IN THE COURT OF APPEALS FOR THE STATE OF ARIZONA
DIVISION ONE

WILLIAM R. CHEATHAM and MARCUS HUEY, Plaintiffs/Appellees, vs. SAL DICICCIO, in his official capacity as member of the Phoenix City Council; CITY OF PHOENIX and PHOENIX LAW ENFORCEMENT ASSOCIATION, Defendants/Appellants THOMAS COX; VICTOR ESCOTO; RICHARD V. HARTSON; VIVIAN REQUE; and DAVID WILSON, Intervenors/Appellants	1 CA-CV 13-0364 Maricopa County Superior Court Case No. CV2011-021634

APPELLEES' ANSWERING BRIEF

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Clint Bolick (021684)
Taylor Earl (028179)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs/Appellees

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Appellees are Phoenix taxpayers who challenge an egregious and unconstitutional practice that diverts full-time police officers away from some of the most important services that the City provides, and instead places them under the direction and control of a labor organization for its private use and benefit. The practice of release time also places nearly two thousand additional police hours each year at the disposal of the union. No limits or accountability are placed on the union's use of those police resources.

This is an interlocutory appeal of an injunction granted that ensures, in conformity with the Gift Clause of the Arizona Constitution, that public funds will be used for public purposes and only in return for enforceable obligations that constitute valuable consideration. This Court already has considered and rejected a stay of the injunction. The injunction was rightly granted and should be sustained.

Statement of the Case

On December 7, 2011, two Phoenix taxpayers filed a complaint in Maricopa County Superior Court challenging "release time" provisions of the 2010-12 Memorandum of Understanding between the City of Phoenix and the Phoenix Police Law Enforcement Association (PLEA) as a violation of the Gift Clause of the Arizona Constitution, Art. 9, § 7 (Index of Record (I.R.) 1). The complaint

sought declaratory and injunctive relief against the challenged portions of the contract, along with attorney fees.[1] Following a half-day evidentiary hearing (I.R. 81), Judge Katherine Cooper issued a preliminary injunction against the release time provisions of the 2010-12 Memorandum of Understanding on June 6, 2012 (I.R. 83).

Thereafter, the City and PLEA entered into a new 2012-14 Memorandum of Understanding ("MOU", "the 2012-14 MOU" or "PLEA MOU") that continued the practice of release time with few substantive changes (I.R. 92, Appx. 2, Exh. 1). Appellees filed an amended complaint challenging the new release time provisions (I.R. 89-90). Following a full-day evidentiary hearing (I.R. 189), Judge Cooper on April 8, 2013 issued a second preliminary injunction against the release time provisions (I.R. 265). That injunction is the subject of this interlocutory appeal.

Appellants sought a stay of the injunction in the trial court, which was denied on June 17, 2013 (I.R. 325). Appellants then sought a stay of the injunction in this Court, which was denied on August 2, 2013. PLEA then sought

[1] Pursuant to Ariz. R. Civ. App. P. 21, Appellees seek attorney fees for this appeal, as provided by A.R.S. §§ 12-341, 12-341.01, and 12-348, and the private attorney general doctrine. See also *Arizona Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356, 371, 837 P.2d 158, 173 (App. 1991) (holding that the private attorney general doctrine may be applied against private parties as well as public entities).

reconsideration of that ruling, which this Court denied on August 22, 2013.

Since the preliminary injunction was issued, all parties filed motions for summary judgment in the trial court, but the court denied all motions. A bench trial was held on November 25-26, 2013, and the case is currently under submission.

Statement of Facts

The parties agree that Appellant PLEA is a labor organization that represents police officers below the rank of sergeant (IR 1 ¶ 16 (Complaint); IR 28 ¶ 16 (PLEA Answer); IR 33 ¶ 16 (City's Answer); IR 109 ¶ 7 (Amend. Complaint); and IR 167 ¶ 7 (Interveners' Answer)). PLEA describes itself as a "political organization" (IR 252 at 33). Approximately 2,150 officers are members of PLEA and four hundred are not (I.R. 203 (also attached as Appx. 1 at "FOF")[2] at "CE" 22, #9). Total PLEA annual dues are approximately $1.68 million (Appx. 1 at FOF ## 8, 10).

[2] The lead document in Appendix 1 is Plaintiffs' Proposed Findings of Fact and Conclusions of Law ("FOF"), which Appellees submitted directly to the Court following the May 2012 evidentiary hearing. The proposed findings of fact were later included as part of the record below (IR 203 at Combined Exhibit ("CE") 22). Each proposed fact in Appellees' FOF cites to one or more exhibits in the record. Those exhibits are attached in Appendix 1 and their record location is indicated in the index to Appendix 1. As the trial court indicated in its ruling (IR 83 at p.1), evidence from the May 2012 was considered in reaching the decision from which this appeal was initiated.

The City defines release time as "time taken by members of the represented unit, and authorized by the member's appropriate manager or supervisor, when the members are relieved of police duties to perform PLEA activities and conduct PLEA business" (Jan. 2013 Evid. Hrg. at Exh. 51 (Steward Deposition) at "Exhibit 1" at p.4). While on release time, full-time release officers still receive their ordinary *City* salary, benefits, and pension, just like police officers who are performing ordinary police duties (Appx. 1 at FOF # 37). Full-time release officers also receive a stipend and car allowance from PLEA (IR 199 (also attached as Appx. 2 at 2FOF)[3] at # 177; IR 265 (trial court ruling) at p. 4, ¶ 12).

The release time provisions in the 2012-14 MOU are located in § 1-3, which is entitled "Rights of Association" (Appx. 2 at Ex. 1 at p. 5). The association whose rights are established by this section is PLEA (Appx. 1 at FOF # 26). Section 1-3(B), entitled "Union Release," sets forth the supposed purposes of release time and lists a number of "examples" of how release time is used (Appx. 2 at Ex. 1 at pp. 5-6). Section 1-3(B)(1) establishes six full-time release positions,

[3] Similar to Appendix 1, the lead document in Appendix 2 is Plaintiffs' **Second** Revised (Proposed) Findings of Fact and Conclusions of Law ("2FOF"), which Plaintiffs filed with the Court following the second preliminary injunction evidentiary hearing in May 2013 (found at IR 199). Each proposed fact in Appellees' 2FOF cites to one or more exhibits in the record. Those exhibits are attached in Appendix 2 and their record location is indicated in the index to Appendix 2.

which will be filled by officers "who will at all times remain qualified to perform such duties" as are required of Phoenix police officers (referred to as "full-time release") (*id*. at p. 6). Section 1-3(B)(2) provides for two PLEA representatives to use unlimited paid hours to participate in grievance meetings and disciplinary proceedings (referred to as "representation time") (*id*. at p. 7). Section 1-3(B)(3) creates an annual bank of 1,859 release time hours for use by other PLEA officers, and again provides "examples" of how those hours are used (*id*.). Section 1-3(C) provides 500 additional hours for a PLEA lobbyist (*id*. at p. 8). Section 1-3(Q) establishes a bank of 960 hours of automatic overtime compensation for the full-time release positions (*id*. at p. 10). Those are the provisions that are the subject of the trial court's injunction. Appellees did not seek to enjoin other provisions, including § 1-3(N), which provides for two positions on "continuous paid standby . . . to respond to critical incidents as needed" (*id*. at p. 10).

The mission of the Phoenix Police Department is to protect public safety (Appx. 2 at 2FOF # 62). Indeed, Appellant Phoenix Councilmember Sal DiCiccio testified that public safety is the City's "most important" function (Appx. 2 at 2FOF # 60). Release time directly reduces the number of officers available for public safety (Appx. 2 at 2FOF # 61). As Phoenix Police Chief Daniel Garcia testified, if they were not on release-time, the officers filling full-time release

positions "would be in uniform. They would be serving the citizens of Phoenix" in the "capacity of fighting crime" (Appx. 2 at 2FOF # 64).

Instead, the full-time release officers report every day to work at the union headquarters (Appx. 1 at FOF # 42). There the union determines how release time is spent (Appx. 1 at FOF # 40). As PLEA puts it, it is "[o]ur time; should be able to use as we see fit" (Appx. 1 at FOF # 40). At any point in time, the Police Department does not know where the full-time officers are; it would have to track them down at PLEA headquarters (Appx. 1 at FOF # 43). PLEA also controls which officers will use the bank of hours and how they will use the time (Appx. 1 at FOF ## 45-46).

In addition to the "examples" of the use of release time set forth in the MOU, release time is used for lobbying, political action (including candidate endorsements), collecting signatures for ballot measures, campaigning for ballot measures, and charitable work (Appx. 1 at FOF # 50). The City pays the salaries of PLEA's negotiators during MOU negotiations (Appx. 2 at 2FOF # 33). During the most recent negotiations, PLEA made threats to strike or engage in work slowdowns, and threatened that members would "torch this place" if the City made certain contract changes that the union viewed as unfavorable (Appx. 2 at 2FOF # 77).

PLEA release-time officers also lobby extensively while on release time (Appx. 2 at 2FOF ## 209-210, 71), and have used that time to lobby against the City's own positions on issues (Appx. 2 at 2FOF # 70). The City believes such lobbying by release-time employees causes "confusion because it is not clear to the public that PLEA does not represent the Phoenix Police Department" (Appx. 2 at 2FOF # 213). The City's position during 2012-14 MOU negotiations was that "[w]e're talking about spending a normal work day, being paid by the City, doing things at the legislature that work against the City" (Appx. 2 at 2FOF # 212); but PLEA rejected any restrictions on the use of release time for lobbying (Appx. 2 at 2FOF # 211).

PLEA also uses release time to solicit grievances, to openly criticize the police chief, and to urge officers to disregard or file grievances over policies it opposes (Appx. 2 at 2FOF ## 86-95); and it met with a Council candidate to determine if he would support the ouster of the then-chief (Appx. 2 at 2FOF # 82). Despite City prohibitions and limits on employees' political activities (Appx. 2 at 2FOF ## 186-187), release-time officers are deeply involved in political campaigns and activities (Appx. 2 at 2FOF ## 188-189, 196-200, 203-207). Overall, the Police Department has stated that PLEA release time "decrease[s] the efficiency of City government" and that a "reduction in the cost of City funded PLEA operations

will have the effect of increasing funds available for mission critical functions" (Appx. 1 at FOF # 24). The Department estimates the annual cost of PLEA release time at $1 million (Appx. 1 at FOF # 25).

The City has no formal accounting mechanism for tracking the six full-time PLEA positions (see Appx. 1 at FOF ## 56-57, 59 – 60, 62; Appx. 2 at CE 20, pp. 184 – 185 (Appellant witness concedes no formal mechanism exists); combine IR 238 at ## 160 – 161 with IR 297 at ## 160-161, IR 280 at ## 160 – 161, and IR 292 at ## 160-161 (in response to Plaintiffs' Statements of Undisputed Facts, Appellants concede no formal mechanism exists); see also I.R. 265 at 8, ¶ 5(c) (trial court: "there is no mechanism to determine how PLEA actually applies the funds or the value that release time returns to the City"). The full-time positions do not account to the Police Department for their time (Appx. 1 at FOF # 56). As for the bank of hours, the City tracks the amount of time used, but not how it is used (Appx. 1 at FOF # 57). The officers using release time from the bank of hours simply write "PW" on their leave slips, which means "union business" (Appx. 1 at FOF # 59). And no mechanism exists to quantify the benefits of release time to the City (Appx. 1 at CE 14 at 80).

Release time provisions are often found in public collective bargaining agreements, but Appellees' expert (who has negotiated over 400 collective

bargaining agreements and researched others for this case) testified that the PLEA contract has fewer limitations or controls on the use of release time of any contract he has ever seen (Appx. 2 at 2FOF # 139). PLEA's expert testified that the most common form of release time is "functional" release time, in which paid leave is allowed for specific purposes (Appx. 2 at 2FOF # 266-67), as opposed to the open-ended release time in the PLEA MOU. He also testified that placing a bank of hours at the union's disposal is less common, even in large police departments (Appx. 2 at 2SOF # 268)). In other jurisdictions, where release time is not provided for certain union services, the union performs them using member dues or off-duty officers (Appx. 2 at 2FOF # 270). Other police departments use "informal" release time, in which the department assigns police officers to certain activities (such as representation of other officers) as *it* (and not the union) deems appropriate (Appx. 2 at 2FOF # 271). Scottsdale provides no formal release time (Appx. 2 at 2FOF # 272-277). It is fairly common for unions to reimburse cities

for release time (Appx. 2 at 2FOF ## 277, 280).[4]

During the negotiations over the 2012-14 MOU, the City proposed a number of changes to release time, including requiring that PLEA track its quarterly use of release time and then reimburse the City for any time used, reducing the number of full-time release positions, restricting lobbying activity on paid release time, requiring leave slips for lobbying, and eliminating guaranteed overtime for full-time release positions, but PLEA categorically rejected all of the changes and none

[4] PLEA exaggerates the extent of release time in other municipal contracts. For instance, it cites (OB at 6 n. 1) its expert as testifying, without providing underlying documentation, that Seattle and San Francisco have an "unlimited amount of release time." While the Seattle contract appears not to be publicly accessible, the San Francisco contract is available on-line. See http://sfdhr.org/modules/showdocument.aspx?documentid=13862 ("SF MOU"). It appears that release time in the San Francisco police department, rather than being greater than the release time in Phoenix, is actually far more restrictive. Unlike PLEA's six full-time positions, San Francisco's police union is limited to only one full-time release position for its President (SF MOU ¶ 33). Also unlike the situation in Phoenix, the full-time release position in San Francisco is limited to certain activities (e.g., representation of officers, meet and confer) and may not be used to perform "any other activities, including but not limited to political activities" (*id.* at ¶¶ 36-39). Finally, unlike in Phoenix, the San Francisco police union must reimburse the city for 25 percent (20 hours of the 80 hours permitted each pay period) of the full-time release officer's salary and benefits (*id.* at ¶¶ 33, 40). Thus, rather than aiding PLEA's case, San Francisco's union contract only further bolsters the testimony of Appellees' expert that the release time provisions of Appellants' 2012 MOU are the "most generous" and subject to the least amount of accountability he has ever seen (Appx. 2 at 2SOF # 139). Ultimately, of course, what other entities do has no bearing on whether these provisions violate Arizona's Gift Clause.

were made (Appx. 2 at 2FOF ## 20-21, 25-32). The Council approved the new MOU by a 4-4-1 vote, with the abstention (which was intended as a "protest vote") being counted as a "yes" (Appx. 2 at 2SOF # 34).[5]

After the MOU was adopted, the City and PLEA negotiated over a proposed addendum to the MOU, which would have required the full-time release positions to create a weekly log of hours worked and activities performed (Appx. 2 at 2FOF ## 51-52). The proposed addendum listed a series of "public purpose activities" for which release time could be used, and would have required PLEA reimbursement for any release-time activities that were not for a public purpose (Appx. 2 at 2FOF ## 51-56). PLEA rejected the addendum (Appx. 2 at 2FOF # 57).

In her ruling granting the preliminary injunction at issue here (IR 265), Judge Cooper applied the Gift Clause framework set forth by our Supreme Court in *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010) and *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984), the latter of which specifically addresses the constitutionality of certain release time provisions under

[5] Thus it was not, as PLEA says (OB at 7), adopted by "majority vote."

the Gift Clause.[6] As will be discussed later, the Arizona Gift Clause analysis consists of two parts, public purpose and adequacy of consideration.

The court made extensive findings of fact. Among other things, it found that while the 2012-14 MOU contains "examples" of how release time is used, nothing obligates PLEA to perform any specific functions, and that release time is used for other purposes including "union management activities, lobbying, and support for ballot measures" (I.R. 265 at 4, ¶¶ 8-9). The court further found that "[r]elease time is funded by taxpayers, not by union dues" (*id.* at 5, ¶ 17), and PLEA's expert acknowledged it is impossible to determine the value of benefits from release time (*id.* at ¶ 18). The court also found that release time is used for union business, including criticizing the police chief, soliciting grievances, and lobbying against the City's position on issues (*id.* at 5-6, ¶¶ 21-23).

As a result, the court concluded that while the MOU as a whole serves a public purpose (securing police services), "in general, release time does not advance a public purpose" (*id.* at 7-8, ¶¶ 4-5). Specifically, the court found that Appellants acknowledge that release time is for the union's benefit, that no mechanism exists to determine how release time is used or its value to the City,

[6] Indeed, the existence of *Wistuber* disproves the assertion of Amicus AFSCME that Appellees' legal theory challenging release time under the Gift Clause is "novel" (Br. at 14).

and that release time is used to foster an adversarial relationship with the City (*id.* at 8, ¶ 5).

The court also concluded the MOU does not provide adequate consideration because it "does not obligate PLEA to do anything, to perform any specific service or give anything in return for $1.7 million"; any benefits of improved labor relations are "indirect" and therefore do not qualify as consideration under *Turken*; no mechanism exists to evaluate the benefits from release time; and release time is provided to the union, not to the members (*id.* at 9-10, ¶9). Thus Plaintiffs demonstrated likelihood of success on the merits (*id.* at 10, ¶ 10).

The court found that Plaintiffs demonstrated the possibility of irreparable harm based on the likely existence of a constitutional violation, an illegal expenditure of at least $1.7 million, and the diversion of police resources away from public safety (*id.* at ¶ 11). The court also concluded that the balance of harms favored an injunction because even with an injunction in place, police officers retain their statutory right to representation; §1-3(N) of the MOU providing for paid standby for such representation was not enjoined; funding for PLEA work can be covered by a modest increase in union dues; nothing prevents PLEA and the City from renegotiating provisions to comply with the Gift Clause; "the City will see the return of six officers to law enforcement that it desperately

needs"; scheduling conflicts caused by release time can be eliminated; and the Police Department will be able to assign and supervise tasks that accomplish the Department's mission (*id.* at 11, ¶ 12). On those bases, the court enjoined §§ 1-3(B), (C), and (Q) of the MOU.

Argument

Standard of Review. It appears the parties agree on the standard for a trial court to issue a preliminary injunction. As set forth in *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787 (App. 1990), the criteria for a preliminary injunction are (1) likelihood of success on the merits, (2) possibility of irreparable harm, (3) balance of hardships, and (4) public policy considerations. The criteria operate on a sliding scale. An injunction is warranted if (1) there is a probability of success on the merits and the possibility of irreparable harm, or (2) serious legal issues are presented and the balance of hardships weighs strongly in favor of an injunction.

On appeal of an injunction, Appellants bear a heavy burden. "In evaluating the actions of the trial court, a reviewing court should only reverse a decision to grant a preliminary injunction if the appealing party demonstrates a clear abuse of discretion." *Clay v. Ariz. Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989) (citation omitted). Moreover, although legal conclusions are reviewed *de novo*, the Court is bound by the trial court's factual findings unless

they are clearly erroneous. *IB Prop. Holdings, LLC v. Rancho del Mar Aparts. Ltd. P'ship*, 228 Ariz. 61, 64, 263 P.3d 69, 72 (App. 2011). Here, the factual findings are aided by two full-day evidentiary hearings on injunctive relief, which enabled the trial court to evaluate the witnesses' credibility in live testimony. Appellants cannot show that the trial court's narrow and well-considered injunction reflects a clear abuse of discretion.

I. LIKELIHOOD OF SUCCESS

The Gift Clause forbids the State and its subdivisions to "make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation..." Ariz. Const. Art. 9, § 7. As the Arizona Supreme Court recently explained, the Gift Clause "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds . . . and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Turken*, 223 Ariz. at 346, 224 P.3d at 162 (citations omitted). Specifically, the "constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests." *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. That describes precisely what is happening here.

Turken prescribes two criteria that must be satisfied in order for an

expenditure of public funds to a private entity to survive a Gift Clause challenge: it must serve a public purpose and it must reflect adequate consideration. As the court below properly found, the challenged release time provisions satisfy neither requirement, much less both.[7]

A. Public purpose. In *Turken*, 223 Ariz. at 346, 224 P.3d at 162, the Court recognized that "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." Indeed, the purposes of the Gift Clause "may be violated by a transaction even though that transaction has surface indicia of public purpose. The reality of the transaction both in terms of purpose and consideration must be considered." *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357.

---

[7] The City (OB at 3-4) seems to suggest that a transaction is invalid only if it lacks *both* a public purpose and adequate consideration. The case law makes clear that a transaction is invalid under Arizona's Gift Clause if it lacks *either* public purpose or adequate consideration. For that same reason, Amicus AFSCME's reliance on cases from North Dakota, New York and California are misplaced because those cases reach decisions on each state's gift clause by only analyzing "public purpose" and without analyzing "adequacy of consideration." See *Haugland v. City of Bismarck*, 818 N.W.2d 660, 676-77 (N.D. 2012); *Bordeleau v. New York*, 960 N.E.2d 917, 923-24 (N.Y. 2011); *Jarvis v. Cory*, 28 Cal. 3d 562, 578, n. 10, 620 P.2d 598, 607, n. 10 (1980). The *Turken* court explicitly rejected this one-prong analysis in Arizona: "Montana courts had concluded by the early 1970's that a public purpose alone satisfied their Gift Clause. . . . This approach, however, threatened to reduce the Gift Clause to something of a redundancy." *Turken*, 223 Ariz. at 347, 224 P.3d at 163 (internal citations omitted).

The court below properly concluded that the MOU *as a whole* serves a public purpose: it provides for one of the most important local government services—public safety (I.R. 265 at 7, ¶ 4). But the release time provisions actually *divert* resources away from that important public purpose, to the use and benefit of a private entity. Indeed, the very nomenclature of "release time" connotes that officers are being released from the public purpose for which they were hired. Moreover, public employees, while paid and on-duty, are placed under the supervision and control of a private entity. The City's definition of release time expresses both of those elements—diversion and transfer of control (officers "are relieved of police duties to perform PLEA activities and conduct PLEA business" (Jan. 2013 Evid. Hrg. at Exh. 51 (Steward Deposition) at "Exhibit 1" at p.4). The release time provisions therefore do not advance a public purpose.

The Court in *Turken* observed that early Gift Clause cases often were conjoined with challenges under Ariz. Const. Art. 9, § 1, which requires that "all taxes . . . shall be levied and collected for public purposes only." 223 Ariz. at 346, 224 P.3d at 162. The Court cited *Proctor v. Hunt*, 43 Ariz. 198, 201, 29 P.2d 1058, 1059 (1934), for the "axiomatic" proposition that "money raised by public taxation is to be collected for public purposes only, and can only legally be spent for such purposes and not for the private or personal benefit of any individual."

Turken, 223 Ariz. at 346, 224 P.2d at 162. *Proctor* is instructive here, for it sustained an action against the governor for allegedly expending funds "for his personal and private use, and not for a public use." *Proctor*, 43 Ariz. at 209, 29 P.2d at 1062. Subsequently, in *Valley Bank & Trust Co. v. Proctor*, 47 Ariz. 77, 53 P.2d 857 (1936), the Court found that several of those expenditures—including travel expenses for third parties—were for private rather than public purposes. See also *McRae v. County of Cochise*, 5 Ariz. 26, 33, 44 P. 299, 301 (1896) (reward to first property owner to dig a flowing well did not serve a public purpose given that it "remains the private property of the person who obtains it, in which the public has no property interest"). Surely, most of the money expended by the governor advanced a public purpose—but the Court found that the specific funds at issue were expended for a private purpose, and thus were invalid. As with the challenged funds in *Proctor*, the release time funds here (even if found in a document that contains public benefits) are expended for the benefit of a third party; and as in *McRae*, the public retains neither ownership nor control.

As the Court observed in *Turken*, 223 Ariz. at 347-48, 224 P.3d at 163-64, it is "a core Gift Clause principle" that "'[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual'" (citing *Kromko v. Ariz. Bd. of Regents*, 149

Ariz. 319, 321, 718 P.2d 478, 480 (1986)). In *Kromko*, the Court carefully examined a lease contract between the Board of Regents (ABOR) and a nonprofit corporation to determine whether the transaction promoted private interests. What is most noteworthy about the factors the Court considered in *Kromko* is that they are *all* missing from the PLEA MOU: the private entity's "internal organization" was subject to ABOR approval; ABOR appointed its board of directors; ABOR retained the right of approval before the entity engaged in any financial transactions that could adversely affect the interests of the state or before its bylaws or articles could be amended; the entity was required to provide annual progress reports and audited financial statements; and all of its assets upon dissolution would revert back to ABOR. *Id.* In essence, the private entity was an alter ego of ABOR. As the Court explained, the nonprofit corporation's operations are "subject to the control and supervision of public officials. Hence, we believe the fear of private gain or exploitation of public funds envisioned by the drafters of our constitution is absent" under the lease. *Id.*

The provision here is literally 180 degrees from the contract approved in *Kromko*. There is no question who "owns" the release time (Appx. 1 at CE 10; Jan. 2013 Evid. Hrg. Ex. 83 at CP00982) (PLEA says it is "[o]ur time; [we] should be able to use it as we see fit")). Not only does the City have no direct control

over PLEA, it doesn't even retain control over its own employees who are placed completely at the disposal of the union. PLEA directs the activities of the six full-time release officers, who do not even report to the Police Department (Appx. 1 at SOF ## 41-42). Likewise, PLEA determines which officers will use the bank of release time hours and how they will use those hours (Appx. 1 at FOF # 46).

That is of course in stark contrast to normal City and police operations. Outside of the context of release time, there are no circumstances under which control over on-duty personnel is delegated to a private entity (Appx. 2 at 2FOF ## 145-149, 155). Chief Garcia testified that it is important to the mission of the Police Department to maintain sole and exclusive authority over personnel and for supervisors to know where their officers are at all times (Appx. 2 at 2FOF ## 140-144). But release time completely eliminates such control, and therefore does not serve a public purpose.

Indeed, release time advances private purposes so much that PLEA's expert opined that requiring release time officers to keep detailed time logs might "breach the confidentiality of union/union member communications, or would otherwise amount to what would be the unfair labor practice of the interference with the

internal activities of the labor organization" (Appx. 2 at Ex. 53, p. 8).[8]

The City and PLEA have dressed up the MOU with a statement of beneficent public purposes that release time supposedly serves.[9] But if it was enough to satisfy the Gift Clause to simply declare a public purpose in form rather than to actually serve a public purpose in substance, it would render the Gift Clause a paper tiger. The trial court noted that "limited applications of release time may serve at least a dual private/public purpose," such as communications between PLEA and the Police Department, training, and representation of officers in disciplinary situations (I.R. 265 at 8-9, ¶ 6). PLEA premises much of its public purpose argument on the release time provisions "ensur[ing] that employees are afforded the representation that state and federal law *requires*" (PLEA OB at 34 (emphasis added)). PLEA has made that assertion throughout the litigation, but

[8] In commenting on that testimony, Appellees' expert explained that PLEA's expert was "pointing out really part of the difficulty in balancing the employer paying for the time and having any level of accountability on it, and at the same time respecting the union's right to autonomy and not being accused of interference with union activity or interference with the administration of the union or dominance of the union, all of which are usually enumerated as prohibited or unfair labor practices" (Jan. 2013 Evid. Hrg. Trans. (Appx. 2 at CE 20) at 220-221). The best way to avoid this dilemma, he stated, is for the union rather than the City to pay the officials, which allows the union to have "autonomy to do what they think is in their best interest, and there is no need to monitor them at all" (*id.*).

[9] PLEA also relies on anecdotal testimony from Sergeant Robinson (PLEA OB at 15-17), but Robinson is not authorized to speak for the Phoenix Police Department on this issue (Appx. 2 at 2FOF 59).

repetition of a falsehood does not make it true. First, PLEA cites to "*Weingarten*" as the federal sources of employee rights. However, the case PLEA is referring to is *National Labor Relations Board v. J. Weingarten, Inc.* 420 U.S. 251 (1975), which dealt with private sector employees subject to the National Labor Relations Act, not state public sector employees. Moreover, even if *Weingarten* were to be applied to City of Phoenix employees, *Weingarten* only requires an employer to allow an employee to have a representative present during certain proceedings. *Id.* It does not require the employer to provide that representation. *Id.* Similarly, under state law, although A.R.S. § 38-1101(A)(1) obligates the City to permit a representative to be present during certain disciplinary proceedings, it does not obligate the City to provide that representation. Indeed, the statute says that in such proceedings, "The law enforcement officer or probation officer may request to have a representative of the officer present *at no cost to the employer* during the interview." A.R.S. § 38-1101 (emphasis added). Hence, to the extent that PLEA uses release time for employee representation, it is plainly not satisfying

any obligation held by the City, as PLEA implies.[10]

Even if some of the functions performed by PLEA advance public purposes, and even if PLEA is *obligated* (see section B below) to perform those functions, the problem is that nothing in the contract *limits* the use of release time to such functions, which is exacerbated by the fact that PLEA, rather than the City, controls how release time is used. The record clearly establishes, as the trial court found, that PLEA uses release time for purely private purposes such as lobbying (Appx. 2 at 2FOF ## 69-71; IR 265 at 4-6, ¶¶ 8, 11, 19, 23), negotiating for pay increases (Appx. 2 at 2FOF ## 74-80; IR 265 at 5, ¶ 19), soliciting grievances against the Police Department (Appx. 2 at 2FOF ## 89, 93, 97, 103; IR 265 at 5-6 ¶¶ 22, 24), and political campaigning (Appx. 2 at 2FOF ## 188-200; IR 265 at 5, ¶

[10] Amicus International Association of Fire Fighters' ("IAFF") attempt (IAFF Br. 4-5) to invoke provisions of the Phoenix meet-and-confer ordinance in fact helps the Appellees' argument. Phoenix Mun. Code § 2-220(B)(5) of the City's meet-and-confer ordinance states that "[e]mployee organizations [like PLEA] are prohibited from: . . . (5) [c]ausing the employer to pay for services not to be performed." Here, the City is paying for police services, and PLEA is using the MOU to cause those service to not be performed.

19).[11] Indeed, not only does political campaigning not serve a public purpose, it is *forbidden* by City policy (Appx. 2 at 2FOF ## 186-187).[12]

All of that underscores the inherent incompatibility of release time and the public purpose requirement of the Gift Clause. All public employees owe a fiduciary duty to the City (Appx. 2 at 2FOF # 286). Indeed, City policy strictly limits the situations in which its employees may accept outside employment, including a complete prohibition against working for any entity that "provides goods or services to the City directly or indirectly, without a competitive bidding process" (Appx. 2 at 2FOF # 182). Similarly, City employees may not accept outside employment that creates a "conflict of interest, or the appearance of a conflict of interest, with the employee's City job or the mission of the employee's

[11] PLEA tries to pass off its role in negotiating contracts against the City as a *public* purpose, rather than a private one (PLEA OB at 14). "Without a partner with whom to meet and confer, negotiating $660 million memoranda of understanding…would be very problematic" (*id.* at 34). While public employees plainly have the right to pursue them, negotiating higher wages, benefits, and so on is a quintessentially private purpose. After all, the City's representatives presumably represent the public interest, whereas PLEA's role is to advance private interests, as is abundantly illustrated by the minutes of the MOU negotiations contained in the record (Jan. 2013 Evid. Hrg. Exhs. 83-84).

[12] Because the release time in this case serves private purposes, it is exactly the type of "historical evil" that Amicus AFSCME says the Gift Clause was enacted to prevent: "[I]t was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business" (Br. at 25 (quoting *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 237 P. 636, 638 (1925)).

assigned department" (Appx. 2 at 2FOF # 178). At the same time, in addition to their full-time City pay and benefits, release time officers who serve as PLEA representatives receive a stipend and car allowance from PLEA (Appx. 2 at 2FOF # 177). In return, PLEA also demands complete fiduciary fidelity from its representatives. PLEA's bylaws require its representatives "to show support for all majority board decisions," and they "may be removed" for failure to do so (Appx. 2 at 2FOF # 179). Moreover, the bylaws provide that it is a "conflict of interest" when a representative "cannot act in the best interests of the association due to a relationship with any . . . legal entity" (Appx. 2 at 2FOF # 180). These bylaws alone make it unmistakably clear that when employees are on release time, they are pursuing the private interests of PLEA rather than the public purposes of the City. That scenario is intolerable under the Gift Clause.

Following the initial preliminary injunction and approval of the 2012-14 MOU, the City appears to have recognized this problem, and it attempted to negotiate with PLEA an MOU addendum that would have divided release time activities into those performed for a public purpose and those not. The City proposed several categories of activities it considered to be for a public purpose. Under the addendum, release time could be used for public purpose activities and PLEA would have to reimburse the City for any time used for non-public purpose

activities. That process, in turn, would necessitate reporting the uses of release time. PLEA rejected the addendum (Appx. 2 at 2SOF ## 51-58). Hence we are left with a system in which on-duty police officers are engaged in activities that promote private rather than public purposes.[13]

The cases cited above make clear that public funds may be expended only where mechanisms exist to ensure that they will be spent in pursuit of the public purpose rather than diverted to private purposes. The challenged provisions of the MOU (and the operation of release time in practice) contain no mechanisms to ensure that release time is either limited or directed to those public purposes. The City has abused its discretion in failing to insist on such safeguards, and its post hoc effort to remedy the problem was predictably vetoed by PLEA. As the trial court therefore aptly concluded, "Release time places public funds at the disposal

[13] PLEA's unrestricted use of release time is just one reason that amicus IAFF's reliance on the federal statute regarding release time (or "official time") for certain federal employees is misplaced. Unlike the release time in this case, the cited federal statute (5 U.S.C. § 7131) limits the use of release time to negotiating collective bargaining agreements only. Beyond that, the Federal Labor Relations Authority, and not the unions, maintains control over whether release time will be granted for certain activities. 5 U.S.C. § 7131(c)-(d). Under subsection (d), the federal government maintains control to grant release time subject to whether the time is "necessary" and is "in the public interest." This type of government control is exactly what Phoenix attempted to negotiate with PLEA under the addendum, which PLEA rejected. Furthermore, federal law is irrelevant here because the U.S. Constitution does not contain a gift clause. And even if it did, it would not have Arizona's gift clause jurisprudence to interpret it.

of the union" (I.R. 265 at 8, ¶ 8c). For all of those reasons, the challenged provisions fail to satisfy the public purpose requirement of the Gift Clause.

B. Consideration. In order to survive Gift Clause scrutiny, the challenged provisions also must be supported by adequate consideration. As the Court explained in *Turken*, 223 Ariz. at 348, 224 P.3d at 164, "[w]hen a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."

Appellants urge that release time is a benefit like insurance. That assertion is complete fiction, and in fact the opposite is true. Under release time, it is City of Phoenix employees, while on-duty and being paid with taxpayer dollars, who are furnishing services to a private entity. If the City actually was purchasing services, it would trigger mechanisms to assure that fair value was being received (see, e.g., Appx. 2 at Exh. 50, pp. 57-59; Appx. 2 at Exh. 55, pp. 13-20; Appx. 2 at 2FOF ## 124-125 (competitive bidding rules and acquisition criteria)). Moreover, the contract between the City and the provider would itemize the services to be rendered and ensure they actually would be provided (see Appx. 2 at Exh. 55, pp. 26:13-27:9; *id.* at Exh. 50, pp. 57-59). In reality, as the preceding section demonstrates, release time here is not a purchase of services but a subsidy of

private activities, and thus further inquiry into adequacy of consideration is unnecessary.

On the question of consideration, *Wistuber* and *Turken* are the controlling precedents, and they dictate a finding of inadequate consideration here. In *Wistuber*, the Court analyzed a release time provision contained within a school district collective bargaining agreement. The agreement set forth a number of specific responsibilities that the teacher/union representative would have to fulfill, and the costs of the salary were shared by the union and the district. Moreover, the district testified that it would have had to hire someone to perform those duties absent the agreement. *Wistuber*, 141 Ariz. at 347, 687 P.2d at 355; see also *id.* at n. 3 (specific duties). The Court held that "the duties imposed upon [the teacher] by the proposal are substantial, and the relatively modest sums required to be paid by the District are not so disproportionate as to invoke the constitutional prohibition." *Id.*, 141 Ariz. at 350, 687 P.2d at 358.

The situation here is the inverse of *Wistuber*: as the trial court found, the "duties" imposed are virtually nonexistent and the costs are substantial ("the 2012 MOU does not obligate PLEA to do anything, to perform any specific service or give anything in return for $1.7 million") (I.R. 265 at 9, ¶ 9a). Hence consideration is inadequate as a matter of law.

PLEA argues (OB at 40) that release time was not part of the teachers' compensation in *Wistuber*, which makes the precedent inapplicable. That assertion appears to be plucked from thin air. The Court in *Wistuber* expressly noted that release time was part of the collective bargaining agreement. 141 Ariz. at 347-48, 687 P.2d at 355-56. By their very nature, collective bargaining agreements reflect the wages, benefits, and obligations negotiated between the employer and the representative of its employees. See, e.g., 29 U.S.C. § 158(d); *City of Phoenix v. Phoenix Employment Relations Bd.*, 145 Ariz. 92, 94, 699 P.2d 1323, 1325 (App. 1985) (defining MOUs in those terms). In its decision, the Court in *Wistuber* examined consideration not in the context of the collective bargaining agreement as a whole—as Appellants urge this Court to do—but in the specific context of release time. In other words, each part of the contract must have a *quid pro quo*. If that were not the case, illegal gifts could be inserted into public contracts any time the contract as a whole was supported by consideration.

If there was any doubt about the holding of *Wistuber*, it was removed by the Court in *Turken*, 223 Ariz. at 347, 224 P.3d at 163 (citation omitted), which reiterated the holding: "We found the consideration adequate in *Wistuber* because the duties imposed on the union president under the challenged agreement were 'substantial, and the relatively modest sums required to be paid by the District not

so disproportionate as to invoke the constitutional prohibition.'" If Appellants want to revisit the holding of *Wistuber*, or create an exception to it, the proper forum to do so is the Arizona Supreme Court.

The Court in *Turken* went on to clarify two aspects of the consideration analysis, both to the detriment of Appellants here. It instructed that the courts should count toward consideration only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party." *Id.*, 223 Ariz. at 349, 224 P.3d at 165 (emphasis added). Hence, the MOU's recitation of "examples" of how release time is used (MOU § 1-3(B)) is legally inconsequential, because it neither limits release time to those activities nor actually obligates PLEA to fulfil them (I.R. 265 at 3-4, ¶¶ 7-9). The City sheepishly admits (OB at 5) that the MOU contains no language "that unequivocally states an obligation," but urges this Court to imply such obligations or write them into the contract. By contrast, *Turken* instructs that the courts should read the contract like a contract, which is exactly what the court below did. If these sophisticated parties wanted to create obligations—especially in the shadow of an earlier injunction that found no such obligations in the prior MOU—surely they could have come up with language a bit more binding than

"examples."[14]

Relatedly, to qualify as consideration under *Turken*, the obligations must arise "out of contract" rather than "from law." *Id.*, 223 Ariz. at 350, 224 P.3d at 166. Here, PLEA is obligated by law to provide representation to police officers (Appx. 1 at FOF # 15; Appx. 2 at 2FOF # 292; Appx. 2 at Exh. 40, p. 7). "A promise to do something which a party is already legally obliged to do is no consideration for a contract." *J.D. Halstead Lumber Co. v. Hartford Acc. and Indem. Co.*, 38 Ariz. 228, 235, 298 P. 925, 927 (1931); accord, *Travelers Ins. Co. v. Breese*, 138 Ariz. 508, 511, 675 P.2d 1327, 1330 (App. 1983). Similarly, PLEA's obligation not to strike arises out of law, not contract (Appx. 2 at 2FOF # 138). Accordingly, such "examples" (which do not even rise to obligations) do not qualify as consideration.

PLEA has identified two "obligations" in the MOU. First is § 1-3(N), which PLEA (OB at 40 n.5) characterizes as requiring it to have "two Association representatives on permanent, continuous stand-by" to respond to critical incidents.

[14] Indeed, during the negotiations of the 2012-14 MOU, PLEA's lead negotiator stated, "[W]e're not at this point willing to change anything about the way release time works. We might be willing to talk about language to clarify how it's used, to appease the Council. But restrictions, we're not open to at all" (Appx. 2 at Exh. 41 at 7416). And that is exactly what the parties did: they added "appeasing" language but did not limit the way release time could be used.

PLEA omits a crucial word from that provision, which provides for two PLEA positions "on continuous *paid* stand-by" (emphasis added), and indeed that section provides for overtime if the representatives are called out. § 1-3(N) (see also Appx. 2 at 2SOF ## 119-122)). That section is self-contained: it establishes a duty and compensation for discharging the duty. It is not encompassed within the injunction. Accordingly, it cannot count as consideration for purposes of the other release time benefits that PLEA receives.

PLEA further notes (OB at 40-41 n.5) that § 1-4(B) provides for PLEA representation of Unit 4. Section 1-4(B) establishes due process rights for officers in such circumstances, but does not establish an obligation that the City provide representation or that such a duty is dispatched by PLEA through release time. In fact, the only obligation that § 1-4(B)(1) imposes on the City is that "[i]f a unit member requests, representation will be *allowed*" (emphasis added). Thereafter, that subsection describes the duties that PLEA owes to Unit 4 members, not a service that it is providing to the City. While A.R.S. § 38-1101 confers upon officers a right to have a representative present but not at taxpayer expense, unions owe a duty of fair representation to their members (Appx. 2 at 2SOF # 252). Even if the Court were to generously construe this provision to impose an obligation that would not exist outside the contract, and further conclude that it served a public

rather than private purpose, it would not establish adequate consideration for the abundant release time because the contract does not limit the uses of release time to representation. Indeed, the evidence establishes it is used for many purposes other than representation (including purely private purposes), the union successfully has resisted all efforts to account for the use of its time, and no mechanism exists to quantify the value of release time used for those purposes. Indeed, the fact that PLEA can identify only two "obligations" (one of which is separately compensated) demonstrates how the MOU on its face is utterly bereft of the types of tangible public purpose obligations and consideration required by *Turken* and *Wistuber*.

Equally damaging to Appellants, the Court in *Turken* also held that "indirect benefits" do not constitute consideration for Gift Clause purposes "when not bargained for as part of the contracting party's promised performance." *Id.* at 350, 224 P.3d at 166. Appellants and the MOU proclaim the benefits of labor harmony, but that is exactly the type of indirect benefit that *Turken* excluded from

consideration.[15] Regardless, the record is replete with examples of how PLEA clearly does not consider itself bound by any obligation to labor harmony (see, e.g., I.R. 265 at 8, ¶ 5(d) ("release time has been used to foster an adversarial relationship with the City"); Appx. 2 at 2FOF # 77 (threatening to (illegally) strike, engage in work slowdowns, and "torch this place" during negotiations); Appx. 2 at 2FOF # 82 (meeting with a candidate for City Council and encouraging him to support the ouster of the police chief); Appx. 2 at 2FOF # 88 (discussing hiring a private investigator to follow Chief Garcia and to "break it off in his ass" if he met with other unions to discuss a dispute over police uniforms); Appx. 2 at 2FOF # 89 (soliciting as many as 100 grievances against the Phoenix Police Chief regarding the Chief's new uniform policy); Appx. 2 at 2FOF ## 90 - 91 (publicly opposing the Chief's invitation for officers to retake their oaths as a sign of commitment to

[15] Amicus IAFF argues that an "exchange that would qualify as traditional consideration will qualify as adequate consideration to satisfy the Gift Clause" (IAFF Br. 7 (citing *Turken*, 223 Ariz. at 352, 224 P.3d at 168)). But this is a misstatement of the law. Though Courts should apply contract law to determine consideration, *Turken* specifically said that "[u]nder contract law, courts do not ordinarily examine the proportionality of consideration between parties contracting at arm's length, leaving such issues to the marketplace. In contrast, our Gift Clause jurisprudence quite appropriately focuses on adequacy of consideration." *Turken*, 223 Ariz. at 349-350, 224 P.3d at 165-66 (internal citation omitted). Thus, what may be technical consideration in contract law may not necessarily be "adequate consideration" under the Gift Clause.

Phoenix residents); Appx. 2 at 2FOF ## 92 - 93 (urging officers to "refuse to wear the Tasercam system if asked to do so by a supervisor" and to file a grievance if ordered to do so); Appx. 2 at Exh. 47 (referring to Chief Daniel Garcia as "Danny" because "he needs to know we r equal partners and he is not above PLEA"). Such statements and actions do not advance a public purpose, much less qualify as consideration.

The challenged provisions also suffer a separate fatal infirmity because no formal mechanism exists to account for the uses of release time (see Appx. 1 at FOF ## 56-57, 59 – 60; Appx. 2 at CE 20, pp. 184 – 185 (Appellant witness concedes no formal mechanism exists); combine IR 238 at ## 160 – 161 with IR 297 at ## 160-161, IR 280 at ## 160 – 161, and IR 292 at ## 160-161 (in response to Plaintiffs' Statements of Undisputed Facts, Appellants concede no formal mechanism exists); see also I.R. 265 at 8, ¶ 5(c) (trial court: "there is no mechanism to determine how PLEA actually applies the funds or the value that release time returns to the City") nor to determine its value to the City (Appx. 1 at CE 14 at 80). In *Ariz. Center for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991), this Court invalidated an agreement on Gift Clause grounds where "the legislature acted without particularized information, and established no mechanism to provide particularized information,

to support even an estimate of the value" of public benefits. Without such information, neither the City nor the courts can ascertain proportionality of consideration.[16] Likewise, in *Turken*, 223 Ariz. at 350, 224 P.3d at 166, the Court warned that the "potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals." The City's self-imposed ignorance about how release time is used precludes any assurance that the time is used for public purposes and, to the extent that some of it is, that it provides fair value for the $1.7 million of police resources the City is diverting to PLEA.

Finally, Appellants insist the entire inquiry is beside the point because the members of Unit 4 "pay" for release time as part of their total compensation. As

[16] Appellants attempt without success to avoid this central constitutional inquiry altogether by saying (PLEA OB at 43) that the supposed benefits from release time are "unlikely to be as easy to quantify as the value of an agreement like the money-for-parking-spaces contract at issue in *Turken*," and therefore the requirements of *Turken* should be ignored. See also (Appx. 2 at Exh. 2 at 11 (Appellants' expert says value of release time benefits are "necessarily impossible" to quantify, though he goes on to estimate (without any stated basis) that they are at least worth $1 million)). The reason the direct public benefits from release time, if any, are difficult to quantify owes not to some metaphysical impossibility—after all, the City places dollar values on services all the time—but to the Appellants' own steadfast refusal to account for the *use* of release time. Because the City has acquiesced in such non-accountability over release time, it has no way of determining value, which is the same situation this Court found intolerable in *Hassell*.

discussed previously, were that the case, *Wistuber* would have been a much simpler case because release time was part of the overall contract in that case as well. 141 Ariz. at 347-48, 687 P.2d at 355-56. Instead, the Court required consideration for the release time. *Id.* at 349-50, 687 P.2d at 357-58. But the reality is that, as the City itself has testified, the money used to fund release time is the "City's money," not the "members' money" (Appx. 2 at 2FOF at ## 225, 228; see also I.R. 265 at 5, ¶ 17)).[17] As the trial court found, "While these funds are *budgeted* as part of Unit 4's total compensation, they are *disbursed* to PLEA, not paid to the officers" (IR 265 at 10, ¶9(d) (emphasis in original)). That fact is plain as can be on the face of the MOU, in which release time is made part of the "Rights of Association" that comprise §1-3, as opposed to "Rights of Unit Members" in §1-4. Indeed, if release time was part of the officers' compensation package, one would expect to find it in Article 3 of the MOU, which sets forth officers' "Compensation/Wages" over the course of 14 pages; or in Article 5, a ten-page section detailing "Benefits."

Release time can be found in none of those places, because it is not part of the compensation package—it is a gratuity to PLEA. It may be partially "costed"

[17] It is fairly common in other cities, including Chicago and Los Angeles, for unions to reimburse police departments for release time (Appx. 2 at 2FOF # 277).

as part of the contract, but that is because it is a part of the cost of the City doing business with PLEA.[18] And although the City and PLEA now insist that officers' compensation will be increased if release time is enjoined, in fact that did not happen after the injunction against the earlier 2010-12 MOU (Appx. 2 at 2FOF # 250). The "saving clause" of the MOU (§6-1(A)) merely provides that if any provision is invalidated, the parties "shall meet and confer and endeavor to agree on a substitute provision."[19]

Even if release time is part of the officers' compensation, it would not be constitutionally permissible. An analogy may be useful. What if PLEA negotiated—and its members ratified in an up-or-down vote—a contract that established an amount of police compensation, but provided that a certain amount

---

[18] The cost of the hours allowed for City-paid representation in grievances and disciplinary proceedings under § 1-3(B)(2) is not included in the "costing." Because those hours are unlimited and because PLEA does not have to account for its time, there is no way of calculating the cost to the City of those hours. But given PLEA's emphasis on representation in such circumstances, it is reasonable to conclude that the costs to the taxpayers are not insubstantial. Moreover, the City hired six new officers to replace the full-time release officers (Appx. 2 at 2SOF #231), and that amount is not included in the "costing" either (2013 Evid. Hrg. Exh. 99).

[19] Because release time is not compensation to officers, Amicus AFSCME's citation to *San Joaquin County Employees' Assn v. County of San Joaquin*, 39 Cal.App.3d 83 (1974) is inapposite. In that case, the government disbursement being challenged was payment of salary increases directly to public employees. *Id*. at 39 Cal. App. 3d at 88. But here, because PLEA (and not officers) is the recipient of Phoenix's disbursement, the situation is entirely different.

of each check had to be signed over to a political campaign? The fact that the money passed through the employees' paycheck would not alter the fact that it was a gift to the campaign, because the employee would have no choice in the matter.

That was precisely the analysis performed by the Arizona Supreme Court in an analogous context in *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009). Just as our Constitution forbids gifts of public funds to private entities, so does it prohibit "an appropriation of public money made in aid of any . . . private or sectarian school" (Art. IX, § 10). In *Cain*, the Court struck down a school voucher program against the argument that the appropriation was in aid of families rather than schools. "That the checks or warrants first pass through that hands of parents is immaterial," the Court explained, for "the parents have no choice; they must endorse the check or warrant to the qualified school." *Id.*, 220 Ariz. at 83, 202 P.3d at 1184. Because the funds were preordained for an illegal purpose, the fact that parents directed them to that destination did not break the circuit of unconstitutionality.

Here the situation is even worse, because the officers don't even decide in the first instance to participate. Under Appellants' argument, a part of the officers' "compensation" is automatically directed to the union. The fact that

some of the officers (and usually only some of the *dues-paying members*[20] (Appx. 2 at 2SOF # 246-247)) ratify the contract on an up-or-down vote (Appx. 2 at 2SOF # 249) does not break the circuit of unconstitutionality any more than does the parents' decision to use their vouchers in a particular school.

Nor could such an arrangement—where part of the officers' compensation is diverted to a union—be lawfully constructed, for two reasons. First, it would violate Article XXV of the Arizona Constitution and Arizona's right-to-work laws, A.R.S. §§ 23-1301-1307. Those provisions not only forbid forced union membership, they also prohibit forcing non-union employees to pay any financial compensation to unions. *AFSCME v. City of Phx.*, 213 Ariz. 358, 368, 142 P.3d 234, 244 (App. 2006). The diversion of part of the officers' compensation to a union would violate those constitutional protections.[21] Similarly, the diversion of officers' compensation to a self-described political organization for use, in part, to engage in campaigns and other political activities (Appx. 2 at 2FOF ## 201-209; 188 – 192, 195 - 200) would violate the First Amendment rights of non-members.

---

[20] In addition to the evidence on the record to prove that non-dues paying officers did not vote on the 2012-2014 MOU, this fact was admitted to by the other parties during the parties' cross-motions for summary judgment (combine IR 238 at # 237 with IR 297 at # 237, IR 280 at # 237, and IR 292 at # 237).

[21] Approximately 400 Unit 4 officers have chosen not to join PLEA (Appx. 1 at FOF # 9).

As the U.S. Supreme Court recently held in *Knox v. SEIU*, "procedures for collecting fees from nonmembers must be carefully tailored to minimize impingement on First Amendment rights." 132 S.Ct. 2277, 2292 (2012). The Court held that such members must be given an *individual* opportunity to express "affirmative consent" to such fees, *id.* at 2296, or at least be given an opportunity to opt out. Those restrictions demonstrate that release time is not a form of compensation to officers; it is an appropriation of taxpayer-funded resources to the union.

For all of the foregoing reasons, Appellees have a strong likelihood of success on the merits, and it was far from a "clear abuse of discretion" for the trial court to so conclude.

II. EQUITABLE CONSIDERATIONS

The balance of equities also weighs in Appellees' favor.

A. Harm to Taxpayers. As the trial court concluded (I.R. 265 at 10, ¶ 11), Appellees sustain irreparable injury in three distinct ways.

First, because they are the intended beneficiaries of the protections of the Gift Clause, they are harmed by the City's constitutional violation. Because it cannot be remedied by monetary damages, a constitutional violation generally constitutes irreparable injury. *Collins v. Brewer*, 727 F.Supp. 2d 797, 812 (D.

Ariz. 2010). Absent an injunction, the constitutional violation will persist.

Second, "the injury that flows from an illegal expenditure of public funds is inherently irreparable." *Rath v. City of Sutton*, 673 N.W.2d 869, 884 (Neb. 2004). On this point, PLEA repeatedly asserts that because release time is part of the compensation package that will have to be monetized if release time is enjoined, an injunction will save nothing. Even if that were true, it would not negate the injury from an *illegal* expenditure of public funds. But it is not true. First, the City had to replace the six police officers who were diverted to the union (Appx. 2 at 2FOF # 231), so the cost of the replacement officers is ongoing. Second, as discussed in the preceding section, there is no requirement that if release time is enjoined, the City must make a commensurate increase in police compensation. Third, the unlimited hours for PLEA representation in grievances and disciplinary proceedings is not part of the cost analysis (Appx. 2 at 2SOF # 114; Jan. 2013 Evid. Hrg. at Exh. 99).

Finally, Appellees and all other citizens are harmed when police officers are diverted from the core duty for which they were hired: public safety. PLEA complains that the officers have been reassigned to patrol—as if that is a horrible thing. Quite to the contrary, the "police function fulfills a most fundamental obligation of government to its constituency." *Foley v. Connelie*, 435 U.S. 291,

297 (1978). As the Police Department itself stated, "A reduction in the cost of City funded PLEA operations will have the effect of increasing funds available for mission critical functions that provide a direct benefit to the citizens of Phoenix" (Appx. 1 at CE 6). Such resources are especially salient in Phoenix, which has endured a police hiring freeze for some time (Appx. 1 at FOF # 69). Chief Garcia testified that the six full-time release officers would be more valuable as patrol officers than working for the union (Appx. 2 at 2FOF # 63). Public safety is an appropriate factor in determining injunctive relief. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307 (1976); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004).

Appellees will sustain irreparable harm if the injunction is lifted.

B. Harm to Appellants. PLEA argues that its operations have been damaged by the injunction. For instance, the six full-time release officials have had to take personal leave and off-duty time to perform PLEA work (PLEA OB at 3). But PLEA fails to mention that in addition to their full-time salaries and benefits as Phoenix police officers, PLEA compensates them for their union work (Appx. 2 at 2SOF # 177).

The principal harm, PLEA contends, is that without release time it cannot provide representation to officers. PLEA provides affidavits saying that since the

injunction, representation has not been provided or has been delayed in numerous instances. Appellees, of course, had no opportunity to cross-examine the PLEA officials who made the affidavits supporting that contention prior the Court's injunction ruling. The most obvious question is why representation was not provided in these instances by using § 1-3(N) of the MOU, which provides for two PLEA representatives to be on continuous paid standby for critical incidents (pursuant to that provision, the representatives are paid overtime when they actually are called out). Section 1-3(N) was not enjoined and thus remains fully operative. Chief Garcia testified that the two standby positions should be sufficient to provide representation (Appx. 2 at 2FOF # 259). When Appellants sought a stay of the injunction in both the trial court and this Court, Appellees raised this very question: why are there problems with representation in light of § 1-3(N)? Which PLEA representatives were on paid standby during the relevant situations and why did they fail to provide representation? It is mystifying that Appellants fail to address such questions in either their subsequent briefs or affidavits.

Although Appellees are unable to investigate the situation through depositions, we have provided to this Court the Declaration of our expert, Robert Brown, who has negotiated hundreds of public employee labor agreements in New

Mexico and Arizona (Appx. 3 at ¶ 4). He testifies that given the City has no obligation to provide representation, § 1-3(N) "is a very generous arrangement that should ensure that no officer will be without representation during a critical incident" (*id.*, ¶ 10). He notes that PLEA collects approximately $1.68 million each year in membership dues, yet there is no explanation why PLEA's paid employees are not providing representation, given that it should be PLEA's top priority (*id.*, ¶¶ 11-12). Many unions provide representation without paid release-time positions (*id.*, ¶15), and that a number of police departments do not have paid release-time positions (*id.*, ¶ 21). Brown also observes that PLEA could have used a fraction of its monthly dues to hire a labor lawyer to provide representation (*id.*, ¶¶ 13, 20).

Given that PLEA consistently has resisted transparency regarding its release time activities throughout the litigation and during the 2012-14 MOU negotiations (and proposed addendum)—the full-time release positions do not account for how their time is spent at all (see Appx. 1 at FOF ## 56-57, 59 – 60, 62; Appx. 2 at CE 20, pp. 184 – 185 (Appellant witness concedes no formal mechanism exists); combine IR 238 at ## 160 – 161 with IR 297 at ## 160-161, IR 280 at ## 160 – 161, and IR 292 at ## 160-161 (in response to Plaintiffs' Statements of Undisputed Facts, Appellants concede no formal mechanism exists); see also I.R. 265 at 8, ¶

5(c) (trial court: "there is no mechanism to determine how PLEA actually applies the funds or the value that release time returns to the City")) and officers using the bank of hours routinely write "PW," which simply means union business (Appx. 1 at FOF ## 59-60)—PLEA's affidavit offers a rare glimpse into its activities. Although it cites representation high (if not highest) among its pantheon of activities, our expert Robert Brown notes that PLEA's affidavit establishes that all of the listed instances in which PLEA representation was necessary in May 2013 added up to about 54 hours (Appx. 3 at ¶ 16). He estimates that under the enjoined provisions of the MOU, PLEA would have received a minimum of 1,291 paid release-time hours per month (*id.*, ¶ 18). "Contrary to PLEA's assertions," Brown concludes, 1,291 release-time hours "were not necessary to cover May's 54 hours of representation needs" (*id.* ¶ 19). Were the injunction to be dissolved on the basis of PLEA's failure to fulfill its legal duty to represent Unit 4 members, PLEA would receive a massive windfall of release-time hours that it could continue to use for whatever purposes it wishes, including campaigns, lobbying, soliciting grievances, and the like.

Moreover, any predicament in which PLEA finds itself is largely self-inflicted. The City repeatedly has tried to rescue PLEA from its intransigence, to no avail. In the 2012-14 MOU negotiations, the City proposed that PLEA

reimburse it for release time (Appx. 2 at 2FOF # 21), as well as other changes, but PLEA responded it was "not open" to any significant changes (Appx. 2 at 2FOF ## 27 -28; IR 265 at 4, ¶ 13). PLEA even opposed restrictions on lobbying on release time, and to turn in leave slips for legislative activity (Appx. 2 at 2FOF ## 29 - 30). Following the June 2012 injunction, the City proposed an addendum that would have (a) limited release time to specified public purposes; (b) required tracking of time; (c) provided for PLEA repayment for release time not used for public purposes; and (d) prohibited the use of release time for political activities (Appx. 2 at 2FOF ## 51-56), but PLEA rejected all changes (Appx. 2 at 2FOF # 57). "[S]elf-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); see also *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 679-80 (7th Cir. 2012) (no irreparable injury where readily avoidable); Wright, *Fed. Prac. & Proc. Civ.* § 2948.1 (2d ed.).

When it denied Appellants' earlier stay motion, the trial court saw things largely the same way. The court held that "the injunction does not prohibit PLEA from engaging in PLEA work. Far from it" (I.R. 325 at 2). The court noted that § 1-3(D) of the MOU authorizes PLEA representatives to engage in Association-

related activities during work hours on a non-paid basis[22] and that §1-3(N) provides for two PLEA representatives to be on continuous paid standby to respond to critical incidents (*id.*). The court also observed how modest the financial impact would be if PLEA and its members rather than the City paid for the services now provided through release time (*id.*).[23] Further, the court recognized that in both of the evidentiary hearings, "Plaintiffs presented uncontroverted evidence regarding police agencies that provide representation and other union services to its members *without release time*" (*id.* (emphasis in original)). Accordingly, the court held that Appellants did not establish irreparable injury. For all of the reasons set forth above, that ruling was correct.

C. Balance of harms and public interest. As described above, the balance of harms favors the injunction. The strong interest in public safety and constitutional governance weighs heavily in favor of sustaining the injunction.

---

[22] Of course, PLEA could provide compensation to officers using that provision, or it could fall within the stipend already paid by PLEA to its full-time release officers.

[23] In so doing, the court may have uncovered the true motivation behind release time: if individual police officers were actually required to bear the full cost for PLEA's services, they might choose not to do so. But by including release time as part of the MOU, which members must ratify on an up-or-down basis (Appx. 2 at 2SOF # 249) (and which non-members do not get to vote on at all (Appx. 2 at 2SOF # 246); *supra fn*. 20), PLEA does not face that conundrum. As discussed earlier, in a right-to-work state, individual workers must be given that choice. Regardless, under our Gift Clause, taxpayers cannot be forced to pick up the tab.

Police officers retain their statutory rights, they may enforce them against PLEA, and MOU provisions that were not enjoined provide more than ample means for PLEA to do so in addition to its own resources. And, as the trial court found, the Police Department "can assign officers to carry out the tasks that, in fact, benefit the department and create a process for monitoring and supervising such assignments" (I.R. 265 at 11, ¶ 12). The broad public interest outweighs PLEA's narrow private interests.

D. Remedy. The City focuses most of its argument on the appropriate remedy. Ironically, while chastising the trial court for supposedly going too far, the City argues that the court should have taken a much more activist role, literally rewriting the terms of the contract. That is beyond the scope of the court's remedial power.

First, the City urges (OB at 3) the "court must . . . divine a reasonable interpretation of the enactment that cures the constitutional defect." The City's choice of verb—"divine"—is especially apt in describing what it wishes the trial court would have done. For as the City confesses (*id.* at 5), the contract contains no language "that unequivocally states an obligation" on the part of PLEA. The City thus invites the court not only to manufacture such obligations, but also presumably to *limit* the use of release time to such obligations. That would be

contrary to the clear intent of one of the contracting parties, which during negotiations tenaciously resisted both obligations and limitations. Regardless, it is not within the power of a court to rewrite contracts. *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966).

The City then says (OB at 8) that the trial court "could have enjoined the parties to affirmatively account for release time use with greater specificity and detail than under current practice." Such relief would be more by way of mandamus than injunction, see *Smoker v. Bolin*, 85 Ariz. 171, 172-173, 333 P.2d 977, 977-978 (1958) (mandamus actions and injunction actions are fundamentally distinct and one cannot be substituted for the other), and also would entail rewriting the contract. As discussed earlier, following adoption of the MOU, the City proposed such a change (as well as restriction of release time to public purposes and repayment by the union for time spent on nonpublic purposes), but PLEA rejected that proposal (Appx. 2 at 2SOF ## 51-58). Hence, by following the City's remedial suggestion, the Court again would be adding a restriction expressly rejected by one of the parties.

Judge Cooper did exactly what a trial judge should do: she tailored a remedy commensurate with the scope of the constitutional violation. *Columbus Bd. Of Educ. v. Penick*, 443 U.S. 449, 465-67 (1979). Only the unconstitutional

provisions were enjoined, while the vast majority of the contract remains intact. Among the remaining provisions is a saving clause, § 6-1, which provides that if any provisions are held invalid, "the parties, upon request of either of them, shall meet and confer to endeavor to agree on a substitute provision or that such a substitute provision is not indicated." The parties, not the Court, should determine their contractual relationship in a manner that comports with the Constitution.

Conclusion

None of this is to say that some type of arrangement to achieve the professed aims of release time is impermissible. *Wistuber* provides the model for an arrangement that provides release time for specified services. If the funds budgeted for release time actually are a part of officer compensation, officers could receive that compensation directly and then individually decide whether to use their additional monetary compensation to purchase PLEA services. But clearly, in the years since *Wistuber*, the practice of release time in this context has been loosened from its constitutional moorings. PLEA has tenaciously resisted every effort to bring the practice into constitutional conformity. Until it agrees to do so, the injunction should remain in place.

For all of the foregoing reasons, the ruling of the trial court should be sustained.

/S/ Clint Bolick
Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
Clint Bolick (021684)
Taylor Earl (028179)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs/Appellees