IN THE SUPREME COURT

STATE OF ARIZONA

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<td>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.</td>
<td>Supreme Court 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</td>
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INTERVENING DEFENDANT/APPELLEE'S SUPPLEMENTAL BRIEF

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Respondent/Intervening Defendant/Appellee American Federation of State, County and Municipal Employees, (AFSCME), Local 2384 ("AFSCME," "Union," or "Respondent") hereby submits this supplemental brief as directed by the Court in its October 17, 2023 Minute Entry as modified by its October 26, 2023 Order.

ISSUES FOR REVIEW

1. Does release time violate Petitioners' free speech, free association, and Right to Work rights?

2. Do the challenged release time provisions violate the Gift Clause?

As to each of these issues, the Union submits that the MOU and its associated release time at issue are constitutional and lawful.

ARGUMENT

Petitioners acknowledge that union release time cannot violate both the Gift Clause, on the one hand, and free speech and association on the other. Plaintiffs/Appellants' Petition for Review ("Petition" or "Pet.") at p.1. This is for the reason that these are distinct concepts that require an analysis of the funding source. *Id*. Petitioners must prove that either (1) public employees are subsidizing release time and that the subsidy constitutes an unconstitutional impairment on their free speech, association and right to work claims *or* (2) that taxpayers fund release time through the contract between the City and its employees *and* that the value the public receives is "far exceeded" by the amount paid for release time in order to succeed on their Gift Clause claims. They admit that they cannot prevail on both. The

undisputed facts in the record are clear that Petitioners failed to meet their burden on any of their claims. The City funds release time and as was the case in prior Supreme Court cases upholding release time, and Petitioners have failed to meet their burden to demonstrate a Gift Clause violation. Likewise, nothing in the record supports a claim that City funded release time violates any Arizona Right-to-Work laws. Accordingly, the Court of Appeals Opinion ("Opinion") should be affirmed.

A. City Funded Release Time Does Not Violate Petitioners' Free Speech, Free Association, or Right to Work Rights

The appellate court correctly and unanimously held that Petitioners failed to meet their burden to prove that they were subsidizing release time based on the simple and undisputed fact that Petitioners admitted, under oath, that the money used to fund release time is not theirs and never was, that they have no claim to any of these funds, the City is free to allocate money to fund release time however it chooses (even if the City stopped funding release time altogether), that they have no claim to any of the City's money it uses to fund release time, and that they have received all wages and benefits to which they were entitled under the MOU in exchange for their labor. Union's Appendix to Union's Answering Brief ("UAPP.") 166-174 ¶¶79-82, 88-96, 105, 107, 115-118, 125-129, 136, 157.

The Court of Appeals correctly concluded:

> [T]he City, not plaintiffs, pay for release time, meaning plaintiffs are not compelled to subsidize the Union's speech or activities. The City, not plaintiffs, pay for release time, meaning plaintiffs are not 'compelled to subsidize' the Union's speech or other activities. Thus,

> release time does not implicate plaintiffs' freedom of speech, which 'necessarily includes the freedom of deciding both what to say and what not to say.'

Gilmore v. Gallego, 255 Ariz. 169 ¶ 20 (App. 2023) (quoting *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz 269, 282 ¶ 48 (2019)) (cleaned up). Likewise, the Court of Appeals was correct in concluding that Petitioners are not compelled to join or associate with the Union based on undisputed facts conceded by the Petitioners. *Gilmore*, 255 Ariz. 169 ¶ 21.

In short, Petitioners are unable to prove that they had to part with any money or property they were otherwise entitled to receive that was, in turn, used to fund release time. The Opinion correctly held that this fact alone is fatal to Petitioners' free speech and association claims because in order for to prevail on those claims, Petitioners had to prove that they were the source of the subsidy for union release time. *Gilmore v. Gallego*, 255 Ariz. 169 ¶¶ 19-22; *see also* ¶ 46 (Bailey, J. concurring in part and dissenting in part). *See cases* cited in Union's Answering Brief at 35-39.

Petitioners attempt to side step the critical defect in their argument by contending that because the City and Union had negotiated an additional eight hours of vacation time in an earlier MOU (2016-2019) that could be donated to the Union, Petitioners had the right to those additional vacation hours throughout the remainder of their employment and that removing them from the following MOU after the previous one expired somehow equates to a compelled subsidy of release time. The

Opinion addresses and soundly rejects this contention recognizing that "a public employee has no contractual right to past compensation." *Gilmore,* 255 Ariz. 169 ¶ 18 (citing *Smith v. City of Phx.*, 175 Ariz. 509, 514–15 (App. 1992) and *Bennett ex rel. Ariz. State Pers. Comm'n v. Beard*, 27 Ariz. App. 534, 536–37 (1976)). *See also Abbott v. City of Tempe*, 129 Ariz. 273, 277 (App. 1981) (holding there is no vested contractual right to holiday pay rates and vacation credit in prior contracts).

Petitioners also attempted to argue that strict scrutiny should apply to the analysis of their speech and association claims. Although the appellate court did not expressly address the appropriate level of scrutiny when analyzing Petitioners' speech and association claims, the level of scrutiny applied makes no difference. Regardless of whether strict or a lower level of scrutiny applies, Petitioners cannot satisfy their burden to show infringement on their rights of expression because money allocated to fund release time does not belong to them and never passed through their paychecks, making their reliance on *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), improvident. *Janus* held only that public employers cannot require nonmembers to pay fair-share fees to the exclusive representative; otherwise, public employers can "keep their labor-relations systems exactly as they are[.]" *Id.* at 2478, 2485 n.27. As the Court of Appeals held in the Opinion, "But the mandatory payment in *Janus* (employer to employee, but with a deduction of the non-union employee's wages for payments to a union) is not what the MOU requires or contemplates. . . . Plaintiffs admit they have received all the wages and benefits

promised to them under the MOU. Simply put, plaintiffs are not forced to make any payment to the Union, in any respect." *Gilmore,* 255 Ariz. 169 ¶ 14.

Even putting aside the fact that courts apply much lower levels of scrutiny to government regulation of its own employees (i.e., the City regulating its employees in Unit 2 through the provisions of the Meet and Confer Ordinance ("Ordinance") and the MOU negotiated and adopted pursuant to processes outline in the Ordinance) those provisions are content neutral because they do not espouse any point of view.

Content-neutral government regulations "that impose an incidental burden on speech" are subject to intermediate scrutiny. *Brush & Nib*, 247 Ariz. at 292 (citation omitted). A regulation will pass intermediate scrutiny "if: (1) it furthers an important or substantial governmental interest, (2) the governmental interest is unrelated to the suppression of free expression, and (3) any restriction on speech is incidental and 'no greater than is essential' to further the government interest." *Id.*

The Ordinance and MOU state that labor peace and harmonious labor-management relations with the City's workforce are the underlying purpose behind each. P.C.C. §2-209(2) (UAPP.132); MOU § 1-3(A) (UAPP.76). *See also* City Manager testimony, (UAPP.303 at 23:20-25:1), and other evidence discussed at UAPP.157,160,162-163 ¶¶ 26-27, 44-45, 54. The City's interest in unrelated to any exercise of Petitioner's speech. Neither the Ordinance nor MOU tell Petitioners what they cannot and cannot say nor do they require Petitioners to adopt any particular

viewpoint or refrain from having and speaking their own. The record confirms this fact. UAPP.175-76 ¶¶ 139-157.

Similarly, there is no requirement that the Ordinance or MOU's release time provisions require the Petitioners to associate with the Union. They are not required to attend Union meetings or functions, pay dues, take an oath of loyalty to the Union, acknowledge or disavow any statements made by the Union or positions which it may oppose, or ever speak to any of its officers or stewards. UAPP.175-76 ¶¶ 139-146, 157. In fact, Petitioners were members of the Union and voluntarily *disassociated* from it when they chose to do so. UAPP.175-76 ¶¶ 151, 157.

To the extent Petitioners contend that the Union is recognized by the City under the Ordinance as the exclusive bargaining representative for all Unit 2 employees (Petitioners included) somehow rises to the level of compelled association, the United States Supreme Court and multiple federal appellate and district courts have universally rejected that contention. *See* cases cited in Union's Answering Brief at pp. 38-43. Likewise, there is no reason for this Court to depart from the reasoning in *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 289 (1984), where the Court rejected a similar, if not identical, freedom of association challenge. See cases cited in Union's Answering Brief at 41-43. *See also Adams v. Teamsters Union Loc. 429,* No. 20-1824, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022), *cert. denied,* 143 S. Ct. 88 (2022) (As in *Knight*, public employees "are free to express whatever ideas they wish, including through groups they create

and including about the Union. Indeed, PERA protects their right to present certain grievances to their employer. Also like the teachers, the employees are free to associate—or not—with the Union. Given these similarities, this law does not violate the First Amendment."); *Goldstein v. Pro. Staff Cong./CUNY*, 643 F. Supp. 3d 431, 438-440 (S.D.N.Y. 2022) (holding, following *Knight* and "following all courts of appeals to have addressed the issue," that bargaining relationship between public employer and employee representative did not violate constitutional rights of speech and association).

Similarly, there is no violation of Petitioners' constitutional or statutory right to work. The plain language of the Arizona Constitution defeats Petitioners' argument.

> No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.

Ariz. Const. art. XXV.[1] The release time provisions of the MOU contain no requirement that Petitioners or any other City employee join or refrain from joining the Union as a condition of employment or continuation thereof. These Petitioners voluntarily joined AFSCME and paid dues for a period of time and subsequently withdrew their membership and stopped paying dues without any consequence to

[1] Ariz. Rev. Stat. § 23-1302 contains identical provisions and prohibitions.

their employment status, enjoying all the benefits the MOU and other City policies make available to all Unit 2 employees.

In short, Appellants here are not required to join the Union, not required to agree with the Union nor to associate with the Union. They pay no dues to the Union nor subsidize any Union activities. They actually resigned their Union membership with no repercussions whatsoever; both remain employed with the City in the same bargaining unit and concede that they have received all the pay they are due. *Goldstein*, 643 F. Supp. 3d at 443–44 (if dissatisfied with the Union's activities and speech, the public employee can "resign from the union, to decline to subsidize the union as *Janus* now permits, and/or to otherwise disassociate from the noxious speech. An employee may also seek to vote out the union as representative of the bargaining unit, to work within the union to change its leadership, or to pursue, through appropriate channels, claims of a denial of fair representation.") (footnote omitted). Nothing requires Petitioners to adopt or endorse any expressive speech or associate with the Union.

For these reasons, this Court should affirm the Court of Appeals Opinion holding that the release time provisions at issue do not violate Petitioners' free speech, free association, and Right to Work rights.

B. The MOU Does Not Violate the Gift Clause

The Court of Appeals majority was also correct in holding that Petitioners failed to meet their burden to prove that City funded release time does not violate

the Gift Clause of the Arizona constitution. *Gilmore*, 255 Ariz. 169 ¶¶ 23-40. Nearly 40 years ago, this Court upheld release time and set forth the framework for determining whether there is a violation of the gift clause in *Wistuber v. Paradise Valley School Dist.,* 141 Ariz. 346 (1984). *Wistuber* requires a "panoptic view" of governmental transactions.

This Court reaffirmed *Wistuber*'s holding 25 years later when it ho-eld that a "governmental expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that 'is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.'" *Turken v. Gordon,* 223 Ariz. 342, 345 (2010) (quoting *Wistuber*, 141 Ariz. at 349). Two years ago, this Court once again reiterated *Wistuber*'s principles in *Schires v. Carlat*, 250 Ariz. 371 (2021) (citing *Wistuber*, *Cheatham* and *Turken*), further explaining the two-prong analysis of Gift Clause jurisprudence. As the State of Arizona has argued in its amicus brief, there is no reason to revisit or redefine these principles. Amicus Curiae Brief of the State of Arizona in Opposition to the Petition for Review, at 13 ("As a policy matter, reasonable minds might disagree about the City's chosen ends and means. But those decisions are nonetheless entitled to significant deference' and are nowhere near constitutionally suspect….Most relevant for present purposes though, none of these issues are new, unresolved, or worthy of further review") (citing and quoting *Turken*, 223 Ariz. at 346 ¶ 14; *Schires*, 250 Ariz. at 375-76 ¶¶ 8-12).

"The party asserting a Gift Clause violation bears the burden of proving it." *Turken*, 223 Ariz. at 346-47, 349, 350. The record demonstrates that Petitioners completely failed to meet their burden to show that either of the two prongs necessary to establish a Gift Clause violation were met. Under the first prong of the analysis, courts owe "significant deference" to elected officials on the question of whether an expenditure has a public purpose (although not in the consideration element as the Court found in *Schires*), and will "find a public purpose absent only in those rare cases in which the governmental body's discretion has been unquestionably abused;" further, for the consideration to be inadequate, it must be "grossly disproportionate" to the cost to the City.

The release time confers substantial public benefits. Given the profusion of labor strife in this country at the moment, it is imperative that the City, which provides essential services to the public have labor peace.[2] Allowing parties to strike a bargain that both sides can accept provides a mechanism for continued uninterrupted City services to the public and avoidance of labor strife. As the Court of Appeals recognized, *Wistuber* and *Cheatham* each hold that release time confers

[2]"At least 453,000 workers have participated in 312 strikes in the U.S. this year…" *Thousands of US Workers Are on Strike Today*, Associated Press online article, October 5, 2023, available at https://apnews.com/article/labor-strikes-us-uaw-kaiser-hollywood-9c3d6d63c70078f1dd769ccadc81a06b (last visited Nov. 20, 2023); Jill Cowan. Thousands of Los Angeles City Workers Strike for One Day, *New York Times*, August 8, 2023 available at https://www.nytimes.com/2023/08/08/us/los-angeles-city-strike.html (last visited Nov. 20, 2023).

a public benefit. The benefits of release time here are indistinguishable in principle from those in *Cheatham v. DiCiccio*, 240 Ariz. 314, 320-21 ¶¶ 21-27 (2016). *Gilmore*, 255 Ariz. 226 ¶¶ 26-28. The undisputed evidence is that the use of City funded release time benefits all Unit 2 employees and the City.

As with *Cheatham*, the MOU at issue procures services of more than 1,500 skilled trades and other City workers; it, and the integral release time positions, identifies an authorized representative with whom the City can deal on all labor-related matters and release time provides a mechanism to ensure that the labor representative will be available to deal with the City; provides a method for more efficient negotiations. The release time provisions at issue also ensure that the Union's use of City funded release time is used for important purposes including such things as negotiating wages and benefits, problem solving, participating in and contributing to citywide task forces that address terms and conditions of employment impacting City employees and providing Unit 2 employees with a collective voice. Petitioners conceded as much. UAPP.163-64 ¶¶ 58, 62-63; IR 66 PSOF Ex. 31 at 27:8-18, 45:1-5 (problem solving); *Id*. at 37:24-39:8 (providing a collective voice); *Id*. at 40:8-22 (negotiating wages); IR 66 PSOF Ex. 32 at 23:13-24:7 (facilitating the bargaining process).

Even if the Court were to consider the release time provisions in isolation from the rest of the MOU benefits, which is not the correct analysis, the release time

provisions would not run afoul of the Gift Clause.[3] Petitioner Harder even admitted that release time might benefit both the Union and the City. IR 66 PSOF Ex. 32 at 26:5-22. While the Petitioners take issue with the Union bringing pizza to a work location during a lunch break or being seen on a city street talking to a City Council member, isolated events are red herrings that do not support Petitioners' burden to show that the overall benefits of release time did not serve a public purpose.[4] UAPP.176 ¶¶ 147-48.

Petitioners also never met their burden to show that the funding of release time was "grossly disproportionate" or "far exceeded" the benefits of the agreement so as to constitute a gift to the Union – a requirement that falls squarely on their shoulders. *Schires*, 250 Ariz. at 375 ¶ 7 ("The party asserting a Gift Clause violation bears the burden of proving it."). Here, it was undisputed that the total cost to the City associated with the 2019-2021 MOU for the 2020-2021 fiscal year was

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[3]In addition to the cases cited by the Union in its Answering Brief, the Texas Court of Appeals upheld a lower court ruling that release time did not violate the Texas Constitution's gift clause (Tex. Const. art. III §§ 50, 51, 52A and art. XVI § 6(a)) in *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786 (Tex. App. Nov. 22, 2022). The lower court ruling in *Borgelt* was attached to Union's Opp. to MSJ No. 4 as Appendix A.

[4] As the State of Arizona pointed out in its amicus brief (at 6-8), with respect to political activities Petitioners complained of, the Arizona Legislature has now adopted legislation that prohibits political activities on government subsidized release time for any MOU enacted after Sept. 24, 2022. *See* SB 1166 (2022) and A.R.S. § 23-1431. Although Petitioners complained in response that the statute does not apply to law enforcement agreements, the MOU at issue covers civilian employees, not law enforcement. Furthermore, that is not an issue raised in this case nor one properly before the Court.

$168,569,000, of which release time cost $499,000 or approximately 0.3% of the entire cost of the MOU.[5]

Attempting to avoid their burden, Petitioners attempt to rely on *Wistuber* for the proposition that a separate analysis for the adequacy of consideration in exchange for release time itself, divorced from the context of the entire MOU, is required. Respectfully, but unfortunately, the Dissent in the Opinion fell prey to the same argument. *Gilmore*, 255 Ariz. 169 ¶ 50. *Wistuber* does not support such a restrictive view of Gift Clause jurisprudence requirements.[6] In *Wistuber*, 141 Ariz. at 348, there was a single agreement at issue and only one employee who received release time. Taking a required panoptic view of the entire agreement, this Court found that the arrangement whereby the released association president agreed to perform a number of activities and undertake duties that inured to the benefit of the school district did not violate the gift clause, These duties included providing information to a number of groups, meeting monthly and logging time with the assistant superintendent for personnel. In other words, the panoptic view covered the nature of the whole arrangement and the benefit derived from the entirety of the agreement.

Here, unlike *Wistuber*, release time is not limited to one person and the evidence established that the release time serves all employees and the public by,

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[5] UAPP.169 ¶¶98, 101-102.

[6] The Court of Appeals Dissent cited nothing for its holding that the release time provisions could be excised from the MOU and somehow considered as a separate agreement without reference to the benefits of the entire agreement.

inter alia, procuring the services of approximately 1,500 Unit II employees, defining their terms and conditions of employment, and confirming their agreement to not strike, (UAPP.156 ¶ 19); having knowledgeable and experienced representatives in the grievance and meet and confer processes, (UAPP.156-57 ¶¶ 23-25); having participation by "Union leaders on citywide task forces and committees" (UAPP.157, 160 ¶¶ 26-27, 44); and by having representatives designated for a Labor-Management Committee "to facilitate improved labor-management relationships by providing a form for the free discussion of mutual concerns," and for a Health and Safety Committee to assist with employee health and safety issues. (UAPP.157 ¶¶ 26-27).

The Opinion's Dissent acknowledges that a "panoptic view" is required but then mistakenly examines the MOU not as one agreement "but two agreements housed in one document." *Gilmore*, 255 Ariz. 169 ¶ 50. The MOU at issue is a single labor agreement, a contract voted on and approved in its entirety by the parties to the agreement – the City of Phoenix and Unit 2 representative. Each section of the MOU was not called for a vote and approved separately. It was approved and implemented as a single document. Parsing it for purposes of a gift clause analysis is antithetical to a panoptic view of the entirety of the benefit the City and its citizenry receive from the consideration it provides to the labor force and its designated bargaining representative. It was error to read the release time provisions as a separate contract divorced from the MOU as a whole. *See, e.g.*, *Clare v. Malia*, 52 Ariz. 552, 558

(1938) (rules of construction require that "contract must be construed as a whole, instead of by taking isolated sections thereof alone and following their literal language."); *C & T Land & Dev. Co. v. Bushnel*l, 106 Ariz. 21, 22, 470 P.2d 102, 103 (1970) ("it is axiomatic that any agreement must be construed as a whole, and each part must be read in light of all the other parts."); *Cent. Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1128 (D. Ariz. 1998) ("A contract must be construed in its entirety, rather than from reading one provision in isolation from the rest of the contract.").[7]

The MOU covers a large amount of expenditures, benefits, working conditions, and many other provisions, all of which are negotiated between the City and AFSCME. If the MOU were to be parsed and examined line by line or provision by provision, it would invite endless challenges of an alleged Gift Clause violation on the claim that the "get" does not exceed the "give," provision by provision. For example, the MOU provides employees and their families with dental insurance for

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[7] *See also* *Nichols v. State Farm Fire & Cas. Co.,* 175 Ariz. 354, 357 (App. 1993) ("A contract of insurance, like any other contract, is not a collection of separate unrelated parts; each part must be read and interpreted in connection with all other parts.") (internal citations and quotations omitted); *Bryceland v. Northey,* 160 Ariz. 213, 215-16 (App. 1989) ("We reject Northey and Malvin's interpretation of the contract for several reasons. First, paragraph ten must be read as a whole and in light of all other parts of the contract.") (citations omitted); *Technical Equities Corp. v. Coachman Real Estate Inv. Corp.,* 145 Ariz. 305, 306 (App. 1985) ("We cannot read Paragraph 13 by itself, disjointed from Paragraph 15 and the other provisions of the contract. When the agreement is read as a whole, the inescapable conclusion is that Paragraph 15, providing for the proration and payment of taxes, governs the parties' agreement regarding that subject.") (citations omitted).

which the City pays 100% of the monthly contribution for single coverage and 75% of the monthly contribution for family coverage. MOU § 5-2 (UAPP.115). The City also provides parking at the airport and a tool allowance for certain employees. MOU §§ 5.7, 5.8 (UAPP.115-16). Any claim that these provisions are somehow unconstitutional "gifts" to the employees that receive them when they are at the dentist, parking their cars on the way to work or buying tools to use at work is unsupportable. The provisions for those benefits, like release time, are only small and inextricable parts of an entire MOU that serves numerous public purposes and provides the City and the public with valuable consideration and labor peace. *See Cheatham*, 240 Ariz. at 322 ¶ 31 ("when considering a Gift Clause challenge to provisions of a collective bargaining agreement, we cannot consider particular provisions in isolation. For example, if such an agreement provided for paid vacation or personal leave time for public employees, the adequacy of the consideration received by the employer would not be evaluated by asking if the employees must use their time in a way that benefits the employer. In that situation, the consideration received by the employer is the work the employees generally agree to provide under the agreement, not only during their paid leave or vacation times").

It would be absurd to conclude that the dental insurance, parking and tool allowances must be examined separately and as a stand-alone agreement to be matched against the associated costs under Gift Clause jurisprudence. That would ultimately require not one negotiated MOU but a plethora of separate agreements,

each of which must be, at a minimum, a dollar-for-dollar exchange. Such a result would lead to unmanageably complicated agreements (for example, would the isolated cost of every window in a building to be constructed by a private contractor need to be separately considered in relation to the whole?) and also to impossibly difficult and absurd labor-management negotiations and contract administration. Neither the private nor public sector operates their labor relations in that manner. There is no reason to attempt to bifurcate the MOU at issue in a similar manner for purposes of a Gift Clause analysis. Such approach is directly contrary to *Wistuber* and is not supported by even a strained construction of either *Cheatham* or *Schires*. Respondent Union respectfully requests that this Court reject any temptation to tinker with decades of established jurisprudence that has proven workable simply because these Petitioners may want to advance a personal agenda that should be addressed to City Council which enacts the laws and makes funding decisions, not to the courts.

The Opinion's Dissent also contends that City funded release time fails the second prong of gift clause analysis stating, in part, "the benefits the City claims it receives from these agreements, such as avoiding lawsuits and efficiently addressing labor concerns, are anticipated indirect benefits at best, which are 'valueless under [the] second prong' of the Gift-Clause analysis because the Union has not provided an enforceable promise to provide these benefits." *Gilmore*, Ariz. 169 ¶ 51. Respectfully, this conclusion is flawed for several reasons.

First, the Dissent ignores the panoptic approach that this Court has followed for at least 40 years. Second, as set forth above, the law is clear that the burden on demonstrating a gift clause violation rests with Petitioners. No challenger to a public expenditure should be allowed to assert a gift clause violation on an unsupported assertion that the consideration received by the public entity is "valueless." Similarly, a reviewing court should not be allowed to make that conclusion, when there is nothing in the record to support such a finding.

Third, while *Schires* speaks of an objective determination of "the fair market value of the benefit provided to the entity and then determine proportionality," that was raised in the context of the facts of that case which dealt with consideration concerning a private development. Even then, examination was made of the entire project, not its separate parts. Establishing "fair market" value in the kind of transactions present in *Schires* is more readily determined because of the tangible aspects of the transaction. Intangibles are not so easily valued – especially when separated from the larger whole. How does one put a precise value on not being sued for wage and hour violations that could run into the hundreds of thousands of dollars, preventing workplace injuries through cooperative labor/management relations that could otherwise result in significant personal injuries with economic and non-economic consequences, retention of skilled trades employees rather than being faced with significant employee turnover resulting in the hiring less qualified or less experienced employees, or the City being forced to deal separately and individually

with the 1500 Unit 2 employees each and every time any has a complaint, grievance or question about her wages, hours or working conditions rather that working with cooperatively with the Union to address, avoid and attempt to resolve such issues? The City was well within its right to state that it had determined the value it receives through union release time exceeds the annual cost to the City for funding it whether viewed in context of the entire MOU or the release time provision standing alone. If Petitioners disagree, they have presented nothing in the record to challenge the City's valuation aside from their unsupported claim that it is not a proportionate exchange.

Finally, if the Petitioners or the Dissent have true questions about the adequacy of consideration the City receives in exchange for funding the release time, neither offers nor suggests a market value approach for valuing what the City has clearly described as adequate consideration it receives in exchange for funding release time. If they contend one exists, they have not presented it. If this Court is truly concerned about reliance on the City's valuation of the "get" it receives in exchange for the "give" of City funded release time or the lack of adequate evidence in the record to support the City's determination, then the proper course of action is to remand this issue to the superior court to determine an acceptable approach and means for establishing a dollar value for the consideration the City receives in exchange for funding release time and hold an evidentiary hearing to determine such value.

CONCLUSION

For the reasons stated here, in Respondent AFSCME's responding brief in the Court of Appeals, its opposition to the petition for review and the amici in support of the City and Union, AFSCME requests that this Court affirm the Opinion of the majority in all respects. In the alternative, should the Court have concern regarding the second prong of the *Schires* gift clause analysis, AFSCME requests that the Court remand that issue to the superior court with instruction to determine an acceptable approach and means for establishing a dollar value for the consideration the City receives in exchange for funding release time and hold an evidentiary hearing to determine such value.

The Union renews its requests for costs on this appeal to the Arizona Supreme Court.

Respectfully submitted this 21st day of November 2023

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