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' SUPPLEMENTAL BRIEF

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INTRODUCTION

The City of Phoenix ("City") operates a government program called "release time," whereby City employees are paid their normal salary *not* to perform the government jobs they were hired to perform, but instead to work exclusively for the American Federation of State, County, and Municipal Employees, Local 2384 ("AFSCME" or "Union"), a private labor organization. While on release time, these government employees engage in political and lobbying activities, recruit new members to AFSCME, file grievances against the City, participate in Union meetings, and engage in a wide range of other activities that exclusively serve the Union's private interests, not those of the City, its employees, or the tax-paying public.

To emphasize: although "released" employees are *working* for the Union, the Union does not pay for them. The Memorandum of Understanding ("MOU") between the City and the Union says that other employees—including non-Union members like Appellants here[1] – pay for release time as part of their "total compensation" That means Appellants are forced to pay for release time out of their salaries—which means release time violates Appellants' rights against compelled speech and association, as well as this state's Right to Work protections. But after this case was filed, the City started arguing (contrary to the express terms of the MOU) that release time is funded *not* out of compensation to

[1] Only 671 of the approximately 1,542 Unit 2 employees—less than 44 percent—belong to the Union and pay Union dues. APP.029 ¶ 7.

workers, but out of the City's own funds. But if *that's* true, release time is still unconstitutional—because it violates the Gift Clause.

Either way, the practice of release time is an illegal affront to the rights of government workers and taxpayers in this state. This Court should declare it so.

ARGUMENT

I. Appellants are compelled to fund release time.

Nearly all of the City's argument hinges on the claim that Appellants do not pay for release time. This is legally and factually incorrect for three reasons: (1) the MOU's plain language says release time is funded "as part of … total compensation," which means paid for by money appropriated for the services of Appellants and other City employees. APP.050 § 1-3(A); (2) this Court squarely held in *Cheatham v. DiCiccio*, 240 Ariz. 314, 318–19 ¶ 14 (2016), that release time is paid for by each *individual* employee; and (3) the City and the Union have *always* treated release time as individual employee compensation.

That release time is paid for out of Appellants' compensation is so obvious that the City originally *admitted it.* In its Answer to the Complaint, it agreed that release time expenditures in the 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." APP.008 ¶¶ 34–35; 2SAPP.007 ¶ 34–35. When that position no longer suited the City's litigation strategy, it sought to deny what it previously admitted by amending its Answer. [2]

[2] The City also took the position that release time is funded out of employee compensation in a previous challenge to paid release time. *See* *Cheatham v. DiCiccio*, 238 Ariz. 69, 72 ¶ 8 (App. 2015) ("The City and PLEA argued that …

The City and the Union do not seriously attempt to address that the plain language of the MOU says that the cost of release time "has been charged as part of the total compensation." APP.050 § 1-3(A). Compensation means "Remuneration and other benefits received in return for services rendered; esp., salary or wages." COMPENSATION, Black's Law Dictionary (11th ed. 2019)[3]; *see also* Decker & Felix, *Drafting and Revising Employment Contracts* § 3.17 at 68 (1991) ("*Compensation* consists of wages and benefits in return for services. It is payment for work."). The City instead tries a new definition of "total compensation" as "the sum of all economic items in an MOU." 2SAPP.066 ¶ 71; 2SAPP.083 ¶ 16; APP.132 at 109:13–110:3. But that's not what the contract says and that's not what "compensation" means. Despite the City's semantics, the MOU means what it says: release time is compensation to all Unit 2 employees. *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588 (1977) ("Where parties bind themselves by a lawful contract … a court must give effect to the contract as it is written, and the terms or provisions of the contract, where clear and unambiguous, are conclusive." (citation & marks omitted)). And that means Appellants are being forced to fund the political activities and speech of the Union out of their

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release time was … part of the officers' compensation package."). Then that position did not suit the City's litigation strategy in *this* case, so it claimed the opposite. Judicial estoppel should bar the City from asserting an inconsistent position from the position it took and benefited from in *Cheatham* on an identical issue that it fully litigated. *See Marriage of Thorn*, 235 Ariz. 216, 222 ¶ 27 (App. 2014.

[3] "In the absence of express definitions within a contract, we may consider dictionary definitions to assist in determining the ordinary meaning of words." *Centerpoint Mech. Lien Claims, LLC v. Commonwealth Land Title Ins. Co.*, 255 Ariz. 261 ¶ 45(App. 2023).

compensation, which is unconstitutional. *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018).

This Court need not indulge the City's attempts to redefine "total compensation," however, because "[i]nterpreting the MOU is a legal question." *Cheatham*, 240 Ariz. at 318–19 ¶ 14. And the legal question of whether release time is paid for as part of individual compensation to Unit 2 employees was definitively resolved in *Cheatham*, when it held that "release time is a component of the overall compensation package," and is paid "*[i]n lieu of* increased hourly compensation or other benefits … *per unit member*." *Id.* (emphasis added). That finding, in fact, was the *ratio decidendi* of that case.

The Union says the elimination of the phrase "in lieu of wages and benefits" (which appeared in the *Cheatham* contract) means that Appellants don't fund release time in *this* contract. Union Opp'n at 10. But the record here shows otherwise: these parties have always treated release time as individual compensation and did so in this case. When paid release time was removed from a previous MOU, all individual employees, including Appellants, received an additional eight hours of vacation leave—and then when release time was reinserted into *this* MOU, those wages and benefits were eliminated. APP.041 ¶

123; APP.149 at 41:7–42:1.[4] In other words, the record shows that release time *was* funded by all Unit 2 employees *in lieu of* other compensation.[5]

The City tries to contort the record by contending that Appellants "admitted" that they have no "financial interest" in release time and "were not deprived of any compensation." City. Resp. at 1, 2. They did not and do not admit any such thing. Instead, their testimony was that the money used to fund release time wasn't paid to them *because it was illegally diverted from their pay.* SAPP.35 at 214:6–215:8. In other words, the money used to fund release time was not in their possession because their compensation was used to pay for release time instead.[6] *That* was Appellants' testimony and has been since it was filed. APP.010–12 ¶¶ 53–54, 65, 70. *See* SAPP.40 at 110:11–15; *see also* SAPP.35 at 215:3–8. The City's and Union's assertions that Appellants "admitted" that they don't fund release time is provably false—and has been proven false.

The City also argues that Appellants don't fund release time because "[i]f City-funded release time were eliminated, the City would have discretion to reallocate the funds to another purpose unrelated to [Appellants'] compensation." City Resp. at 3. But Appellants do not contend that their constitutional rights

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[4] This outcome was not some outlier; it also happened in *other* MOUs that the City has with *other* labor organizations. The City's current MOU with the firefighters' union, for example, replaced paid release time with a voluntary bank of hours. APP.041 ¶ 126– 27; SAPP.024 § 5-5(A). As a result of this change, the City now provides each firefighter in the unit, whether a union member or not, with 8.5 hours of additional vacation time. APP.041 ¶ 128; SAPP.24 § 5-5(I).

[5] Nor are Appellants claiming any "permanent entitlement" to additional vacation hours, as the Union asserts. Union Opp'n at 11. They are instead asking that their current compensation not be diverted to Union activities.

[6] Petitioner Gilmore testified, e.g., that the City "just took … away" eight hours of his vacation leave to fund release time. SAPP.31 at 13:17–23.

would be violated if the City were to redirect the funds that this MOU allocates to release time money to some other purpose like fixing potholes. Rather, Appellants' injuries result from the City forcing them to subsidize Union speech against their will by directing funds that the MOU identifies as their compensation to the Union's activities, including its political and lobbying activities. We know that's happening because *these* Appellants in *this* case had 8 hours of vacation leave—amounting to $647.21 per employee—directly removed from their paychecks to fund release time. APP.040 ¶ 117, APP.149–50 at 41:19–42:43:21, APP.032 ¶ 29, 2SAPP.020. In other words, the MOU did not "reallocate" Appellants' compensation to fixing potholes—it reallocated it to fund Union political lobbying—in violation of Appellants' constitutional rights to freedom of speech and association.

II. Forcing Appellants to fund release time violates their rights against compelled speech, association, and Arizona's Right to Work laws.

A. Forcing Appellants to fund the Union's release time activities violates Appellants' rights against compelled speech and association.

The Constitution protects freedom of speech broadly and unambiguously. Ariz. Const. art. II, § 6. This protection "includes both the right to speak freely and the right to refrain from speaking at all," *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 282 ¶ 48 (2019), and it is "broader … than the First Amendment." *Id.* at 281 ¶ 45. Consequently, "a violation of First Amendment principles 'necessarily implies' a violation of the broader protections of article 2, section 6 of the Arizona Constitution." *Id.* at 282 ¶ 47. Of course, the First

Amendment, too, protects the right of every person to decide "both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988); *Accord*, *Janus*, 138 S. Ct. at 2464.

The Constitution also protects the basic "'right to associate for the purpose of engaging in those activities protected by the First Amendment,'" *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136 ¶ 13 (App. 2001) (citation omitted), and, correspondingly, a "right to eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463. In other words, the freedom to associate includes the "freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). And the government cannot compel individuals to associate with an organization, or with its messages, as a condition of employment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977), overruled on other grounds (Non-union members cannot be forced, as a condition of employment, to support "ideological causes not germane to [a union's] duties as collective-bargaining representative.").

This Court had occasion to examine *Abood* and its progeny in *May v. McNally*, 203 Ariz. 425 (2022), when it set out a framework relevant to examining compelled association cases like this one. "[G]overnment," it said, "may not condition involuntarily associated individuals' opportunity to receive a benefit or *ply their trade or profession* upon their compelled support of speech with which they disagree." *Id.* at 428 ¶ 15 (emphasis added).

Government rules that compel speech, as the release time payments here do, are content-based and subject to strict scrutiny. As this Court recently held, "[w]hen a facially content-neutral law is applied by the government to compel

speech, it operates as a content-based law." *Brush & Nib Studio*, 247 Ariz. at 292 ¶ 100 (citing *Riley*, 487 U.S. at 795).

Content-based laws, of course, are presumptively unconstitutional and must satisfy strict scrutiny, *id.* ¶ 96; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015). That means the City must prove that its compulsion of Appellants' speech "(1) furthers a compelling government interest and (2) is narrowly tailored to achieve that interest." *Brush & Nib Studio*, 247 Ariz. at 293 ¶ 105.[7] The release time provisions of the MOU fail that test.

Janus struck down "agency fees" that a government employee was compelled to pay to a union as a condition of employment. The Court held that under the First Amendment, "[n]either an agency fee *nor any other payment* to the union may be deducted from a nonmember's wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486 (emphasis added). *Janus* built on previous cases finding that compelling employees to pay fees to finance a union's political activities violated those employees' rights against compelled speech. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 310–11 (2012); *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

The Union tries to distinguish *Janus* by claiming that "payments [were not] deducted directly from [Appellants'] earned wages." Union Opp'n at 12. But *how*

[7] Because Arizona courts "apply[] First Amendment jurisprudence … [to] address … state claim[s]," *Id.* at 282 ¶ 47, if strict scrutiny doesn't apply, exacting scrutiny does. *See Janus*, 138 S. Ct. at 2472. The MOU's release time provisions fail either test.

release time is deducted from Appellants' compensation makes no difference. An "indirect" payment to the Union violates Appellants' constitutional rights just the same as a "direct" payment to the Union. *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 396 (1923) ("It is axiomatic in law that what cannot be done directly may not be done by indirection."). Just like the agency fees in *Janus*, release time is indisputably a "payment to the Union" that has been diverted from Appellants' pay.

As with the fees in *Janus*, *Knox*, and *Harris*, the City cannot meet its heavy burden under the applicable heightened scrutiny of showing that such compulsion is narrowly tailored to serve a compelling government interest.

1. The Union's private activities on paid release serve no government interest at all, let alone a compelling government interest.

To satisfy strict scrutiny, the City must prove that forcing Appellants to fund release time furthers a compelling *government* interest. A compelling interest must be a *state* interest, not the interest of a private party. *See*, *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 645 (Cal. 1994) (because "[p]rivate entities pursue private ends and interests, not those of government," their interests do not normally "establish a 'compelling *public* interest' or 'compelling *state* interest.'").

The record shows, however, that the Union uses release time to perform the *Union's* business, not the public's business. The Union used release time to subsidize its self-interested political and lobbying activities, APP.035–36 ¶ 67–68; 2SAPP.028; APP.179 at 110:9–111:6; APP.038–39 ¶¶ 99–102; APP.018 ¶ 19;

APP.170 at 76:9–13, 123:20–127:17, 127:23–128:14; 2SAPP.026, 32–37, which cannot be a compelling *state* interest. *Janus*, 138 S. Ct. at 2473 ("a public employer is flatly prohibited from permitting nonmembers to be charged for [political or ideological] speech.").

The Union also uses release time to recruit new members, APP.006 ¶ 20; APP.018 ¶ 20; APP.168 at 67:3–68:24, which again, the U.S. Supreme Court has found violates the rights of nonconsenting employees. *See Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps*, 466 U.S. 435, 452 (1984). And the Union uses paid release time to engage in collective bargaining and file grievances against the City, APP.164–65 at 53:4–55:8; APP.022 ¶ 63; APP.019 ¶ 24, APP.169 at 70:2–19, uses that are inherently political, as *Harris* and *Janus* held. 573 U.S. at 636; 138 S. Ct. at 2468. These activities are not viewpoint-neutral and not even germane to the Union's purpose as the (compelled) exclusive representative.

The other uses of release time also serve the Union's *private* interests, not those of the government—for example, as the use of release time to attend Union meetings, APP.035–36 ¶ 67–68; APP.37 ¶¶ 84-85, or to support other labor organizations in other cities, APP.177–78 at 105:5–106:18.

For the remaining uses of release time, the reality is that the City is simply *unaware of how that time is spent*—because the Union controls and directs release time, and is not obligated to provide an accounting of its use to the City. APP.033–34 ¶ 46; APP.007 ¶¶ 30–31; APP.019 ¶¶30–31 (The City has no "mechanism to determine or confirm how release time is in fact being used."). If

the City doesn't know how release time is being used, it can't show that release time serves *any* government interest, let alone a compelling one.

2. Any government interest in Union activities can be achieved through means significantly less restrictive of Appellants' constitutional rights, as the *Janus* Court held.

Not only must the City prove a compelling interest, but it must also show that it cannot accomplish such an interest through any means that are significantly less restrictive of Appellants' rights than compelling them to fund release time. *Janus*, 138 S. Ct. 2448, 2465–66. The compelled subsidization at issue in *Janus* failed this test because there were means of accomplishing "labor peace" that were "'significantly less restrictive of associational freedoms'" than forcing non-members to pay agency fees. *Id.* at 2466 (citation omitted). The proof was that several states and the federal government did not require such fees—yet they had experienced no disruption of "labor peace." *See id.* at 2465.

The proof here is even more compelling. **First**, the City entirely eliminated paid release time with Unit 2 for three years (2014–2016), replacing it with a voluntary system that did not extract payments from nonconsenting members. During those years, the City experienced no disruption in labor peace. APP.041 ¶ 120; SAPP.012 at 61:8–14.[8] **Second**, the *current* contract between the City and the *firefighter's* union includes *no* paid release time provisions—although previous contracts did, APP.041 ¶ 126, SAPP.022–27—yet labor relations with the

[8] Phoenix's City Manager was 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?"—and testified, "[W]e made it work." SAPP.012 at 58:5–12.

firefighters' union is no worse than it was when paid release time was mandated. APP.041 ¶ 129; 2SAPP.017–18 at 68:23–69:2, 70:3–8, 71:18–23. The same is true of other unions that don't get release time; there's no evidence this has disrupted labor relations. APP.041–42 ¶¶120–21, 129, 131, 133–34, 136–37; SAPP.010 at 49:3–8; 2SAPP.016–19 at 64:3–16, 68:23–69:271:18– 23, 95:5–96:15.

Thus, by *Janus*'s reasoning, compulsory subsidization is broader than necessary—and violates Appellants' speech and association rights. Because any purported public interests in forcing them to fund release time can be—and *actually have been*—served in ways less burdensome of free expression than the current mandatory regime, the existing MOU must fail the test set out in *Janus*, 138 S. Ct. at 2466.

B. Paid release time violates Appellants' rights under Arizona's Right to Work protections.

Arizona's Right to Work laws, Ariz. Const. art. XXV; A.R.S. §§ 23-1301–1307, also forbid the City and from imposing on Appellants "the requirement that [they] participate in *any form or design* of union membership," whether directly or "indirectly." *AFSCME Local 2384 v. City of Phoenix*, 213 Ariz. 358, 366–67 ¶¶ 23–24 (App. 2006) (emphasis added). Forcing them to fund release time violates those laws.

In *Local 2384*, the court of appeals examined whether Right to Work protections prohibited the compulsory payment of union dues by non-union members as a condition of employment. *Id.* at 367 ¶ 24. It concluded that the Constitution and Right to Work statutes prohibit the City from mandating *any*

payments by non-members to a union as a condition of employment, whether such payments amount to full dues or some fraction of dues that the union attributes to representational duties. *Id.*

Appellants here do not belong to the Union, don't pay dues, and don't wish to participate in Union activities—yet the MOU requires them to direct part of their *compensation* to the Union to underwrite its release time activities. APP.029 ¶ 5, SAPP.005 ¶ 8, SAPP.003 ¶ 8. The MOU requires each individual employee to pay for release time—i.e., pay for Union activities—as a condition of employment. Since the cost of release time to Appellants is nearly as much as voluntary union dues, , SAPP.033 at 178:20–179:1, SAPP.037 at 92:17–20, APP.032 ¶ 29, 2SAPP.020, it is "in its practical effect … little different than mandatory membership dues." *Local 2384*, 213 Ariz. at 366 ¶ 23. Consequently, the release time provisions violate Arizona's Right to Work laws.

III. Paid release time violates the Gift Clause.

The City claims that Appellants' speech and association rights aren't violated because they don't fund release time; it claims that "*The City* paid for release time." City Resp. at 2. But even if that's true, release time is still unconstitutional because it violates the Gift Clause for the City to give a subsidy to the Union. Release time is a subsidy because it's a payment to the Union which the Union uses for private purposes, and for which it does not provide direct, contractually obligatory consideration in return.

A. Release time must be tested independently for a public purpose and consideration.

The City says release time does not violate the Gift Clause because we must take a "panoptic view" of the MOU. City Resp. at 9–10; *see also* Union Opp'n at 13. "Panoptic" means "all-seeing … permitting everything to be seen," *Webster's Third New International Dictionary* 1631 (2002). In other words, "panoptic" means paying attention to the actual facts—and to "[t]he reality of the transaction." *Ariz. Ctr. Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 368 (App. 1991). The reality of *this* transaction is that release time is given to the Union as part of the MOU to advance the Union's own private interests, and that the City gets no reciprocal, objectively valued benefit in return.

Instead, release time is simply a direct payment—that is, a discrete subsidy—to the Union. The record supports this view, as the release time provisions were negotiated and paid for individually, *not* as a total package. For example, when release time was removed from a previous MOU, the employees received an increase in wages and benefits—and then when it was reinserted into this MOU, those wages and benefits were reduced. APP.041 ¶ 123; APP.149–50 at 41:7–42:1.

In other words, the City and the Union negotiated for the paid release time provisions separately, and made a specific, discrete trade-off for them, in the form of Appellants' salary and wages. Paid release time and employee compensation have always been linked. Consequently, the release time provisions should be independently tested for public purpose and adequacy of consideration, as this Court did in *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346,

348 (1984).[9]

As Appellants have shown (Pet. 14–15), the Union's and City's contrary view would hold that any subsidy is permissible so long as it is part of a larger contract. That would eviscerate key Gift Clause protections, and would mean that government entities *could always* place a gift to a private party into a contract as long as the contract was large, and the gift was "small." But *an illegal gift hidden within a larger contract is still a gift*.

B. The City does not receive direct, objectively valued consideration for release time.

In evaluating adequacy of consideration, the Court's role is to "focus[] on what the public is giving and getting from an arrangement and then ask[] whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires v. Carlat*, 250 Ariz. 371, 376 ¶ 14 (2021). Importantly, "anticipated indirect benefit[s]," are "valueless" in this part of the test, and therefore cannot be included on the "get" side of the comparison. *Id.* at 377 ¶ 16.

The cost of release time under the MOU is $998,000. APP.032 ¶ 29;

[9] The MOU also includes a "saving clause" that specifically contemplates that if "any article or section of this Memorandum … [being] held invalid by operation of law or by a final judgment of any tribunal of competent jurisdiction … the remainder of this Memorandum shall not be affected thereby." APP.092. Just like any other contract that has discrete, illegal provisions, the release time provisions can and should be tested independently for legality and severed when found unlawful, as the Appellees appeared to contemplate in their own agreement. *See Olliver/Pilcher Ins., Inc. v. Daniels*, 148 Ariz. 530, 532–33 (1986) ("It may be suggested that only that part of the agreement which is unreasonable should be voided, and the rest enforced.").

2SAPP.020. The question, then, is what is "the objective fair market value of what the private party has promised to provide in return for the public entity's payment," *Schires*, 250 Ariz. at 376 ¶ 14, and is it proportional to this $998,000 expenditure?

The Phoenix City Manager testified that release *time has no monetary value*. SAPP.008 at 23:16–21. Nor can Appellees identify *any* other direct benefits that can be objectively valued in return for the release time payments.

The City contends "that release time promotes cooperative labor relations and facilitates an open dialogue about employment issues." Resp. to Pet. at 11. Appellants have addressed this argument in detail in their Response to Amicus Shierholz, but to briefly reiterate: these are the sort of speculative, indirect benefits that are "valueless" under the *Schires* test. 250 Ariz. 377 ¶ 16. The MOU contains no promise or other obligation to provide *any* such services or benefits to the City, and only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration under the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342, 349 ¶ 31 (2010) (emphasis added). Since *nothing* in the MOU requires the Union "to promote[] cooperative labor relations" or engage in "an open dialogue about employment issues," City Resp. to Pet. at 11, they cannot be factored in on the "get" side of the test.

Simply put, the Union has not obligated itself, in the MOU or anywhere else, to provide *any* benefits in return for release time. APP.039 ¶ 109; SAPP.009 at 27:5–28:11; APP.119–20 at 57:2–58:8. It has not promised to

spend a certain amount of time meeting with City officials or discussing employee concerns,[10] APP.039 ¶ 111, APP.120 at 58:17–25, or to resolve disputes "efficiently" or at the lowest level, APP.039 ¶ 110, APP.119–20 at 57:2–58:8, or to provide feedback on matters that will prevent complaints from becoming more costly to the City. APP.039 ¶ 112; APP.120 at 59:11–18. On the contrary, the Union expressly promises nothing but to "engage in lawful *union* activities," APP.039 ¶ 109; APP.050 § 1-3(A)(1); APP.119–20 at 57:2–59:21; SAPP.009 at 27:5–28:11 (emphasis added), *not* to provide services to the City. In the absence of mandatory contractual obligations on the part of the Union, there is *not* adequate Gift Clause consideration.[11]

What's more, the City has never even tried to determine what *value*, if any, it receives in return for release time. Several City witnesses uniformly testified that the City has never conducted any research or studies to assess the value, if any, of any purported benefits of paid release time. SAPP.009 at 26:5–10; APP.148 at 34:17-35:5; APP.119 at 54:5–11. The contract in *Schires* contained an equally vague promise, which the Court said was insufficient to satisfy the Gift Clause because it was "too indefinite to enforce, much less value." 250 Ariz. at 378 ¶ 21. Consequently, like *Schires*, the purported benefits of release time are too indefinite to value, and thus there cannot be adequate

[10] By contrast, such obligations were present in *Wistuber*, 141 Ariz. at 348.
[11] Even if the Union *were* performing functions for the City, and even if release time *did* assist with labor relations, the consideration is still disproportionate because the objective fair market value of release time, to the extent it exists at all, does not even remotely approach its cost of $1 million. *See* SAPP.008 at 23:16–21.

consideration under the Gift Clause.

Obviously, if the City thinks it needs to retain the services of a private entity to assist with labor relations, it can do so: by entering into an enforceable contract with mutual obligations and fair exchange on both sides. It didn't do that here.

C. Release time does not serve a public purpose.

Nor does release time serve a public purpose as required by the Gift Clause. Although government entities have broad discretion in determining a "public purpose" under the Gift Clause, "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Turken*, 223 Ariz. at 346 ¶ 14. Here, the release time provisions are so plainly earmarked for private interests that they do not survive even this deferential inquiry.

Release time is predominantly—if not exclusively—used for activities that promote the Union's own interests. The MOU itself says the full-time release positions are provided to the Union "to engage in lawful *union* activities." APP.050 § 1-3(A)(1) (emphasis added). And the Union, in fact, uses it to engage in extensive political and lobbying activities, APP.036–37 ¶¶ 71–87; APP.174 at 90:15–21, 91:9–13; APP.175 at 97:18–22; APP.176 at 100:6–25, 103:14–25; APP.177–78 at 105:1–106:18; 107:3–7; APP.180 at 114:–11; 114:3–115:22; APP.181 at 118:1–15, 120:3–121:3; 2SAPP.021–25, 027, 029–31; APP.035–36 ¶¶ 67–68; 2SAPP.024, 028; APP.179 at 110:9–6, recruitment, APP.006 ¶ 20; APP.018 ¶ 20; APP.168 at 67:3–68:24, political action and other Union meetings, APP.035–36 ¶ 67–68; 2SAPP.024, 028; APP.179 at 110:9–6 to support *other* labor

organizations in *other* cities, APP.177–78 at 105:5–106:18, and a variety of other activities that exclusively advance the Union's interests.

In other words, full-time release is not granted to the Union to engage in *City* activities, nor is it used by the Union to engage in activities that actually "promote[] the public welfare," *Schires*, 250 Ariz. at 375 ¶ 8. Instead, it is used, as the MOU says, to engage in *private* "[U]nion activities." APP.050 MOU § 1-3(A)(1).

The City says release time serves a public purpose because it purportedly promotes peaceful labor relations. City Resp. at 11. As discussed above, and in Appellants' Response to Amicus Shierholz, there's no evidence that release time actually promotes harmonious labor relations.[12] Instead, the Union simply uses it "to foster or promote [its] purely private or personal interests," *Turken*, 223 Ariz. at 347–48 ¶¶ 19–20, not those of the public.

But more than that: the City exercises no form of control or supervision over release time to ensure that a public purpose is actually achieved. APP.034 ¶ 55. In *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986, this Court said that continuing "control and supervision" over the operations of private entities receiving public funds was necessary to prevent "private gain or exploitation of public funds," which the Gift Clause prohibits. *See also McRae v. Cnty.of Cochise*, 5 Ariz. 26, 33 (1896).

[12] Actually, it probably undermines good labor relations and increases labor tensions. *See* APP.040 ¶ 114; Brown Report, 2SAPP.048–49(citing numerous examples of how paid release time undermines employer-employee relations and "contradicts the normal employee/ employer relationship.").

But such control and supervision are entirely absent here. The City admitted in its Answer that that it "does not control or direct the activities of Union members while they are using release time" and that "Union officials using release time are not required to account to the City for how release time is in fact used." APP.033–34, ¶¶ 46–47, APP.007 ¶¶ 30–31, APP.019 ¶¶ 30–31, APP.159 at 32:4–25. And as the record shows, the Union uses release time whenever and however it likes, with virtually no oversight and no control *whatsoever* from the City. APP.033–35 ¶¶ 43–60.

Thus, even if release time could, hypothetically, serve a public purpose to "promote corporative labor relations", City Resp. at 5, the City has surrendered any means by which it could ensure that this happens. Thus, the City has "unquestionably abused" its discretion, *Turken*, 223 Ariz. at 349 ¶ 28, in approving and then failing to oversee the use of release time.

CONCLUSION

The decision of the Court of Appeals should be reversed, and judgment entered in favor of Appellants.

Respectfully submitted November 21, 2023 by:

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