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

WILLIAM R. CHEATHAM; and MARCUS HUEY,

Plaintiffs,

vs.

PHIL GORDON, in his official capacity as Mayor of the City of Phoenix; THELDA WILLIAMS, in her official capacity as member of the Phoenix City Council and Vice Mayor; JIM WARING, in his official capacity as member of the Phoenix City Council; BILL GATES, in his official capacity as member of the Phoenix City Council; TOM SIMPLOT, in his official capacity as member of the Phoenix City Council; CLAUDE MATTOX, in his official capacity as member of the Phoenix City Council; SAL DICICCIO, in his official capacity as member of the Phoenix City Council; MICHAEL NOWAKOWSKI, in his official capacity as member of the Phoenix City Council; MICHAEL JOHNSON, in his official capacity as member of the Phoenix City Council; and DAVID CAVAZOS, in his official capacity as City Manager of the City of Phoenix; CITY OF PHOENIX; and PHOENIX LAW ENFORCEMENT ASSOCIATION.

Defendants.

CV2011-021634

Case No.

**COMPLAINT for Declaratory
and Injunctive Relief**

and

**APPLICATION FOR
ORDER TO SHOW CAUSE**

INTRODUCTION

1. In September 2011, the Goldwater Institute issued a report entitled “Money for Nothing: Phoenix taxpayers foot the bill for union work.” The report revealed that the City of Phoenix had executed contracts with seven public labor unions containing illegal subsidies. Those subsidies were at their worst in the City’s contract with the Phoenix Law Enforcement Association (“PLEA”).

2. Under the Memorandum of Understanding between the City and PLEA, Phoenix is committed, among other things, to pay approximately 1.5 million dollars for Phoenix police officers to leave their official police duties to work on behalf of the union, while still receiving full pay and benefits. Because the City receives very little from PLEA in return, this grant to PLEA represents a clear violation of the Arizona Constitution. Plaintiffs in this case seek to enforce the Arizona Constitution’s guarantees that limit the exercise of government power to truly public purposes and that prevent unjust enrichment of favored interests to the detriment of the taxpaying public

PARTIES, JURISDICTION, AND VENUE

3. Plaintiff William R. Cheatham is a citizen of the United States and a resident of the City of Phoenix in the state of Arizona. Plaintiff Cheatham pays property tax and sales tax in Phoenix.

4. Plaintiff Marcus Huey is a citizen of the United States and a resident of the City of

Phoenix in the state of Arizona. Plaintiff Huey pays property tax and sales tax in Phoenix.

5. Defendant Phil Gordon is the Mayor of the City of Phoenix and its chief executive officer. He is sued in his official capacity only.

6. Defendant Thelda Williams is a member of the Phoenix City Council, which is the legislative body for the City of Phoenix, and serves as its Vice Mayor. She is sued in her official capacity only.

7. Defendant Jim Waring is a member of the Phoenix City Council, and is sued in his official capacity only.

8. Defendant Bill Gates is a member of the Phoenix City Council, and is sued in his official capacity only.

9. Defendant Tom Simplot is a member of the Phoenix City Council, and is sued in his official capacity only.

10. Defendant Claude Mattox is a member of the Phoenix City Council, and is sued in his official capacity only.

11. Defendant Sal DiCiccio is a member of the Phoenix City Council, and is sued in his official capacity only.

12. Defendant Michael Nowakowski is a member of the Phoenix City Council, and is sued in his official capacity only.

13. Defendant Michael Johnson is a member of the Phoenix City Council, and is sued in his official capacity only.

14. Defendant David Cavazos is City Manager for the City of Phoenix, and is authorized to remit payments under certain contracts on behalf of the City of Phoenix. He is sued in his official capacity only.

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

16. Defendant Phoenix Law Enforcement Association is a labor union that represents Phoenix police officers below the rank of Sergeant.

17. Jurisdiction over this action and its claims and application for order to show cause is provided by A.R.S. §§ 12-123, 12-1831, and 12-1801, and Ariz. R. Civ. P. 6(d).

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

FACTS COMMON TO ALL CLAIMS

19. The Phoenix Law Enforcement Association (“PLEA”) is a public labor union with complete organizational independence from the City of Phoenix, including its own board of trustees, staff, and mission statement.

20. PLEA has the exclusive right to serve as the “meet and confer” representative of all “unit members,” which consist of all Phoenix police officers below the rank of Sergeant, including assignments. (MOU § 1-3.A)

21. On March 17th, 2010, Defendant David Cavazos, City Manager for the City of Phoenix; Lori Steward, Labor Relations Administrator for the City of Phoenix; and Mark Spencer, then President of PLEA, executed an agreement entitled “Memorandum of

Understanding” (“MOU”) between the City of Phoenix and PLEA.

22. Under the MOU, the City of Phoenix bestows lopsided benefits on PLEA, which constitute an unconstitutional subsidy under the gift clause.

23. While some of those benefits are described hereafter, others are unknown to Plaintiffs at this time and will be uncovered during factual discovery.

24. The City of Phoenix finances the benefits to PLEA under the MOU through city tax revenue.

25. Plaintiffs Cheatham and Huey pay property tax and sales tax in the City of Phoenix. Because their taxes finance the City’s MOU with PLEA, they are directly harmed by the City’s grant of illegal subsidies to PLEA in the MOU.

Release Time Hours

26. Under the MOU, the City of Phoenix grants PLEA tens of thousands of “release time hours.”

27. Release time hours permit PLEA to release Phoenix police officers from their official duties to perform union duties while still receiving full pay, benefits, and insurance coverage from the City.

28. In total, the City grants PLEA 31,556 quantified release time hours.

29. The City also grants a substantial amount of additional release time hours that are circumstantial and thus they cannot be quantified without further investigation.

30. The breakdown of these hours under the MOU is described hereafter.

Full-Time Positions

31. PLEA is authorized to designate six Phoenix police officers to work on a full-time basis on behalf of PLEA. (MOU § 1.3-G.1)

32. The six officers are granted a leave of absence by the Chief of Police from their ordinary police officer duties. (MOU § 1.3-G.2)

33. While working on behalf of PLEA, the six officers shall continue to receive full pay and benefits from the City as if they were continuing to perform their standard police duties. (MOU §§ 1.3-G.1, G.5)

34. Each full-time position receives 4,160 paid release time hours (40 hours per week for the two years of the MOU). (MOU § 1.3-Q)

35. Each position also receives 320 hours of overtime release time hours, for which they are paid 1.5 times their ordinary base pay. (MOU § 1.3-Q)

36. In total, the City grants PLEA 26,880 hours of release time hours for these six employees, 1,920 of which are paid at an overtime pay scale.

PLEA Representatives

37. PLEA may designate up to 35 police officers to serve as part-time union representatives. (MOU § 1.3-B.1)

38. In the event the City creates new bureaus and precincts, PLEA may also designate up to one additional representative per bureau and up to three additional representatives per precinct. (MOU § 1.3-B.3)

39. PLEA representatives continue to engage in ordinary police duties but are authorized by PLEA to interrupt those duties to engage in union work. (MOU §§ 1.3-B.2, M)

40. Two or three of the 35 PLEA representatives are authorized to use as many release time hours as necessary to represent unit members at any and all “grievance meetings, Use of Force Boards, Disciplinary Review Boards, IRP Meetings, and hearing with department representatives and hearings scheduled and conducted by the Civil Service Board.” (MOU § 1.3-B.2)

41. Each of the 35 PLEA representatives may use six hours of paid release time to become familiar with the terms of the successor Memorandum of Understanding for a total of 210 release time hours. (MOU § 1.3-M)

Bank of Release Time Hours

42. In addition to the hours specified above, PLEA receives a “bank” of 3,166 hours of paid release time hours to assign any member to perform union duties. (MOU § 1.3-I.1)

43. PLEA is granted broad discretion in assigning these hours. (MOU § 1.3-I)

44. Bank release time hours may be used for any union purpose so long as it is determined to be a “legitimate [PLEA] purpose[.]” (MOU § 1.3-I.1.b)

Other Quantified Release Time Hours

45. PLEA may release a police officer for 1,000 hours to perform union duties as a union lobbyist. (MOU § 1.3-I.6)

46. The MOU allows PLEA a total of 300 release time hours for its members to attend

PLEA seminars, lectures, and conventions. (MOU § 1.3-K)

47. PLEA may designate six union members to use up to 144 release time hours to sit on a labor-management committee and attend its quarterly meetings. (MOU §§ 2.2)

Other Unquantified Release Time Hours

48. PLEA is permitted one hour of release time per new police officer to attempt to enroll the officers into the union. (MOU § 1.3-L)

49. The MOU grants PLEA the authority to appoint two additional police officers to serve in “stand-by” positions. These stand-by officers respond to “critical incidents” on a “call-out” basis, receiving overtime release time pay. (MOU §§ 1.3-R; 3-2.C; 3-2B)

Other Benefits to PLEA

50. PLEA is not required to account for its use of release time hours nor is the City of Phoenix granted permission to audit PLEA’s use of the hours.

51. PLEA may designate representatives to perform union work during City work hours on a non-paid basis. (MOU §§ 1.3.H, I.5)

52. The City must make a “concerted effort” to release officers on short notice from regular police duties to attend interviews/interrogations as union representatives. (MOU § 1.4-B.1)

53. The city may not unreasonably withhold permission from PLEA representatives to enter work areas for purposes of investigating formal grievances from its members. (MOU § 1.3.B.2)

54. The City agrees to furnish PLEA on a bi-monthly basis, and at no cost, a list of all unit members' names, mailing addresses, phone numbers, and assignments. (MOU § 1.3.B.3)

55. The City agrees to provide, at no cost, "pertinent collective bargaining information" and information regarding specific grievances, arbitrations and civil service appeals. (MOU § 1.3.B.2)

56. The City agrees that on a monthly basis it will deduct union dues from the pay of its employees on behalf of PLEA. (MOU § 1.3.D)

57. The City grants authority to PLEA to use inter-office mail boxes, bulletin boards, and non-work areas in City facilities to distribute union materials. (MOU §§ 1.3.E, F)

Financial Value of Quantified Release Time

58. The following financial estimates are provided upon information and belief.

59. The approximate financial value of the average salary and benefits package for Phoenix police officers eligible to use release time hours is at least \$100,000 per year.

60. Full-time hours for Phoenix police officers are 2080 per year. (MOU § 1.3-Q)

61. Accordingly, the approximate total financial value of the 31,556 quantified release time hours specified in the MOU is at least \$1,500,000.

62. The grant of unquantified release times hours under the MOU has resulted in or will result in approximately 4,160 hours of total release time.

63. Therefore, the total financial value of the unquantified release time hours in the MOU is approximately \$200,000.

64. Upon information and belief, the total financial value of the additional benefits granted to PLEA in the MOU is approximately \$100,000.

65. Therefore, the approximate combined total financial value of the benefits granted to PLEA by the City of Phoenix under the MOU is \$1,800,000.

Additional MOU Notes

66. The MOU does not impose substantial or tangible obligations upon PLEA in exchange for the tremendous benefits provided by the City. Indeed, the City's residents suffer from the diversion of scarce police resources to union activities.

67. The MOU remains "in full force and effect . . . up to the beginning of the first regular pay period commencing in July 2012, and thereafter shall continue in effect year-by-year unless one of the parties notifies the other in writing no later than November 1 of its request to meet and confer regarding a new Memorandum." (MOU § 6-6.A)

68. The practice of providing release time to unions is widespread in contracts between municipal governments and unions and is present in all seven contracts between the City of Phoenix and employee unions in the City.

69. Because of the limited duration of the MOU and the common practice of release time, the situation presented here is capable of repetition yet evading review.

Count One—Gift Clause

70. As Phoenix taxpayers, Plaintiffs are responsible for paying and/or remitting sales, property, and other taxes, and will bear a share of the burden for replenishing the coffers of the

City of Phoenix for revenues lost from the benefits granted to PLEA pursuant to the MOU.

71. Article 9, § 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. . . .”

72. 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, 687 P.2d 354, 356 (1984).

73. 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, 246 P.2d 871, 876 (1952).

74. Cities must receive direct public benefits of roughly proportionate value in exchange for their expenditure of public funds on goods and services. Indeed, the Arizona Supreme Court has reiterated that indirect public benefits do not satisfy the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010).

75. The benefits to PLEA under the MOU serve to promote the union’s purposes, and do not serve a public purpose.

76. The benefits derived from the MOU by the City of Phoenix, if any, are not equivalent to the benefits the City has obligated itself to make to PLEA, and are so inequitable

and unreasonable as to amount to an abuse of discretion on the part of Defendants.

77. For all those reasons, the benefits the City has granted to PLEA under the MOU, including release time hours to further the mission and organizational existence of PLEA, constitute a subsidy and an impermissible gift to an association, which exceeds Defendants' lawful powers in violation of Ariz. Const. Art. 9, § 7.

APPLICATION FOR ORDER TO SHOW CAUSE

78. As set forth above, Defendants are prohibited from spending public funds to subsidize PLEA through the grant of release time and other benefits. Accordingly, pursuant to Rule 6(d), Ariz. R. Civ. P., it is appropriate and proper for this Court to issue an Order to Show Cause why the requested relief should not be granted.

REQUEST FOR RELIEF

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

- A. Declare that MOU is unconstitutional and preliminarily and permanently enjoin its 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 7th day of December, 2011 by:



Clint Bolick (021684)

Taylor Earl (028179)

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at the GOLDWATER INSTITUTE**

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Attorneys for Plaintiffs

Verification in Support of Complaint and Order to Show Cause

Pursuant to Arizona Rule of Civil Procedure 80(i), William R. Cheatham declares as follows:

1. I am an individual Plaintiff in this action.
2. I have read the foregoing and know the contents thereof.
3. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.
4. The statements and matters alleged show cause for the granting of an Order to Show Cause.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: 12-6-2011


William R. Cheatham

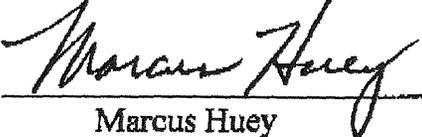
Verification in Support of Complaint and Order to Show Cause

Pursuant to Arizona Rule of Civil Procedure 80(i), Marcus Huey declares as follows:

1. I am an individual Plaintiff in this action.
2. I have read the foregoing and know the contents thereof.
3. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.
4. The statements and matters alleged show cause for the granting of an Order to Show Cause.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: December 6, 2011



Marcus Huey

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

CHEATHAM, *et al.*,

Plaintiffs,

vs.

GORDON, *et al.*,

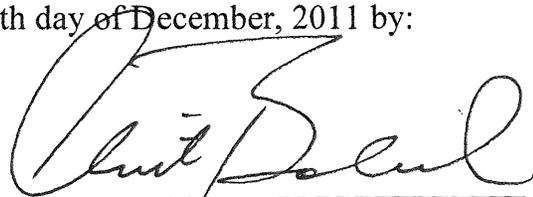
Defendants.

Case No.

**CERTIFICATE OF
COMPULSORY ARBITRATION**

The undersigned certifies that the largest award sought by the complainant, including punitive damages, but excluding interest, attorneys' fees, and costs does not exceed limits set by the Local Rule for compulsory arbitration. This case is not subject to the Uniform Rules of Procedure for Arbitration.

RESPECTFULLY SUBMITTED this 7th day of December, 2011 by:



Clint Bolick (021684)
Taylor Earl (025760)
Attorneys for Plaintiffs

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**IN THE SUPERIOR COURT OF ARIZONA
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CHEATHAM, *et al.*,

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Case No.

CV2011-021634

**PROPOSED ORDER TO SHOW
CAUSE**

TO: Phil Gordon
Thelda Williams
Jim Waring
Bill Gates
Tom Simplot
Claude Mattox
Sal DiCiccio
Michael Nowakowski
Michael Johnson
David Cavazos

City of Phoenix
200 W. Washington St.
Phoenix, AZ 85003

Phoenix Law Enforcement Association
1102 West Adams Street
Phoenix, Arizona 85007

The Court having considered Plaintiffs' Application for Order to Show Cause,

IT IS HEREBY ORDERED that Defendants shall appear and show cause, if there is any, why the Court should not enter an order immediately enjoining them from illegally expended public funds on _____, 2011, at _____ a.m./p.m. before this Court at _____.

Dated: _____

Judge of the Superior Court