IN THE SUPREME COURT
STATE OF ARIZONA

MARK GILMORE; and MARK HARDER, Plaintiffs / Appellants, v. KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; and CITY OF PHOENIX, Defendants / Appellees, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2384, Intervenor-Defendant / Appellee.	Supreme Court No. CV-23-0130 PR Court of Appeals, Division One No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

PLAINTIFFS/APPELLANTS' RESPONSE TO AMICUS BRIEF OF HEIDI SHIERHOLZ

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INTRODUCTION

To start with an important correction: Amicus Shierholz repeatedly claims that Plaintiffs-Appellants have "concede[d]" that the City benefits from release time. Amicus Br. at 6, 11. **That is not true.** The document Amicus is citing to, City App.43 (that is, page 43 of the Appendix to the City's Response to the Petition for Review) ¶ 40, is a Joint Statement *by the City and the Union.* It was never agreed to, or signed or conceded in any way by, Plaintiffs-Appellants.

As to Amicus's substantive argument: she contends that release time benefits the City by "providing employees with an institutional voice" so that they can "communicate" with management, and that this "enhances productivity" to some unspecified degree. Amicus Br. at 8. That, however, is nothing more than the standard argument in favor of any subsidy: that public financial aid to a private entity will improve the economic climate in some broader sense. And the Arizona Constitution forbids subsidies, Ariz. Const. art. IX §7. Amicus's argument is precisely the one *Schires v. Carlat*, 250 Ariz. 371 (2021), rejected, because under the Gift Clause, an expenditure of public funds must obtain contractually obligatory public benefits, the objective, fair-market value of which is proportionate to the expenditure. *Id.* at 376 ¶14. The Court must compare "what the public is giving and getting" from the challenged transaction, *id.*, and that comparison depends on *actual* values and *actual* promises, not on "theory" about

what "should" result from the expenditure. Amicus Br. at 8. The latter, in fact, are precisely the sort of "anticipated indirect benefits" that *Schires* said aren't consideration for Gift Clause purposes. *Id.* at 376 ¶14.

Not only does Amicus rely (entirely) on indirect benefits and on guesswork about the value they "ought" to result in, Amicus Br. at 8, but in so doing, she ignores the *actual* evidence in this case, which shows that the MOU does *not* bind release-time employees to the kinds of performance Amicus refers to, and that these employees *actually* spend their time performing private union business, including lobbying the government and making political endorsements—not "enhanc[ing] productivity." *Id*. What the MOU *actually* says, and what Petitioners *actually* argue show why this Petition should be granted and the decision below reversed.

I. Amicus offers exactly the kind of "indirect benefit" arguments *Schires* rejected.

Release time is a subsidy whereby the public is required to fund the activities of a private entity: the Union. Supporters of subsidies *always* claim that in the long run the general public will benefit from the subsidy in some broad sense—for example, that giving taxpayer money to a railroad will ultimately improve the economy, *see* *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973)—and that's the argument Amicus makes here. But that argument falls short of what the Gift Clause requires because the Clause forbids all subsidies.

The government may, of course, pay private entities for *services*—but *Schires* says that in such a circumstance, the government must obtain direct and objectively quantifiable benefits that are proportionate to the expenditure. Only direct, quantifiable benefits count as "consideration" for purposes of that test. 250 Ariz. at 378 ¶20. But Amicus does not cite direct, quantifiable benefits—she cites only the kind of anticipated, indirect benefits that don't count. *Id.* at 376–77 ¶¶14–16. Put simply, Amicus argues that by "providing employees with an institutional voice," paid release time "'*can* alleviate various forms of [labor] strife,'" which "*facilitates* the realization of [social] benefits," and this, in turn, "'*should* raise productivity.'" Amicus Br. at 2, 8, 10 (citations omitted; emphases added). As the italicized terms make clear, these are "anticipated economic [benefits]"—i.e., benefits that the contracting parties *hope* will result from the transaction—of the type *Schires* found insufficient. 250 Ariz. at 377 ¶17. Such benefits are not quantifiable. The City has never tried to quantify them, APP.035 ¶65, and neither does Amicus; she only guesses at their value. *See* Amicus Br. at 15. Indeed, Amicus can't even describe them except in vague terms like "should" and "ought to." *Id*. at 8. They are exactly the sort of contract terms that were rejected in *Schires* because they are "too indefinite to enforce, much less value." 250 Ariz. at 378 ¶21.

And although Amicus offers a general theory of release time, she ignores or misrepresents the actual terms of the MOU. The indirect benefits she discusses—

such as the resolution of disputes through fair representation—are achieved here (if at all) through obligations imposed on the Union by pre-existing law, *not* by duties imposed by the MOU. That means they're the kind of pre-existing duties that *Schires* also said don't count as consideration for Gift Clause purposes. *Id.* at 377 ¶18.

In *Schires*, the pre-existing duty was the developer's duty to pay taxes. Here, it's the duty of fair representation imposed by the Phoenix City Code. *See* Amicus Br. at 2–3, citing Phx. City Code § 2-217(E). Amicus says, "the union here is obligated to represent fairly employees who seek its assistance," and that this "[is] consideration," Amicus Br. at 12, but that obligation is a pre-existing legal duty, and "[a] promise to do something which a party is already legally obliged to do is no consideration." *J. D. Halstead Lumber Co. v. Hartford Acc. & Indem. Co.*, 38 Ariz. 228, 235 (1931).

Amicus also goes on at some length about the general social and economic benefits of labor unions in general, but this, too, is neither relevant nor at issue here. Amicus Br. at 2–3. What is at issue is whether the City, in spending hundreds of thousands of dollars on release time, receives a quantifiable, contractually-mandatory benefit in exchange that has an objective, fair-market value that is proportionate to that expenditure.

Amicus points out that a separate section of the MOU (not the release-time section) establishes a committee with the goal of "'facilitat[ing] improved labor management relationships'" and "attempt[ing] to resolve problems," Amicus Br. at 3 (quoting MOU §2-3), but "attempting to resolve problems" is just the sort of vague, aspirational commitment that the private business made in *Schires*, 250 Ariz. at 378 ¶21 (to "participat[e] in meetings with business prospects" and "marketing activities."). That was inadequate because it was not a direct, quantifiable value. *Id.* The same is true here.

Moreover, nothing in the MOU requires release-time employees to serve on that committee, or to participate in *any* of the other processes Amicus refers to. In fact—though Amicus never mentions it—**the MOU contains no provision whereby the City ensures that *any* of the purposes that Amicus claims release time serves are actually being served**. APP.039 ¶109. It imposes no obligations on release-time employees except for one: a promise to "engage in lawful union activities." APP.050 (MOU §1-3(A)(1)). The City doesn't monitor what release-time employees do, or direct their activities, or penalize those who fail to serve the laudable goals Amicus mentions—because the City simply doesn't control them at all. Release-time employees provide no accounting of any kind to the City about how they spend release time. APP.034 ¶48. They're left to themselves.

What *do* they do with their time? The evidence is clear: they engage in private union business at their own discretion, which includes lobbying the government for and against passage of legislation, endorsing candidates for office, recruiting new members, and attending union conferences and meetings, all at public expense. *See* APP.036 ¶69 through APP.039 ¶106.

The evidence also belies Amicus's generalities about the theory that release time increases efficiency by reducing labor strife. Consider: between 2014 and 2016, Phoenix ended release time for Unit 2 (the group of employees at issue here). Yet the record shows no evidence that this caused any decrease in productivity or labor unrest. APP.041 ¶¶120–21. Release time has also been eliminated with respect to other unions in Phoenix, and in neighboring cities, and again, there's no evidence that this led to labor strife or any loss of productivity. APP.041–42, ¶¶129, 131, 133–34, 136–37.

It's blackletter law that courts In Gift Clause cases should focus on "'the *realities* of the transaction.'" *Turken v. Gordon*, 223 Ariz. 342, 345 ¶8 (2010) (citation omitted, emphasis added). But Amicus ignores the realities and focuses instead on hypotheses and scholarship about what release time "should" and "ought to" do, Amicus Br. at 8, as well as a false claim that Plaintiffs-Appellants "*conceded*" something they never conceded. *Id.* at 11.

Yet even if the MOU *did* require release-time employees to perform the duties to which Amicus refers, and even if that did "facilitate[ ] the realization" of "benefits," *id*. at 10, this Court still cannot evaluate the *adequacy* of that consideration, because those purported benefits are "too indefinite to enforce, much less value," *Schires*, 250 Ariz. at 378 ¶21, and the City, in any event, has never even tried to determine what value, if any, it gets in return for the money it gives for release time. APP.035 ¶65.

Schires makes clear that the consideration test relies on objectively quantifiable fair-market values. 250 Ariz. at 378 ¶21. Yet the City Manager testified that release time has no monetary value, SAPP.008 at 23:16–21, and other City witnesses uniformly testified that the City has never conducted any research to assess the value, if any, of the purported benefits of release time. SAPP.009 at 26:5–10; APP.119 at 54:5–11. The best Amicus can do to fill that void is to say that, theoretically, "providing employees with an institutional voice…'*should* raise productivity.'" Amicus Br. at 8 (emphasis added). But that's too indefinite to establish the kind of "fair market value of [the] obligation" that *Schires*' consideration analysis necessitates. 250 Ariz. at 378 ¶21.

In the end, Amicus is simply arguing that release time probably helps improve workplace efficiency in the long run, and that this results in unspecified, unquantifiable benefits to the City. That's just the argument this Court rejected in

Schires, where the city argued that improving the business climate in Peoria would benefit the public. That did not justify the unconstitutional subsidy in that case, and it can't justify it here.

II. Subsidies always involve circumstances in which the government *thinks* the public payment will result in public benefits.

A common misconception, which Amicus appears to share, holds that a payment cannot be a subsidy if the government entity making that payment thinks it will result in public benefits. In fact, a subsidy *only* exists when the government thinks that financial aid to a private recipient will result in public benefits.

The Second Edition of *Black's Law Dictionary*, published the same year that the Arizona Constitution was written, defined "subsidy" as a payment to a private entity motivated by the government's belief that the entity is "likely to be of benefit to the public." *Black's Law Dictionary* 1117 (2d ed. 1910). *See also City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 362 (1974) (defining subsidy as "a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise *deemed advantageous to the public*." (emphasis added; citation omitted)). In other words, the fact that the government believes the public will benefit from the expenditure is *part of* the *definition* of "subsidy." And that means it would be fallacious to hold that an expenditure isn't a subsidy if the government thought it would serve a public benefit. On the contrary, such a belief tends to prove it *is* a subsidy.

This is important because the Gift Clause forbids public funding of private entities "by subsidy or otherwise." Ariz. Const. art. IX §7. Thus, Amicus's contention that release time indirectly "enhances productivity," Amicus Br. at 8, cannot resolve the question of whether it's a subsidy prohibited by the Gift Clause.

That's precisely what *Schires* recognized when it said that courts should apply non-deferential scrutiny to the question of whether the government is paying for a service that is proportionate to what the government is receiving. 250 Ariz. at 378 ¶23. That comparison is how the Court differentiates between the legitimate purchase of services and the unconstitutional subsidization of a private party. And that comparison depends on whether the MOU includes actual obligations that have quantifiable market value comparable to the amount of the expenditure. *Id.* at 376 ¶14. That alone ensures that the government is *buying* something, which is allowed, rather than *subsidizing* something, which is not.

While Amicus cites some scholarship about the theory of release time, there is also research that shows that instead of improving workplace efficiency, release time actually forces employers to bear the "expenses otherwise borne by unions." Fisk & Malin, *After Janus*, 107 Cal. L. Rev. 1821, 1845 (2019). Far from being efficient, this practice simply conceals costs by shifting them onto taxpayers and other public employees. . Meanwhile, other scholars have shown that assessing the predictions of efficiencies resulting from release time is impossible where—as

in this case—released employees are not required to account for their time, and "may go years without performance evaluations." Bullock, *Official Time as A Form of Union Security in Federal Sector Labor-Management Relations*, 59 A.F. L. Rev. 153, 204 (2007).

In fact, Amicus cites only *one* article that actually addresses release time: Reilly & Singla, *Union Business Leave Practices in Large U.S. Municipalities: An Exploratory Study*, 46 Pub. Personnel Mgt. 342 (2017). But that article concludes: "Finally, this study does not address the efficacy of [release time] as a labor-management smoothing technique." *Id.* at 365. In other words, the article does not even attempt to substantiate whether release time actually improves workforce efficiency. The reason, the authors say, is because of the lack of transparency. *See id.* at 346, 360. That lack of transparency is obviously present here, since released employees are not required to report what they do on release time, or to submit to any kind of evaluation at all. Without that information, the authors say, it is impossible to assess whether release time "result[s] in cost savings, or [is]…simply [a] nontransparent transfer[] to union[s]." *Id.* at 365. Indeed, Petitioners' expert in this case, a 35-year labor relations specialist who worked for both municipal governments and government labor unions, found that assertions "that release time will improve employee relations, reduce conflict, and save the employer money…[are] not supported by fundamental principles of labor relations."

Appellants' App. to Opening Br. at 206 (Ariz. App. Mar. 21, 2022). Instead, [r]elease time contradicts the normal employee/employer relationship," and "increases the expense to the City" in grievance actions and other areas, such that "labor relations problems" are *increased*, not decreased, as a result of paid release time. *Id.* at 206, 209.

For all Amicus' "theory" and "research" about how release time "ought to" reduce City employment costs, Amicus Br. at 8, neither Amicus nor the Defendants-Respondents have offered *any* objective fair-market valuations that can serve as the basis for the "give" and "get" comparison *Schires* mandates.

III. Amicus misrepresents what the MOU says.

Amicus says that the MOU "'release[s]' employees…[to] work to effectuate the MOU for the benefit of all employees." Amicus Br. at 5. But the MOU doesn't do that. It releases employees—but does *not* require them to work to effectuate the MOU, or to do any other particular thing whatever. It simply releases them. And, as noted above, the record shows that they spend their time on other things: namely, private union business.

Amicus also argues that the MOU requires release-time to "participate" in "important committees and task forces," Amicus Br. at 5 (citing MOU §1-3(A)(1)), which it likens to the arrangement upheld in *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346 (1984). But consider what this MOU actually says,

APP.051, and that argument collapses. It describes these "committees and task forces" as "citywide task forces and committees, Labor - Management work groups, and a variety of Health and Safety committees." *Id.* That is too vague to qualify as the kind of consideration the Gift Clause requires. What "task forces" and "committees" must release-time employees participate in? For how long? What counts as "participation"? The MOU does not even identify any particular committees (it just says there's a "variety" of them), let alone how many of them release-time employees must serve on, or for how long, or what tasks they must undertake, or how they should report their time.[1] And in any event, the Union's release time employees receive an *additional* 448 hours of "straight time in…[their] compensatory time bank[s]" for these ambiguous and modest activities, even though those employees are already on paid *full-time* release from the City. APP.051.

In *Wistuber*, by contrast, the union president was contractually obligated to "provid[e] information to a number of groups, meet[] monthly and log[] time with the Assistant Superintendent for personnel." 141 Ariz. at 348. She had to "[a]ttend school Board meetings," and spend at least 15 hours per week once every two weeks in meetings with the Assistant Superintendent. *Id.* at n.3.

[1] Again, they are not, in fact, required to report their time at *all*. APP.034 ¶48.

This MOU contains no such specificity. It doesn't require any particular number of hours, or any log, or the provision of information. It doesn't even define what it means by "task forces and committees." APP.050. It also gives examples of common (but not mandatory) release-time activities, which include "attend[ing] Union…meetings" and "participating in collaborative labor-management initiatives." *Id.* These terms are broad enough to encompass virtually anything. In *Schires'* words, they "may be too indefinite to enforce, much less value." 250 Ariz. at 378 ¶21. And they are *discretionary* on the part of the Union. They are certainly not the kind of detailed duties involved in *Wistuber*.

In *Schires*, the private business's promise to "participate in economic development activities" was too vague to qualify as consideration, in part because the contract "[did] not define those 'activities,' other than to state that they include 'the development of customized work force development plans…' and 'participation in meetings with business prospects…and marketing activities.'" 250 Ariz. at 378 ¶21. This Court said that did not count as consideration *at all* because it "[did] not define the duration of this commitment, how many meetings must be attended, what developing plans and programs entails or how many programs [the business] must prepare, or what is meant by 'marketing activities.'" *Id.* Here, the agreement is even vaguer.

In short, what Amicus calls obligations under the MOU are actually too

nebulous to even impose enforceable obligations under ordinary contract law, let alone under the Gift Clause's constitutional standard. They're described with "insufficient detail to permit valuation," *id.*, and cannot satisfy the "give" and "get" test of *Schires*.

IV. Even if the MOU satisfies the Gift Clause, it violates the freedom of speech.

Even if the MOU does serve "labor peace," Amicus Br. at 10 (citation omitted), in a way that is proportionate in terms of objective fair-market value to the expenditure of public money, that's not the end of the case. Those funds are compensation to the Petitioners, and spending those funds to engage in private union activities, such as contract negotiations, grievance procedures, lobbying the government and endorsing political candidates, as the release-time employees do (APP.036 ¶69 through APP.039 ¶106), violates Petitioners' speech and association rights as discussed in Section I of their Petition. *See further Janus v. AFSCME*, 138 S. Ct. 2448, 2465–66 (2018).

In *Janus*, the Court *accepted* arguendo that "labor peace" is a sufficient state interest for First Amendment[2] purposes. But it found that the compelled subsidization at issue there was still unconstitutional, because there were "means"

[2] Petitioners invoke only their state constitutional rights here, but *Janus*'s protections are subsumed by Arizona's broader constitutional protections. *See* Petition at 11–12.

of accomplishing that goal that were "'significantly less restrictive of associational freedoms.'" *Id.* at 2466. The proof was that several states and the federal government did not require compulsory subsidization of unions and yet they had experienced no "pandemonium." *See id.* at 2465.

The proof here is even more direct and compelling. When Phoenix ended release time for Unit 2 between 2014 and 2016, it experienced no "inefficiencies in the workplace" or "[harm to] morale" or "discontent" among employees. *Compare* APP.041 ¶¶120–21 *with* Amicus Br. at 11. Likewise, other unions don't get release time, and there's no evidence this has disrupted labor relations. APP.041–42 ¶¶120–21, 129, 131, 133–34, 136–37. Or, when asked whether "the City was able to come up with an alternative means to serve the purported benefits of release time through the donated bank of hours?", the Phoenix City Manager testified, "[W]e made it work." SAPP.012 at 58:5–12. Thus, by *Janus*'s reasoning, compulsory subsidization is broader than necessary—and violates Petitioners' speech and association rights.

Naturally, Amicus ignores all that, but this Court cannot.

CONCLUSION

The petition should be *granted*.

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