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 Filed with the written consent of all parties pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(1)(A)

BRIEF *AMICUS CURIAE* OF HEIDI SHIERHOLZ

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Introduction

Heidi Shierholz is a labor-market economist serving as *amicus curiae*, with the written consent of all parties, supporting Defendants-Appellees' oppositions to the Petition for Review. Ms. Shierholz has been the President of the Economic Policy Institute ("EPI") since 2021. After receiving her Ph.D. in economics from the University of Michigan in 2005, she worked as an assistant professor of economics at the University of Toronto through 2007 and then as a labor economist at EPI from 2007-2014. She served as the chief economist for the U.S. Department of Labor from 2014-2017 and as EPI's director of policy from 2017-2021.

In amicus' professional view, this Court's application of the Gift Clause in *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016), and *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346 (1984), properly recognizes that public entities, as employers, receive economic benefits from release-time provisions like those in the Memorandum of Understanding ("MOU") that the City of Phoenix ("City") negotiated with the American Federation of State, County and Municipal Employees Local 2384 (the "union"). This brief elaborates on those benefits.

Amicus curiae has no interest in the outcome of this case. This brief has been sponsored, through payment for counsel, by the Service Employees International Union, the American Federation of Teachers, and the National Education Association. They are affiliated with local unions that are party to collective-bargaining agreements that this case could affect.

Background

A. Statutory framework

As this Court previously recognized in *Cheatham*, union agreements, like the MOU challenged here, "must be understood in light of the governing provisions of the Phoenix City Code." 240 Ariz. at 318 ¶11. Those provisions recognize the public's "fundamental interest in the development of harmonious and cooperative relationships between the City government and its employees." Phx. City Code §2-209(1). "[F]ull acceptance of the principle and procedure of full communication between public employers and public employee organizations," the City Council found, "can alleviate various forms of strife and unrest." *Id.* at §2-209(2).

To achieve that "full communication," Phoenix recognized the right of public employees to representation by an employee organization of their choosing, as well as "the mutual obligation" of both that representative and the public employer "to meet … and to confer in good faith with respect to wages, hours and other terms and conditions of employment." *Id.* at §§2-210(11), 214(B).

Agreements created through that meet-and-confer process are codified in an MOU—a tripartite agreement "that binds the City as the employer, the authorized representative for the employees, and the employees themselves." *Cheatham*, 240 Ariz. at 318 ¶13. In negotiating and administering an MOU, the union serves as the "agent of *all* public employees" it represents, including employees who choose not to join or financially support the union. Phx. City Code §2-217(E) (emphasis added). Unions

nevertheless "must represent fairly and without discrimination all employees in the unit without regard to whether such employees are members" of the union. Phx. City Code §2-217(E).

B. Contractual commitments

The MOU seeks to achieve the fundamental purposes of the Ordinance. It begins by recognizing that "the well-being[,] dignity, respect and morale of the employees of the City are benefited by providing employees an opportunity to participate in the formulation of policies and practices affecting the[ir] wages, hours, and working conditions." Pls.' App.048. To that end, the MOU creates a series of forums to facilitate employees' communication, via the union, with the City.

i. Under the MOU, the City and union must jointly staff a Labor-Management Committee to "facilitate improved labor management relationships by providing a forum for the free discussion of mutual concerns and to attempt to resolve problems." Pls.' App.068 (MOU §2-3(A)).

Likewise, the MOU establishes a jointly staffed Health and Safety Committee that "advis[es] Department Heads and the City Manager concerning on-the-job safety and health matters." Pls.' App.070 (MOU §2-4(C)). And it establishes a jointly staffed Apprenticeship Labor Management Committee. Pls.' App.068-69 (MOU §2-3(B)).

The MOU also establishes a grievance procedure to resolve disputes over the interpretation of its terms. Pls.' App.060-65 (MOU §2-1). That procedure governs asserted "violation(s) of the specific express terms of" the MOU, which are channeled

through a multistep process culminating in a hearing before either the Grievance Committee or an arbitrator. Pls.' App.061-63 (MOU §2-1(B)(1), (C)). The City, the union, and the employees all must assert their disputes over the meaning of the MOU via its grievance procedures. Pls.' App.064-65 (MOU §2-1(D), (I)). Those procedures offer an exclusive forum for the resolution of covered disputes, precluding expensive judicial action. *See Austin v. City of Chandler*, No. 1 CA-CV 14-0476, 2015 WL 5209328, at *1 ¶5, *3 ¶14 (Ariz. Ct. App. Sept. 8, 2015) (cited pursuant to Ariz. Supreme Ct. R. 111(c)(1)(C)) (affirming dismissal where City argued that a nearly identical "grievance procedure provided the exclusive forum to address [city employee] claims, precluding the [employees'] civil lawsuit").

Unlike many grievance-and-arbitration procedures, however, the procedure here gives an employer representative the final word on the meaning of the MOU: Whether a grievance is heard before the Grievance Committee or an arbitrator, the "findings and advisory recommendation(s)" of that factfinder are submitted to the City Manager, who "shall make the final determination of the grievance." Pls.' App.063-64 (MOU §2-1(C)).

The union nevertheless plays an important role in processing grievances under the MOU. Indeed, a representative of the union sits as one of three members on the Grievance Committee that makes findings and issues advisory recommendations to the City Manager. Pls.' App.063 (MOU §2-1(C)).

In administering the MOU, the union is bound not only by its *statutory* duty of fair representation, Phx. City Code §2-217(E), but also by a *contractual* obligation to represent all employees in the unit without regard to "membership or non-membership in the Union." Pls.' App.056 (MOU §1-4(A)).[1] Alleged violations of that duty are thus subject to the contract's grievance procedures, providing an additional forum to seek relief.

ii. To facilitate the union's exercise of its duties under the MOU, the contract requires the City, under certain conditions, to "release" employees from their ordinary responsibilities so that they can work to effectuate the MOU for the benefit of all employees, union and non-union alike, as well as the City and the union. Pls.' App.050-52 (MOU §1-3(A)(1), (A)(3)).

The MOU states that this release time ensures "an efficient and readily available point of contact for addressing labor-management concerns." Pls.' App.050 (MOU §1-3(A)). Significantly, the full-time releasees "agree to participate in [the City's] important committees and task forces," including "Labor-Management work groups[] and a variety of Health and Safety Committees." Pls.' App.051 (MOU §1-3(A)(1)).

[1] Although that contractual duty has the same scope as the statutory duty of fair representation, "the trend of the law is to hold that the performance of a preexisting contractual duty is consideration provided the duty is not owed to the promisor." *USLife Title Co. v. Gutkin*, 152 Ariz. 349, 356 (1986); Restatement (Second) of Contracts §73 cmt. d.

And the union agrees to designate stewards to "service grievances." Pls.' App.051 (MOU §1-3(A)(2)). More generally, the parties codified

> [e]xamples of work performed by the release positions in support of the City[, which] include ensuring representation for employees during administrative investigations and grievance/disciplinary appeal meetings with management; participating in collaborative labor-management initiatives that benefit the City and the members; serving on City and departmental task forces and committees; facilitating effective communication between City and Department management and employees; assisting members in understanding and following work rules; and administering the provision of the Memorandum of Understanding. Union release is also used for authorized employees to prepare for appeals and hearings and attend Union conferences, meetings, seminars, training classes and workshops so that employees better understand issues such as City policies and practices, conflict resolution, labor-management partnerships, and methods of effective representation.

Pls.' App.050 (MOU §1-3(A)).

Plaintiffs-Appellants, for their part, concede that "[t]he City benefits from the … release time provisions." City App.43 (J. Statement ¶40). Those conceded benefits include facilitating "harmonious labor relations," "open dialogue about employee preferences and concerns," the achievement of "the Meet & Confer Ordinance's purposes," the expression of employee discontent, and the provision of "information about worker preferences"; "identifying and potentially remedying inefficiencies in the production process"; "informally resolving disputes outside of the formal grievance process"; enhanced employee morale; and "avoiding lawsuits and resolving disputes more efficiently." City App.43-44, 46-47 (J. Statement ¶¶41, 42, 46, 54, 55).

The MOU specifies that the cost of providing release time "has been charged as part of the total compensation detailed in this agreement." Pls.' App.050 (MOU §1-3(A)). The annual cost of that release time is $499,000. City App.53 (J. Statement ¶101). The City's annual payments under the MOU as a whole amounted to $169 million. *Gilmore v. Gallego*, 529 P.3d 562, 566 ¶5 (Ariz. Ct. App. 2023).

ARGUMENT

Where, as here, a party challenges public spending under the Gift Clause, "[t]he expenditure will be upheld if (1) it has a public purpose, and (2) the consideration received by the government is not 'grossly disproportionate' to the amounts paid to the private entity." *Cheatham*, 240 Ariz. at 318 ¶10 (quoting *Turken v. Gordon*, 223 Ariz. 342, 345, 348 ¶¶7, 22 (2010)).

Plaintiffs' petition does not seriously challenge the Court of Appeals' determination that the release time provisions here serve a public purpose. Nor could it. This Court has twice concluded that nearly identical release time provisions support a public purpose. *Cheatham*, 240 Ariz. at 321 ¶27; *Wistuber*, 141 Ariz. at 347-48.

Plaintiffs instead contend that "the City receives insufficient consideration because it receives no direct, contractually obligatory benefits in exchange for the release time payments." Pls.' Pet. 12. That argument is grounded on the premise that the only consideration that could support the provision of release time is the labor of employees represented by the union. But decades of economic research show that premise to be mistaken. As explained in Part I, the research demonstrates that

providing employees with an institutional voice to communicate with their employer enhances productivity, to employers' benefit. As explained in Part II, the MOU ensures that the City will obtain the benefits of employees' institutional voice by obligating the union to serve as the employees' spokesperson in specific institutional forums. Those obligations constitute consideration—provided by the union—for release time, apart from any work performed by represented employees.

I. Economic evidence confirms that unions increase productivity—and thus provide valuable consideration—by enhancing employee voice.

Over half a century ago, the economist Albert O. Hirschman identified two mechanisms by which economic actors respond to dissatisfaction with an organization: They can quit or they can "express their dissatisfaction directly to management." *See* Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4 (1970). He dubbed these two responses the "exit option" and the "voice option." *Id.* In the contemporary United States, the primary mechanism for collective voice is the trade union.

Economists have applied Hirschman's theory to evaluate the economic effects of unionism. *See generally, e.g.*, Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 7 (1984). To the extent unions enhance worker voice on the job, that effect ought to reduce turnover. "Since lower quit rates imply lower hiring and training costs and less disruption in the functioning of work groups, they should raise productivity." *Id.* at 14. Likewise, "the collective bargaining apparatus opens an important

communication channel between workers and management, one likely to increase the flow of information between the two and possibly improve the productivity of the enterprise" by better aligning the compensation package with worker preferences, identifying inefficiencies in the production process, and remedying disputes, sometimes through formal grievance processes. *Id.* at 15.

Early empirical research, based on data from the 1970s, confirmed these conclusions. That evidence showed that "unionized work forces are more stable than nonunion workforces paid the same compensation." *Id.* at 21; *see also id.* at 95, 101. Likewise, unionized work forces were more productive in most sectors of the economy. *Id.* at 21-22, 180.

In the decades since that early work was completed, hundreds of studies have further enhanced those findings. The most recent meta-analysis of all the published empirical studies—that is, a quantitative synthesis of published studies—confirms that unions enhance productivity in the United States outside of the manufacturing sector, mostly likely via reduced turnover. Hristos Doucouliagos, Richard B. Freeman, & Patrice Laroche, *The Economics of Trade Unions: A Study of a Research Field and its Findings* 10, 59, 90 (2017). And recent work focusing on the service sector further corroborates those findings. *See* Aaron J. Sojourner, *et al.*, *Impacts of Unionization on Quality and Productivity: Regression Discontinuity Evidence from Nursing Homes*, IZA Discussion Papers, No. 8240 (2014).

Providing release time facilitates the realization of these benefits. The ubiquity of union release time in collective-bargaining agreements confirms that employers deem it desirable on the theory that their behavior reveals their preference. Indeed, a recent study of the 77 largest municipalities in the United States indicated that only 10% had negotiated contracts that lacked provisions for union release time. Thom Reilly & Akheil Singla, *Union Business Leave Practices in Large U.S. Municipalities: An Exploratory Study*, 46 Public Personnel Management 342, 354 (2017).

Other evidence confirms that union release time carries substantial benefits for employers. In the federal sector—where release time is required by statute, 5 U.S.C. §7131—agency officials interviewed by the Government Accountability Office reported that release time facilitated the union's input into workplace policies and reduced agency costs associated with employee complaints. Gov't Accountability Office, *Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time* 29-30 (Oct. 2014). And numerous judicial decisions have recognized the benefits of union release time. *See, e.g.*, *Rozenblit v. Lyles*, 243 A.3d 1249, 1266 (N.J. 2021) (paid release time facilitates "the resolution of employer-employee disputes and the promotion of labor peace"); *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 72 (6th Cir. 1997) (paid release time provides "an obvious benefit" to the employer, because "[a] labor force secure in the belief that [the employer] is treating its members fairly and in accordance with the bargaining agreement is likely to be more productive."); *Int'l Ass'n*

of Machinists, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp., 387 F.3d 1046, 1057 (9th Cir. 2004).

The record in this case provides still more evidence for the benefits of release time: As noted, Plaintiffs have *conceded* that the release time offered under the MOU has provided the City with information about employee preferences and discontent, identified inefficiencies in the workplace, improved morale, and resolved disputes efficiently—all of which is likely to enhance productivity. *See supra* p. 6.

II. The MOU obligates the union to serve as represented employees' spokesperson, providing consideration for the provision of release time independent of represented employees' labor.

This Court has twice recognized that unions, as well as the employees they represent, may offer consideration in support of a collective-bargaining agreement. In *Cheatham*, this Court concluded that union release time was supported not merely by the labor of employees working under the agreement, but also by the union's "obligations under the MOU and the City Code as the employee's authorized representative." 240 Ariz. at 322 ¶33. And in *Wistuber*, this Court affirmed the provision of release time, partially funded by the public employer, to a union president where the collective-bargaining agreement obligated that union official to "provide communication" with the employer, to serve as a representative of public employee in certain formal settings (such as school board meetings), and to "[a]ssist in the processing of grievances." 141 Ariz. at 348 & n.3. This Court stated that those contractual duties "are substantial" and would support the provision of release time,

even though "many of the obligations imposed upon the [union] President … are duties she might have performed in any event." *Id.* at 349-50.

Here, the City's provision of release time to the union is supported by multiple forms of consideration provided by the union, not the employees it represents, and oriented toward enhancing employee voice:

i. The MOU here is little different than the one sustained in *Wistuber* inasmuch as it ensures that the City obtains the benefits of unionization by *requiring* the union to serve as employees' spokesperson in certain settings. Just as the union president in *Wistuber* was required to serve as employees' spokesperson at school board meetings and in periodic meetings with the employer, *id.* at 348 n.3, the union here is required to appoint multiple releasee representatives to the City's Labor-Management Committee, its Apprenticeship Labor-Management Committee, and its Health and Safety Committee, *see supra* p. 3. And just as the union president in *Wistuber* was required to assist in processing grievances, *Wistuber*, 141 Ariz. at 348 n.3, the union here is obligated to represent fairly employees who seek its assistance with grievances and to serve on the Grievance Committee, *see supra* pp. 4-5. Those promises are consideration.

To be sure, many of these bargained-for benefits pass directly from the union to the employees it represents, just as they did in *Wistuber*. The dissenting judge of the Court of Appeals thus believed that these were "indirect benefits" that are insufficient to support an alleged gift of public funds, drawing on this Court's decisions in *Turken*

v. Gordon, 223 Ariz. 342, 350 ¶33 (2010), and *Schires v. Carlat*, 250 Ariz. 371, 376 ¶14 (2021). *See Gilmore*, 529 P.3d at 576-77 ¶51 (Bailey, J., dissenting). But the distinction between a direct benefit and an indirect one is not whether the government itself receives the benefit of a counterparty's performance, but whether that performance is "'bargained for as part of the contracting party's promised performance.'" *Schires*, 250 Ariz. at 376 (quoting *Turken*, 223 Ariz. at 350 ¶33). Indeed, it is blackletter law that a promise to render performance to a third party can qualify as sufficient consideration. *See, e.g.*, Restatement (Second) of Contracts §71(4) cmt. e (1981), *cited in, e.g.*, *Cheatham*, 240 Ariz. at 322; *Williston on Contracts* §7:19. By contrast, a benefit that is not bargained for is not consideration. *See, e.g.*, *Turken*, 223 Ariz. at 350 ¶33. Consistent with that longstanding distinction at common law, this Court has explained that the performances promised by the union president in *Wistuber* were *not* "indirect benefits," but were instead "duties imposed on the union president under the challenged agreement—the consideration promised directly in return for the" release time payments. *Turken*, 223 Ariz. at 351-52 ¶¶45-46. The same is true here.

Plaintiffs ignore the consideration offered by the union, wagering their entire case on the proposition that the only consideration supporting the provision of release time is the labor of employees represented by the union. They have thus failed to carry their "burden of proving gross disproportionality of consideration" offered by the union in support of the MOU's release time provisions. *Cheatham*, 240 Ariz. at 322-23 ¶35.

ii. The union's consent to the grievance procedure embedded in the MOU offers still further consideration for release time. As Judge O'Scannlain explained for the Ninth Circuit in a related context, a union steward's participation in grievances while on release time "serves the company's interest" by "peacefully resolving disputes between labor and management—helping both parties avoid expensive and time-consuming litigation." *Goodrich*, 387 F.3d at 1057-58. For that reason, "virtually every single collective bargaining agreement in this country contains a grievance mechanism" that "provide[s] for union representation." *Id.* at 1058.

The grievance procedure here is unusually beneficial to the City, which has final control over the MOU's meaning by ultimately deciding most contractual grievances. *See supra* p. 4. The arrangement is analogous to the one in *Minnesota State Board for Community Colleges v. Knight*, where government employees, via their union, had a voice on certain policy matters as to which the government nevertheless retained ultimate control. 465 U.S. 271 (1984). The Supreme Court held that the legislature could reasonably conclude that the government benefited from that arrangement by "hear[ing] one, and only one, voice" when it engaged with its employees via their union, which was obligated to present their collective preferences fairly. *Id.* at 291.

More to the point, given the control the City Manager exerts over contract interpretation questions under the MOU, the union gave the City valuable consideration when it agreed to make the MOU's grievance procedure exclusive as to

covered disputes, *supra* p. 4, effectively insulating the City Manager from even judicial review as to such disputes.

Thus, the union's agreement to allow the City Manager to exercise such interpretative control in a $169 million labor contract is a significant benefit that, on its own, supports the provision of $499,000 in release time. Again, Plaintiffs ignore that consideration, offering no estimate of its value and failing to carry their burden of proving gross disproportionality.

CONCLUSION

For the reasons stated above, review should be denied.

Dated: August 8, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the accompanying *Amicus Curiae* brief is double-spaced, utilizes 14-point proportionally spaced Garamond typeface, and contains 3,468 words according to the word count function of Microsoft Word.

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