ARIZONA SUPREME COURT

MARK GILMORE et al.,

Plaintiff-Appellants,

v.

KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix et al.,

Defendant-Appellees,

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2384,

Arizona Supreme Court
No. CV-23-0130 PR

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

Maricopa County Superior Court
No. CV 2019-009033

BRIEF OF ARIZONA FREE ENTERPRISE CLUB AND GRAND CANYON LEGAL CENTER AS *AMICI CURIAE*

Filed With Consent of All Parties

Drew C. Ensign
Counsel of Record
Brennan Bowen
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
2575 East Camelback Rd., Suite 860
Phoenix, AZ 85016
(602) 388-1262
densign@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Amici

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INTERESTS OF *AMICUS CURIAE*

Amicus Arizona Free Enterprise Club is an Arizona nonprofit social welfare corporation that engages in public education and advocacy in support of free markets, limited government, and economic growth in the State of Arizona.

Amicus Grand Canyon Legal Center is a project of the AZ Liberty Network, an Arizona charitable organization that is focused on increasing public knowledge and civic participation with respect to social, cultural and economic issues affecting Arizona. The Grand Canyon Legal Center was established to champion in civil litigation constitutional rights and structural limitations on government power.

The Gift Clause vindicates individual rights, the rule of law, and the security of the public fisc by constraining government actors from misappropriating taxpayer-owned resources to enrich favored private interests. The proper construction and rigorous application of this constitutional precept is central to the organizational missions of both amici.[1]

[1] All parties have consented to the filing of this amicus brief.

INTRODUCTION

It is a bedrock principle of economics that "there is no such thing as a free lunch." *See*, *e.g.*, Milton Friedman, *There's No Such Thing as a Free Lunch* (1975).[2] In the end, "'[s]omeone, somewhere, is paying for "lunch" regardless of the posted price or absence thereof.'" *Sanford v. Fillenwarth*, 863 N.W.2d 286, 291 (Iowa 2015) (citation omitted). And just as money does not grow on trees, it similarly cannot be created through legal artifices or sophistry.

The Court of Appeals, however, lost sight of these economic principles and common sense. In its view, the cost of release-time salaries was just such a "free lunch"—paid for by neither the employees performing the actual work of the public contract nor the City itself.

But the Court of Appeals' reasoning blinks economic reality. That court identified *no one*—not the employees nor the City, nor any

[2] "The adage 'there ain't no such thing as a free lunch' has been traced back to the Depression era, but the concept's roots apparently lie in the practice of nineteenth-century saloons to provide a 'free lunch' to customers who purchased alcoholic beverages." *Pizza Di Joey, LLC v. Mayor*, 470 Md. 308, 355 n.14 (2020) (citation omitted). "The idea was that the high salt content in the food would cause the customers to purchase more drinks, thereby offsetting the cost of the food to the saloon." *Id.* (citation omitted).

identified third party or supernatural force—that paid the salaries of union employees on release time for all relevant purposes. While claiming that the City pays for Free Speech purposes, the Court of Appeals' Gift Clause analysis relies almost exclusively on precedent in which the *employees* paid for release time to reject the claim. *See* Opinion ¶¶36-41.

That no-one-is-consistently-paying premise results in the release time evading all relevant constitutional scrutiny: if no one is paying, then there is no payment that could run afoul of any constitutional prohibition.

The upshot is that the Court of Appeals effectively reasoned that Defendants' careful legal machinations resulted in those funds being conjured *ex nihilo* in a manner that impressively evades the scrutiny of the Arizona Constitution, including its Free Speech and Gift Clauses. But that holding is as untenable as a matter of law as it is of economic logic.

Here, the clear import of the evidence is that the economic incidence of the release-time charges fell on the employees—*i.e.*, they were paying for it. When release time was suspended in 2014, employees received additional pay in the form of eight extra hours of vacation time—which was then immediately terminated once release time was resumed in 2019. APP.041 ¶123; APP.149 at 41:7-42:1.4; Opinion ¶18. Tracing cause

and effect here requires neither economic nor legal brilliance.

Indeed, this logic was obvious enough that the City candidly admitted that the release time was "*paid for by all Field Unit II employees, in the form of reduced wages and benefits*," APP.008 ¶¶34–35; (emphasis added)—before the City wizened up to the necessity of its instant economic obfuscation and legal sophistry, and amended its answer to eliminate that fatal admission, 2SAPP.007 ¶34–35. The City had it right the first time.

Because the release time was ultimately paid by the employees, those expenditures violate the Free Speech Clauses of the U.S. and Arizona Constitutions. *See* U.S. Const. amend. I; Ariz. Const. art. II, § 6. Both Constitutions forbid compelling non-union members to fund union speech activities without their consent. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018); *see also Brush & Nib Studios, LC v. City of Phoenix*, 247 Ariz. 269, 282 ¶47 (2019) ("[A] violation of First Amendment principles 'necessarily implies' a violation of the broader protections of article 2, section 6 of the Arizona Constitution.").

Alternatively, if the salaries of release-time employees were instead being paid the City, those expenditures violate our Constitution's Gift

Clause. *See* Ariz. Const. art. IX, § 7. The City funding union activities serves no public purpose and, even if it did, the expenditures are grossly disproportional to the benefit (if any) the City receives in return. *See*, *e.g.*, *Schires v. Carlat*, 250 Ariz. 371, 376 (Ariz. 2021). Indeed, the City does receive *any direct benefit* from funding release time for the union as the Gift Clause requires. The City's funding of release time is thus tantamount a direct payment to the union and squarely violates the Gift Clause as a result. *Id.*

Ultimately, the manifestly not-free salaries of release-time union employees is no "free lunch" and is being paid by *somebody*. If that somebody is the employees, the arrangement violates the Free Speech Clause by compelling the employees to fund union speech without their consent. And if it is the City footing the bill, that donation of public funds to a private special interest group without receiving any corresponding direct benefit in return violates the Gift Clause.

The Court of Appeals' creation of a constitution-free zone in which public-contract expenditures evade both the Free Speech and Gift Clauses because they are putatively paid for by no one should be reversed.

ARGUMENT

I. The Employees Are Paying For Release Time, Which Violates Our Constitution's Free Speech Clause

"The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgement of the freedom of speech." *Janus*, 138 S. Ct. at 2463. And "the Arizona Constitution provides broader protections for free speech than the First Amendment," and a violation of the First Amendment "'necessarily implies' a violation of the broader protections of article 2, section 6 of the Arizona Constitution." *Id.* at 281–82 ¶¶45, 47 (citations omitted).

Freedom of speech not only includes the right to speak freely, but also includes the right to choose not to speak. *Janus*, 138 S. Ct. at 2463 (citations omitted). "The right to eschew association for expressive purposes is likewise protected." *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association…plainly presupposes a freedom not to associate"); *see Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) ("[F]orced associations that burden protected speech are impermissible").

Particularly odious under the First Amendment is compelling a person to subsidize the speech of other private speakers—specifically

including public-section unions. *See Janus*, 138 S. Ct. at 2464. "As Jefferson famously put it, to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] *is sinful and tyrannical*." *Id.* (citing A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (quotation marks and citation omitted) (emphasis added).

These First Amendment concerns are heightened when a person is compelled to subsidize a union that is active in the political sphere and takes positions of significant consequence in today's political and social debates. *See id.* ("[A] significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences.") (quotation marks omitted) (citations omitted)).

For that reason, employees cannot be compelled to fund the union. *See id.* at 2486 ("This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages … [without]

consent[].”). Instead, employees must “clearly and affirmatively consent before any money is taken from them.” *Id.*

Janus thus prohibits forced payments to a union, as the Court of Appeals properly acknowledged here. *See* Opinion ¶14. Yet, the Court of Appeals erroneously concluded that (1) the employees’ unconsented payment was not a payment forced upon the employees, (2) the employees had received everything owed to them under the MOU, and (3) the release time was simply paid out of tax dollars. *See* Opinion ¶¶14–15 (“The cost to the City is funded by tax revenues.”).

The MOU here is nearly identical in both its phrasing and effect to the MOU in *Cheatham*, however. *Compare Cheatham v. DiCiccio*, 240 Ariz. 314, 319 ¶14 (2016) (“The cost to the City for these release positions, including all benefits, has been charged as part of the total compensation contained in this agreement in lieu of wages and benefits.”) (quoting 2012-2014 MOU § 1-3(B)) *with* Opinion ¶13 (“The cost to the City for these release positions and release hours, including all benefits, has been charged as part of the total compensation detailed in this agreement.”) (quoting MOU § 1-3(A)).

The Court of Appeals thus properly recognized that the MOU here was "substantially identical" to that in *Cheatham*. *See* Opinion ¶35. And in *Cheatham*, this Court held that under the MOU "release time is a component of the overall compensation between the City and [the union] on behalf of the [employees,]" *Cheatham*, 240 Ariz. at 318 ¶14—*i.e.*, the *employees* were paying for the release time. But the Court of Appeals attempted to distinguish *Cheatham* on the putative basis that "[t]he cost to the City is funded by tax revenues." Opinion ¶¶14–15.

That is a non-sequitur. It is of course a truism that any "cost to the City is funded by tax revenues." *Id.* So if the City were paying, it would necessarily be paid from tax revenues. But that hardly answers the governing question of *who* is actually for paying the salaries of release-time union workers as a matter of economic substance. On that score, this Court's decision in *Cheatham* is controlling.

Here, the employees are paying for release time by receiving lesser wages and benefits. If the money was not taken from their paychecks, they would receive it directly, as the history here makes clear: "In 2014, the MOUs eliminated paid release time and allowed Unit II employees to voluntarily donate an additional eight hours of vacation to fund release

time. In 2019, the MOUs went back to authorizing paid release time and eliminated the additional eight hours of vacation time." Opinion ¶18. The Court of Appeals discounted this direct evidence and distinguished *Cheatham* by rationalizing this resulting loss as something to which the employees had no legal entitlement. Opinion ¶¶13, 17–18. That was error.

As in *Cheatham*, the City here negotiated a specific amount that it was willing to pay the employees for a specific quantum of performance, thereby revealing its economic willingness to pay for that amount of work. Thus, when release time was again shoehorned into the contract, the total compensation paid to the employees performing the actual, non-release time work of the contract necessarily had to decrease by an identical amount to make room for the release-time payments to be included within the *same total contract amount*—which is precisely what occurred here. *See* Opinion ¶13 (citing MOU § 1-3(A)); *see also Cheatham*, 240 Ariz. at 319 ¶14 (citing 2012-2014 MOU § 1-3(B)).

Indeed, the MOU here states clearly that the cost of release positions was charged as part of the total compensation. APP.050 § 1-3(A). The Court of Appeals opined that this language refers to the City's

cost, which somehow was not coming out of employee compensation. *See* Opinion ¶13. That is both economic and legal nonsense.

The annual cost of release time for the City is $499,000—which equates to approximately $333 annually per employee—regardless of union membership. *See* Opinion ¶40. When release time was not included in the contract from 2014-19, the employees were paid the entire amount of compensation. Opinion ¶18. But when that changed in 2019, and release time was again included, the employees suddenly had eight hours of vacation time they previously received terminated to pay for the release time. APP.040 ¶117, APP.149–50 at 41:19–42:43:21, APP.032 ¶29, 2SAPP.020; Opinion ¶18. That sequence makes perfectly clear who is paying for the release time,

The MOU confirms as much, explicitly stating that the release time salaries were "charged as part of the total compensation" for employees. APP.050 § 1-3(A). The Court of Appeals blinked both economic reality and the MOU's actual language in holding that the employees were not paying. Opinion ¶18. But that "total compensation" is zero-sum, and what was paid to release-time union employees *was necessarily not paid* to the yes-show employees performing the actual work of the contract.

In particular, the lower court erroneously distinguished *Cheatham* on the basis that the MOU there stated release time had been charged out of total compensation "in lieu of wages and benefits," but that precise language did not appear in the MOU here. *See* Opinion ¶17.

But our Constitution "deals with substance, not shadows, and the prohibition against [compelled funding of speech] is levelled at the thing, not the name." *Students for Fair Admissions, Inc. v. Harvard College*, 143 S. Ct. 2141, 2176 (2023) (cleaned up). The question is thus not whether the City and the union's attorneys successfully avoided using the precise words that would have doomed the *Cheatham* MOU under the Free Speech Clause, but rather whether the MOUs are the same in economic substance. And the Court of Appeals forthrightly acknowledged that they were "substantially identical": "Although containing different terms and covering different time periods, the *Cheatham* MOU is remarkably similar to the MOU here." Opinion ¶¶35, 37.

That recognition of identical economic substance is controlling here. The Free Speech Clause of the Arizona Constitution cannot be readily dispensed with as long as the drafting attorneys are not so foolish as to employ the precise phrase "in lieu of wages and benefits" used in

Cheatham—or any other set of magic words. Instead, it is the identical economic *substance* to which Constitution is concerned. The Court of Appeals gravely erred in holding otherwise and exalting trivial variations in form over identical substance.

II. If The Release Time Is Funded By The City, It Violates The Gift Clause

Alternatively, even if the salaries of release-time union employees were paid by the City rather than the employees, that too would violate our Constitution—in this case the Gift Cause.

Under the Gift Clause, cities and public entities may not "give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. The Gift Clause was designed to avoid "the depletion of the public treasury" by engaging with "non-public enterprises," *Schires v. Carlat*, 250 Ariz. 371, 374 (Ariz. 2021).

This Court recently provided a succinct explanation of the application Gift Clause analysis:

> We adopted a two-pronged test in *Wistuber* to determine whether a public entity has violated the Gift Clause. First, a court asks whether the challenged expenditure serves a public purpose. If not, the expenditure violates the Gift Clause, and the inquiry ends. *See id.* If a public purpose exists, the court

> secondarily asks whether "the value to be received by the public is far exceeded by the consideration being paid by the public." If so, the public entity violates the Gift Clause by "providing a subsidy to the private entity."

Id. at 374–75 (citations omitted).

A. Collective Bargaining Against Taxpayers is not a Public Purpose.

It can be difficult to define what constitutes a public purpose. *Id.* at 374 (citing *City of Glendale v. White*, 67 Ariz. 231, 236 (1948) (stating that the term "is incapable of exact definition," changes with the times, and is best elucidated by examples). "[C]ourts take a broad view of permissible public purposes and give significant deference to the judgment of elected officials, who are tasked with identifying and further such purposes." *Id.* (citing *Turken v. Gordon*, 223 Ariz. 342, 346 ¶10 (2010) (internal quotation marks omitted)).

Even under this broad deference, the release-time funding does not serve a public purpose. Public sector unions bargain on behalf of the *private* financial interests of government employees against the *public* fisc. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2742-43. Where their employees receive a higher salary as a result, that certainly is a private benefit to them. But that private benefit is no benefit to the taxpayer or the public—and

instead comes at their detriment, in the form of higher taxes. *Id.*; *Schires*, 250 Ariz. at 375 ¶8 ("In general, however, a public purpose promotes the public welfare or enjoyment."). The only welfare or enjoyment promoted here is that of the union and government employees, not the public.

Simply put, collectively bargaining *against the taxpayer* is not a public purpose. And the funding of release-time employees serves only that collective bargaining and related *private* ends, and hence no public purpose. This is thus one of those "'rare cases in which the governmental body's discretion has been 'unquestionably abused.'" *Id.* at ¶9 (quoting *Turken*, 223 Ariz. at 349 ¶28). Indeed, this is the exact sort of government largesse that the Gift Clause was enacted to prevent: the clause "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi*-public purposes, but actually engaged in private business." *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (Ariz. 1925) (citation omitted).

Because funding of release-time employees who serve only *the union's private interests* and not a public purpose, the MOU's release-time provisions here violate the Gift Clause.

B. The Consideration Here is Grossly Disproportionate.

Even if the funding of release-time employees served a public purpose, the benefits that the City receives here are grossly disproportionate to the public funds that the City is conveying to the union—thereby violating the Gift Clause.

"The second *Wistuber* prong acts as the primary check on government expenditures for Gift Clause purposes." *Schires*, 250 Ariz. at 376. It is not enough under the Gift Clause for there to be consideration to satisfy contract law, "because paying far too much for something effectively creates a subsidy from the public to the seller." *See id.* (quoting *Turken*, 223 Ariz. at 349–50 ¶32). The inquiry "focuses on what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture in violation of the Gift Clause." *Id.* (citation omitted).

There are notable differences between the analysis of what constitutes a public purpose and whether the "give" exceeds the "get."

First, anticipated indirect benefits are not considered relevant, only *direct* bargained for benefits that are part of the "contracting party's promised performance" count. *Id.* (citation omitted). *Second*, "[i]n deciding the sufficiency of consideration under the second prong, courts should not give deference to the public entity's assessment of value but should instead identify the fair market value of the benefit provided to the entity and determine proportionality." *Id.* at 378. Assuming the City is paying for the release time salaries, those payments are grossly disproportionate to the benefits the City receives in return.

So what does the City receive in exchange for half a million dollars paid annually? "The MOU contains four general categories of 'release time,'" none of which accomplish *anything directly* for the City. *See* Opinion ¶5. (1) There are four full-time release positions for union members where they can engage exclusively in union activities; (2) an annual bank of up to 3,183 release time hours permitted to be used for union purposes; (3) 150 release time hours provided for union members to attend seminars, lectures, and conventions; and (4) up to $14,000 the City will reimburse the union for so union members can attend employee-relations skill training. *Id.* (citing MOU § 1-3(A)).

In sum, the union receives a substantial amount of money in paid release time, bankable hours, and reimbursement funds. But it is—*at best*—unclear if the City receives *anything* in return. And it certainly receives no direct benefits.

The union is not serving the City's interests. If anything, the City and union are opposed to one another by design as the union is supposed to serve as the employees' advocate in negotiations *against* the City. Opinion ¶3 ("Every other year, the City and the union collectively bargain the terms of an agreement for Unit II employees."). It does not appear that any of the paid release time will be used for anything outside of "union purposes" or training for union members. Opinion ¶¶4–5. That is no benefit to the City at all. Indeed, to the extent that the release-time expenditures enhance the union's economic strength, that will likely be to the City's *detriment*: the union will employ that augmented strength by coercing the City into paying *more* in the next contract negotiations.

The Court of Appeals reasoned that this is not a concern because one must take a "panoptic view" of the entire transaction. *See* Opinion ¶31. It pointed to the *Cheatham* Court's reasoning that in exchange for the entire package, including the release time, the union—and thus the

employees—had agreed to their terms and agreed to work. *Id.* That court reasoned that the same analysis should apply here, the direct benefit the city receives is the services of the employees. *See* Opinion ¶39. But, as this Court recently explained, parties agreeing to continue conducting their usual business is insufficient consideration for Gift Clause purposes. *See Schires*, 250 Ariz. at 377 ¶16 (finding insufficient consideration where parties "simply promised to engage in their respective private businesses (educating and leasing)").

What's more, the Court of Appeals' Gift Clause analysis is irreconcilable with its free speech and association analysis—specifically, the view that the employees are not paying for the paid release time. As the dissent recognized, "The City removed the language linking the release time payments and the employees' compensation, thus ensuring the City does not violate the free speech and association rights of non-union member employees. But without the link, the agreement violates the Gift Clause." Opinion ¶52 (Bailey, J., dissenting).

Breaking that linkage thus eliminates the City's Gift Clause defense, as the dissent correctly recognized. On the one hand, the Court of Appeals concluded that because the "in lieu of wages and benefits"

language was not included in this MOU, the employees were not entitled to it as compensation—*i.e.*, the City pays the release-time salaries rather than the employees. Yet, on the other hand, the Court of Appeals relied almost exclusively on *Cheatham*—a case in which the *employees* paid for the release time—to reject the Gift Clause claim. *See* Opinion ¶¶36-41. Indeed, the Court of Appeals explicitly reasoned that "[t]he financial analysis here is akin to … *Cheatham*"—glossing over that the Gift Clause analysis in *Cheatham* involved the *employees* and not the City paying. *Id.*

This heads-I-win, tails-you-lose approach effectively ensures that these release-time payments will evade scrutiny under both the Free Speech and Gift Clauses as long as the drafting attorneys are not so indiscreet as to use the precise language condemned in *Cheatham*.

That cannot possibly be the law. Instead, the economic reality is that *someone* is paying for the release-time salaries. And whether that is the employees or the City, those payments violate our Constitution. The legal and economic contortions that the Court of Appeals engaged in to hold otherwise are untenable.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED this 12th day of December, 2023.

/s/ Drew C. Ensign
Drew C. Ensign
Counsel of Record
Brennan Bowen
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
2575 East Camelback Rd., Suite 860
Phoenix, AZ 85016
(602) 388-1262
densign@holtzmanvogel.com
bbowen@holtzmanvogel.com

Counsel for Amici