IN THE SUPREME COURT

STATE OF ARIZONA

MARK GILMORE, et al., Plaintiffs/Appellants, v. KATE GALLEGO, et al., Defendants/Appellees.	Supreme Court No. CV-23-0130-PR Court of Appeals Division One No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV2019-009033

BRIEF OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. WITH CONSENT OF ALL PARTIES[1]

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[1] This amicus brief is filed pursuant to Ariz. R. Civ. App. P. 16(b)(1)(A) in support of plaintiffs/appellants.

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IDENTITY AND INTERESTS OF AMICUS CURIAE[2]

The National Right to Work Legal Defense Foundation, Inc. is a nonprofit, charitable organization that provides free legal aid to individuals subject to compulsory unionism. The Foundation has supported several major cases involving employees' First Amendment right to refrain from subsidizing union activities. This includes *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and *Harris v. Quinn*, 573 U.S. 616 (2014), wherein the United States Supreme Court held it violates the First Amendment for states and unions to compel public employees and homecare providers, respectively, to subsidize unions and their speech.

The Foundation has an interest in this case because several legal determinations in *Janus* demonstrate that release time for union officials violates the Arizona Constitution's Gift Clause, Ariz. Const., art. 9, § 7.

[2] Per Ariz. R. Civ. App. P. 16 (b)(3), no party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The Foundation submits this amicus brief to make a singular point: the Court of Appeals of Arizona, Division 1's reasons for holding that it does not violate the Arizona Constitution's Gift Clauses to require taxpayers to subsidize union activities through release time conflict with the Supreme Court's reasons for holding in *Janus* that public employees' compulsory subsidization of union activities violates the First Amendment.

ARGUMENT

I. The United States Supreme Court's Decision in *Janus*.

The United States Supreme Court in *Janus* reached three conclusions relevant to the issue before this Court when holding that compulsory union payments violate the First Amendment.

First, the Court recognized that union collective bargaining and related activities constitute speech and petitioning on matters of political and public concern. *Janus*, 138 S. Ct. at 2474–78. The reason is simple: a public-sector union's function in collective bargaining and grievance proceedings is to speak with, or more accurately to petition, government officials to influence governmental policies. *See id*.

These governmental policies often are matters of substantial public concern, such as how much money the government expends on wages and benefits. *Id*. The Court earlier recognized this in *Harris*, holding that "in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government" and that, "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues." 573 U.S. at 636-37.

Second, the *Janus* Court rejected the notion that union officials act as public employees performing their official duties when those officials bargain with the government or otherwise represent employees. 138 S. Ct. at 2474. In *Janus*, the respondents argued the Court should apply a low level of First Amendment scrutiny to compulsory union fees because, according to the respondents, "union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, i.e., as speech 'pursuant to [an employee's] official duties.'" *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). Under *Garcetti*, "when public employees are performing their job duties, their speech may be controlled by their employer." *Janus*, 138 S. Ct. at 2474. The reason is that this type of speech "owes its existence to a public employee's

professional responsibilities" and "reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22. In *Janus*, the respondents were "[t]rying to fit union speech into this framework" and were "suggest[ing] that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech." 138 S. Ct. at 2474.

The United States Supreme Court rejected that suggestion, holding:

> This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees, *not the employer*. Otherwise, the employer would be negotiating with itself and disputing its own actions.

Id. (emphasis added). The *Janus* Court thus recognized that union officials do not act for public employers when negotiating against public employers on behalf of employees.

Finally, the *Janus* Court held that a public employer's interest in so-called "labor peace" does not require compelling employees to subsidize exclusive union representatives. *Id.* at 2465-66. The Court

recognized that regimes of exclusive representation often exist without compelled subsidization of the union. *Id.* The reason is that exclusive representative status is a significant power and benefit that unions will avidly seek without subsidies. *Id.* at 2467 (highlighting the existence of unionized public employees in jurisdictions that bar compulsory dues). The Court concluded that it was "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." *Id.* at 2465 (quoting *Harris*, 573 U.S. at 649).

In sum, *Janus* recognized that collective bargaining and related activities by public-sector unions: (1) are political in nature, (2) are not performed for public employers, and (3) need not be mandatorily subsidized to maintain labor peace. As discussed next, these holdings undermine the lower court's determination that the City of Phoenix's policy of subsidizing union activities with release time provides a "direct (not indirect) benefit to the City." *Gilmore v. Gallego*, 529 P.3d 562, 571, ¶ 31 (Ariz. App. 2023).

II. The Lower Courts' Rationales Are Inconsistent with *Janus*.

To determine if a transaction violates the Gift Clause, the Court analyzes whether (1) a given transaction between a public and private entity serves a public purpose, and if (2) the benefit granted by the state is grossly disproportionate to the benefit the state receives. *See Schires v. Carlat*, 250 Ariz. 371, 374–375, ¶ 7 (2021). In light of *Janus*, the lower court was wrong in determining that release time serves a public purpose and was wrong in determining that the City receives a benefit for it.

A. *Janus* Clarified That Union Politics Are Not Performed for the Benefit the City.

The City grants release time to union agents primarily to bargain against the City and to process grievances against the City, as well to recruit individuals to join the union and to attend union meetings. *See* Second Am. Compl. at 2–3, ¶¶ 18–25 *Gilmore v. Gallego*, No. CV2019-009033 (Ariz. Super. Nov. 7, 2019), 2019 WL 13388605. It cannot be said that these union activities predominantly serve a public purpose or provide a clear public benefit, given the three holdings in *Janus* earlier discussed.

First, the City is using taxpayer monies to subsidize union officials' speech and petitioning on matters of political and public concern. *See*

Janus, 138 S. Ct. at 2474-78; *Harris*, 573 U.S. at 636-37. A union official bargaining with the City, or representing employees in grievances against the City, is expressive advocacy under *Janus*, 138 S. Ct. at 2474-78, and *Harris*, 573 U.S. at 636-37. Indeed, this union activity is literally "petition[ing] the Government for a redress of grievances" under the First Amendment to the United States Constitution. U.S. Const. amend. I. With its release time policy, the City is effectively paying individuals to lobby the City for a private advocacy organization and its members. The notion that this political advocacy serves a public purpose is untenable.

Second, the City's subsidization of union political activities does not advance the City's interests because these activities are not performed for the City or for its benefit. As the Supreme Court recognized in *Janus,* union representatives do not act for public employers, but rather act for the union. 138 S. Ct. at 2474. Here, the City is granting release time to AFSCME agents to petition the City on the *union's* behalf and to advance AFSCME's interests. The City paying individuals for services provided to a private organization is a paradigm violation of the Gift Clause.

Indeed, far from serving the City's interests, union agents generally use release time to *oppose* the City's pursuit of what it perceives to be in

the public interests. Collective bargaining is an adversarial process in which the City sits on one side of the table and the union on the other side. This separation is integral to the process because, "[o]therwise, the employer would be negotiating with itself and disputing its own actions." *Janus*, 138 S. Ct. at 2474. Indeed, "[c]ollective bargaining is 'a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals.'" *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 268 (1938) (quoting H.R. Rep. no. 74-1147, at 18 (1935)). Similarly, grievance adjustments involve the union contesting an action that the City wants to take or has already taken—such as instituting a desired policy change or disciplining an employee. The City cannot plausibly claim that granting release time to union agents serves the public interest when union agents use this subsidy to prevent the City from taking actions the City believes to be in the public interest.

Third, the City subsidizing AFSCME's expressive activities is no more necessary to maintain labor peace than the mandatory employee subsidies *Janus* held unconstitutional. The lower court's vague determination that release time serves a public purpose because it could "promote the public welfare or enjoyment," *Gilmore*, 529 P.3d at 571, ¶

26, cannot be squared with this holding.

The lower court remarked that "twice before, in considering similar (but not identical) release time provisions, the Arizona Supreme Court has concluded the provisions serve a public purpose." *Id.* at 571, ¶ 27. But those cases were decided before the United States Supreme Court held in *Janus* that a public-sector union's activities are political in nature, that these activities are not performed for public employers, but for the union, and that these union activities need not be subsidized to attain so-called labor peace. These holdings now compel the conclusion that release time does not serve a public purpose.

B. Both *Janus* and the Phoenix Code Foreclose the Position that Uniform Terms of Employment Are Concessions Granted by AFSCME to the City.

Janus also refutes the lower court's determination that the City, in exchange for granting AFSCME release time, receives: "the ability to impose terms of employment on every unit employee, union members and non-union members alike." *Gilmore*, 529 P.3d at 571, ¶ 31. This ability cannot be a reciprocal benefit for release time because the City is already entitled to it under *Janus* and the Phoenix City Code.

First, in *Janus* the United States Supreme Court explained that a

"union may not negotiate a collective-bargaining agreement that discriminates against nonmembers." 138 S. Ct. at 2468. The reason is that a union would violate its duty of fair representation by so doing. *Id.*; s*ee, e.g.*, *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–203 (1944).

This fiduciary duty to represent all employees in a bargaining unit without discrimination, member and nonmember alike, is "a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit." 138 S. Ct. at 2468. AFSCME owes this duty to City employees by virtue of its legal status as their exclusive representative. This duty precludes AFSCME from agreeing to a City contract that imposes different terms of employment on employees based on their union membership status.

Consequently, AFSCME agreeing to impose uniform terms of employment on City employees cannot be deemed consideration the union granted to the City for release time, as the lower court incorrectly determined. *See Gilmore*, 529 P.3d at 573–574, ¶ 38. AFSCME had a legal obligation to take this action—i.e., to bargain for terms of employment that do not discriminate between union members and nonmembers.

Second, the City has a legal obligation not to discriminate in terms of employment based on union member status under the City's labor code. So does AFSCME. The code provides that "a public employer is prohibited from…[d]iscrimination against employees for membership in employee organizations or for engaging in concerted activities" and "employee organizations are prohibited from…[c]ausing an employer to unlawfully discriminate against an employee." Phoenix City Code §§ 2-220(A)(3), (B)(2) (emphasis added). Given the code already requires the City and AFSCME to impose uniform terms of employment on unit employees, union member and nonmember alike, it necessarily follows that the City did not need to provide AFSCME agents with release time to comply with its pre-existing legal obligations.

CONCLUSION

The Court should reverse the decisions of the Court of Appeals and the trial court on all claims.

RESPECTFULLY SUBMITTED this 12th day of December, 2023.

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