**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 GIFT CLAUSE ISSUE ON REVIEW

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## I. Summary of arguments.

The National Right to Work Legal Defense Foundation, Inc. ("NRW"), Freedom Foundation ("FF"), Arizona Free Enterprise Club ("AFE"), and Grand Canyon Legal Center ("GCL") (collectively, "Amici") ignore the undisputed facts and the correct legal framework for Gift Clause challenges. This case was correctly decided based on the relevant facts and law, not ideological debates over policy.

First, Amici do not take a panoptic view of the entire collective bargaining agreement ("CBA"). The release time provisions are part of the CBA, and mutuality of obligation is not required in piecemeal fashion for each provision.

Second, Amici ignore Petitioners' failure to prove a Gift Clause violation. The City Council did not "unquestionably abuse" its discretion in determining that the CBA, including release time, serves a public purpose – especially when every judge below found a public purpose, as has this Court (twice) and several other courts in similar circumstances.[1] Petitioners also failed to prove "grossly disproportionate" consideration. They conceded adequacy under a panoptic view analysis, and they did not controvert the City's evidence of consideration.

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[1] *See Gilmore v. Gallego*, 255 Ariz. 169, 178, ¶¶ 26-28 (App. 2023); *id.* at 182-83, ¶ 46 (Bailey, J., concurring in part and dissenting in part); *Cheatham v. DiCiccio*, 240 Ariz. 314, 320-21, ¶¶ 22-27 (2016); *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348 (1984); *Rozenblit v. Lyles*, 243 A.3d 1249, 1265-66 (N.J. 2021); *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 730 P.2d 653, 659 (Wash. 1986); *Borgelt v. Austin Firefighters Association*, 2022 WL 17096786, at *8-9 (Tex. App. Nov. 22, 2022) (memo. op.).

Third, Amici's idea of a "public purpose" is far too narrow. They disregard that the CBA procured employee services, defined their terms and conditions of employment, and facilitated a readily available point of contact for labor relations. Moreover, the City and Union do not have mutually exclusive interests. Both have an interest in positive labor relations. Both have an interest in employee morale, recruitment, and retention. Both have an interest in fairly and efficiently addressing workplace disputes and facilitating effective communication between the City and employees, which helps employees understand the City's policies and processes, and helps the City have better information about employee preferences and concerns.

Finally, Amici disregard the City's consideration even if release time is viewed in isolation. They discount the direct benefits from "an efficient and readily available point of contact for addressing labor-management concerns." IR 70 (JSOF) ¶¶ 33-34, 43-46, 54-56; IR 70 & 71, Ex. 1 (2019-2021 MOU) at § 1-3(A). They neglect that the CBA identified specific release time activities for this purpose, and they overlook the resulting positive effects on labor relations. IR 70 ¶¶ 26-27, 29, 33-34, 36-38, 41-44, 46, 54-56, 58-62, 64-65. Perhaps most importantly, Amici ignore the uncontroverted evidence that these activities help the City fulfill its obligations under the CBA and City Code. *Id*. ¶¶ 41-46, 54-56, 103-104.

The City must collectively bargain and ensure employees are represented in labor relations. IR 70 ¶¶ 8-12, 45, 103-104; IR 70 & 75, Ex. 14 (Zuercher Depo.) at

53:8-54:18, 76:16-77:12, 99:5-101:21. As a result, the City "*did not experience savings*" when release time provisions were enjoined in 2014 because the City still needed employee representatives to take time to perform these functions. IR 70 & 75, Ex. 14 (Zuercher Depo.) at 50:23-51:23 (emphasis added). If release time were eliminated again, the City's costs would likely *increase* because it would be more burdensome and less efficient to find available employee representatives on an ad hoc basis. *Id*. at 53:21-54:18, 55:22-56:6, 56:17-57:3, 87:5-20, 99:5-101:21.

## II. Amici fail to take a "panoptic view" of the entire CBA, and there is no basis for disregarding *Cheatham*.

Amici improperly attack the release time provisions in isolation and mostly ignore "whether a *comprehensive examination* of the agreement reveals that the expenditure is grossly disproportionate to the benefit the public receives." *Cheatham*, 240 Ariz. at 322, ¶ 34 (emphasis added). Their only argument for skirting *Cheatham*'s "panoptic view" framework is that it purportedly relied on a finding that "employees paid for release time." AFE/GCL Brief at 19-20.

*Cheatham* made no such finding. The Court conducted a Gift Clause analysis because the City paid. *See Cheatham*, 240 Ariz. 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"). Even Petitioners

concede there is no reason for a Gift Clause analysis unless the City uses "its own money" to pay. Petitioners' Response to Unions' Amicus Brief at 4.

"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). Thus, the "analysis *begins* by recognizing that the challenged release time provisions are part of the MOU." *Id*. at 318, ¶ 11 (emphasis added). But the provisions are not immune from Gift Clause scrutiny simply because "they are part of the compensation package negotiated on behalf of [employees]." *Id*. at 320, ¶ 19. "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." *Id*.

The Court then turned to the "usual Gift Clause analysis" and analyzed the provisions "in light of the entire MOU" because "[d]oing otherwise would conflict with the requirement that courts adopt a 'panoptic view' of the transaction." *Id*. at ¶¶ 18-19. *Cheatham* requires a panoptic view of the CBA because this is the longstanding framework for Gift Clause challenges, not because employees pay for any provisions. *Id*. at 318, 321-22, ¶¶ 10, 25 (citing *Wistuber*), ¶ 30 (citing *Turken*).

The same analysis applies here. Release time was negotiated as part of the CBA with the intent to assist the parties in complying with their collective bargaining and labor relations obligations under the CBA and the Meet & Confer

Ordinance. IR 70 ¶¶ 28, 32-34, 36-38, 41-46, 54, 103-104; IR 100 (Resp. to PSOF) ¶¶ 43-45, 109, 111. The provisions were integrated parts of the contract and included as components of the City's total cost to pay for it – i.e., the "total compensation." IR 70 ¶¶ 28-31, 33, 35-39, 48, 67, 71-73, 92-93, 101-104. They must be analyzed in the context of the entire CBA. *See Rozenblit*, 243 A.3d at 1265-66 (release time provision "is part of an agreement as a whole"); *Borgelt*, 2022 WL 17096786, at *6 ("[m]utuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole").

Amici's attempt to avoid the panoptic view requirement ultimately undermines their position. Petitioners contend they were harmed because they allegedly lost 8 hours of vacation. However, the City was able to procure employee services without providing 8 hours of additional vacation. Mr. Gilmore testified that if he received 8 hours of additional vacation, "the benefit wouldn't be for the public" and the public would get the "same" services from him. IR 100 ¶ 34. If we abandon the panoptic view in favor of Amici's attempt to analyze every part of a transaction in isolation, it is not clear that Petitioners' quest for additional vacation would be supported by consideration. This illustrates why it is problematic to isolate individual components instead of taking a panoptic view of the entire CBA.

## III. Amici ignore Petitioners' failure to show a violation of either element of the Gift Clause claim.

Amici presume the City was required to show that the CBA and release time

provisions satisfied the Gift Clause, but "[i]t was not the burden of the [City] to prove that its contract was reasonable." *Wistuber*, 141 Ariz. at 350. "The burden of proof was on those who challenged that contract." *Id*. Petitioners did not present admissible evidence to meet their burden, and they failed to controvert the City's and Union's evidence of a public purpose and adequate consideration.[2]

For example, Petitioners did not submit evidence to rebut the fact that "[t]he City benefits under the 2019-2021 MOU by procuring the services of Unit II employees" and "defining their terms and conditions of employment." IR 70 ¶ 19; IR 87 ¶ 19. They also did not rebut that "[t]he City benefits … through the Union's confirmation of its agreement to be the collective bargaining and labor representative" because "this provides the City with a defined point of contact for addressing labor relations matters." IR 70 ¶¶ 17, 25; IR 87 ¶¶ 17, 25.

Although Amici incorrectly attempt to isolate release time, they do not address Petitioners' failure to rebut that "[r]elease time helps the City and the Union promote harmonious labor relations and facilitate an open dialogue about employee preferences and concerns, and it helps both the City and the Union fulfill their

[2] "The opponents of a motion for summary judgment do not raise a genuine issue of fact by merely stating in the record that such an issue exists." *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499 (App. 1980). Instead, they must "produce sufficient competent evidence to show that an issue exists." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 14 (App. 2000). "[U]nsworn and unproven assertions of fact are insufficient." *McCleary v. Tripodi*, 243 Ariz. 197, 201, ¶ 21 (App. 2017).

respective obligations under the City's Meet & Confer Ordinance." IR 70 ¶ 41; IR 87 ¶ 41. Importantly, Petitioners did not submit evidence to rebut that "release time serves a public purpose and benefits the City" by: (1) "making it easier to schedule and facilitate collective bargaining sessions … and other labor-management meetings," (2) "providing workers with the means to express discontent," (3) "opening channels of communication," (4) "providing management with information about worker preferences," (5) "identifying and potentially remedying inefficiencies in the production process," (6) "developing dependable, trained, and knowledgeable representatives to help facilitate the collective bargaining process, the dispute resolution process, and the promotion of harmonious labor relations," (7) "facilitating more efficient scheduling and a centralized method for collective bargaining and resolving labor disputes," (8) "facilitating employee service on committees and task forces," (9) "gathering and providing feedback on management policies or programs," (10) "informally resolving disputes outside of the formal grievance process," and (11) "increasing employee satisfaction resulting in greater productivity and reduced turnover." IR 70 ¶ 54; IR 87 ¶ 54.

Petitioners conceded many of these benefits occurred or were possible. IR 70 ¶¶ 51-52, 57-62; IR 100 (CSOF) ¶¶ 44-45; IR 70 & 73, Ex. 9 (Gilmore Depo.) at 25:4-7 (communicating employee preferences), 27:2-18 (resolving disputes), 37:18-38:14 (benefitting both City and Union), 180:5-182:1 (facilitating witness

attendance at grievances, and improving working conditions); IR 70 & 74, Ex. 10 (Harder Depo.) at 23:13-23 (facilitating collective bargaining), 25:5-11 (obtaining better information about employee preferences), 26:18-22 (benefitting both City and Union), 28:4-25 (improving employee collective voice).

Petitioners also admitted the City received adequate consideration for the total cost of the CBA, which includes release time. IR 70 ¶ 100; IR 100 ¶¶ 37-38. For example, Mr. Gilmore agreed that "[t]he City gets a fair amount of services from Unit 2 employees for the total compensation under the MOU." IR 100 ¶ 37. Similarly, Mr. Harder agreed to the best of his knowledge that "[t]he economic cost of the MOU to the City is not too high for what the City gets from Unit 2 employees" and "the City get[s] a fair amount of services from Unit 2 employees in exchange for that economic package." *Id.* ¶ 37.

Notwithstanding Petitioners' admissions, Amici contend the consideration is insufficient under even a panoptic view because (1) uniform terms of employment are not concessions from the Union, (2) "parties agreeing to continue conducting their usual business is insufficient consideration for Gift Clause purposes," and (3) the Union has a preexisting duty to represent all Unit II employees. NRW Brief at 9-11; FF Brief at 18-20; AFE/GCL Brief at 18-19. These arguments are inapposite, and they miss the point of the panoptic view analysis:

> Even if [the Union] is viewed as the primary beneficiary of the release time provisions, in gauging whether the City

> has received consideration for those provisions it is necessary to consider what the [employees] have agreed to do – to work under the wages, hours, and conditions specified in the MOU – in exchange for the compensation package (which includes the release time provisions). This reflects the general contractual principle that one party's performance (here, the City's agreement to pay release time) may be supported by "consideration" in the form of performance or a return promise by either the promisee (arguably [the Union]) or another person (the [employees]).

*Cheatham*, 240 Ariz. at 322, ¶ 32.

Employee services are the City's primary consideration under the CBA, and the City benefits by collectively bargaining with the Union to determine Unit II's terms and conditions of employment for the duration of the CBA. IR 70 ¶¶ 6, 16, 18-19, 21. Collective bargaining promotes better labor relations because it allows employees to participate in formulating their terms and conditions of employment. *Id*. ¶¶ 20, 54, 56; IR 70 & 72, Ex. 6 (Ward Report) at 3-8; IR 70 & 74, Ex. 11 (Ward Depo.) at 47:2-24, 113:14-114:5; IR 70 & 74, Ex. 12 (Frost Depo.) at 54:14-56:24, 82:13-83:13, IR 70 & 75, Ex. 14 (Zuercher Depo.) at 24:1-25, 99:23-101:21.

Amici cannot seriously contend employees would "continue conducting their usual business" – i.e., working – absent the contractual employment relationship. *Contra* AFE/GCL Brief at 18-19. Unlike the businesses in *Schires*, which may have continued operating without public funding, no employee would continue working for free. Under Amici's illogic, no public employment contract would be supported

by consideration, and Petitioners' wages would be unconstitutional gifts. There is no reasonable dispute the services procured by the CBA are consideration.

In addition, the City benefits from the Union's contractual agreement to represent all Unit II employees and by coordinating with the Union to collectively bargain and address labor issues. IR 70 ¶¶ 24-27, 33-38, 45, 54. The Union's duties as the exclusive representative do not mean its promises in the CBA are superfluous. Its contractual commitments to the City are in addition to any preexisting duties it separately owes to employees. *See Leone v. Precision Plumbing & Heating of S. Ariz., Inc.*, 121 Ariz. 514, 515-16 (App. 1979); Restatement (Second) of Contracts § 73 & cmt. d (1981). Moreover, the Union agreed to be a "readily available point of contact" and to "meet with affirmative willingness to resolve grievances and disputes relating to wages, hours and working conditions." IR 70 ¶¶ 22, 33. The Union also agreed to designate representatives for task forces/committees and to address grievances and other disputes. *Id*. ¶¶ 24, 26-27, 36, 38, 44.

It is more efficient for the City to address these issues with an identified point of contact through employee representatives who are trained, knowledgeable, and readily available. *Id*. ¶¶ 16, 29, 33, 37, 43, 54-55, 103-104. But the City does not benefit if there is no mechanism for it to spend time to meaningfully engage in labor relations with the Union. *Id*. ¶¶ 45, 64-65. Release time is this mechanism, and it would be more burdensome to schedule meetings, resolve disputes, and enable

ongoing communication without it. *Id*. ¶¶ 33, 36-38, 41-46, 54-56, 64-65, 103-104.

## IV. Amici incorrectly attempt to narrow the meaning of a public purpose.

Contrary to what Amici suggest, there is no requirement that a public expenditure must "predominantly serve a public purpose" or "provide a clear public benefit." *Contra* NRW Brief at 6. Instead, "courts take a broad view of permissible public purposes and give significant deference to the judgment of elected officials, who are tasked with identifying and furthering such purposes." *Schires v. Carlat*, 250 Ariz. 371, 375, ¶ 9 (2021). We may "consider both direct and indirect benefits," and "[t]he fact that [private parties] also benefit, even primarily, does not alter the public purposes." *Id*. at 375-76, ¶¶ 8, 10-12; *see also Cheatham*, 240 Ariz. at 321, ¶¶ 25-26 (explaining public benefit of having union represent and advocate for employee interests, even if sometimes adversarial relative to City).

Moreover, "the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government." *Cheatham*, 240 Ariz. at 320, ¶ 21. "[A] court should not concern itself with the wisdom or necessity of the expenditure …." *Schires*, 250 Ariz. at 375, ¶ 8. "[A] public purpose is lacking only in those rare cases in which the governmental body's discretion has been unquestionably abused." *Cheatham*, 240 Ariz. at 320, ¶ 21.

As in *Cheatham*, the City benefited from the CBA because it procured employee services, defined their terms and conditions of employment, and

confirmed the Union's agreement to represent employees. IR 70 ¶¶ 6, 13, 18-27, 33-39; *Cheatham*, 240 Ariz. at 320-22, ¶¶ 23-27, 31-34. Because Amici improperly attempt to isolate release time, they offer nothing more to the analysis. But even if the provisions are isolated, they still serve a public purpose.

Amici contend release time serves no public purpose because it is used for "political advocacy" and to advance the Union's adversarial position against the City. NRW Brief at 6-8; AFE/GCL Brief at 14-16. These arguments ignore the public purposes discussed above, and Amici are simply second-guessing the City Council rather than showing an unquestionable abuse of discretion.

In any event, the benefits to the Union do not negate a public purpose, and Amici's arguments "view[] too narrowly both the role of public employee unions and the public's interest." *Cheatham*, 240 Ariz. at 321, ¶ 25. The Meet & Confer Ordinance recognizes that the "public interest" includes "the interest of the public employees, public employer, and the public." City Code § 2-219(J). The City's interests are "broader than a private employer based on 'the unique fact that the public employer was established by and is operated for the benefit of all the people.'" *Cheatham*, 240 Ariz. at 321, ¶ 25 (quoting City Code § 2-209). "While the City may sometimes be in an adversarial role relative to the union (sitting across the table, so to speak, in labor negotiations or employment-related disputes), the City – as its own ordinance recognizes – may also benefit as an employer by having an identified

representative of the Unit 4 officers for employment-related issues." *Id.* And like the Union, the City has an interest in positive labor relations, morale, recruitment, retention, and ensuring employees are treated fairly. IR 70 ¶¶ 16-17, 20, 34, 36-38, 41-42, 46, 54-56, 104; IR 70 & 72, Ex. 6 (Ward Report) at 3-12; IR 70 & 74, Ex. 11 (Ward Depo.) at 47:2-24, 55:5-57:10, 113:14-114:5; IR 70 & 74, Ex. 12 (Frost Depo.) at 54:14-56:24, 82:13-83:13, IR 70 & 75, Ex. 14 (Zuercher Depo.) at 24:1-25, 26:12-27:3, 57:22-61:5, 87:5-20, 99:5-101:21.

Amici also contend there is no public purpose because release time activities "need not be subsidized to attain so-called labor peace."[3] NRW Brief at 8-9. However, "[t]he pertinent issue … is not whether a particular expenditure is the *only way* to achieve a public purpose." *Cheatham*, 240 Ariz. at 322, ¶ 34 (emphasis added). The question is whether the City Council exceeded the bounds of reason.

As *Cheatham* recognized, the CBA "must be understood in light of the governing provisions of the Phoenix City Code." *Id.* at 318, ¶ 11. The Code recognizes "the right of the City to direct its employees … and determine the methods, means, and personnel by which the employer's operations are to be

[3] Amici contend "*Janus* has already established that giving unions money or resources to advocate for their speech does not support labor peace." FF Brief at 8. This is not true. *Janus* "assume[d]" that labor peace "is a compelling state interest," and it dealt with whether this was sufficient to "justify the heavy burden of agency fees on nonmembers' First Amendment interests." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465, 2477 (2018). The Gift Clause has nothing to do with the First Amendment inquiry into agency fees.

conducted." City Code § 2-213(B). The City Council also declared that "[t]he people of Phoenix have a fundamental interest in the development of harmonious and cooperative relationships between the City government and its employees." *Id*. § 2-209(1). "[F]ull acceptance of the principle and procedure of full communication between public employers and public employee organizations can alleviate various forms of strife and unrest." *Id*. § 2-209(2).

To achieve these public purposes, the Ordinance obligates the City and Union "to enter into discussions with affirmative willingness to resolve grievances and disputes relating to wages, hours and working conditions." *Id*. § 2-209(4). "It is also the purpose of this ordinance to promote the improvement of employer-employee relations by providing a uniform basis for recognizing the right of public employees to join, or refrain from joining, organizations of their own choice and be represented by such organizations in their employer-employee relations and dealings with the City in accordance with the provisions of this ordinance." *Id.* This includes recognizing employees' right to be represented in collective bargaining, grievances, and other labor relations. *Id*. §§ 2-214(A), (B), 2-218(A), 2-220.

Consistent with these policy objectives, the CBA recognizes that "[t]he Phoenix community benefits from harmonious and cooperative relationships between the City and its Employees." IR 70 ¶ 34. Accordingly, the City and Union negotiated release time as "an efficient and readily available point of contact for

addressing labor-management concerns." *Id*. ¶¶ 33, 43. In addition, the City "values and benefits from the participation of Union leaders on citywide task forces and committees, Labor-Management work groups, and a variety of Health and Safety committees." *Id*. ¶ 26. The CBA expressly contemplates that release time will be used for activities that fulfill the parties' collective bargaining and labor relations obligations under the CBA and Ordinance. *Id*. ¶¶ 7-12, 22-27, 33-34, 36-38, 41-44.

Even without release time, the City still must implement a mechanism to comply with its obligations, and there will necessarily be a cost. *Id*. ¶¶ 45, 103-104. Release time is the City Council's chosen method for implementing a "procedure of full communication," and it facilitates a readily available point of contact (released employees) with whom the City can "enter into discussions with affirmative willingness to resolve grievances and disputes relating to wages, hours and working conditions." City Code § 2-209; IR 70 ¶¶ 14-15, 28, 41-46, 54-55, 103-104.

Release time also helps develop a knowledgeable and trained group of employee representatives who can convey information between the City and other workers, communicate employee preferences, assist and counsel others in understanding the CBA and the City's policies and work rules, address workplace problems, and help to informally resolve disputes before they become grievances. IR 70 ¶¶ 29, 36-37, 54, 65; IR 70 & 72, Ex. 6 (Ward Report) at 4-6; IR 70 & 74, Ex. 11 (Ward Depo.) at 54:20-57:12; IR 70 & 74, Ex. 12 (Frost Depo.) at 54:14-56:24;

IR 70 & 75, Ex. 14 (Zuercher Depo.) at 24:1-25, 55:4-57:3, 58:21-61:5, 99:5-101:21.

This helps facilitate employees' "collective voice" and creates "a more satisfied, cooperative, and productive workforce" by (1) "[p]roviding workers the means to express discontent other than quitting," (2) "[o]pening channels of communication," (3) "[p]roviding management information about worker preferences," (4) [i]dentifying and potentially remedying inefficiencies in the production process," and (5) "increasing employee education and knowledge, helping the City provide benefits and working conditions that are better matched to employee preferences, increasing job satisfaction, reducing turnover, improving recruitment, and increasing productivity." IR 70 & 72, Ex. 6 (Ward Report) at 5-6; *see also* IR 70 ¶¶ 54, 56; IR 70 & 74, Ex. 11 (Ward Depo.) at 47:2-24, 54:20-57:3, 113:14-114:5; IR 70 & 74, Ex. 12 (Frost Depo.) at 54:14-56:24, 82:13-83:13; IR 70 & 75, Ex. 14 (Zuercher Depo.) at 24:1-25, 26:12-27:3, 58:21-61:5, 99:5-101:21. These benefits "serve to increase the efficiency of City operations, saving money and improving quality," and "directly paying for [release time] is the most practical and least risky option to ensure the ongoing benefits." IR 70 & 72, Ex. 6 (Ward Report) at 5-6, 11-12; IR 70 & 74, Ex. 11 (Ward Depo.) at 49:15-51:7, 76:17-77:2.

Amici ignore these public purposes and direct benefits. At most, they have shown an ideological difference of opinion about the City Council's choice to pay for release time as part of the CBA, but this is not a legal issue – it is exactly the

kind of policy decision to be made by the legislative branch. The Council could not have "unquestionably" abused its discretion when the judges below and other courts have found a public purpose. *See, e.g., Cheatham*, 240 Ariz. at 320-21, ¶¶ 23-24 (release time provisions "benefit the City" because "they can facilitate the resolution of grievances and other employee-employer issues" and allow for "more efficient negotiations"); *Wistuber,* 141 Ariz. at 348 (release time activities "aid the District in performing its obligations"); *Rozenblit*, 243 A.3d 1265-66 ("release time serves public purposes" such as "the prevention or prompt settlement of labor disputes" and "work[ing] to enhance the collective bargaining process").

## V. Amici ignore the direct benefits and consideration from release time.

Although courts do not defer to the City when analyzing consideration, the question is whether "the value to be received by the public is *far exceeded* by the consideration being paid by the public." *Schires*, 250 Ariz. at 375, ¶ 7 (emphasis added). The consideration must not be "grossly disproportionate" to the cost. *Turken v. Gordon*, 223 Ariz. 342, 350, ¶ 39 (2010). "The Gift Clause is violated when that consideration, compared to the expenditure, is so inequitable and unreasonable that it amounts to an abuse of discretion …." *Id*. at 349, ¶ 30.

Amici characterize the release time activities as "indirect benefits" without contractual obligations, but this is inaccurate and contrary to *Cheatham*. "Collective bargaining agreements, like other contracts, should be construed to avoid making

their provisions illusory." *Cheatham*, 240 Ariz. at 323, ¶ 38. "The MOU here, particularly when construed in light of the City Code provisions, clearly contemplates that release time will be used for activities related to PLEA's role as the authorized representative for the Unit 4 officers, even if it does not specify minutely how release time will be used." *Id.* at ¶ 39. "[T]he consideration received by the City is not indirect benefits, but instead the obligations the MOU itself imposes on both [the Union] and the [employees]." *Id*. at 324, ¶ 42.

Here, the CBA specified that release time is to be used to provide "an efficient and readily available point of contact for addressing labor-management concerns." IR 70 ¶ 33. To that end, the CBA identified specific activities and functions to be performed through release time.[4] *Id*. ¶¶ 36-38. These activities include: (1) negotiating CBAs, (2) "ensuring representation for employees during administrative investigations and grievance/disciplinary appeal meetings," (3) "participating in collaborative labor-management initiatives," (4) "serving on City and departmental task forces and committees," (5) "facilitating communication between … management and employees," (6) "assisting [employees] in understanding and following work rules," and (7) "administering the [CBA]." *Id*. ¶ 36. In addition, "[t]he full-time release positions agree[d] to participate in [the City's] committees

[4] For this reason, it is not true that the Union "is completely unrestrained in how it may use the funds." *Contra* Liberty Justice Center Brief at 10. In addition, the released employees must adhere to all City policies and procedures. IR 70 ¶ 39.

and task forces," and the Union agreed to designate stewards to "service grievances at … job sites to which they are regularly assigned." *Id*. ¶ 38.

These activities must be interpreted in light of the City's obligations under the Meet & Confer Ordinance and the intent to ensure a readily available point of contact. The activities are contractual obligations for these purposes. *Id*. ¶¶ 29, 33, 41-45, 103-104; IR 100 (Resp. to PSOF) ¶¶ 43-45, 109, 111. Amici's interpretation ignores the parties' intent and impermissibly renders the provisions illusory.

Crucially, eliminating paid release time would not eliminate the City's obligations under the Meet & Confer Ordinance, nor would it eliminate the need for City employee representatives to perform these functions. IR 70 ¶¶ 45, 103-104. Instead, the City would face logistical and administrative challenges by attempting to find available representatives on an ad hoc basis. *Id*. ¶¶ 45, 64-65.

The City Manager testified that the City "did not experience savings" when release time provisions were enjoined in 2014 "[b]ecause those employees were still working for the City and we were still pulling them to represent and do … the things defined in the MOU." IR 70 & 75, Ex. 14 (Zuercher Depo.) at 50:23-51:23, 53:8-20 ("We still pulled union leadership and stewards to do the work of representing employees, serving on city task forces, and so there wasn't any savings there"). "We need input of employees, through their representatives, on things like health care, interview panels, selections" and "when we're talking about making potential

workplace changes or shift changes." *Id*. at 101:2-21. "It's better for the City for Unit 2 employees to be represented on the health care task force when we're talking about how we might change their benefits in a way that makes them happier to be a city employee rather than more upset." *Id*. at 99:23-100:13.

"[W]e need there to be representation for employees" and "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." *Id.* at 77:2-12, 101:2-21. "And it's more clumsy to go find them just on an ad hoc basis." *Id*. at 55:22-56:6, 87:5-20.

Petitioners did not submit evidence to dispute the City Manager's testimony. IR 70 ¶¶ 45-46, 103-104; IR 87 ¶¶ 45-46, 103-104. Thus, it is uncontroverted that the City's costs would be the same or higher if paid release time were eliminated, in part because there would no longer be a readily available point of contact. The fair-market value of release time was not grossly disproportionate to the cost.

## VI. Conclusion.

Like Petitioners, Amici ignore the evidence and make political arguments about why they disagree with the City Council's legislative policy choices. But this case is not the forum for resolving such disagreements – the ballot box is. Amici's subjective disagreements do not controvert the City's and Union's evidence of a public purpose, direct benefits, and adequate consideration.

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