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**IN THE SUPERIOR COURT OF
ARIZONA IN AND FOR THE COUNTY
OF MARICOPA**

MARK GILMORE; and MARK HARDER,

Plaintiffs,

vs.

KATE GALLEGRO, in her official capacity as
Mayor of the City of Phoenix; ED
ZUERCHER in his official capacity as City
Manager of the City of Phoenix; and CITY
OF PHOENIX.

Defendants.

Case No.

CV2019-009033

**COMPLAINT
for Declaratory and Injunctive Relief**

INTRODUCTION

1. In a practice called “release time,” government workers throughout the City of Phoenix (“City”) are released from the government jobs they were hired to perform and instead work exclusively for private labor unions—all while receiving government pay and benefits. The work that individuals on release time perform for private labor unions—for which they are paid government salaries—includes engaging in political activities, lobbying the government, recruiting new union members, filing grievances against their employer, and negotiating for higher wages and benefits, among other things.

2. Release time employees are funded under memoranda of understanding between the City and labor unions that charge the cost of release time employees' salaries as part of "total compensation" to all employees that are bound by the memorandum of understanding, whether those employees are members of the private union or not. In other words, release time is funded by all employees of a particular bargaining unit, and as a result, non-union members are being forced to fund the salaries of release time employees.

3. On May 22, 2019, the City entered into a Memorandum of Understanding ("2019–2021 MOU") with the American Federation of State, County, and Municipal Employees, Local 2384, Field Unit II ("Union"). Under the MOU, the City is obligated to provide the Union with multiple release time benefits, including four full-time release positions, guaranteed compensatory time for high-ranking union officials using release time, a bank of release time hours per year to be used by other Union representatives, and additional hours and direct payments for Union members to attend Union seminars, lectures, conventions, and workshops. Because expenditures for this release time are part of the "total compensation" paid to all Field Unit II employees under the MOU, all Field Unit II employees pay for the release time through reduced wages and benefits.

4. Not all Field Unit II employees wish to pay for this release time, and not all have consented to doing so. As a result, under the MOU, the City is directing substantial payments to a private labor organization from employees' compensation without their consent. This arrangement violates the U.S. Constitution, the Arizona Constitution, and state statute.

PARTIES, JURISDICTION, AND VENUE

5. Plaintiff Mark Gilmore is a citizen of the United States and a resident of the state of Arizona. Plaintiff Gilmore is employed by the City of Phoenix and is subject to the 2019–2021 MOU between the City and the Union as an employee within the Field Unit II bargaining unit. Mr. Gilmore is

not a member of the Union and has not provided, and does not wish to provide, affirmative consent to have any portion of his compensation directed toward Union activities, including release time.

6. Plaintiff Mark Harder is a citizen of the United States and a resident of the state of Arizona. Plaintiff Harder is employed by the City of Phoenix and is subject to the 2019–2021 MOU between the City and the Union as an employee within the Field Unit II bargaining unit. Mr. Harder is not a member of the Union and has not provided, and does not wish to provide, affirmative consent to have any portion of his compensation directed toward Union activities, including release time.

7. Defendant Kate Gallego is the Mayor of the City of Phoenix and is sued in her official capacity only.

8. Defendant Ed Zuercher is the City Manager of the City of Phoenix and is sued in his official capacity only.

9. Defendant City of Phoenix is a municipal corporation organized under the laws of the State of Arizona.

10. Jurisdiction over this action and its claims is provided by A.R.S. §§ 12-123, 12-1831, and 12-1801.

11. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

12. The American Federation of State, County, and Municipal Employees, Local 2384, Field Unit II (“Union”), is a public-sector labor union with complete organizational independence from the City of Phoenix, including its own board of trustees, staff, and mission statement.

13. The Union has the exclusive right to serve as the “meet and confer” representative of all “unit members,” which consist of all employees in Field Unit II. MOU § 1-1.A.

14. Several employees in Field Unit II are not dues-paying members of the Union, including Plaintiff Gilmore and Plaintiff Harder.

15. On or about May 22, 2019, the City and the Union agreed to the 2019–2021 MOU that will govern their relationship between the period starting approximately July 1, 2019 until approximately June 30, 2021. The 2019–2021 MOU is attached hereto as Exhibit A.

16. The Phoenix City Council authorized the City to enter into the 2019–2021 MOU at a City Council meeting on or about May 15, 2019.

17. Under the MOU, the City is obligated to provide the Union with: (1) four full-time release positions; (2) 448 hours of guaranteed compensatory time per year for the four full-time release positions; (3) a bank of 3,183 release time hours per year to be used by other Union representatives; (4) 150 additional hours per year for Union members to attend Union seminars, lectures, and conventions; and (5) \$14,000 per year in reimbursement for Union members to attend schools, conferences, and workshops. MOU §§ 1-3(A)(1), (3).

18. Release time under the 2019–2021 MOU is used by Union members to engage in political activities, including supporting or opposing candidates for elected office.

19. Release time under the 2019–2021 MOU is used by Union members to lobby for or against legislation at the state and local level.

20. Release time under the 2019–2021 MOU is used by Union members to engage in the recruitment of new members to the Union.

21. Release time under the 2019–2021 MOU is used by Union members to file grievances against the City.

22. Release time under the 2019–2021 MOU is used by Union members to represent City employees against the City in disciplinary actions brought by the City.

23. Release time under the 2019–2021 MOU is used by Union members to attend union meetings and conferences.

24. Release time under the 2019–2021 MOU is used by Union members to negotiate contracts with the City, including those contracts subject to meet and confer provisions.

25. Release time was used to negotiate the terms of the 2019–2021 MOU.

26. Release time activities are subject to the discretion, direction, and control of the Union, not the City.

27. The full-time release time employees are not contractually required to provide an accounting to the City for *how* they use release time.

28. The City is not contractually granted permission to audit the Union for its use of release time.

29. Upon information and belief, the City has no mechanism to determine or confirm how release time is in fact being used.

30. Union officials using release time are not required to account to the City for how release time is in fact used.

31. The City does not control or direct the activities of Union members while they are using release time.

32. Upon information and belief, the full-time release time employees ordinarily report to Union headquarters rather than to City offices or duty stations, except when performing Union business that, by its nature, requires a presence on city property.

33. Under the 2019–2021 MOU, “[t]he cost to the City for these release positions and release hours, including all benefits, has been charged as part of the total compensation detailed in [the 2019–2021 MOU].” MOU § 1-3(A).

34. As a result, all of the release time expenditures in the 2019–2021 MOU are paid for by all Field Unit II employees, in the form of reduced wages and benefits, whether those employees belong to the Union or not.

35. City employees who are members of the Field Unit II bargaining unit, including Plaintiffs, are obligated to finance release time.

36. Plaintiffs have never provided their affirmative consent to fund release time activities under the 2019–2021 MOU.

37. City employees who are members of the Field Unit II bargaining unit, including Plaintiffs, cannot opt out of funding release time.

38. Plaintiffs do not agree with financing activities the Union engages in while utilizing release time, including but not limited to its electioneering activity, lobbying, and collective bargaining.

39. The City finances the benefits of release time to the Union under the MOU through city tax revenue.

40. Any legitimate public purposes that release time might serve can be provided by the Union or its voluntary members at their own expense, or can be provided under the control and supervision of the City.

41. The practice of providing release time to unions is widespread in contracts between the City and other bargaining units in the City of Phoenix.

42. The City has elected not to fund release time, including full-time release positions, in other memoranda of understanding with other labor unions that are currently in force and effect.

43. In other memoranda of understanding between the City and other labor unions, Union members or bargaining unit employees have the option to donate their own leave time for other employees to use as release time.

44. Because of the limited duration of the 2019–2021 MOU, and the common practice of release time throughout the City, the situation presented here is capable of repetition.

Count One—U.S. Constitution First Amendment Compelled Speech

45. Plaintiffs incorporate by reference all preceding allegations.

46. The First Amendment to the U.S. Constitution, made applicable to state and local governments by the Fourteenth Amendment, forbids the government from abridging the freedom of speech. U.S. Const., amend. I.

47. The First Amendment right to freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

48. Compelling individuals to support views with which they do not agree violates the First Amendment. *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018).

49. In the context of public employees, public employers cannot, under the First Amendment, take money from nonconsenting employees to support the activities of a public-sector labor organization. *Id.* at 2486.

50. As the U.S. Supreme Court recently held, “[n]either an agency fee *nor any other payment* to the union may be deducted from a nonmember’s wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmative consents to pay.” *Id.* (emphasis added).

51. In this case, under the City's meet and confer procedures, Plaintiffs, as City employees who are part of Field Unit II, are subject to the terms and conditions of the 2019–2021 MOU, whether they want to be or not.

52. It is a condition of Plaintiffs' public employment that they are bound by the terms of the 2019–2021 MOU.

53. Under the plain terms of the 2019–2021 MOU, “[t]he cost to the City for these release time positions and release hours, including all benefits, has been charged as part of the total compensation detailed in this agreement.” MOU § 1-3(A).

54. As a result, Plaintiffs who are part of Field Unit II, are required to direct part of their “total compensation” to finance release time under the MOU.

55. Plaintiffs have never provided affirmative consent to fund release time under the 2019–2021 MOU.

56. Plaintiffs cannot opt-out of funding the release time provisions of the 2019–2021 MOU.

57. Consequently, the City's direction of part of Plaintiffs' compensation to fund release time without Plaintiffs' affirmative consent violates the First Amendment to the U.S. Constitution.

Count Two—Arizona Constitution Article II, § 6 Compelled Speech

58. Plaintiffs incorporate by reference all preceding allegations.

59. The Arizona Constitution likewise protects the right to free speech: “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Ariz. Const. art. II, § 6.

60. The Arizona Constitution’s protection for free speech “by its terms...provides broader protections for free speech than the First Amendment.” *Brush & Nib Studio, LC v. City of Phoenix*, No. CV-18-0176-PR, 2019 WL 4400328, at *8 ¶ 45 (Ariz. Sept. 16, 2019).

61. Like the U.S. Constitution’s First Amendment protections, Arizona’s Constitution “includes both the right to speak freely and the right to refrain from speaking at all.” *Id.* at *9 ¶ 48 (internal quotations and citation omitted).

62. Under the Arizona Constitution, an Arizonan “may not be forced to speak a message he or she does not wish to say.” *Id.* at *10 ¶ 52.

63. In this case, Plaintiffs are forced to provide financial support to the Union, which uses that financial support to take positions with which Plaintiffs disagree.

64. Plaintiffs have never provided affirmative consent to fund release time under the 2019–2021 MOU.

65. Plaintiffs cannot opt out of funding the release time provisions of the 2019–2021 MOU.

66. Consequently, the City’s direction of part of Plaintiffs’ compensation to fund release time without Plaintiffs’ affirmative consent, and the Union’s use of that money to engage in speech with which Plaintiffs disagree, violate Article II, Section 6 of the Arizona Constitution.

Count Three—Arizona Constitution Article II, § 5 Right to Association

67. Plaintiffs incorporate by reference all preceding allegations.

68. The Arizona Constitution also protects “[t]he right of petition, and of the people peaceably to assemble for the common good, [which] shall never be abridged.” Ariz. Const. art. II, § 5.

69. The protections of Ariz. Const. Article II, Section 5 include the “right to associate for the purpose of engaging in those activities protected by the First Amendment.” *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136 ¶ 13 (App. 2001).

70. The freedom to associate “plainly presupposes a freedom not to associate.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

71. When the government compels an individual to associate with others, and that compulsion leads to the monetary endorsement of political views, the message expressed must be “viewpoint neutral.” *See May v. McNally*, 203 Ariz. 425, 429-30 ¶ 21 (2002).

72. In this case, release-time employees’ activities on behalf of the Union include political activities, lobbying, filing of grievances, and collective bargaining.

73. These activities are not viewpoint neutral, but rather express views on “important political issues.” *See Janus*, 138 S. Ct. at 2480 (“In the public sector, core issues such as wages, pensions, and benefits are important political issues.”).

74. Because Plaintiffs do not agree with these views, but are obligated as a condition of employment to fund them, the release time provisions of the 2019–2021 MOU violate Plaintiffs’ right to association under Article II, Section 5 of the Arizona Constitution.

Count Four—Right to Work Violation

75. Plaintiffs incorporate by reference all preceding allegations.

76. Article XXV of the Arizona Constitution and Arizona’s Right to Work laws, A.R.S. §§ 23-1301 to 23-1307 and 23-352, prohibit both forced union membership as well as forcing non-union employees to pay any financial compensation to unions.

77. As a result of these constitutional and statutory provisions, no person in this state may be forced to subsidize union activities or to participate “as a condition of employment ... in

any form or design of union membership.” *AFSCME v. City of Phoenix*, 213 Ariz. 358, 367 ¶ 23 (App. 2006).

78. The release time provisions in the 2019–2021 MOU authorize expenditures for release time as part of employees’ “total compensation.” MOU § 1-3(A).

79. As a result, funds that would otherwise be included in employees’ salaries and benefits are instead paid to the Union.

80. Therefore, the release time provisions of the 2019–2021 MOU force Plaintiffs to finance union activities as a condition of employment and thus violate Arizona’s right to work laws.

Count Five—Gift Clause

81. Article 9, Section 7 of the Arizona Constitution provides that neither the State nor any city “shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.”

82. A payment by the State or a subdivision is proper under the gift clause only if “(1) the agreement serves a public purpose and (2) there is neither donation *nor* subsidy to a private association.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348 (1984).

83. A “subsidy” is “a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.” *State Tax Comm’n v. Miami Copper Co.*, 74 Ariz. 234, 241 (1952).

84. Cities must receive direct public benefits of roughly proportionate value in exchange for their expenditure of public funds on goods and services.

85. The Arizona Supreme Court has held that indirect public benefits do not satisfy the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342 (2010).

86. The release time expenditures under the 2019–2021 MOU inure to the primary, if not exclusive, benefit of the Union. The release time provisions are used in a discretionary manner by the Union to support the mission of the Union and serve to promote the Union’s exclusive private purposes, not public purposes.

87. The release time provisions of the 2019–2021 MOU lack sufficient public control to ensure a public purpose is being accomplished.

88. The release time provisions fail to provide the City a clear public benefit in return, and are unsupported by sufficient consideration.

89. The Union is not obligated to provide any direct benefits to the City in return for the grant of release time under the 2019–2021 MOU.

90. The benefits derived from the MOU by the City, if any, are not equivalent to the benefits the City has obligated itself to make to the Union, and are so inequitable and unreasonable as to amount to an abuse of discretion on the part of Defendants.

91. For all these reasons, the benefits granted to the Union under the MOU, including release time hours to further the mission and organizational existence of the Union, constitute a subsidy and an impermissible gift to an association, which exceeds Defendants’ lawful powers in violation of Ariz. Const. Article 9, Section 7.

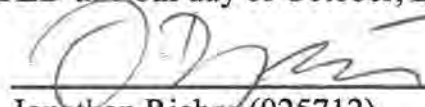
REQUEST FOR RELIEF

For their relief, Plaintiffs respectfully request that this Court take the following actions:

- A. Declare that Sections 1-3(A), 1-3(C), and 1-3(D), of the 2019–2021 MOU are unconstitutional and preliminarily and permanently enjoin their further effect;
- B. Award costs and attorney fees pursuant to A.R.S. §§ 12-341, 12-348, and the private attorney general doctrine; and

C. Award such other and further relief as may be just and equitable.

RESPECTFULLY SUBMITTED this 8th day of October, 2019.



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