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, LOCAL 2384, Intervenor-Defendant / Appellee.	Supreme Court No. CV-23-0130 PR Court of Appeals, Division One No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

PLAINTIFFS/APPELLANTS' RESPONSE TO AMICUS BRIEF OF LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, ET AL.

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INTRODUCTION

Because the amicus brief of Laborers' International Union of North America, *et al*., ("Unions") does little more than repeat the arguments already offered by the parties and the previously filed amicus briefs, Appellants will be quick. Here, we will address only two points, otherwise referring the Court to the answers provided in our earlier briefs. The first concerns the Unions' straw-man characterization of Appellants' argument about "compensation," and the second concerns the fact that, even if Unions are correct, Appellants are still entitled to prevail based on the Gift Clause.

I. The Court should disregard Unions' straw-man argument.

The Unions engage in a straw man argument in order to characterize Appellants' position as extreme. They do this by saying that Appellants are offering a "novel" theory by which government employees would have "[a legally enforceable] interest in any government expenditures to a third party on the ground that the government might have instead increased the employee's compensation." Unions' Br. at 4. This, indeed, would be a novel theory—and it's not Appellants' theory.

Appellants have *never* argued that government employees have some kind of *per se* implicit interest in funds in the treasury, which entitles them to block government expenditures based on the speculation that, absent the expenditure,

they might get a raise.[1] Instead, Appellants' argument—which is thoroughly supported by the record—is that *as a factual matter, in this case,* the funds the City spends on release time fall within the definition of "compensation" which this Court gave in *Cheatham v. DiCiccio*, 240 Ariz. 314, 318 ¶ 14, 323 ¶ 40 (2016). That means they're being forced to fund speech in violation of their constitutional right against compelled speech (as articulated in *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018), and *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 282–84 ¶¶ 48–55 (2019), and the amicus brief of the Liberty Justice Center).

Cheatham said that "[i]nterpreting the [agreement] is a legal question," and that the language of the agreement challenged there labeled release time "part of the total compensation" given to employees "in lieu of wages and benefits." 240 Ariz. at 318 ¶ 14. The Court went on to say that the evidence showed that the payments were allocated to government employees in exchange for services provided by those employees, *see id.* at 320 ¶ 23 (payments "procure[] police services for the City"), and that the evidence showed that release time funding was allocated to these employees instead of "other benefits under the compensation package, such as personal time or paid vacation time." *Id.* at 323 ¶ 40.

[1] *Taxpayers*, of course, *do* have an equitable interest in public funds, which entitles them to challenge unconstitutional expenditures. *Rodgers v. Huckelberry*, 247 Ariz. 426, 429 ¶ 11 (App. 2019).

In this case, Appellants simply say the same is true of the agreement challenged here. It, too, identifies the release time payments as "part of … total compensation," APP.050 § 1-3(A); (2), and in all essential respects, it's identical to the agreement challenged in *Cheatham*. Also, as in *Cheatham*, 240 Ariz. at 323 ¶ 40, the evidence here shows that during the short period when release time payments were eliminated, the employees received "other benefits … such as personal time or paid vacation time" instead, in an amount exactly equal to the release time expenditures—and that when release time was later reinstated, these other benefits were reduced in the same amount. *See* Pet. for Review at 11; APP.041 ¶ 123. In fact, the City originally admitted that the payments were "compensation," before it changed its tune and—in violation of principles of judicial estoppel—began arguing the opposite of what it argued in *Cheatham*. *See* Appellants' Supp. Br. at 2 & n.2.

In other words, Appellants are *not* proposing some kind of new rule whereby every government employee has standing to challenge every government expenditure on the theory that she might have received a raise if the government hadn't made that expenditure. Instead, Appellants argue that, *as a matter of fact*, the payments *here* are "compensation," because *Cheatham* said so, the MOU between the City and the Union says so, and because, the Union and the City have always treated release time as individual compensation whereby the Unit 2

employees received other benefits that increased or decreased in tandem with the elimination or reinstatement of release time funding, and in equivalent amounts.

Because the expenditures here are compensation under *Cheatham*, the Appellants are being forced to fund speech in violation of their rights under *Janus* and *Brush & Nib*. *See further* Appellants' Supp. Br. at 6–12.

II. If the Unions are right, release time violates the Gift Clause.

Not only is Unions' argument a straw man, but it's also a red herring. They argue at length that there's a difference between laws that force people "to contribute *their own* money or property to a private advocacy organization," and "government spending of *its own* money in support of private speech," Unions' Br. at 4, 12 (emphasis altered), and that only the former trigger compelled speech concerns along the lines of *Janus* and *Brush & Nib*. That's true, but Unions ignore the fact that the latter triggers Gift Clause concerns under *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346 (1984), *Schires v. Carlat*, 250 Ariz. 371 (2021), and other cases.

In other words, Unions ignore the fact that "government spending of its own tax money in support of private speech" *is unconstitutional* in Arizona when—as in this case—it constitutes a subsidy.

The Gift Clause forbids the City from "ever giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any …

association." Ariz. Const. art. 9 § 7. So for the City to spend its own money to support what Unions rightly call *private* speech by a "*private* advocacy organization," Unions' Br. at 5 (emphasis added)—that is, speech that serves the private interests of a private entity—violates this prohibition if (a) there is no public purpose or (b) the City does not receive a proportionate benefit from that speech. *Schires*, 250 Ariz. at 374–75 ¶ 7.

In *Schires*, this Court offered a helpful hypothetical: if a municipal government were to pay a hamburger restaurant to operate in the city, it said, that would violate the Gift Clause, because that would be subsidizing the operation of a private business. *Id.* at 377 ¶ 17. For exactly the same reason, if a city were to *pay for the restaurant's advertising*, or *pay for the restaurant's recruiting,* or *pay for the restaurant to lobby a zoning board for permission to open a restaurant,* that would also be a violation of the Gift Clause. Exactly what the City does here.

Perhaps Unions are correct that it wouldn't violate the First Amendment for the City to pay for McDonalds' billboards or Burger King's recruitment ads.[2] But

[2] Although that's debatable, given *United States v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001). There, the U.S. Supreme Court found that forcing mushroom producers to fund generic mushroom advertisements violated the First Amendment rights of those producers who wanted to express the message that their mushrooms were better than the average—that is, the requirement was compelled speech. *See also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (government funding of speech by "an entity other than the government itself" can constitute compelled speech.)

it is plain that for the government to fund what Unions repeatedly call "private speech" by a "private speaker"[3]—that is, speech that centers on a speakers' own private goals and serves its own self-interest—would, and in this case does, violate the Gift Clause.

To emphasize: Unions argue that the Union Defendants here are "private speakers," analogous to "artists" or "[political] organizations advocating for democracy overseas." Unions' Br. at 5. That's true. Actually, the Union is *even more private than that*, because although government funding of artists or pro-democracy organizations might conceivably serve a public purpose, and obtain proportionate consideration in return, that's not true here. Here, the agreement imposes no public duties whatsoever on the use of release time; on the contrary it requires *nothing* of the Union except that it "engage in lawful *union* activities." APP.039 ¶ 109; APP.050 §1-3(A)(1) (emphasis added). And the record shows that the Union does, in fact, use release time to serve its own self-interest, by recruiting, lobbying, and engaging in other self-interested activities. *See* Appellants' Supp. Br. at 9–10; Appellants' Resp. to Shierholz Br. at 5–6. And that means that whatever the First Amendment implications may be, the funding of release time is a subsidy that violates the Arizona Constitution.

[3] Unions' Br. at 10, 11, 12, 13, 16.

The bottom line is that this case is an even clearer example than the ones cited in Unions' brief of government spending *public* funds to subsidize "a *private* advocacy organization." Unions' Br. at 5 (emphasis added). Release time here is less like government funding for the National Endowment for the Arts, *cf. id.*, and more like paying Wendy's to erect an advertising billboard, or paying Whataburger to recruit new franchisees, or paying Five Guys to lobby for a building permit, or paying Sonic to endorse a candidate for Senate.[4] As *Schires* and other cases have said, that's unconstitutional.

CONCLUSION

The decision of the Court of Appeals should be *reversed* and judgment entered in favor of Appellants.

Respectfully submitted December 19, 2023 by:

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[4] From a special interest enrichment perspective, release time is even more pernicious than these examples because of the extraordinary political influence and extensive political activities of government labor unions. *See* Philip K. Howard, *Not Accountable: Rethinking the Constitutionality of Public Employee Unions* (2023); *see also Roe v. Kervick*, 199 A.2d 834, 842 (N.J. 1964) ("When the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation." (citation omitted)).