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 (AFSCME), LOCAL 2384,

Intervenor Defendant/Appellee.

Arizona Supreme Court
Case 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

CITY DEFENDANTS/APPELLEES' CONSOLIDATED RESPONSE TO AMICUS BRIEFS REGARDING THE FREEDOM OF SPEECH, FREEDOM OF ASSOCIATION, AND RIGHT TO WORK ISSUES ON REVIEW

John Alan Doran (AZ Bar No. 012112)
Matthew A. Hesketh (AZ Bar No. 029319)
Carli J. Simkin (AZ Bar No. 038154)
SHERMAN & HOWARD L.L.C.
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
Telephone: (602) 240-3000
JDoran@ShermanHoward.com
MHesketh@ShermanHoward.com
CSimkin@ShermanHoward.com
Attorneys for City Defendants/Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Rules, and Statutes

Other Authorities

I. Summary of arguments.

Amici's contention that Petitioners pay for release time is irreconcilable with Petitioners' admissions that the City can "do whatever it wants" with the money if release time is enjoined, including spending it on things completely unrelated to their employment such as "fixing potholes." If this were Petitioners' money, the City could not "do whatever it wants" – it would be required to give it to them. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (employees must "clearly and affirmatively consent before any money is taken from them"). But this is not Petitioners' money, and it never belonged to them.

Despite this, the Liberty Justice Center ("LJC"), Freedom Foundation ("FF"), Arizona Free Enterprise ("AFE"), and Grand Canyon Legal ("GCL") (collectively, "Amici") contend Petitioners are compelled to fund release time in violation of *Janus*. Amici contend Petitioners are forced to pay because (1) the collective bargaining agreement ("CBA") says release time is part of "total compensation," (2) this Court purportedly held that "*employees* were paying for the release time" in *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016), and (3) if the money were not spent on release time, Petitioners supposedly "would receive it directly." *See* AFE/GCL Brief at 3-13; LJC Brief at 2, 9-11; FF Brief at 9-15. These arguments fail. The "economic reality" based on the law and undisputed facts is that the City pays for release time.[1]

[1] No one has treated release time as a "free lunch." The City has always paid.

First, "total compensation" is a term of art that refers to the City's cost to pay for all expenses under the CBA. This includes the wages and benefits of Petitioners' coworkers and even expenditures unrelated to any employee's compensation. Yet Petitioners do not claim an interest in these parts of total compensation. In particular, Petitioners admit their "co-workers' wages are part of that total compensation," but they "don't finance them" because the City does. IR 70 (JSOF) ¶¶ 88-90; IR 70 & 73, Ex. 9 (Gilmore Depo.) at 97:7-20; IR 70 & 74, Ex. 10 (Harder Depo.) at 21:4-22:5. The City pays the wages and benefits of the released employees, which it would do even without release time, and Amici cannot explain why Petitioners supposedly fund these wages and benefits but not others. Amici's misinterpretation of "total compensation" ignores the proven meaning and realities of the term.

Second, *Cheatham* did not hold that employees pay for release time. It analyzed the Gift Clause specifically because the City paid. Even Amici and Petitioners acknowledge there is no reason for a Gift Clause analysis if employees pay with their own money. Amici selectively quote from *Cheatham* and make alterations that change the meaning of the text, but the Court did not say that employees paid for release time with their own money.

Finally, Petitioners were not deprived of any wages or benefits to pay for release time. They admittedly were not "entitled to anything more than the wages and benefits specified in the MOU." IR 100 (CSOF) ¶ 50; *see also* IR 70 ¶¶ 87, 127.

They "received all of the wages and benefits that were promised to [them] under the MOU," and they "have no reason to believe that the City and the Union have failed to comply with all of the terms of the 2019-2021 MOU." IR 100 ¶¶ 47, 52-53, 55; IR 60 & 66, Ex. 26 & Ex. 27 (Petitioners' Decl.) ¶¶ 14-16. Petitioners specifically admitted they are not "receiving fewer wages or benefits than what was promised in the MOU as a result of release time." IR 100 ¶¶ 46-47, 53-54. Indeed, Mr. Gilmore testified that "[n]o money is taken out of me," and Mr. Harder agreed that "money is not being taken out of [his] pocket to pay for release time." *Id*. ¶¶ 47, 53.

Petitioners would like to receive an additional eight hours of vacation, but they admitted the City did not "make a commitment to pay [them] those eight hours" and "has not told [them] that [they] will get an additional eight hours." *Id*. ¶¶ 48-49, 54-55. Thus, "[i]t's not [their] actual compensation under the MOU that's being used to finance release time, but some higher amount of compensation that [they] would like to have if release time were eliminated." *Id*. ¶¶ 47, 54. "The City never promised to pay [them] that higher amount," and "if release time were eliminated, [they] don't know whether [their] benefits or wages would increase." *Id*. ¶¶ 48-49, 54-55. Indeed, they "don't know what the City would do with the money that's allocated for release time if release time were eliminated," and they "don't know whether [their] benefits or wages would increase." *Id*. ¶¶ 51, 54-55.

As a practical matter, funds would not simply become available for

redistribution if paid release time were eliminated. The City still would pay the previously released employees, and it would need employee representatives to fulfill the labor relations obligations under the City Code, which currently are facilitated by release time. IR 70 ¶¶ 45, 103-104. Even if money became available, the City Council could reallocate it to an unrelated purpose. *Id*. ¶¶ 85-86, 112-117, 122-125.

Amici also erroneously assume "total compensation" is a zero-sum concept and that each change from a prior CBA can be traced directly to a new expense. Neither assumption is true. First, total compensation is subject to negotiation, so the size of the pie is not fixed. *Id*. ¶¶ 76-77. Second, the CBA is negotiated as a whole and subject to evolving negotiations over myriad economic items, and it is arbitrary and artificial to draw one-to-one comparisons. *Id*. ¶¶ 68-71, 75-77, 84-85. Amici also ignore that Petitioners' wages and benefits *increased* under the 2019-2021 CBA compared to the prior CBA. *Id*. ¶¶ 131, 133, 135.

II. Amici cannot inject new claims and legal theories into the case.

Petitioners' "free speech and association and right to work claims each rest on the foundation that plaintiffs (not the City) pay for release time." *Gilmore v. Gallego*, 255 Ariz. 169, 176, ¶ 19 (App. 2023). Their alleged injury is based on the allegation that they "lost" 8 hours of vacation to "pay" for release time. IR 9 (Second Amended Complaint) ¶¶ 3-4, 52-57, 65, 69-71; *see also* IR 100 ¶¶ 17-18 (similar). They wanted to eliminate release time solely because they hoped to receive 8 hours

of additional vacation. IR 70 ¶¶ 108-110; IR 100 ¶¶ 32-36.

Nevertheless, Freedom Foundation attempts to raise an entirely new issue by arguing that even the public funding of release time would "constitute impermissible viewpoint discrimination … if such funds were not distributed to equally situated speakers." FF Brief at 7-8. Freedom Foundation concedes "[t]his issue may not be presented in this case now." *Id*. The Court should disregard this issue, which the parties have not litigated or addressed. *See Vangilder v. Ariz. Dep't of Revenue*, 252 Ariz. 481, 493, ¶ 46 (2022) (amici "will not be permitted to create, extend, or enlarge the issues"); *Ruiz v. Hull*, 191 Ariz. 441, 446, ¶ 15 (1998) (similar).

III. Total compensation means the overall cost of the CBA, and Petitioners do not have an interest in it beyond their personal wages and benefits.

Amici contend Petitioners pay for release time because it is included in "total compensation" under the CBA, and Amici argue that all employees have an interest in "total compensation" as remuneration for services. This is not the meaning or reality of "total compensation."

The purpose of contractual interpretation is to "give effect to the intention of the parties." *Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 153 (1993). If parties "use language that is mutually intended to have a special meaning, and that meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent, even if the language ordinarily might mean something different." *Id*.; *see also Johnson v. Cavan*, 152 Ariz. 452, 455 (App.

1986) (trial court erred by assuming meaning without considering parties' intent). "Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected …." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 73 (2012) ("Every field of serious endeavor develops its own nomenclature – sometimes referred to as *terms of art*"); A.R.S. § 1-213 (term of art "shall be construed according to such peculiar and appropriate meaning").

Here, the City and Union (the contracting parties) submitted uncontroverted evidence of their intent that "total compensation" refers to all economic items the City must pay for under the CBA. IR 70 ¶¶ 67-73, 79-82, 92-93. Total compensation *does not* refer to the compensation of individual employees, and it is more than just the sum of all employee wages and benefits. *Id*. ¶¶ 70, 74-75, 84. For example, it includes economic items that are not part of any employee's compensation, such as expenditures for tools, equipment, and infrastructure. *Id*. ¶¶ 70, 75. Petitioners did not submit controverting evidence or specific facts to show a different intent.

Thus, "total compensation" is a term of art to describe the total cost *to the City* to pay for the entire economic package under the CBA. *Id.* ¶¶ 71-73; IR 70 & 74, Ex. 10 (Harder Depo.) at 21:4-7. The CBA makes this clear in connection with release time: "The cost *to the City*" was "charged as part of the total compensation." IR 70 & 71, Ex. 1 (2019-2021 MOU) § 1-3(A) (emphasis added). Petitioners admit the City pays for total compensation, *including* release time. IR 70 ¶¶ 30-31, 79-80,

82, 92-94; IR 100 ¶¶ 23, 26, 39; IR 70 & 73, Ex. 9 (Gilmore Depo.) at 127:15-129:6, 135:24-136:13; IR 70 & 74, Ex. 10 (Harder Depo.) at 48:15-50:12. "That money does not go through Unit 2 employees first," and "[i]t's not that the City is forcing Unit 2 employees to take money out of what they've been guaranteed under the MOU." IR 70 & 73, Ex. 9 (Gilmore Depo.) at 136:2-13.

Moreover, employees do not share equally in the portion of total compensation that does go toward wages and benefits. IR 70 ¶¶ 74, 84. Not all employees have the same wages and benefits, and not all are eligible for certain benefits like a uniform/tool allowance (MOU §§ 5-6, 5-8) or shift differential pay (MOU § 3-5). *Id*. ¶ 84; IR 87 ¶ 84. Thus, Petitioners admit Unit II employees do not share pro rata in total compensation. IR 70 ¶¶ 84, 90; IR 87 ¶¶ 84, 90.

Petitioners also concede they have no interest in "total compensation" beyond their personal wages and benefits. IR 70 ¶¶ 87, 127-129; IR 100 ¶¶ 50, 52-55. For example, they do not have an interest in economic items that are not any employee's compensation. IR 70 ¶¶ 75, 84-86; IR 100 ¶¶ 33, 36. Even more to the point, they have no interest in the compensation of other employees, and they do not finance their coworkers' wages and benefits. IR 70 ¶¶ 88-90. Instead, employees "get paid from the City." IR 70 & 73, Ex. 9 (Gilmore Depo.) at 97:7-20; *see also* IR 70 & 74, Ex. 10 (Harder Depo.) at 39:6-10, 48:15-50:12; IR 70 ¶¶ 30-31, 92-94.

The City pays for release time by "continuing to pay … the wages and benefits

to those Unit II employees who are either on 'fulltime release' or who draw from a bank of release time hours for specific reasons permitted under the MOU." IR 70 ¶¶ 29-31. Petitioners have no answer for why they supposedly pay for these wages and benefits but admittedly do not pay for others. With or without release time, the City still would need to pay the wages and benefits of these employees, and the City would "not experience savings" that could simply be reallocated to others. *Id*. ¶¶ 30, 45, 48; IR 70 & 75, Ex. 14 (Zuercher Depo.) at 50:23-51:23, 53:8-20, 87:5-20.

Ultimately, Petitioners have no interest in total compensation beyond their personal wages and benefits, and they do not pay for other employees' compensation. IR 70 ¶¶ 84-94, 127-129; IR 100 ¶¶ 50, 52-55. They also admit changes in total compensation could affect other economic items or other employees. IR 70 ¶¶ 85-86, 113-118, 122-123; IR 100 ¶¶ 33, 36. These facts and admissions are fatal to Amici's argument that Petitioners pay for release time.

IV. *Cheatham* did not hold that employees pay for release time.

Amici contend *Cheatham* involved a similar CBA and relied on a finding that employees paid for release time to conclude there was no Gift Clause violation. But *Cheatham* involved a *taxpayer* challenge to release time, and the Court "would have had no reason to address the Gift Clause if the City did not pay for release time." *Gilmore*, 255 Ariz. at 176, ¶ 16. Even Petitioners concede "there's a difference between laws that force people to contribute *their own* money or property" and

"government spending of *its own* money." Petitioners' Response to Unions' Amicus Brief at 4. "[O]nly the former triggers compelled speech concerns," whereas "the latter triggers Gift Clause concerns." *Id.*; *see also* Petitioners' Supp. Brief at 1-2, 13 (similar). Amici also concede this by arguing that "even if the salaries of release-time union employees were paid by the City rather than employees, that too would violate our Constitution – in this case the Gift Clause." AFE/GCL Brief at 13.

Cheatham repeatedly recognized that the City paid for release time, which is why the Court conducted a Gift Clause analysis in the first place:

> That a public entity is making payments to employees (here, payments for time spent on union-related activities) pursuant to a [CBA] does not necessarily obviate the concerns underlying the Gift Clause. Public funds conceivably could be expended for private purposes or in amounts grossly disproportionate to the benefits received even under a [CBA].

Cheatham, 240 Ariz. at 320, ¶ 19; *see also id.* at 316, ¶ 1 ("the City of Phoenix has contracted … to pay officers for certain time spent on behalf of their authorized representative"); *id.* at 317, ¶ 2 (release time is "when officers will be excused from usual police duties, but are still paid by the City"); *id.* at 322, ¶ 33 ("[t]he City's payments for release time are supported by consideration").

Amici contend *Cheatham* held that release time is "a component of [employees'] overall compensation package" and "[i]n lieu of increased hourly compensation or other benefits … per unit member." LJC Brief at 9-10; AFE/GCL

Brief at 9. These alterations do not fairly represent the quoted text. The Court actually said: "release time is a component of the overall compensation package negotiated between the City and PLEA on behalf of the police officers," and "[i]n lieu of increased hourly compensation or other benefits, PLEA negotiated for release time provisions worth about $1.7 million over a two-year period, or $322 annually per unit member." *Cheatham*, 240 Ariz. at 318, ¶ 14. The Court did not suggest that individual employees pay for release time or that release time is part of any employee's personal compensation. Instead, the Court recognized that release time is part of "total compensation," which means it is an economic item that has a cost to the City under the CBA. *See* IR 70 ¶¶ 67-73.

The Court rejected the notion that the Gift Clause was inapplicable simply because the City paid for release time as part of total compensation: "That the release time provisions at issue here are part of the negotiated compensation package … *is the beginning but not the end of our analysis*." *Cheatham*, 240 Ariz. at 320, ¶ 18 (emphasis added). The Court "also reject[ed] PLEA's argument that the release time provisions are not subject to Gift Clause scrutiny because they are part of the compensation package negotiated on behalf of the Unit 4 officers." *Id*. at ¶ 19. The Court focused instead on the traditional Gift Clause analysis, taking a panoptic view to analyze a public benefit and consideration. *Id*. at 320-23, ¶¶ 18-35. Nothing about the Court's analysis suggest the City's funding of release time is somehow turned

into private financing by individual employees with their money.

The Court stated that "had the release time provisions been omitted, the officers *might* have received other benefits under the compensation package." *Id*. at 323, ¶ 40 (emphasis added). But the Court did not say that employees were forced to fund release time or that their wages and benefits were reduced as a result. Indeed, the Court acknowledged (and did not overrule) the trial court's findings that "officers could not simply divide total compensation however they wished" and "the MOU does not discuss release time under 'Compensation/Wages.'" *Id*. at 319, ¶ 14. The Court also did not disturb the trial court's findings that (1) release time "is funded 100% by the City," (2) "reductions in one area of the MOU do not automatically trigger increases in officer salaries," and (3) "[t]he MOU does not require the City to increase officer salary if release time is enjoined." IR 100 ¶¶ 9-10.

After the City's release time payments were enjoined by the *Cheatham* trial court, the City did not simply reallocate the funds to other employees' wages and benefits. *Id*. ¶¶ 10-11. Petitioners' own expert acknowledged this, and he testified that release time is "not compensation for employees," and that he "would not say that there is an automatic correlation" between release time and employee wages and benefits. IR 70 & 73, Ex. 7 (Brown Depo.) at 138:3-18, 140:9-141:9, 144:5-144:24.

Amici contend the CBA here is similar to the one in *Cheatham*, and they latch on to the "in lieu of wages and benefits" language in the *Cheatham* CBA to argue

that Petitioners pay for release time. As the court of appeals noted, however, the CBA here does not have this language. Amici contend this difference is irrelevant because the parties cannot change the "economic reality" of the transaction based on the language in the CBA. It is not clear how Amici square this argument with their reliance on the phrase "total compensation," and they do not explain why the different language should be ignored. In any event, Amici are right about one thing: the absence of these 6 words in the CBA here did not change who paid for release time. The City paid for it in *Cheatham*, and the City still paid for it here.

V. Petitioners were not deprived of wages or benefits to pay for release time.

Amici contend Petitioners pay for release time because they received 8 hours of additional vacation under a previous CBA but "lost" 8 hours under the 2019-2021 CBA. Amici argue the 8 hours were "taken" to fund release time. *See* LJC Brief at 11 (Petitioners "in particular *have* given up compensation – eight fewer hours of vacation leave – to fund AFSCME's release time"); AFE/GCL Brief at 9 ("If the money was not taken from their paychecks, they would receive it directly"). This theory fails based on the law and undisputed facts.[2]

[2] Like Petitioners, Amici make arguments about the City's answer before it was amended. AFE/GCL Brief at 4. The original answer became a legal nullity after it was amended (IR 53), and it is irrelevant here. *See Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586 (App. 1996) (an amended pleading "supersedes" the original pleading, and the latter "becomes *functus officio*, that is, of no further effect or authority"); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (it is "well-established" that "an amended pleading supersedes the original").

The City Code requires the City's agreements regarding wages, hours, and working conditions to be set forth in a CBA that must be approved by the City Council. City Code §§ 2-209(4), 2-215. When the Council adopts an annual budget, it "may fix, increase, decrease or modify the salaries applicable to any position … except for those previously established by a duly executed and approved Memorandum of Understanding which does not exceed three years in duration." City Charter, Ch. III, § 9(A). The City "may not use or agree to a method or procedure for determining the compensation, hours and conditions of employment … which prohibits the City Council or the City Manager from disapproving or altering such determinations." City Charter, Ch. XXV, § 14(F).

Before each CBA expires, the City must collectively bargain with the Union regarding the next CBA. City Code §§ 2-210(11), 2-215. Every provision is a mandatory subject of bargaining, which means all are subject to negotiation, and the Charter and Code preclude the City from interfering with the Council's authority to approve the next CBA and make changes to compensation. City Code § 2-215; City Charter, Ch. III, § 9(A), Ch. XXV, § 14(F). The City Code also reserves the City's rights to "exercise control and discretion over its organization and operations" and "take all necessary actions to maintain uninterrupted service to the community." City Code § 2-213(B). "The Mayor and City Council may, at their option and sole discretion, direct the City Manager to consult with the City's employees, or their

authorized representatives, about the direct consequences that decisions on these matters may have on wages ….” *Id*.

In addition, an employee has “no continuing rights” to “compensation under his old contract of employment.” *Bennett ex rel. Ariz. State Pers. Comm’n v. Beard*, 27 Ariz. App. 534, 537 (1976); *see also Paczosa v. Cartwright Elem. Sch. Dist. No. 83*, 222 Ariz. 73, 77, ¶¶ 15-17 (App. 2009) (no right to past compensation from expired contract). “[C]ontractual obligations will cease, in the ordinary course, upon termination of the [CBA].” *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 135-36 (2018); *see also Watkins v. Honeywell Int’l, Inc.*, 875 F.3d 321, 322 (6th Cir. 2017) (similar); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 816 (7th Cir. 1992) (similar).

After the previous CBA expired, the 2019-2021 CBA governed Petitioners’ terms and conditions of employment, and they were not entitled to more than the wages and benefits set forth therein. City Code §§ 2-209(4), 2-210(11), 2-215; *see also Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 264, ¶¶ 12-13 (App. 2004) (“neither the record nor the law supports any contention that appellants reasonably expected to be paid in a manner different than that described in the contract”). In particular, Petitioners had no right to any compensation from the previous CBA, including the 8 hours of vacation they seek here. *See Abbott v. City of Tempe*, 129 Ariz. 273, 278-79 (App. 1981) (employees have “no right to continue benefits into the future in the absence of a formal written contract setting forth that right”);

Paczosa, 222 Ariz. at 77, ¶¶ 15-17 (same); *Bennett*, 27 Ariz. App. at 537 (same).

For the same reason, Petitioners have no claim to any compensation that was never part of their personal terms and conditions of employment under the 2019-2021 CBA. *See Orfaly*, 209 Ariz. at 264, ¶¶ 12-13. Employees do not have a prospective right to compensation, and they must earn their contractual wages and benefits through their ongoing services. *See Abbott*, 129 Ariz. at 279 (employees only entitled to compensation in contract and must provide services to earn it). By performing services, Petitioners earned only their personal wages and benefits under the CBA. *Id*. They had no right to or interest in the money that paid for release time because it was never part of their personal wages and benefits as they rendered services. IR 70 ¶¶ 82, 87-94, 96, 127-129; IR 100 ¶¶ 50, 52-55.

Amici contend release time is part of "employees' compensation" under the CBA. But this relies on the misinterpretation of "total compensation" discussed above, and Petitioners disclaimed any interest in total compensation beyond their personal wages and benefits. IR 70 ¶¶ 74-75, 87-94, 96, 127-129; IR 100 ¶¶ 50, 52-55. They are not "entitled to anything more than the wages and benefits specified in the MOU" and "have no reason to believe that the City … failed to comply." IR 70 ¶¶ 127-129; IR 100 ¶¶ 16, 50, 52-55; IR 60 & 66, Ex. 26 & Ex. 27 (Petitioners' Decl.) ¶¶ 14-16. They "received all of the wages and benefits that were promised" and were not "receiving fewer wages or benefits … as a result of release time." IR

70 ¶¶ 87-94, 96; IR 100 ¶¶ 46-47, 52-55; *see also* IR 100 ¶ 47 (Mr. Gilmore: "No money is taken out of me"); *id*. ¶ 53 (Mr. Harder agreeing: "money is not being taken … to pay for release time"); IR 70 & 73, Ex. 9 (Gilmore Depo.) at 118:18-119:2; IR 70 & 74, Ex. 10 (Harder Depo.) at 39:19-15. Thus, "[i]t's not [their] actual compensation under the MOU that's being used to finance release time, but some higher amount of compensation that [they] would like to have if release time were eliminated." IR 100 ¶ 54. However, "[t]he City never promised to pay [them] that higher amount." *Id*. ¶¶ 48-55; IR 70 ¶¶ 117, 125.

Amici also rely on the assumption that release time was funded by money that "would otherwise go toward employees' compensation and benefits were it not diverted to the [U]nion." LJC Brief at 11; *see also* AFE/GCL Brief at 11 ("what was paid to release-time union employees *was necessarily not paid* to the yes-show employees"). This assumption fails for multiple reasons.

To start, the City still would pay the wages and benefits of the previously released employees, so there would be no money to "otherwise go toward" Petitioners. IR 70 ¶ 45; IR 70 & 75, Ex. 14 (Zuercher Depo.) at 50:23-51:23, 53:8-20, 57:16-58:3, 87:5-20, 99:5-101:21. Even if money were available, the City Council or Manager would ultimately decide how to reallocate the funds. IR 70 ¶¶ 111-116; *see also* City Charter, Ch. III, § 9(A), Ch. XXV, § 14(F); City Code §§ 2-213(A), (B), 2-215. There is no requirement, obligation, or guarantee that the funds

would be reallocated to increasing Petitioners' wages or benefits. IR 70 ¶¶ 112, 117, 121-125; IR 70 & 75, Ex. 14 (Zuercher Depo.) at 76:2-77:12, 99:5-101:21.

Indeed, Petitioners admit "[t]he City can do whatever it wants" with the money if paid release time is enjoined, and they have no right, authority, or claim to dictate the City's funding choices. IR 70 ¶¶ 78-83, 113-118, 122-125, 136; IR 100 ¶¶ 48-51, 54-55. For example, the City could return the money to its general fund, invest in infrastructure, or expand City services. IR 70 ¶¶ 121-122, 124. Or the City could spend it on "fixing potholes." Petitioners' Supplemental Brief at 5-6.

In reality, the City would negotiate with the Union to determine "how those duties that we need are accomplished," including ensuring employees are represented in collective bargaining and labor relations. IR 70 & 75, Ex. 14 (Zuercher Depo.) at 76:16-77:12, 99:5-101:21; *see also* IR 70 ¶¶ 45, 103-104, 111-112. The City manager explained: "we have to … make sure that we're covering what the ordinance requires us to do, which is to provide representation to people, to provide negotiation for members, and then the labor-management work that we do together." IR 70 & 75, Ex. 14 (Zuercher Depo.) at 76:16-77:12. "[W]e need there to be representation for employees as laid out in the labor ordinance," and "we would have to find a way to get that time invested in the outcome." *Id*. at 101:2-21. Accordingly, there is no guarantee the elimination of paid release time would result in higher wages and benefits for other employees. *Id*. at 76:16-77:12, 101:2-21.

Even when paid release time was enjoined, "those employees were still working for the City" and "it still resulted in their time being spent on these activities because these activities are required by the MOU [and] they're required by management for better running of the City." *Id*. at 50:23-51:23, 53:8-54:18. As a result, the City "did not experience savings." *Id*. If anything, the City's costs would likely increase because "we have to find people to go and do those things," and "it's more clumsy to go find them just on an ad hoc basis." *Id*. at 55:22-56:6, 87:5-20; *see also id*. at 56:17-57:3 (City may need "more HR people running around" without release time). Petitioners did not present evidence to controvert the City Manager's testimony. IR 70 ¶¶ 45, 103-104; IR 87 ¶¶ 45, 103-104.

The City's and Union's expert also explained why Amici's assumptions are "illogical and unsupported by evidence or accepted economic or other academic theories." IR 70 & 72, Ex. 6 (Ward Report) at 3-4, 8, 12-14. "[T]he City's ability and willingness to pay for compensation would likely shrink" if eliminating release time "reduces productivity, increases turnover, increases management costs, etc., by even a small amount." *Id*. at 12. The City also "may decide that allocating additional money toward wages is unnecessary" because it "bargains to ensure that wages allow it to attract and retain employees while not overpaying." *Id*. "I do not expect eliminating release time to make workers more productive, to make jobs at other employers more attractive, or to make any other change to market forces that would

likely put pressure on the City to increase wages." *Id.*

Moreover, Amici cannot "trace" the City's release time payments to any loss of wages or benefits. They attempt to show the tracing through the alleged loss of the 8 vacation hours, but Petitioners admit the City did not "make a commitment to pay [them] those eight hours" and "has not told [them] that [they] will get an additional eight hours." IR 100 ¶¶ 48-49, 54-55. "[I]f release time were eliminated, [they] don't know whether [their] benefits or wages would increase," and they "don't know what the City would do with the money that's allocated for release time." *Id.* ¶¶ 51, 55. Thus, the City "has not made a promise to … pay more than what's in the MOU" or "made a commitment to … pay [them] any of the money that was allocated for release time." IR 70 & 74, Ex. 10 (Harder Depo.) at 39:19-40:15.

Amici also rely on the false assumption that total compensation is "zero-sum" so the wages and benefits of other employees "necessarily had to decrease by an identical amount to make room for the release time payments." AFE/GCL Brief at 10-11. Total compensation is not a "fixed pie" or "zero sum" concept. It is subject to negotiation just like the economic items that comprise it – i.e., the size of the pie can change. IR 70 ¶ 77. There is no way to trace the City's payments for release time to alleged "lost" compensation because they are not mutually exclusive.

Further, the City's collective bargaining negotiations involve the entire economic package and include myriad evolving negotiations over a range of

economic items. IR 70 ¶¶ 68-71, 75-77, 84-85. There are not necessarily linear or one-to-one tradeoffs, and drawing such comparisons is arbitrary. IR 70 & 74, Ex. 12 (Frost Depo.) at 123:19-124:15. Amici speculate, but there is no evidence the parties reduced wages and benefits to fund release time. *Id*.

In fact, Petitioners' compensation was *higher* under the 2019-2021 CBA because they received higher wages and new one-time payments. IR 100 ¶¶ 3-7. The economic value of either was *more* than the percentage share of the City's release time funding if it had been divided equally among Unit II employees. *Id.*; IR 70 ¶ 101. The Union may have bargained for these payments instead of more vacation time. *Cf. id*. ¶¶ 68-70, 76-77, 117,122-123.

Finally, Amici's position has incredibly concerning implications. It implies a continuing right to old compensation from expired CBAs, and it would seemingly allow employees to attack other expenditures by arguing they might have received more compensation. For example, they may object to reproductive healthcare for female employees by arguing it forces them to "pay." Employees do not have this type of veto power over the City's operations, funding decisions, and policy choices.

VI. Conclusion.

Petitioners were not deprived of any wages or benefits, and release time does not take money out of their pockets. They admitted this. Amici ignore the law and these undisputed facts, which are fatal to Petitioners' claims.

DATED: January 3, 2024.

SHERMAN & HOWARD L.L.C.

By: /s/ *Matthew A. Hesketh*
John Alan Doran (AZ Bar No. 012112)
Matthew A. Hesketh (AZ Bar No. 029319)
Carli J. Simkin (AZ Bar No. 038154)
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
Telephone: (602) 240-3000
Facsimile: (602) 240-6600
JDoran@ShermanHoward.com
MHesketh@ShermanHoward.com
CSimkin@ShermanHoward.com
Attorneys for City Defendants/Appellees