SUPREME COURT 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.

Arizona 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

AMICUS CURIAE BRIEF OF THE STATE OF ARIZONA IN OPPOSITION TO THE PETITION FOR REVIEW

Alexander W. Samuels (No. 028926)
Luci D. Davis (No. 035347)
OFFICE OF THE ATTORNEY GENERAL
2005 N. Central Ave., Phoenix, AZ 85004
(602) 542-3333
Alexander.Samuels@azag.gov
Luci.Davis@azag.gov
ACL@azag.gov

Attorneys for State of Arizona

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INTRODUCTION

Unhappy with the court of appeals' faithful application of precedent, Petitioners seek review of issues that this Court has already analyzed and clearly resolved. For several reasons, the Court should deny the Petition and decline the invitation to disturb this settled area of law.

To begin, Petitioners' challenge depends in large part on their theory that the City of Phoenix is funding political activities by the Union, but recent legislation has rendered that theory inapposite. Since Petitioners brought this action, the Legislature enacted A.R.S. § 23-1431, which prohibits public employers from funding political and lobbying activities by unions, including through release time. As a practical matter, the statute significantly narrows the scope of Petitioners' challenges to the MOU's release-time provisions, making many of Petitioners' constitutional arguments wholly theoretical and unnecessary to reach.

Petitioners' remaining arguments fail under this Court's precedent and present no novel issues for review. To the extent Petitioners seek more than mere error correction of the fact-specific analysis below, stare decisis and contractual reliance interests weigh strongly against granting review and broader relief.

INTERESTS OF AMICUS CURIAE

Pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(1)(B), the State submits this brief to articulate its interests regarding the development of constitutional law in this area and the force of stare decisis on issues involving contractual expectations and reliance statewide.

ARGUMENT

The Court should deny review for three reasons. First, many of Petitioners' constitutional arguments concern release-time activities that the Legislature has now prohibited anyway. Second, the release-time provisions here pass muster under settled precedent and raise no new issues meriting review. Third, review is otherwise unjustified because the legal standard is clear, and stare decisis is at its zenith here given the contractual expectations and reliance interests implicated.

I. Many of Petitioners' arguments are now inapposite in light of A.R.S. § 23-1431.

A prominent feature of Petitioners' challenge to the 2019–2021 MOU is their argument that employees use release time to "engage in political activities." *E.g.*, Pet. at 1, 5-6. But to the extent that was ever true, it is no longer possible for any public employees to use release time for "political activities."

In 2022 (after this case began in 2019), the Legislature enacted A.R.S. § 23-1431, which addresses two defined categories of "union activities": "(a) Political activities performed by a union that involve advocating for the election or defeat of any political candidate," and "(b) Lobbying activities performed by a union that involve attempting to influence the passage or defeat of federal or state legislation, local ordinances or any ballot measure." A.R.S. § 23-1431(G)(5)(a)-(b). Under the statute, a "public employer may not spend public monies" on these political and lobbying activities, which includes contracting "with a public employee to engage in" such activities and providing "paid leave or any form of compensation" for a public employee to do so. *Id.* § 23-1431(A), (B).

The statute applies to any contracts entered after September 24, 2022. *Id.* § 23-1431(D). So, any MOU the City and Union have entered since then—which would appear to include any currently operative MOU—cannot provide paid release time for the prohibited activities.[1] Thus, the new statute

[1] The 2019–2021 MOU was effective from July 2019 to June 2021. APP094. Presumably, the 2021–2023 MOU was effective from July 2021 to June 2023, *see Gilmore v. Gallego*, 529 P.3d 562, 568 ¶ 11 n.3 (Ariz. App. 2023), and the statute would then apply to any MOU entered after that point.

renders a central feature of Petitioners' challenge to the 2019–2021 MOU incapable of repetition going forward.

Further, in light of A.R.S. § 23-1431, this case is now an exceptionally poor vehicle for addressing these arguments under the Gift Clause. To the extent the 2019–2021 MOU (or 2021–2023 MOU) might have implicated the statute's prohibition, the Petition would be challenging the constitutionality of terms that are no longer effective. If the current MOU includes such a term, then that provision is likely "void and unenforceable" as a straightforward statutory matter, without requiring a constitutional analysis. *Id.* § 23-1431(B). And if the current MOU does not include such a term, then the Petition would be challenging the constitutionality of a provision that does not, and cannot, exist.

Among other things, release-time employees cannot "lobby the legislature for and against laws that interest [the Union]" or "campaign for elected officials who support" the Union. *Cheatham v. DiCiccio*, 240 Ariz. 314, 324 ¶ 46 (2016) (Timmer, J., dissenting). As such, whether framed in terms of constitutional avoidance, prudential standing, or as a pure practical matter, this Court's review is not warranted under these circumstances.

II. Petitioners' remaining arguments present no novel issues under this Court's Gift Clause precedent.

With the activities prohibited by § 23-1431 out of the picture, this case becomes even more unremarkable under existing precedent.

A. The release-time provisions serve a public purpose.

Under the first prong of the Gift Clause analysis, the challenged expenditure must serve a public purpose—meaning, it "promotes the public welfare or enjoyment" when considering "both direct and indirect benefits." *Schires v. Carlat*, 250 Ariz. 371, 374–75 ¶¶ 7-8 (2021). Courts "find a public purpose absent only in those rare cases in which the governmental body's discretion has been 'unquestionably abused.'" *Id.* at 375 ¶ 9 (citation omitted).

Here, the City has determined, quite rationally, that "[t]he Phoenix community benefits from harmonious and cooperative relationships between the City and its employees." APP050. In fact, the City's Code calls this a "fundamental interest" of the "people of Phoenix," drawing a direct line between harmonious employment relationships and the "basic obligation to the public to assure the orderly and continuous operations and functions of government." Defs.' Suppl. App. at 20 (Code § 2-209).

To facilitate cooperative employment relationships and, in turn, ensure orderly government operations, the City has long negotiated with unions to enable activities that the City views as furthering those interests. The City's assessment is reasonable. For instance, there is a clear relationship between the purposes above and permitting employees to engage in activities like "collaborative labor-management initiatives that benefit the City and the members." APP050.

Relatedly, full-time release employees provide the City with "an efficient and readily available point of contact for addressing labor-management concerns." APP050. Given the less efficient, less effective alternative—spending limited resources to deal with multiple individuals, on different matters, and across different areas—the benefit to the City is significant. *See Cheatham*, 240 Ariz. at 320 ¶ 23 (finding "more efficient negotiations" to be a benefit).

And surely the City has not "unquestionably abused" its discretion in determining that government operations are served by release-time employees "assisting members in understanding and following work rules," or by allowing "authorized employees" to use release time for "training classes and workshops so that employees better understand … City policies

and practices [and] conflict resolution." APP050-51. Can there be any real question that the City (and the public in turn) benefits when employees better understand governing policies and resolve conflict more effectively?

Other release-time provisions also "serve a public purpose by providing an incentive for public employment" and "substitut[ing] for an expense the employee would otherwise pay." *Cheatham*, 240 Ariz. at 326 ¶ 52 (Timmer, J., dissenting). Under the MOU, employees in the "release positions" are charged with "ensuring representation for employees" for grievance and disciplinary matters—a meaningful benefit to public employees. APP050.

From the City's perspective, too, having knowledgeable representation on both sides of a dispute helps "facilitate the resolution of grievances." *Cheatham*, 240 Ariz. at 320-21 ¶ 24; *cf. Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348 (1984) ("The services performed by the [union president] aid the District in performing its obligations."). Indeed, full-time release positions can spend 40-60% of their time on representation, further illustrating just how much the City benefits from consolidating dispute resolution among experienced representatives on issues "that more than likely will happen in the future again." APP165 (Dep. 55:03–57:12).

In sum, the MOU contemplates that release time must be used for specific activities or similar endeavors. *E.g.*, APP050-51. And those activities all relate directly to the City's and public's interests in cooperative labor relations and efficient government.[2] "The MOU, including its release time provisions, serves a public purpose." *Cheatham*, 240 Ariz. at 320 ¶ 23.

Importantly, it does not matter whether the Union "would not have negotiated an MOU [without] those provisions," nor whether "the City would have allocated" the same amount of money. *Id.* at 325 ¶¶ 47-48 (Timmer, J., dissenting). In assessing public purpose, "the wisdom or necessity of the expenditure in question" is not a court's concern—"those considerations lie exclusively within the public entity's discretion." *Schires*, 250 Ariz. at 375 ¶ 8. The City has acted well within its discretion here.

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[2] Notably, the record here supports that release-time employees do not "work almost unchecked" for the Union. *Cheatham*, 240 Ariz. at 324 ¶ 46 (Timmer, J., dissenting). Nor is the City in the dark about their activities. By virtue of the work they do, release-time employees "communicate with the City nearly every day in one form or another," and they are "held to the same standards as any full-time employee." APP175 (Dep. 97:06-11); *see also* APP163 (Dep. 48:06-09, 48:25–49:02); APP050. In addition, the MOU's terms impose specific limitations and expectations. For instance, reimbursable funds are allocated for "designated members" and specific subjects—and both the Union and City have oversight over those activities, as the Union must "submit receipts for reimbursement" for the City's approval. APP051.

As a policy matter, reasonable minds might disagree about the City's chosen ends and means. But those decisions are nonetheless entitled to "significant deference" and are nowhere near constitutionally suspect. *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 14 (2010); *see also Schires*, 250 Ariz. at 375-76 ¶¶ 8-12 (citing cases reiterating deference owed and finding wide range of public purposes). Most relevant for present purposes though, none of these issues are new, unresolved, or worthy of further review.[3]

B. Petitioners' proposed application of the consideration prong contradicts precedent and strains the Gift Clause's purpose.

The court of appeals correctly found that Petitioners failed to show that what the City pays for release time—about 0.31% of the annual payment under the MOU—is "grossly disproportionate" to the value the City receives. *Gilmore*, 529 P.3d at 566, 574 ¶¶ 5, 40-41. On the merits, the State has little to add to that well-reasoned opinion.

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[3] The City is hardly alone in determining that governmental functions (and thus the public) are served by harmonious worker relations and cooperation with unions. Indeed, Arizona's Framers made a similar value judgment when they memorialized protection for organized labor and prohibited the "giving out of any labor 'black list.'" Ariz. Const. art. XVIII, § 9. Blacklisting was "a practice apparently rather common when the constitution was drafted, in which employers attempted to stifle workers' efforts to organize into unions." John D. Leshy, The Arizona State Constitution 402 (2d. ed. 2013).

Instead, the State highlights three ways in which Petitioners' approach under the second prong is inconsistent with precedent, and why, if accepted, it would convert the Gift Clause from an important check on public spending to a broad sword for challenging a wide swath of governmental policy decisions.

Panoptic View. This Court has made clear that the Gift Clause requires a "panoptic view of the facts," not an "overly technical view of the transaction." *Turken*, 223 Ariz. at 352 ¶ 47 (citation omitted); *see also Cheatham*, 240 Ariz. at 322-21 ¶¶ 30-32. Ignoring this mandate, Petitioners here wrongly zoom in on the provisions they challenge rather than viewing the MOU as a whole. That selective framing distorts the agreement that was actually entered and omits relevant parts of the "give" and "get" that courts must consider.

Petitioners miscite and misunderstand (at 13-14) *Wistuber* on this point. There, plaintiffs challenged certain terms ("Proposal 98") in a CBA between a school district and teachers' union which provided release time to the union's president. *Wistuber*, 141 Ariz. at 347-48. The Court focused on the bargained-for consideration in Proposal 98, *see id.* at 348–50, instead of the "services rendered by all teachers" more broadly (Pet. at 13). But

under that CBA, release time was provided to *the president only*—not other teachers—because the president's responsibilities "require[d] a considerable amount of [her] time." *Id.* at 348 n.2. Accordingly, the Court focused on what the president (the recipient of the public's "give") agreed to do in exchange for her released time (the public's "get"). *Id.* at 348.[4]

Wistuber demonstrates how Petitioners (and the dissent below) are mistaken in their focus. The "give" and "get" here are not limited to one person. The MOU provides full-time release positions to four employees, a bank of release hours available to Union members, and a set amount of reimbursable costs available to members. APP050-51. And that release time is provided for purposes that serve *all* employees (i.e., representation in grievance proceedings). Accordingly, because the public's "give" flows to all employees and the Union alike, the panoptic view must include the

[4] Further, the mere fact that the Court did not need to look beyond Proposal 98 to find adequate consideration in *Wistuber* does not amount to a per se rule for all cases involving release time. A contract's specific terms and the nature of the promised performance inform the panoptic view in any given case. *E.g.*, *Cheatham*, 240 Ariz. at 322 ¶ 32 (observing "the general contractual principle that one party's performance … may be supported by 'consideration' in the form of performance or a return promise by either the promisee … or another person" (citation omitted)).

bargained-for "get" that the City receives from *all* employees and the Union. That means looking at the MOU as a whole.

The MOU is a single agreement that was entered into based on the sum costs and benefits of its parts; it must be analyzed as such. Slicing and dicing its terms is inconsistent with both law and fact.

Nonpecuniary Consideration. Petitioners err in calling (at 13) for the City to establish the "objectively valued benefits" it receives, which is not the City's burden anyway. *Wistuber*, 141 Ariz. at 350. But also, this Court has made clear that nonpecuniary benefits (not merely "objectively valued" ones) are cognizable consideration under the Gift Clause.

In *Kromko v. Arizona Board of Regents*, 149 Ariz. 319 (1986), the Board leased a state-owned hospital to a private corporation, which agreed to maintain the facility as a teaching hospital for university students. *Id.* at 319-20. The lease helped "guarantee the perpetuation of the critical educational relationship between the hospital and the University of Arizona College of Medicine." *Id.* at 322. Thus, although the "benefit [was] nonpecuniary, it nonetheless [could] be viewed as consideration." *Id.* As this Court later reiterated, "the perpetuation" of the relationship in *Kromko* "plainly

qualified as traditional consideration" because it "was directly contracted for" in the lease. *Turken*, 223 Ariz. at 352 ¶ 48.

Here, all of the City's benefits—both pecuniary and nonpecuniary—were directly contracted for under the unequivocal terms of the MOU.

For example, in exchange for the "negotiated full-time release positions," the City gets to deal exclusively with an "efficient and readily available point of contact" for disputes. APP050. Those full-time positions also perform certain work "in support of the City," including: serving on "committees and task forces"; "assisting members in understanding and following work rules"; and "administering the provisions of" the MOU. APP050-51.

And as to other employees, "release hours, including all benefits," are "part of the total compensation" in the MOU. APP050. Thus, the Union bargains for the employees; the employees agree to provide their labor under the MOU's terms; and the MOU's terms include paid release time for activities that serve the employees and benefit the City. Thus, the City's (and therefore the public's) "get" includes not only the labor that employees agree to provide under the MOU generally, but also all the specific obligations set out in the MOU.

Grossly Disproportionate. Although courts must analyze the proportionality of an agreement's cost and value, that inquiry does not involve the necessity or wisdom of the challenged terms. *See Wistuber*, 141 Ariz. at 349–50 (finding adequate consideration even though "many of the obligations imposed upon the [union president were] duties which she might have performed in any event").

The test also is not whether consideration is slightly, or even moderately, disproportionate or unequal. It must be *grossly* disproportionate and "far exceed[]" what the public paid. *Schires*, 250 Ariz. at 376 ¶ 13. The reason for that threshold is clear: courts are not well-suited for line-by-line accounting and weighing of every penny paid and every pecuniary and nonpecuniary benefit returned.

To be sure, an objective analysis is required. *See id.* at 378 ¶ 23. And some purely financial agreements easily lend themselves to economic balancing. *E.g.*, *Turken*, 223 Ariz. at 350 ¶ 33 ("In evaluating a *contract like the Parking Agreement*, analysis of adequacy of consideration … focuses instead on the objective fair market value…." (emphasis added)).

But again, nonpecuniary benefits can "plainly qualif[y] as traditional consideration" under the Gift Clause. *See id.* at 352 ¶ 48; *Kromko*, 149 Ariz.

at 322. So other agreements—like the one at issue here—which also involve relational costs and benefits, will necessarily require a less mathematical analysis of the "direct benefits that are 'bargained for as part of the contracting party's promised performance.'" *Schires*, 250 Ariz. at 376 ¶ 14 (citation omitted). This is not new or alarming; not all exchanged promises are purely monetary, and courts can still assess their proportionality. *See, e.g.*, *Cheatham*, 240 Ariz. at 322 ¶¶ 31-32; *Kromko*, 149 Ariz. at 322.

There will almost always be a variety of ways that an agreement could have been structured differently, perhaps even more so when nonpecuniary benefits are involved. The "grossly disproportionate" standard ensures that courts intervene only when the public has truly been wronged, and not merely when judges (or citizens, like Petitioners) disagree with lawmakers about the policy choices underlying certain bargained-for benefits.

III. Stare decisis and statewide reliance interests counsel against review.

The State offers three final points weighing against review.

First, the mere fact that the majority and dissent below disagreed about the application of the law does not mean there is "confusion" about "existing Gift Clause precedent." Pet. at 4.

Just seven years ago, *Cheatham* resolved issues largely overlapping with those here, and *Schires* provided additional guidance. The majority below expressly and faithfully heeded both. Nothing has changed over the last several years that calls those precedents into question. True, the composition of this Court has changed. But if Petitioners are relying on that fact alone, they misunderstand this Court's respect for precedent. *E.g.*, *Young v. Beck*, 227 Ariz. 1, 6 ¶ 22 (2011) ("[M]ere disagreement with those who preceded us is not enough" to overrule precedents.); *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 484 ¶ 17 (2022) (finding it "debatable whether" precedent "offer[ed] the best interpretation" of issue, but finding "no compelling reason to overrule" it).

Second, stare decisis is "at its zenith" when, as here, "the precedent established 'important settled expectations—especially those relating to … contract rights.'" *Laurence v. Salt River Project Agric. Improvement & Power Dist.*, 528 P.3d 139, 144-45 ¶ 19 (Ariz. 2023) (citation omitted). Public employers and employees have ordered their contractual relationships based on this Court's precedents. The ability of public employers to provide services and deal effectively with their employees depends in no small part

on the stability and predictability of the law issued by this Court. The State urges the Court to give those considerations great weight.

Last, the Legislature's prohibition on public employers funding certain activities, but not others, is at least some evidence that it recognized a potential public benefit in other scenarios. *Cf. Kromko*, 149 Ariz. at 320 ("[O]ur legislature, by providing for the type of transaction at issue, has statutorily recognized the public benefit …."). Plainly, A.R.S. § 23-1431 does not resolve the merits of any constitutional question. But the Legislature's selective prohibition and preemption should give the Court additional pause about shuffling this settled area of law.

* * *

This case simply does not involve the kind of "extravagant dissipation of public funds" that the Gift Clause "was historically intended to protect against." *Kotterman v. Killian*, 193 Ariz. 273, 288 ¶ 52 (1999) (citation omitted). Without question, the Gift Clause is an important check on governmental spending. But its power is—and should remain—limited to those cases where the public has been truly wronged by a grossly disproportionate deal. The Gift Clause is not a tool for advancing policy preferences, and that is all Petitioners here seek.

CONCLUSION

The Court should deny the Petition.

RESPECTFULLY SUBMITTED this 9th day of August, 2023.

KRIS K. MAYES, ARIZONA
ATTORNEY GENERAL

By /s/ *Luci D. Davis*

Alexander W. Samuels (No. 028926)
Luci D. Davis (No. 035347)
OFFICE OF THE ATTORNEY GENERAL
2005 N. Central Ave., Phoenix, AZ 85004
(602) 542-3333
Alexander.Samuels@azag.gov
Luci.Davis@azag.gov
ACL@azag.gov

Attorneys for State of Arizona