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 THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, THE SERVICE EMPLOYEES INTERNATIONAL UNION, THE NATIONAL EDUCATION ASSOCIATION, AND THE AMERICAN FEDERATION OF TEACHERS

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INTEREST OF *AMICUS CURIAE*

Amici curiae—the Laborers' International Union of North America, the Service Employees International Union, the National Education Association, and the American Federation of Teachers—are four international unions with millions of members across the country. All four are affiliated with local unions representing public employees in Arizona. Those local unions are party to collective-bargaining agreements that this case could affect. Although *amici*'s interests extend to both of the questions presented in this case, this submission is limited to addressing the first of those questions. No persons or entities, other than *amici* themselves, have sponsored this brief or provided financial resources for its preparation. Counsel for no party authored this brief.

STATEMENT

This brief addresses the first of the two questions presented: "Does release time violate Petitioners' free speech, free association, and Right to Work rights?" In the Court of Appeals, all three judges answered in the negative.

The following facts are relevant to the question:

1. The two petitioner-plaintiffs in this case are public employees for the City of Phoenix ("City") assigned to "Unit 2." Petitioners have exercised their right not to join or pay dues to the union that represents Unit 2 as the employees' exclusive representative. Petitioners challenge the constitutionality of the release-time clauses in the Memorandum of Understanding ("MOU")—a type of collective-bargaining

agreement ("CBA")—applicable to Unit 2. Those clauses provide that certain union-designated employees may take a specified number of hours away from their regular duties, known as "release time," to assist the union in representing the City's employees without loss of pay. Pls.' App.050-53 (MOU §1-3(A)(1)-(3)). The MOU requires the union, in turn, to represent all employees in the unit, union and nonunion alike, without discrimination. Pls.' App.056 (MOU §1-4(A)).[1]

2. The MOU states that release time constitutes a "cost to the City" that comprises part of the "total compensation detailed in this agreement." Pls.' App.050 (MOU §1-3(A)). It contains no language stating or implying that Mr. Gilmore, Mr. Harder, or any other Unit 2 employee would be entitled to more compensation in the absence of the release-time clause. There is, in other words, no provision specifying any hypothetical compensation formula to which an employee could claim an entitlement in the absence of the release-time provision.

3. Petitioners' claim is not that the release-time clause restricts their right to support any cause or assert any grievances, whether touching on their own employment or otherwise. Rather, they contend that the clause is analogous to the agency-fee clause that the U.S. Supreme Court struck down in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), under the First Amendment. *See, e.g.*, Pls.' Supp. Br.

[1] While the duty of fair representation is also codified in Phoenix's Code, Phx. City Code §2-217(E), the express inclusion of the duty in the contract is not superfluous; it gives employees and the employer an additional means of enforcing that duty. *See* Br. Amicus Curiae of Heidi Shierholz at 5 & n.1.

2-3, 8-9. That agency-fee clause, authorized by Illinois statutes and contained in a collective-bargaining agreement for state-government employees, compelled nonunion employees, as a condition of employment, to pay an agency fee to the union that represented them. *Janus*, 138 S. Ct. at 2461. The required fee was a percentage of the membership dues for the union's voluntary members, and the fee was taken by the state via payroll deduction from the actual earnings of every nonunion employee, including the plaintiff, and transferred directly to the union. *Id.* The CBA in *Janus*, discussed in more detail below, did not suggest that the agency-fee clause was a "cost to the state"; instead, the cost was borne solely by the individuals who paid the fee.

4. Consistent with Arizona law, the CBA at issue in this case does not contain an agency-fee clause requiring any employees to contribute their property to the union representing them, whether as a deduction from the employee's earnings or as a free-standing liability. Nor does it contain any clause that requires any employee to join or associate with the union in any way. Indeed, the CBA specifically guarantees all employees, union and nonunion alike, "the right to present their own grievance, in person or by legal counsel," to their employer. Pls.' App.056 (MOU § 1-4(C)).

SUMMARY OF ARGUMENT

The Court of Appeals rightly rejected Petitioners' claim that the release-time clause violates Petitioners' free-speech, free-association, or right-to-work rights. While framed as a claim under Arizona's Constitution, Petitioners' argument relies on the U.S. Supreme Court's First Amendment "compelled subsidy" doctrine, *see, e.g.*, Pls.'

Supp. Br. 7-8, which developed within its broader "compelled speech" jurisprudence.

The compelled-subsidy doctrine recognizes that First Amendment rights are implicated when individuals are forced by the government to contribute *their own* money or property to a private advocacy organization whose speech they find objectionable. The doctrine does not recognize any First Amendment right of individuals to challenge government expenditures made from *the government's general treasury*. To the contrary, as we show in Part I, the U.S. Supreme Court has expressly held that the First Amendment has no application to laws that authorize expenditures of the government's money from the general treasury to support private speakers.

Here, Petitioners attempt to circumvent that limitation on the compelled-subsidy doctrine through a novel theory that imputes to Petitioners a notional interest in money that is not theirs. In particular, they assert that they "are forced to pay for release time out of their salaries" because, on their account, they might have been paid more if the City were not funding release time. Pls.' Supp. Br. 1, 4-5, 8-9. But they do not—indeed, cannot—claim any property interest in some fraction of the money used to fund release time. For that reason, they emphasize that Unit 2 employees received a greater amount of vacation time in a prior MOU, on the theory that this history establishes that the parties "treat[] release time as individual compensation." *Id.* at 4. Endorsing that remarkable position, however, would recognize government employees' interest in any government expenditures to a third party on the ground that the government might have instead increased the employee's compensation.

If the compelled-subsidy doctrine were extended that broadly, it would unmoor that doctrine from its rationale and enable a new kind of heckler's veto. Numerous statutes authorize government disbursements to private speakers, ranging from artists[2] to legal-aid organizations,[3] and from crisis pregnancy centers[4] to organizations advocating for democracy overseas.[5] On Petitioners' theory, such laws would become vulnerable to speech- and association-based challenges by government employees speculating that they would have more compensation if not for a challenged expenditure that facilitated another's speech. Such a veto would ignore the bedrock principle that the ballot box, not the courts, is the place to register discontent with government expenditures of taxpayer funds.

ARGUMENT

I. The right against compulsion to contribute one's own money to a private advocacy organization does not prevent the government from spending general taxpayer funds to support such an organization.

Petitioners invoke the "compelled subsidy" doctrine. *See, e.g.*, Pls.' Supp. Br. 8-9. To understand the scope of that doctrine, it is helpful to examine the compelled-

[2] *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (case concerning federal funding for controversial public artists).

[3] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (case concerning federal funding to "facilitate private speech . . . . to represent the interests of indigent" individuals).

[4] *See State Legis. Tracker: Crisis Pregnancy Funding*, Gutmacher Institute (detailing examples of states funding crisis pregnancy centers) (last visited Dec. 7, 2023).

[5] *See* 22 U. S. C. § 4411(b).

speech cases that birthed it.

A. Development of the right against compelled speech.

The compelled speech doctrine has its origins in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). There, a local board of education policy required public school students, on pain of expulsion, to pledge allegiance to the American flag with their classmates each day. *Id.* at 627-29. Objecting students and their parents sued, invoking the First Amendment to obtain an injunction that would excuse objectors from participating in the pledge ceremony. *Id.* at 629.

The U.S. Supreme Court affirmed a judgment enjoining enforcement of the policy. It reasoned that the right to speak as to matters of individual conscience included, as a necessary corollary, the right to refrain from doing so. *Id.* at 634 ("[A] Bill of Rights which guards the individual's right to speak his own mind" does not "le[ave] it open to public authorities to compel him to utter what is not in his mind.").

The right against compelled speech recognized in *Barnette* was thus the right of objectors to be spared the indignity of compulsion to affirm someone else's ideological message from their own lips. *See, e.g.*, *Burns v. Martuscello*, 890 F.3d 77, 85 (2d Cir. 2018) ("[C]ompelled speech presents a unique affront to personal dignity."). It was not the right of an objector to prevent the government from allocating government resources, such as classroom time, in ways the objector found offensive, but that others supported. Indeed, the Court stressed that "the refusal of [plaintiffs] to

participate in the ceremony does not interfere with or deny rights of others to do so." *Barnette*, 319 U.S. at 630.

The next doctrinal development came in *Wooley v. Maynard*, 430 U.S. 705 (1977). There, New Hampshire statutes required drivers to display the state motto, "Live Free or Die," embossed on their official license plates and made it a crime to obscure that motto. *Id.* at 707. The plaintiffs, who did not subscribe to the philosophy expressed by that motto, taped over it, and one was criminally convicted of multiple violations. *Id.* at 708. Like the plaintiffs in *Barnette*, the plaintiffs in *Wooley* did not seek to enjoin all government expenditures on "Live Free or Die" license plates. Nor did they claim a First Amendment right to tape over the motto on other peoples' cars. Instead, they complained that that they should not be compelled "to use *their* private property as a mobile billboard." *Id.* at 715 (emphasis added). In accepting that argument, the U.S. Supreme Court explained that the New Hampshire law was constitutionally offensive because it "force[d] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.*

This Court's decision in *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269 (2019), is to the same effect. There, this Court concluded that custom wedding invitation designers had a First Amendment right not to be forced by a public accommodations ordinance to include messages they opposed in their invitations. *Id.* at 295 ¶ 111. Citing *Wooley* and quoting the U.S. Supreme Court's subsequent decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 576 (1995), the

Court emphasized that "'when dissemination of a view contrary to one's own is forced upon a speaker *intimately connected with the communication advanced*, the speaker's right to autonomy over the message is compromised.'" *Id.* at 283 ¶ 53 (emphasis added).

B. Development of the right against compelled subsidization.

Later in the same Term as *Wooley*, the U.S. Supreme Court held in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), that the principles underlying the compelled speech doctrine apply to laws compelling individuals to contribute their own funds to a private membership organization that engages in speech the plaintiff finds objectionable. *Abood* considered a Michigan statute that permitted local government employers to negotiate with the unions representing their employees an "agency fee" provision obligating every employee represented by a union, even though not a union member, to pay directly to the union a service fee equal in amount to union dues. 431 U.S. at 211-12, 224. Public school teachers, who were not members of the union and did not wish to pay dues to a private organization that engaged in speech that they found objectionable, challenged the law. *Id.* at 211-12.

The Court held that nonmembers could not be compelled to pay fees to finance the union's political activities or "other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235. In doing so, the Court synthesized its then-recent campaign financing decision in *Buckley v. Valeo*, 424

U.S. 1 (1976) (per curiam), with the analytic method of the *Barnette* decision discussed above. In *Buckley*, the Court had held that the First Amendment is implicated not only by laws that prohibit speech, but also by laws that prohibit spending one's own money on speech. 424 U.S. at 19-23. In *Abood*, the Court extended that holding, reasoning that the right *not* to contribute one's own money to a political organization be considered a corollary of the right to do so. 431 U.S. at 234-35 ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."). In this regard, the Court mirrored the reasoning of *Barnette*, which had held that the right *not* to speak is a corollary of the right to speak, as noted above.

Again, the plaintiffs in *Abood* sought only relief from compulsion to pay their own earnings as dues to an organization they did wish to join; they did *not* seek to prevent the state from using general tax revenues to support unions. *Id.* at 213-14 & n.6. Indeed, such relief would have been inconsistent with another portion of *Buckley*, where the Court *rejected* a claim that "public financing of election campaigns . . . violates the First Amendment" and instead upheld a statute that provided for funding presidential candidates via the government's general tax revenues. 424 U.S. at 86, 91-93. Indeed, the Court held that the public-financing provisions did not even implicate the First Amendment. "The fallacy of appellants' argument is . . . apparent[]," the Court explained, because "every appropriation made by Congress uses public money in a manner to which some taxpayers object." *Id.* at 91-92. The Court added that

"[o]ur statute books are replete with laws providing financial assistance to the exercise of free speech." *Id.* at 93 n.127.

The U.S. Supreme Court reaffirmed this aspect of *Buckley* less than a decade after *Abood*. In *FCC v. League of Women Voters*, the Court explained that taxpayers' objections to the government's use of their taxes to fund editorializing by private organizations—that is, core political speech—"does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." 468 U.S. 364, 385 n.16 (1984). Far from being a constitutional right, the interest in "prevent[ing] the use of taxpayer moneys to promote private views with which taxpayers may disagree" does not even qualify as a "substantial" government interest. *Id.* at 380, 385 n.16. Relying on *Buckley*, the Court reiterated that "virtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object." *Id.* 385 n.16. But the taxpayer's objection to such spending did not create even a "serious interest" in honoring that objection, let alone a substantial government interest. *Id.* at 380, 385 n.16.

The principle animating *Buckley* and *League of Women Voters*—that government disbursements of general tax revenues to a private speaker do not implicate the First Amendment—is compatible with the *Abood* principle that the First Amendment *is* implicated by laws that identify a discrete group of individuals and force them to pay their own funds directly to a private membership organization. Because the payment of taxes to the government is a general burden of citizenship, the collection and

expenditure of general tax revenues does not "'intimately connect[]'" any individual taxpayer "'with the communication advanced.'" *Brush & Nib*, 247 Ariz. at 283 ¶ 53 (quoting *Hurley*, 515 U.S. at 576). Indeed, the tax system thoroughly diffuses the connection between any given expenditure and any individual taxpayer, making no individual taxpayer "an instrument" of the government programs funded with tax dollars. *Wooley*, 430 U.S. at 715.

This Court's decisions support the same conclusion. In *May v. McNally*, this Court recognized that, under *Buckley*, public funding in support of private speech generally does not implicate the First Amendment, "even though the funding may be used to further speech to which the contributor objects." 203 Ariz. 425, 428 ¶ 10 & n.2 (Ariz. 2002). At the heart of *May* was a dispute about the scope of the challenged assessment—a surcharge on civil and criminal fines dedicated to funding qualifying political candidates. *Id.* at 427 ¶ 2. The *May* plaintiffs unsuccessfully argued that the surcharge was unlawful because it targeted them and was earmarked for political speech. But this Court observed the petitioners had wisely conceded that any challenge to spending that was from "the general fund and could not be traced to any individual" would present "no constitutional problem." *Id.* at 428 ¶ 10 n.2.[6]

First Amendment jurisprudence thus observes a distinction between

[6] *See also id.* at 430 ¶ 22 (explaining that the disposition of "taxes from the state's general fund" does not violate the freedom of speech or association as "government could not function if taxpayers could refuse to pay taxes if they disagreed with the government policy or function that the tax supported").

government spending of its own tax money in support of private speech, on one hand, and targeted exactions of others' money, such as agency fees, on the other. That distinction makes sense. The tax system interposes politically accountable officials as intermediaries between taxpayers and the ultimate recipients of any government funds, subjecting them to repercussions at the ballot box if an expenditure appears unjustified. In contrast, agency fees transfer nonunion employees' earnings directly to a union, costing taxpayers nothing and allowing government officials to avoid responsibility to their constituents for how any funds are spent. As Justice Powell noted in his concurrence in *Abood*, "the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." 431 U.S. at 259 n.13 (Powell, J., concurring).[7] Representation, in other words, is key.

C. The scope and limits of the *Janus* decision.

The Supreme Court's most recent compelled-subsidy case, *Janus v. AFSCME, Council 31*, *supra*, preserved the dichotomy between expenditures of government funds to private speakers and impermissible laws that force individuals to contribute their

[7] A similar concern animates the federal anti-"commandeering" doctrine, which bars Congress from directing state officials to carry out a federal program even where Congress could appropriate federal funds to achieve the same policy objective. *See Printz v. United States*, 521 U.S. 898, 930 (1997) ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes.").

own funds to such speakers. There, the Court re-affirmed the basic principle in *Abood* that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns" as compelling a person to speak. *Janus*, 138 S. Ct at 2464. But the Court overruled the portion of *Abood* that had sustained the assessment of agency fees for union collective-bargaining speech, reassessing the cogency of *Abood*'s "justifications for agency fees." *Id.* at 2465.

As noted earlier, the plaintiff in *Janus*, Mark Janus, was a public employee required to pay agency fees to a union. *Id.* at 2461. Like the plaintiff in *Abood*, Mr. Janus sought only to prevent his own earnings from being taken by the government and transferred to an organization he did not wish to join; he did *not* seek to prevent the state from using general tax revenues as it saw fit. *Id.* at 2462. Quite to the contrary, in his brief, Mr. Janus drew the Supreme Court's attention both to the paid release-time provision in the CBA governing his employment, as well as to the plethora of statutes and public-sector CBAs providing for paid release-time in right-to-work jurisdictions, as proof that there were constitutionally permissible alternatives to compulsory agency fees that enabled unions to carry out their duty of fair representation on behalf of nonunion employees without facing insolvency. *See* Br. for Pet'r at 39-40, 43, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 5952674 ("Janus Br.") (citing, *inter alia*, the pages of the joint appendix containing the release-time provisions in the CBA governing Mr. Janus' employment). Mr. Janus further pointed out that the "federal government sees no need for agency

fee requirements," Janus Br. at 40 (citing 5 U.S.C. § 7102, which bars agency fees in the federal sector), and instead, pursuant to 5 U.S.C. § 7131, provides for paid release time—called "official time" for federal employees—under which "the government pays its employees to engage in union activities." Janus Br. at 39.

Mr. Janus—who was represented by the National Right to Work Legal Defense Foundation—did not make these points idly. He did so to address a central contention by the proponents of agency fees—namely, that agency fees were necessary to finance the proper functioning of exclusive representation in the public sector. *Id.* at 37. On his account, agency fees were not "necessary" because other forms of "government assistance" would enable unions to carry out their duty of fair representation without subjecting nonunion members to the indignity of directly contributing to the union out of their own funds. *Id.* at 42-43.

The Supreme Court agreed with Mr. Janus' submission in rebutting the argument that agency fees were necessary to exclusive representation in light of the danger of "free riders" who would "enjoy[] the benefits of union representation without shouldering the costs." *Janus*, 138 S. Ct. at 2466. In explaining why "[t]he[] benefits [of exclusive-representative status] greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers," the Court cited the pages of the record that contain the release-time provisions of the CBA that governed Mr. Janus' employment. *See id.* at 2467 (citing J.A. at 138-43, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 6887533). By

referencing release-time as an explanation for its holding, the Court implicitly embraced the propriety of release-time as a constitutional mechanism for facilitating fair representation of public employees who are not union members.

Further, in implicit recognition of Mr. Janus' repeated references to labor relations in the federal sector, the Court explained that unionism was thriving among federal employees, even though "federal law does not permit agency fees." *Janus*, 138 S. Ct. at 2466 ("[N]early a million federal employees—about 27% of the federal work force—are union members."). In response to the dissent's concern that the majority's holding could disrupt public-sector labor-relations practices across the country, the *Janus* Court said emphatically: "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, *these States can follow the model of the federal government* and 28 other [right-to-work] States." *Id.* at 2485 n.27 (emphasis added). Of course, "the model of the federal government" includes robust allowances for paid release time.

Thus, although *Janus* invoked neither *Buckley* nor *League of Women Voters* by name, the Court presupposed their validity by citing government-funded release time as a permissible alternative to agency-fee laws that advanced the important state interest in ensuring adequate funding of nonmembers' fair-representation rights.

II. Because the "release time" provisions in the MOU challenged here involve only the expenditure of government funds, they do not infringe Petitioners' free-speech, free-association, or right-to-work rights.

The history of the compelled-subsidy doctrine—viewed alongside the principle

animating *Buckley* and *League of Women Voters*—establishes that, when the government expends untraceable general treasury funds to support a private speaker, that expenditure does not implicate any First Amendment rights.[8] That should be enough to dispose of Petitioners' attack on the release-time clause in the MOU at issue here.

Start with the text of the MOU. It states that release time is a "cost to the City," Pls.' App.050 (MOU §1-3(A)), and it does not require any nonunion employee to contribute a penny to the union. Because the challenged MOU exacts no payment of money or property from Petitioners, and instead simply allocates the government's own resources, the requisite "intimate[] connect[ion]" between an objector and the objected-to speech that triggers a compelled-speech or compelled-subsidy claim is absent. *Brush & Nib*, 247 Ariz. at 283 ¶ 53 (quoting *Hurley*, 515 U.S. at 576). Indeed, as the First Circuit has explained, where a party objects to the use of someone else's money, the "connection between dissenters and the organization" to which they object is absent, such that the dissenters cannot "reasonably understand that they are supporting the message propagated by recipient organizations" under the First Amendment. *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 979 (1st Cir. 1993), *overruled on other grounds by Phillips v. Wash. Legal Found.*, 524 U.S. 156, 159 (1998) (holding that the property at issue in *Massachusetts Bar*—interest on lawyers' trust

[8] We are mindful that the right-to-work protection in the Arizona Constitution has no analog in the federal constitution. In *Janus*, however, the U.S. Supreme Court inferred from the First Amendment a right-to-work protection for public employees equivalent to the protection afforded by Arizona's Constitution.

accounts—belonged to the client).

To the contrary, Petitioners are no differently situated than ordinary taxpayers sharing the general burdens of citizenship. Under *Buckley* and *League of Women Voters*, such individuals have no right to veto government expenditures from the general treasury to which they object. The Washington Supreme Court came to a similar conclusion in *Elster v. City of Seattle*, where it considered taxpayers' challenge to a campaign financing system funded, unlike here, by a specific levy. 193 Wash. 2d 638, 640-41 (Wash. 2019). The court explained that, because the taxpayers could not establish that they were "individually associated . . . with any message conveyed by the" campaign-financing system, the compelled-subsidy doctrine had "no bearing" on the case. *Id.* at 645-46. The same is true here, where Petitioners are not associated with the unions' speech by force of the City's payments of *its own* general treasury monies.

Unsatisfied with the terms of the current MOU, Petitioners look beyond it to the language of the prior MOU, which provided for more vacation hours for all Unit 2 employees, but did not permit any paid release time. In Petitioners' view, reading these separate agreements together reveals "that release time" in the current MOU "*was* funded by all Unit 2 employees *in lieu* of other compensation." Pls.' Supp. Br. 4-5. Petitioners thus suggest that the Court should treat the less generous grant of vacation time in the current MOU as if it were the taking of their money or property equivalent to the exaction of an agency fee, suggesting an ongoing entitlement to the benefits codified in an expired employment contract.

That argument is fatally defective. The predecessor agreement Petitioners seek to graft onto the MOU is expired and superseded. As the Court of Appeals cogently explained, Arizona courts consistently reject the proposition that an employee promised particular compensation for the term of an employment contract earns a vested property right in the continuation of that compensation after the contract expires. *Gilmore v. Gallego*, 529 P.3d 562, 569 ¶ 18 (Ariz. Ct. App. 2023) (citing *Smith v. City of Phx.*, 175 Ariz. 509, 514-15 (App. 1992); *Bennett ex rel. Ariz. State Pers. Comm'n v. Beard*, 27 Ariz. App. 534, 536-37 (1976)).[9] To recognize such a property right here would violate the principle, embraced by the U.S. Supreme Court, that the freedom of speech "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Regan v. Tax'n with Representation*, 461 U.S. 540, 550 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

The wisdom of the common law of contracts points to the same result. Centuries of decisions have developed "the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining

[9] The result would be the same even under a collective-bargaining agreement, unlike the MOU here, in which the parties agreed that release time was provided "in lieu of wages and benefits." *See Cheatham v. DiCiccio*, 240 Ariz. 314, 319 ¶ 14 (2016). In that circumstance, no individual employee could be sure that he or she would have earned even a penny more absent the provision of release time, let alone identify a traceable amount of increased compensation or claim any legal entitlement to that amount. Indeed, an employee's compensation may be set at any "rate of compensation fixed by his employer," *Bennett*, 27 Ariz. App. at 537, or negotiated with the union representing that employee, *see generally Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944).

agreement.'" *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441-42 (2015) (quoting *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991)). So too here.

Embracing Petitioners' claim—that they have an entitlement to the benefits conferred under the prior contract—would produce wildly arbitrary results. For example, there could be two identical collective-bargaining agreements, one of which may be enforceable while the other may be unconstitutional, depending not on the terms of the agreements themselves, but instead on the terms of whatever expired agreements preceded them. To take another example, suppose an unusual number of holidays observed by minority faiths happen to fall during weekdays in a given year, leading a public employer to propose changing its collective-bargaining agreement to enable more employees to take time off for religious observance in exchange for a concession as to some longstanding fringe benefit. On Petitioners' theory, such an employer could find itself sued by the employees who would have been better off under the prior agreement, arguing that they cannot be compelled to subsidize the religious observance of others via the loss of previously granted benefits.

That cannot be right. Permitting nonunion employees to veto, via litigation, any tradeoff in compensation between differently situated subgroups of employees would make public-sector labor relations all but impossible. That is so because employer resources are scarce, making tradeoffs in compensation between subgroups of employees inevitable. *Cf. Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("Inevitably differences arise in the manner and degree to which the terms of any …

agreement affect individual employees and classes of employees. . . . The complete satisfaction of all who are represented is hardly to be expected."). The implications of Petitioners' theory would thus hamstring the ability of local governments to allocate their scarce resources in new ways; any public employee who had previously received a benefit could argue that the removal of that benefit constituted an illegal "subsidy" to any employees granted new compensation. Nothing in the Arizona Constitution mandates such an irrational rule.

* * *

In sum, where a government chooses to allocate its own general funds to a release-time provision, its decision does not implicate the compelled-speech, compelled-subsidy, or right-to-work doctrines. Endorsing Petitioners' revolutionary claim to the contrary would threaten longstanding labor-relations agreements and practices and countless laws on the books. It should be roundly rejected.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Dated: December 12, 2023

Respectfully submitted,

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