IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Mark Gilmore; and Mark Harder, Plaintiffs/Appellants, vs. 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, -and- American Federation of State, County and Municipal Employees, (AFSCME) Local 2384, Intervening Defendant/Appellee.	Case No.: 1CA-CV 22-0049 Maricopa County Superior Court Case No: CV2019-009033

Intervening Defendant/Appellee's Response to Brief of Amicus Curiae Pacific Legal Foundation

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION AND BACKGROUND

Intervening Defendant, American Federation of State, County and Municipal Employees, (AFSCNE), Local 2384 (the "Union") is entitled to and was properly awarded attorneys' fees by the Superior Court in accordance with A.R.S § 12-341.01. *Amicus Curiae*, Pacific Legal Foundation ("PLF") supports Plaintiffs/Appellants' (hereinafter, "Plaintiffs") request to reverse the lower court's award of attorney's fees in favor of the Union on untenable legal grounds. That request should be rejected. PLF's brief improperly expands the scope of this case and appeal by arguing for the first time in this litigation that an intervenor defendant should not be awarded fees based on its status as an intervenor and that the Court should adopt a rule here that fees are appropriate "only when the plaintiff's lawsuit is found to have been frivolous, unreasonable or without foundation." PLF Brief, at 2, 8. These points were never argued by Appellants and the attempt to expand the scope of issues on appeal should be disregarded. PLF's brief is also completely divorced from the facts and issues in this case, which, in contrast to the Title VII federal discrimination case PLF cites and attempts to import into Arizona law, arise out of contract. PLF's brief provides no assistance to the Court in resolving the state law claims presented here and should be disregarded.

This case was filed by Plaintiffs against the City of Phoenix on October 8, 2019. In the Complaint, Plaintiffs attacked the Union release time provisions set

forth in the Memorandum of Understanding between the City of Phoenix and the Union and alleged violations of the First Amendment to the U.S. Constitution, the speech, association, and gift clause provisions of the Arizona Constitution, and the Arizona Right-to-Work statutes. Plaintiffs subsequently amended their complaint abandoning their federal claims and proceeding only with claims alleged to arise under Arizona law. Index of Record ("IR") IR 7-8 and 9-10.

The Union moved to intervene as a named Defendant in the action pursuant to Ariz. R. Civ. P. 19(a)(1)(A) and/or (B) and 24, explaining, *inter alia*, that it had negotiated, was a party to, and intended beneficiary of the Memorandum of Understanding ("MOU") and provisions of that MOU that Plaintiffs challenged and sought to enjoin. IR 13-15. The Superior Court granted the Union's motion to join the action as an Intervening Defendant after Plaintiffs filed a non-opposition to the Union's motion, stating that they "do not object to AFSCME's voluntary intervention in this matter." IR 22. Thereafter, the Union filed its Answer, which contained a request for attorneys' fees if it ultimately prevailed. IR 23. Plaintiffs attempted to strike the request for attorneys' fees but made no argument regarding an alleged inability on the part of the Union to seek attorneys' fees because of its status of a "private party" intervening defendant. IR 31-32.

As the record shows, following the close of discovery, the parties filed cross-motions for summary judgment. The Court granted Defendants' motions and denied

Plaintiffs' dismissing all their claims. Defendants, as the prevailing parties, then filed their respective motions for attorneys' fees and taxable costs. Nowhere in their opposition to the Union's motion for attorneys' fees did Plaintiffs raise or suggest that the Union should be denied fees because it is a "private party" or by virtue of its status as the Intervening Defendant. IR 138.

On November 8, 2021 the Superior Court entered an Order Granting Intervenor-Defendant's Motion for Attorneys' Fees and Costs in part by awarding the Union $68,212.00 of the $88,254.58 in fees it requested.[1] The Superior Court found that Plaintiffs' claims arose out of contract because, *inter alia*, their claims were based on section 1-3 of the 2019-2021 MOU between the City of Phoenix and Union. IR 143, ¶ 1.[2] The Court found that the Intervening Defendants were prevailing parties entitled to an award of fees and costs in part, for defending the interests of all Field Unit 2 employees of the City of Phoenix and their rights under the MOU as well as the Union's. Citing *Piccioli v. City of Phoenix*, 249 Ariz. 113, 119 (2020) and *Am. Fed'n of State Cnty. & Mun. Emps. AFL-CIO Loc. 2384 v. City of Phoenix*, 249 Ariz. 105, 113 (2020), the Superior Court recognized that Plaintiffs had commenced this action and brought their claims against the City as employees of the City of Phoenix and third-party beneficiaries of the contract between the City

[1] The PLF Brief does not appear to challenge the award of taxable costs.
[2] The Superior Court's order granting fees to the Union is set forth in the Plaintiff/Appellant's Appendix on Appeal at APP. 236.

and the Union, which represents the bargaining unit. *Id.* ¶ 3. After considering the six factors set forth in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985), the Superior Court found that "five of the factors weigh in favor of Intervening Defendant and none weigh in favor of Plaintiffs[.]" *Id.* ¶ 4. PLF does not challenge the Union's status as a party to the MOU or its role as exclusive representative of all Field Unit 2 employees to negotiate and enforce the terms of a duly ratified MOU. Rather, the PLF Brief asserts, in essence, that the Court should somehow ignore established Arizona law providing for fee shifting in contractual disputes and instead create a standard that provides that if the lawsuit is somehow couched as "public interest litigation," fees should only be awarded if the case "is found to have been frivolous, unreasonable or without foundation" because of the alleged potential chilling effect if fees are awarded.

Under Arizona law, the potential chilling effect is already one of the factors in determining the amount that is awarded under contract pursuant to *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350 (1984). *See Piccioli*, 249 Ariz. at 119. There is no need for a special rule to be imparted that conflicts with and deviates from long-established Arizona law. In any event, Plaintiffs did not commence this action to advance public interests. Union's Appendix on Appeal ("UAPP") 166-174 ¶¶79-82, 91-96, 128-129. Rather, they did so out of their own self-interests. UAPP. 167-177 ¶¶88- 96, 115-118, 125-129, 136, 157. *See* also

UAPP. 168-173 ¶¶91-94, 96, 105, 107, 125, 127-128. The Superior Court did not err in awarding the Union attorneys' fees and costs. This Court should affirm.

ARGUMENT

I. Appellate courts should not consider arguments not raised by the parties directly appealing a decision.

In its brief, PLF exceeds the scope of issues raised by the Appellants. Neither in the Superior Court nor in their Opening Briefs did Plaintiffs raise arguments: (1) that fees should not be awarded to an intervening defendant nor (2) that the court should adopt the rule that "intervenors may recover attorneys' fees from an unsuccessful public-interest plaintiff only when the plaintiff's lawsuit is found to have been frivolous, unreasonable or without foundation." PLF Brief, at 2, 8. While Plaintiffs opposed fees, they never made either of these two arguments that PLF attempts to insert in this appeal.

The issues raised by PLF that were not argued either by Plaintiffs or Defendants on appeal are not properly brought before this Court and, as such, should not be considered. It is well established in appellate jurisprudence that a court will not consider issues raised by amici if not raised by the parties to the appeal. "Amici cannot raise issues not raised below or by the parties." *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 241 Ariz. 230 (Ct. App. 2016) (citation omitted); *Ruiz v. Hull*, 191 Ariz. 441, 446 (1998) (discussing amicus briefs and holding "in accordance with our practice, we base our opinion solely on legal issues advanced

by the parties themselves."). *See also Gonzalez v. Google LLC*, 2 F.4th 871 n. 24 (9th Cir. 2021) (declining to consider amici arguments on First Amendment issue not raised or briefed by parties). PLF's arguments on this point should be disregarded.

II. Contrary to PLF's assertion, Plaintiffs did not bring their claims as public interest litigants.

The central issues raised by Plaintiffs in this lawsuit can best be characterized by their own testimony acknowledging that it was the City's money not their own, that funds release time. UAPP. 166-174 ¶¶79-82, 91-96, 128-129. Unlike the public employees in *Janus* who actually had money deducted out of their gross pay thereby reducing their net pay, these Plaintiffs admit they never had any right to the City money used to fund release time and have no right (only wishful thinking) that if release time went away, it would result in an increase in their wages. UAPP. 167-177 ¶¶88- 96, 115-118, 125-129, 136, 157. *See* also UAPP. 168-173 ¶¶91-94, 96, 105, 107, 125, 127-128.

PLF states in its brief that:

> Public-interest litigants across the political spectrum pursue their ideological goals in court by suing the government for failure to comply with constitutional mandates or statutory requirements. . …public-interest litigation often draws intervenors. Usually, intervenors align with private plaintiffs against a public entity defendant or, occasionally, with a public entity plaintiff against a public entity defendant.

PLF Brief, at 3. Aside from citing no authority or statistical data to support the sweeping proposition that intervenors generally align with public interest plaintiffs, the argument is simply inapposite to the circumstances here. Plaintiffs conceded that they did not commence the litigation for ideological goals. Their motivation to bring the lawsuit was grounded in their personal desire to overturn contractual provisions of an MOU in an effort they hoped would end up benefitting them personally in a financial sense if they were successful. UAPP. 170-171 ¶¶105, 108-110. The central focus of this litigation was Plaintiffs' personal grievances and their attempt to undermine contractual provisions between the Union and City. Accordingly, the record establishes that this case was not motivated by the public interest concerns that PLF expresses in its brief, and the Superior Court correctly determined that this action arises out of contract and that an award of fees was proper under A.R.S. § 12-341.01. *See* argument and cases cited in the Union's Answering Brief, at 63-67.

The nature of the action and its surrounding circumstances lend themselves to a clear determination that the action arises out of contract and was not the sort of public interest litigation that raises policy concerns. The entire Complaint focuses on Sections 1-3 of the MOU, the relief requested was focused on the labor contract and its enforcement. As the Union has argued in opposition to Plaintiffs' briefing, A.R.S. § 12-341.01 is the applicable statutory authority allowing for an award of attorneys' fees and costs because the Superior Court correctly found that the

undisputed facts and applicable law show that the litigation is a challenge arising out of contractual terms of a labor agreement thinly premised on concocted theories previously rejected by the Arizona Supreme Court. *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016); *Wistuber*, 141 Ariz. 346.

The Union intervened to protect its contractual rights and fulfill its obligations to all bargaining unit employees. The facts and circumstances simply do not support PLF's misguided policy argument that this Court should deny attorneys' fees in this case that arises out of the contractual relationship between the Union and the City simply because the Union intervened to protect its interests and the interests of the bargaining unit it represents. *American Federation of State County and Municipal Employees AFL-CIO Local 2384*, 249 Ariz. at 113 (finding that claims arose under contractual provisions rather than constitutional or statutory basis and awarding City attorneys' fees and costs); *Piccioli*, 249 Ariz. at 119 ¶ 24.

III. Awarding fees to Defendant Intervenors in this action will not "chill" First Amendment rights.[3]

The parties extensively briefed the general rule discouraging an award of attorneys' fees against private citizens who bring actions challenging governmental action as established in *Wistuber*, 141 Ariz. 346. As both the Union and City have

[3] As noted, Plaintiffs voluntarily abandoned their United States Constitutional First Amendment claims and elected to rely solely on Arizona state law. Accordinglhy, the Union presumes PLF's arguments are directed at free speech and associational rights under Arizona law.

fully briefed (and which cannot be genuinely disputed), Plaintiffs brought Counts One, Two and Three of Plaintiffs' Second Amended Complaint not as private citizens, but rather, as intended third-party beneficiaries to a labor contract.[4] The facts and circumstances in this action closely align with the circumstances and the holding of the Arizona Supreme Court in *Piccioli*, 249 Ariz. at 119 ¶ 24:

> This case is distinguishable from *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346, 30, 687 P. 2d 354, 358 (1984), which stated that courts should generally refrain from awarding fees under § 12-341.01 against citizens who sue to challenge the legitimacy of government action because it would "chill" such suits. Here, Petitioners challenged A.R. 2.441 as parties to a contract rather than as aggrieved citizens.

Counts One, Two and Three of Plaintiffs' Second Amended Complaint mistakenly claimed that Plaintiffs' personal wages were reduced because of the bargained-for release time provisions contained in Section 1-3 of the MOU. IR at 8-9 (Second Amended Complaint). Count Four (the Gift Clause Claim) is the only claim that even marginally might be said to have been brought in the public interest as private citizens or taxpayers.[5] However, that claim still arises from Plaintiffs' challenge to

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[4] "A third-party beneficiary is a non-party who has the right to enforce a contract." *Maricopa-Stanfield Irr. & Drainage Dist. v. Robertson*, 211 Ariz. 485, 491, ¶ 33 (2005) (citing Restatement (Second) of Contracts § 304 (1981)). See also cases and argument set forth in the Union's Answering Brief, at 50-51.

[5] Plaintiff Gilmore is not a resident of Phoenix and lacked standing to bring a Gift Clause claim in this action. Further, the Court in its holding stated that "Defendants are correct as a ***matter of law*** that there is no basis for Plaintiffs' alternative theory that they are forced to associate with Local 2384's release time activities." (Emphasis added).Minute Entry filed July 16, 2021. (IR at 128).

the specific contractual language in Section 1-3 of the MOU. No claim would have existed independent of the MOU provisions which provided for release time funded with City money. Consequently, all the claims arise out of contract. Even if Count Four were found not to arise out of contract, at most that would call for a reduction of fees for that count, not a denial of all fees on all counts. The Superior Court reduced the requested fees to the Union by approximately 23%.

Granting a motion for attorneys' fees in this action will not cause a "chilling" effect in later litigation involving private citizens seeking to defend their free speech and association rights for the reasons the Union and City both explain in their respective Answering Briefs. PLF's arguments do not support a different result than that reached by the Superior Court.

IV. The standard established in *Christiansburg Garment* does not apply to this action.

PLF's arguments that the Arizona courts should adopt the standard for fees articulated by *Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412 (1978), is an argument that should be raised in a different case; it simply has no applicability in the instant litigation. While *Christiansburg Garment* may strike an appropriate balance in litigation focused entirely on individual civil rights, the standard established in *Christiansburg Garment* is not appropriate here. *Christiansburg Garment* set forth a standard that although a prevailing plaintiff in a Title VII discrimination case is ordinarily awarded fees, a prevailing defendant

should ordinarily only be awarded fees where the court finds the plaintiff's action was frivolous, unreasonable or without foundation. PLF seeks to extrapolate that standard to the facts of this case in order to depart from established Arizona precedent in the proper application of A.R.S § 12-341.01 in cases similar to this one. This case presents far different facts, circumstances and law and does not support application of the than those of *Christiansburg Garment* standard

Christiansburg Garment arises from a racial discrimination charge under Title VII of the Civil Rights Act of 1964. The complainant filed a charge with the Equal Employment Opportunity Commission (EEOC) but after notification that the conciliation efforts had failed and that she had the right to sue the company, the complainant did not. Two years later, after § 14 of the 1972 amendments to Title VII gave authorization to the EEOC to file claims for charges "pending" with the EEOC, the EEOC sued Christiansburg Garment Company. The District Court found that the charges were not "pending" with the EEOC at the time the claims were filed and granted Defendant Christiansburg Garment Company's motion for summary judgment. Defendant Christiansburg Garment Company then moved for attorneys' fees. None of these facts are even remotely present here.

Christiansburg Garment centers around a claim that arises from racial discrimination in violation of Title VII of the Civil Rights Act of 1964 with a discretionary fee shifting statute. The statutory authorization the defendant in

Christiansburg Garment was using in seeking attorney's fees was set forth under Title VII of the Civil Rights Act of 1964. The Court explained that the goals of the fee shifting statute was to encourage plaintiffs to file litigation to vindicate rights under "a policy that Congress considered of the highest priority." [6]

In contrast to the Title VII discrimination claims brought in *Christiansburg Garment Co.*, Plaintiffs here challenged the contract between the City of Phoenix and the Union. Clearly, this case arises out of contract, and, under Arizona law, Plaintiffs are intended third-party beneficiaries of the contract, not civil rights or public-interest plaintiffs. Because the state law claims arise out of contract, they are governed by A.R.S. § 12-341.01 which is a fee shifting statute whose goals include: "(1) mitigating 'the burden of the expense of litigation to establish a just claim or a just defense'; (2) encouraging 'more careful analysis prior to filing suit' by imposing the risk of paying the opposing party's attorneys' fees where legitimate settlement offers are rejected; and (3) promoting settlement and thus reducing caseloads involving contractual matters." *Am. Power Prod., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 369 (2017) (citation omitted). Here, the Union successfully upheld the contract it negotiated on behalf of all bargaining unit employees and to which it is a party against meritless claims motivated by personal gain seeking to overturn the contract.

[6] *Christiansburg Garment Co.*, 434 U.S. at 418. See § 706 (K) of Title VII of the Civil Rights Act authorizes the Court, in its discretion, to award prevailing parties, other than the Commission or the United States, reasonable attorney's fees and costs.

The award of fees by the Superior Court here is consistent with the purposes and policy behind Arizona's contractual fee shifting provision.

The far reaching, new rule that PLF advocates the Court should adopt is also unnecessary; courts in Arizona already consider the potential chilling effect an award of fees may have under *Wistuber*. PLF's request that the Court subvert A.R.S § 12-341.01 and existing Arizona precedent to the federal law standard established in *Christiansburg Garment* so as to protect future civil rights and public-interest litigants from fee awards is antithetical and contrary to Arizona law, would be far reaching, and inappropriate. *See, e.g., Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 29 (Ct. App. 2006) (rejecting claim that consumers should not be required to pay fees for bringing unsuccessful action asserting car company violated the federal Magnuson-Moss Warranty Act: "The legislature intended that the risk of paying the opposing party's attorneys' fees would encourage more careful analysis prior to filing suit."); *Sengupta v. Univ. of Alaska*, 21 P.3d 1240, 1262 (Alaska 2001) (rejecting argument that *Christiansburg Garment* standard should be extended to apply to state law claims brought in state court even if lawsuit is related to federal civil rights claims) (citing *Lyman v. State*, 824 P.2d 703, 707 (Alaska 1992) (holding that taxation of fees and costs was appropriate for state law claims)).

CONCLUSION

The PLF brief provides no basis to reverse the Superior Court's fee award.

Plaintiffs respectfully request that the Court affirm the trial court's award of attorneys' fees under A.R.S § 12-341.01.

Respectfully submitted this 3rd day of August 2022.

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