence of the phrase "in lieu of wages and benefits" in the MOU at issue here, coupled with Petitioner's numerous admissions cited above, clearly demonstrate that release time is funded with **City** money to which Petitioners never had or have any claim, interest or expectation as the Court of Appeals held. Each Petitioner has admitted that the City funds release time with the City's own money, not theirs. Op. at ¶ 15. They also admit the City can spend its money however the City decides. *Id*. They further admitted under oath that no money was deducted from the gross pay they receive in the form of their paychecks and that if City funded release time were to cease, they would have no claim for increased wages. *Id*. at ¶ 14; Union's Answering Brief and Appendix on Appeal at UAPP. 171-174 ¶¶ 111-125, 136.

Petitioners' arguments that they had more vacation pay under an earlier, expired MOU also provides no support for their argument that they are paying for release time. Their argument attempts to transform a benefit in a single labor agreement into a permanent entitlement. This is not the law. As much as the Union would like to always retain benefits and wages for its constituents, it acknowledges that the City was under no obligation to permanently provide the same number of vacation hours from prior MOUs. The Court of Appeals correctly relied on *Smith v. City of Phoenix*, 175 Ariz. 509, 514–15 (App. 1992) and *Ariz. State Pers. Comm'n v. Beard*, 27 Ariz. App. 534, 536–37 (1976) which held that public employees do not have contractual rights to past compensation. *See also Abbott v. City of Tempe*, 129 Ariz. 273, 279 (App. 1981). Failure to include the eight hours of additional vacation pay in any subsequent MOU does not mean Petitioners subsidize release time in any manner and the appellate court was correct in so holding. Op. at ¶ 18.

C. The Court of Appeals Correctly Determined that Petitioners' Free Speech and Association Rights Have Not Been Abridged

The Court of Appeals correctly held that Petitioners are not subsidizing release time, and accordingly that there is no compelled speech. Op. at ¶ 14. Petitioners conceded at oral argument that if the City is paying for release time, there are no free speech and right to work claims. *Id.* at ¶ 19. The Court of Appeals Opinion expressly found, Petitioners claims fail as a factual matter because they are not paying for the release time:

> There is ***no factual support*** that the City requires non-Union members to associate with the Union, as plaintiff Harder conceded during his deposition. Both plaintiffs 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.

Op. at ¶ 21 (emphasis added).

There is no reason to revisit the Court of Appeals decision. It was correct on both the facts and the law and needs no further clarification. As the Court of Appeals correctly held, unlike the non-union employees in *Janus v. AFSCME Council 31*,138 S. Ct. 2448 (2018), who had payments deducted directly from their earned wages, these Petitioners "admit they have received all wages and benefits promised them . . . [and] are not forced to make any payment to the Union, in any respect." Op. at ¶ 14. This undisputed fact is fatal to Petitioners' claim of compelled speech.

The Court of Appeals held that the Petitioners' claim that they are somehow forced to associate with the Union fails for the same reason (i.e., lack of any evidence that employees in Unit II are subsidizing paid release time and Petitioners' admission under oath that they are not). Op. at ¶ 20. Without the nexus that Petitioners subsidize release time, there is no basis to claim they are associated with the Union, and they point to nothing in the record to the contrary. *Id.* at ¶ 21.

Petitioners attempt to divert the Court from the lack of any factual support by once again repeating their rejected argument that use of the words "total compensation" in the MOU in describing the funding of release time must mean Petitioners' own compensation. Petition at 11. But this assertion is unsupported by

the record. They also try to complain that the Union engages in political activity. But as the Court of Appeals correctly found, this does not mean Petitioners' rights were violated and provides no basis to grant review of the Court of Appeals' well-reasoned Opinion.2

Finally, the appellate court further explained its straightforward analysis that as with their speech and association claims, the Petitioners' right to work claims fail because they are not required to subsidize or join the Union as a condition for working for the City of Phoenix. Op. at ¶ 22. In fact, neither Mr. Gilmore nor Mr. Harder lost his employment when each voluntarily dropped his union membership. Op. at ¶ 22; see also Union's Answering Brief and Appendix on Appeal at UAPP. 175-176 ¶¶ 143-44, 151.

D. There Is No Gift Clause Violation Because City Funded Release Time Serves a Legitimate Public Purpose That Provides a Direct Benefit to The City, Its Citizens and City Employees

Petitioners acknowledge that both the superior and appellate courts were required to take a panoptic view of the release time provisions of the MOU. Petition at 13. They then proceed to apply an overly broad dictionary definition and a 1991 appellate court opinion[3] to an incomprehensible hypothetical about a nonexistent

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2 In fact, since this case was initiated, the Arizona Legislature has barred political activities on release time for any MOU enacted after Sept. 24, 2022 which reflects the fact that this is a legislative concern, not a judicial one. *See* SB 1166 (2022) and A.R.S. § 23-1431.

[3] Petitioners cite *Arizona Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356

gift from the City of a personal residence to the Union's president from which he might conduct release time business. Petition at 14. Such a comparison with the facts of this case grasps at straws and is a completely fantastical parade of horribles. This Court deals with the actual facts of a case – and does not accept review based on hypothetical red herrings. This case was decided on the facts and accords with Arizona Supreme Court precedent. There is nothing to suggest it will lead to the absurd result Petitioners conjure.[4]

Furthermore, Petitioners refuse to acknowledge that it is *their* burden to establish a Gift Clause violation – one at which they failed altogether. *Schires*, 250 Ariz. at 375 ¶ 17 ("The party asserting a Gift Clause violation bears the burden of

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(App. 1991), a 1991 appellate court decision. The quoted language actually appears at 172 Ariz. at 368. Neither *Hassell* nor the *Merriam-Webster's Collegiate Dictionary* definition of "panoptic" which simply means looking at all facts and circumstances alter this Court's two-step analysis set forth in *Cheatham* and *Schires*.

[4] Petitioners' "what if" example is meritless. Take, for example, City employees (like firefighters) who spend days at a time on call, sometimes sleeping in City facilities like firehouses so they can be available when emergencies arise. If the City were to purchase a $1 million residence to be used by those workers instead so they could reduce response time critical to addressing life threatening emergencies, there would be no constitutional issue -- so long as the purchase did not "far exceed" the actual value of the home. As *amici* Pima County pointed out in its amicus brief in *Cheatham* (using luxury cars as examples), governmental entities are tasked with deciding what public purposes to pursue, the means by which to pursue them, and the amount of public resources to devote to that pursuit. The Gift Clause requires only that the public entity not pay substantially more than the going rate for whatever it has decided to buy. This is an objective standard and the lower court and Court of Appeals properly applied that standard in light of the facts. Dissatisfied taxpayers may seek a remedy, not in court, but at the polls.

proving it.") (citing *Wistuber*, 141 Ariz. at 350). The lower court correctly observed that Petitioners "had the burden to show the City's cost of release time under the MOU far exceeds the value the City receives [and] failed to do so. Nor did they claim that more discovery was needed before the superior court could decide the competing motions for summary judgment." *Id.*

The Court of Appeals Opinion cites numerous cases relative to the *Schires* first-step analysis that release time provision similar to those present here serve a public purpose including this Court's decision in *Cheatham*, considering and expressly rejecting Petitioner's reliance of on *Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319 (1986), for the proposition that some monitoring or oversight of release time activity is constitutionally required. Op. at ¶¶ 27-28. Even if there were such an obligation (and there is none), the record reflects that City employees on Union release are not free to run rampant as Petitioners imply. They are subject to the same rules, regulations and policies as any City employee and have affirmative obligations to the City and its employees in Unit II by virtue of the MOU and Ordinance. *E.g.*, Union's Answering Brief and Appendix on Appeal at UAPP. 76 MOU §1-3(A)(1), UAPP. 78 MOU § 1-3(A)(3), UAPP 79 MOU § 1-3(B) at 9, UAPP. 159-160 ¶41. In applying a panoptic view, the Court of Appeals considered these obligations both in terms of furtherance of a public purpose and what the City receives in return for funding paid release time. Op. at ¶¶ 2-3, 28; *see also* UAPP 157, 160, 162-63 ¶¶ 26-27, 41-45, 54.

The record amply supports the Court of Appeals' careful application of *Schires* and its findings that Petitioners failed to meet their burden on the second prong of the analysis to show a gift clause violation. Op. at ¶¶ 29-35. The Court of Appeals expressly found that the record supports a finding that the City receives adequate consideration in exchange for the dollar cost of funding release time. *Id*. at ¶ 39-41. The Petitioners have likewise not shown any reasons for the granting of their Petition for Review.

III. NOTICE UNDER RULE 21

Pursuant to Ariz. R. Civ. App. P. 21(a), A.R.S. § 12-341.01 and A.R.S. § 12-341, Appellants respectfully request an award of attorneys' fees and costs.

CONCLUSION

For the foregoing reasons, Intervening Defendant/Appellee, AFSCME Local 2384, respectfully requests that this Court deny Mark Gilmore and Mark Harder's Petition for Review.

Respectfully submitted this 19th day of July 2023.

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