IN THE SUPREME COURT FOR THE STATE OF ARIZONA

WILLIAM R. CHEATHAM; and MARCUS HUEY, Respondents/Plaintiffs-Appellees, vs. SAL DICICCIO, in his official capacity as member of the Phoenix City Council; CITY OF PHOENIX; and PHOENIX LAW ENFORCEMENT ASSOCIATION, Petitioners/Defendants-Appellants, THOMAS COX; VICTOR ESCOTO; RICHARD V. HARTSON; VIVIAN REQUE; and DAVID WILSON, Petitioners/Intervenors-Appellants.	Arizona Supreme Court No. CV-15-0287-PR 1 CA-CV 13-0364 1 CA-CV 14-0135 (Consolidated) Maricopa County Superior Court Case No. CV2011-021634

RESPONDENTS' SUPPLEMENTAL BRIEF

Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
Jonathan Riches (025712)
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs/Appellees

Table of Contents

Table of Authorities ii

Introduction 1

Argument 2

I. Standard of Review 3

II. The Release Time Provisions Do Not Serve a Public Purpose Under the Gift Clause 4

III. The Court of Appeals was Correct in Ruling That the Release Time Provisions are Groslly Disproportionate to What is Received In Return Under this Court's Well-Established Gift Clause Framework 11

IV. Release Time is Not Part of Total Compensation …………….....….. 16

Conclusion 19

Table of Authorities

Cases

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)...18

American Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, Local 2384 v. City of Phoenix, 213 Ariz. 358 (App. 2006)...17

Arizona Bd. of Regents v. Phoenix Newspapers, Inc., 167 Ariz. 254 (1991)...........3

Arizona Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356 (App. 1991) ..16

Cheatham v. Diciccio, 238 Ariz. 69, 356 P.3d 814 (App. 2015) 2, 12, 13

Ellis v. Railway Clerks, 466 U.S. 435 (1984)...18

In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 198 Ariz. 330 (2000)..3

J.D. Halstead Lumber Co. v. Hartford Accident & Indem. Co., 38 Ariz. 228 (1931)...14

Knox v.Service Emps. Int'l Union, 132 S.Ct. 2277 (2012).....................................18

Kromko v. Arizona Bd. of Regents, 149 Ariz. 319 (1986)...............................4, 7, 8

McRae v. County of Cochise, 5 Ariz. 26 (1896)...8

Meinhard v. Salmon, 164 N.E. 545 (1928)...9

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 9

Proctor v. Hunt 43 Ariz. 198 (1934) 4

Security Title Agency, Inc. v. Pope, 219 Ariz. 480 (App. 2008) 9

Transp. Ins. Co. v. Bruining, 186 Ariz. 224 (1996)..3

Travelers Ins. Co. v. Breese, 138 Ariz. 508 (App. 1983).......................................14

Trist v. Child, 88 U.S. 441 (1874) 9

Turken v. Gordon, 223 Ariz. 342 (2010) ....passim

Valley Bank & Trust Co. v. Proctor, 47 Ariz. 77 (1936)..8

Wistuber v. Paradise Valley Unified Sch. Dist., 141 Ariz. 346 (1984) ....passim

Statutes

A.R.S. § 15-1637 8

A.R.S. § 23-352 17

A.R.S. §§ 23-1301 to 1307 17

Constitutional Provisions

Ariz. Const. art. 9, § 7 2

Introduction

At issue in this case is a taxpayer-funded practice that diverts full time police officers away from some of the most crucial services the City of Phoenix ("City") provides, and instead places them under the direction and control of a private labor organization for its sole use and benefit. No limits, controls, or accountability are placed on the union's use of those public safety resources. Indeed, not only do the majority of release time activities not advance a public purpose, they are often directly and diametrically opposed to the interests of the City and City taxpayers.

The Arizona Constitution's Gift Clause was designed to prevent the use of public funds for private enterprises and activities and the allocation of those funds to special interests. Unfortunately, the activities the Gift Clause was intended to prevent describe precisely what is done on release time: public aid to private, special interests. As a result, the courts below were correct in finding release time unconstitutional.

This case has now been in litigation for over four years. During that time, the challenged release time provisions have been preliminarily enjoined twice following extensive evidentiary hearings, and permanently enjoined after a two-day bench trial. The court of appeals and this Court rejected stays of those injunctions. On August 11, 2015, the court of appeals unanimously affirmed that the challenged release time provisions violate the Gift Clause.

This Court should affirm the opinion of the court of appeals, and advance clarity in the law by ruling that the allocation of public resource for private purposes does not serve a public purpose under the Gift Clause.

Argument

The Gift Clause forbids the State and its subdivisions from "mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation...." Ariz. Const. art. 9, § 7. As this Court recently explained, the Gift Clause "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 v. Gordon*, 223 Ariz. 342, 346 ¶ 10 (2010) (citations omitted) (emphasis added). Specifically, the "constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). That describes precisely what is happening here.

Turken and *Wistuber* prescribe 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.

The court of appeals correctly held that the release time provisions at issue were unconstitutional because they "do not obligate PLEA to perform any specific duty or give anything in return for the release time, meaning the City receives no consideration 'for *Wistuber* purposes' for its expenditure." *Cheatham v. Diciccio*, 238 Ariz. 69 ¶ 20, 356 P.3d 814, 820 (App. 2015). For this reason, and others, the court of appeals was correct in finding that the release time provisions violate the

Gift Clause.

Because resolution of the consideration prong was dispositive, the court of appeals did not determine whether the release time expenditures served a public purpose. *Id.* ¶ 16, 356 P.3d at 819. While we agree with the court of appeals that this inquiry is not necessary to resolve this case, the issue is of tremendous and continuing importance. To provide clarity in the law, this Court should examine the issue and find that the allocation of public resources to private activities, especially activities that are adverse to the public's interest, do not constitute a public purpose under the Gift Clause.

I. STANDARD OF REVIEW

"In reviewing findings of fact and conclusions of law, we must recognize a trial court's findings of fact unless they are clearly erroneous." *Arizona Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257 (1991). "The trial court, not this court, weighs the evidence and resolves any conflicting facts, expert opinions, and inferences therefrom. [When] [t]he record reflects that the trial court carefully and thoroughly performed those functions and then made findings that, although disputed, are fully supported by the evidence…we will not second-guess the court's factual findings, but rather, will uphold them unless they are shown to be clearly erroneous." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 340 ¶ 25 (2000).

Conclusions of law are reviewed *de novo*. *Transp. Ins. Co. v. Bruining*, 186 Ariz. 224, 226 (1996).

II. THE RELEASE TIME PROVISIONS DO NOT SERVE A PUBLIC PURPOSE UNDER THE GIFT CLAUSE.

Following several evidentiary hearings and a bench trial, the trial court concluded that "release time, in general does not serve a public purpose" because it "diverts officers from performing police work" and serves PLEA's private mission, which is often "adversarial" to the City. IR.400 at 5-6, ¶ 2. The court found that the MOU imposes no duties on PLEA and that the asserted benefits of release time are indirect or accrue to PLEA. *Id.* at 6, ¶¶ 4-5. The trial court concluded that the City "lacks even minimal control over how release time is used," given that it does not even know how full-time release or the bank of hours are used, and the officers are not supervised while on release time. *Id.* at 7, ¶ 6). Although the court of appeals did not address the public purpose requirement, the trial court was correct in this ruling.

As this Court observed in *Turken*, 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." 223 Ariz. at 347-48 ¶¶ 19-20 (citing *Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321 (1986)). *See also Proctor v. Hunt* 43 Ariz. 198, 201 (1934) (cited by the *Turken* Court 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." 223 Ariz. at 346 ¶ 11.) The Court went on to recognize that "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Id.* ¶ 14.

Indeed, the purposes of the Gift Clause "may be violated by a transaction even though th[e] 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 (emphasis added).

Although government entities have broad discretion in determining what constitutes a "public purpose" under the Gift Clause, the release time provisions at issue here are so plainly earmarked for private interests that, as the trial court concluded, they do not survive even this differential inquiry. Two significant factual findings demonstrate why this is the case.

First, release time cannot serve a public purpose when so many release time activities inure exclusively to the benefit of PLEA, and in many cases, are actually adverse to the City. The record clearly establishes that PLEA uses release time for purely private purposes, such as lobbying (IR.199 at 13-14 ¶¶ 69-71; IR.265 at 4-6 ¶¶ 8, 11, 19, 23), negotiating for pay increases (IR.199 at 14-15 ¶¶ 74-80; IR.265 at 5, ¶ 19), soliciting grievances against the Police Department (IR.199 at 17-19 ¶¶ 89, 93, 97, 103; IR.265 at 5-6 ¶¶ 22, 24), and political campaigning (IR.199 at 34-36 ¶¶ 188-200; IR.265 at 5 ¶ 19). Indeed, not only does political campaigning not serve a public purpose, political campaigning is *forbidden* by City policy (IR.199 at 33 ¶¶ 186-187). That would appear to be dispositive on the question of whether such activity promotes a public purpose. 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.*" IR.203 at 12, ¶ 24

(emphasis added).

Despite PLEA's assertions of the supposed public *benefits*[1] of release time, other examples of release time activities that are antithetical to a public purpose abound. These include:

- Threatening during negotiations to (illegally) strike, engage in work slowdowns, and "torch this place" if contract demands were not met. IR.199 at 15 ¶ 77.
- Meeting with a candidate for City Council and encouraging him to support the ouster of the police chief. *Id.* ¶ 82.
- Discussing hiring a private investigator to follow former Police Chief Garcia and to "break it off in his ass" if he met with other unions to discuss a dispute over police uniforms. *Id.* at 16 ¶ 88.
- Soliciting as many as 100 grievances against the uniform policy. *Id.* at 17 ¶ 89.
- Publicly opposing the police chief's invitation for officers to retake their oaths. *Id.* ¶¶ 90-91.
- 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. *Id.* ¶ 93.
- Referring to the former Chief of Police Daniel Garcia as "[D]anny" because "he needs to know we r equal partners and he is not above PLEA". *Id.* at 39

[1] PLEA continually conflates public *benefits* with "public purpose" under the Gift Clause. Many government expenditures may provide public benefits, incidental or otherwise, but that does not mean they serve a "public purpose" for constitutional analysis, particularly when, as here, they are so clearly earmarked for private activities.

¶ 217.

Quite simply, the challenged release time provisions not only do not serve a public purpose, but as the record reveals, they are adverse to it.

Second, the release time provisions do not serve a public purpose because the City exercises neither ownership nor control over release time employees or their activities. *Kromko v. Arizona Bd. of Regents* reiterated that a government expenditure does not advance a public purpose if it is used "to foster or promote the purely private or personal interests of any individual." 149 Ariz. 319, 321 (1986). In that case, this Court carefully examined a lease contract between the Arizona Board of Regents ("ABOR") and a nonprofit corporation to determine whether the transaction advanced a public purpose. In making its finding, the Court relied heavily on the level of control ABOR exercised over the nonprofit hospital at issue.

What is most noteworthy about the factors the Court considered in upholding the contract 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 to ABOR. *Id.* In essence, the private entity was an alter ego of ABOR. As this Court explained, the nonprofit corporation's activities 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 both A.R.S. § 15-1637 and the lease." *Id.*

The release time provisions here are 180 degrees opposite from the contract approved in *Kromko*. There is no question who "owns" the release time. (PLEA says it is "[o]ur time; [we] should be able to use [it] as we see fit"). IR.47 at 159. Not only does the City have no direct control over PLEA, it does not 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 report to the Police Department. IR.203 at 7 ¶¶ 41-42; IR.400 at 2 ¶ 3. Likewise, PLEA determines which officers will use the bank of hours and how they use the time. IR.203 at 7 ¶ 46; IR.400 at 2 ¶ 4. Indeed, outside of the context of release time, there are no circumstances under which control over on-duty personnel is delegated to a private entity. IR.199 at 27-28 ¶¶ 145-149, 155; *see also* IR.400 at 2 ¶ 2. The public must maintain some control over the expenditure of public funds in order for that expenditure to serve a public purpose under the Gift Clause. *See Valley Bank & Trust Co. v. Proctor*, 47 Ariz. 77 (1936) (funding several of the governor's expenditures—including travel expenses for third parties—were for private rather than public purposes); *McRae v. County of Cochise*, 5 Ariz. 26, 33 (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"). In this case, public control is simply absent. *See* IR.199 at 25 ¶ 139 (Appellees' expert testified that the PLEA contract

has fewer limitations or controls on the use of release time than any contract he has ever seen).

The tension between *public* employees and *private* control over their professional activities, moreover, underscores the fundamental problem with release time in terms of public purpose analysis: the dueling and incompatible loyalties that are required by the arrangement. "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good." *Trist v. Child*, 88 U.S. 441, 450 (1874). As the U.S. Supreme Court has admonished, the rule against those in a trust relation dividing their loyalties "must be enforced with 'uncompromising rigidity.'" *NLRB v. Amax Coal Co*., 453 U.S. 322, 329-30 (1981) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (Cardozo, C.J.)). "A fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.'" *Id.* (citation omitted).

In Arizona, "'an employee . . . owes his or her employer . . . a fiduciary duty,' which includes a duty of loyalty." *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 492 ¶ 53 (App. 2008) (citation omitted). All City of Phoenix employees owe a fiduciary duty to the City. IR.199 at 52 ¶ 286. Indeed, City policy strictly limits the situations in which its employees may accept outside employment or other situations that create a conflict of interest, 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" (*id.* at 33 ¶ 182; 32 ¶ 178).

Yet at the same time that they are collecting their full-time City pay and benefits, release time officers who serve as PLEA representatives receive a stipend and car allowance from PLEA. *Id.* ¶ 177. More significantly, those representatives are subject to a fiduciary responsibility to PLEA. PLEA's bylaws require its representatives "to show support for all majority board decisions," and they "may be removed" for failure to do so. *Id.* ¶ 179. PLEA's bylaws also 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." *Id.* ¶ 180. These bylaws make it unmistakably clear that when City employees are on release time, they are bound by their fiduciary obligation to PLEA to pursue its private interests, rather than the public purposes of the City.

The release time provisions, therefore, create an incompatible arrangement where public employees owe a fiduciary duty to the public while at the same time owe a fiduciary duty to their members' private interests. Release time officers, moreover, are on both payrolls at the same time, thus owing conflicting and irreconcilable duties to each. The City cannot "assign" its employees to union headquarters to do union work and still assure the pursuit of a public purpose as required by the Gift Clause, by virtue of the principles set forth in *Proctor*, *Valley Bank*, *McRae*, and *Kromko*.

If PLEA wants to pursue private interests, it can and should do so. But it may not demand that taxpayers finance those activities. Although PLEA refused to follow this simple rule, even after two preliminary injunctions, it did at last

negotiate an amendment with the City that limits City Business Time to specified public purposes, subject to City control and PLEA accountability, prohibits the use of City Business Time for specified private purposes, and provides a bank of voluntarily donated hours to use for PLEA activities. IR.416, Ex. A. It did so, however, only after the trial court issued a preliminary injunction.

Prior to that amendment, in the provisions that are before this Court, the City placed public employees at the disposal of a private entity, with no meaningful control over the uses to which those employees could be directed. IR.400 at 7 ¶ 6. In fact, those employees repeatedly have been deployed in ways that are adverse to the mission of the Phoenix Police Department and to the interests of Phoenix residents and taxpayers. *Id.* at 5-6 ¶ 2. As a result, those activities do not serve a public purpose under the Gift Clause.

III. THE COURT OF APPEALS WAS CORRECT IN RULING THAT THE RELEASE TIME PROVISIONS ARE GROSSLY DISPROPORTIONATE TO WHAT IS RECEIVED IN RETURN UNDER THIS COURT'S WELL-ESTABLISHED GIFT CLAUSE FRAMEWORK.

In order to survive Gift Clause scrutiny, the challenged provisions not only must serve a public purpose, but also must be supported by adequate consideration. As this Court explained in *Turken*, "[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." 223 Ariz. at 348 ¶ 22. Receiving something for nothing, as is the case under the release time provisions here, is by definition grossly disproportionate.

On the question of consideration, *Wistuber* and *Turken* are the controlling precedents. In *Wistuber*, this 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. Additionally, the collective bargaining agreement at issue in *Wistuber* included binding language ("the CTA *shall*…"). 141 Ariz. at 347, 351; *see also id.* at 348 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 not so disproportionate as to invoke the constitutional prohibition." *Id.* at 350.

The situation here is the inverse of *Wistuber*: as the trial court found in its order granting the second preliminary injunction, 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". IR.265 at 9 ¶ 9a). Hence consideration is inadequate as a matter of law.

Also unlike *Wistuber*, there is in this case an extensive factual record on the issue of the disproportionality of consideration. *Id.* As the court of appeals correctly held, the trial court's factual findings are binding unless clearly erroneous. "Consequently, the record supports the trial court's findings, and neither the City nor PLEA has shown that the court's findings are erroneous." *Cheatham*, 238 Ariz. 69 ¶ 22, 356 P.3d at 820-21; *see also id.* at ¶ 5, 356 P.3d at

816 (“the [trial] court *found as fact* that the ‘MOU [did] not obligate PLEA to provide any services to the City in exchange for the compensation and benefits the City [gave] to PLEA for release time.’”) (emphasis added); *id.* at ¶ 7, 356 P.3d at 817 (“the [trial] court also determined that the exchange lacked consideration, *based on its factual findings*) (emphasis added). In this case, no such showing has been made by PLEA.

Turken also clarified two aspects of the consideration analysis, both demonstrating that the release time provisions lack adequate consideration: only “obligations” under the contract constitute consideration and “indirect benefits” do not.

First, only what a party “*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party” counts as consideration. 223 Ariz. at 349 ¶ 31 (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 perform them. The court of appeals agreed: “Although listing examples of uses for release time, the 2012-2014 MOU release time provisions do not *obligate* PLEA to perform any specific duty or give anything in return for the release time, meaning the City receives *no* consideration ‘for *Wistuber* purposes’ for its expenditure.” *Cheatham*, 239 Ariz. 69 ¶ 20, 356 P.3d at 820.

PLEA contends (Pet. for Review at 10-11) that the release time provisions as well as the “Meet and Confer Ordinance” and “state and federal law” obligated them to perform a variety of functions, including negotiating for wages and

working conditions and representing officers in administrative investigations and hearings. These "obligations," however, do not qualify as consideration for Gift Clause purposes.

To qualify as consideration under *Turken*, the obligations must arise "out of contract" rather than "from law." 223 Ariz. at 350 ¶ 38. PLEA already is obligated by law to provide representation to police officers. IR.199 at 53 ¶ 292; IR.240 at 397. "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 Accident & Indem. Co.*, 38 Ariz. 228, 235 (1931); *accord, Travelers Ins. Co. v. Breese*, 138 Ariz. 508, 511 (App. 1983). Similarly, PLEA's "obligation" not to strike arises out of law, not contract. IR.199 at 25 ¶ 138. It should perhaps give the Court pause that PLEA's conception of consideration under the Gift Clause amounts to a promise to fulfill its preexisting legal obligations to *not* engage in illegal activity. Accordingly, such "examples" (which do not even arise to obligations) cannot qualify as consideration.

Second, PLEA (Pet. for Review at 9) contends that the court of appeals "introduced a new legal standard to the Gift Clause analysis" by purportedly requiring "specific duties" to satisfy the consideration requirement. The "specific duties" PLEA is referencing are otherwise known as "direct benefits" under this Court's Gift Clause jurisprudence. In *Turken*, this Court 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." 223 Ariz. at 350 ¶ 33. PLEA and the MOU proclaim the benefits of labor harmony and other

intangible factors as purported benefits for purposes of consideration. But these examples are exactly the type of unenforceable, unquantifiable, indirect benefits that *Turken* excluded from the consideration analysis. In any event, as the record abundantly demonstrates, and as recounted above, PLEA has not delivered on its promise of labor harmony (*e.g.*, solicitation of grievances, suggestions of disobedience to orders, criticisms of the police chief, etc.).

PLEA's assertion (Pet. Review at 10-11) that consideration is provided by all Unit 4 officers, rather than PLEA, is likewise unavailing. First, the MOU itself is captioned as a contract between the "City of Phoenix and Phoenix Law Enforcement Association." IR.92. Second, the release time provisions are located in § 1-3 of the MOU, which is entitled "Rights of Association." *Id.* at 6. Indeed, as described more fully below, if release time were part of total compensation to all Unit 4 officers, one would expect to find those provisions 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." *Id.* at 23-37, 40-50. Lastly, PLEA itself is on record as considering release time, PLEA's time, not time allocated to Unit 4. As PLEA put it, release time is "[o]ur time; should be able to use as we see fit." IR.203 at 7 ¶ 40.

Finally, PLEA's contention (Pet. for Review at 11-12) that release time is tantamount to insurance has it backwards. 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 were purchasing services, it would trigger mechanisms put in place by the City to assure that fair value was being

received. *See, e.g.*, IR.199 at 22, ¶¶ 124-125; IR.243 at 57-59; IR.245 at 140-147 (competitive bidding rules and acquisition criteria). The contract between the City and the provider would also itemize the services to be rendered and ensure they actually would be provided. IR.245 at 153-154; IR.243 at 58-60. In reality, as the preceding section demonstrates, release time here is not a purchase of services, but a subsidy of private activities.

Not only do the release time provisions not obligate PLEA to perform *any* duties or provide *any* direct benefits to the City, but there is no way to evaluate the proportionality of consideration, because no mechanism exists to track the time and activities of release time officers. In *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 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. 172 Ariz. 356, 369 (App. 1991). Without such information, neither the City nor the courts can ascertain proportionality of consideration or quantify the benefits of release time to the City and its taxpayers.

IV. RELEASE TIME IS NOT PART OF TOTAL COMPENSATION.

PLEA spends a considerable portion of its Petition (at 6-8), as it did in briefing below, insisting that an analysis of consideration is beside the point because release time is part of the total compensation package allocated to Unit 4 members. This is a truly remarkable assertion.

As a threshold matter, under PLEA's reasoning, any gift or subsidy is permissible so long as it is contained within a much larger contract. Even a

$200,000 Ferrari (equivalent to .00033 percent of the overall cost of Police Department operations under the MOU) to PLEA's president would not be a gift under PLEA's theory. Fortunately, such a proposition is inconsistent with *Wistuber*, which requires that every single provision within a collective bargaining agreement be tested for both a public purpose and consideration. 144 Ariz. 346. A gift hidden within a large contract is still a gift.

The underlying factual premise of this assertion is also untrue. Release time is not compensation to officers. IR.393 at 11 ¶ 40. As described above, the provisions at issue appear in the MOU section labeled "Rights of Association," not the sections pertaining to "Compensation/Wages" or "Benefits." IR.92 at 6. Moreover, compensation is a mandatory subject of bargaining; release time is not. The City does not treat release time as compensation for officers. IR.199 at 41 ¶¶ 225, 228; *see also* IR.265 at 5 ¶17. And neither does PLEA. IR.47 at 159 (According to PLEA, release time is "[o]ur time; [we] should be able to use [it] as we see fit").

Additionally, for at least two reasons, it would simply not be lawful to make release time a form of total compensation.

First, if release time were part of overall compensation, it would violate Article XXV of the Arizona Constitution and Arizona law, including Arizona's right-to-work laws. A.R.S. §§ 23-1301 to 1307; *see also* A.R.S. § 23-352. Those provisions not only prohibit forced union membership, they also prohibit forcing non-union employees to pay any financial compensation to unions. *American Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, Local 2384 v. City of Phoenix*, 213

Ariz. 358, 368 ¶ 28 (App. 2006). Forcing the 400 officers who are not members of PLEA (IR.203 at 9 ¶ 9) to subsidize union activities as a condition of employment, would therefore violate these constitutional protections. Despite its contentions (Pet. for Review at 6-7), PLEA cannot unilaterally determine (nor can they do so in concert with the City) that a portion of officer compensation come to them.

Second, the diversion of officers' compensation to a self-described political organization for use, in part, to engage in campaigns and other political activities (IR.400 at 5 ¶ 23; IR.199 at 34-37 ¶¶ 188-192, 195-209) would violate the First Amendment rights of non-members. As the U.S. Supreme Court has held, a union cannot, consistent with the Constitution, "collect from dissenting employees *any sums* for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984) (emphasis added) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). More recently, the Supreme Court held that "procedures for collecting fees from nonmembers must be carefully tailored to minimize impingement on First Amendment rights." *Knox v.Service Emps. Int'l Union*, 132 S.Ct. 2277, 2292 (2012). The Court required that such members must be given an individual opportunity to express "affirmative consent" to union fees, *id.* at 2296, or at least be given an opportunity to opt out.

There is no doubt that release time is spent in part on political activities. PLEA describes itself as a "political organization," and is actively engaged in politics, including candidate endorsements, collecting signatures for ballots, and supporting ballot measures. IR.252 at 33, ¶ 3; IR.400 at 4-5 ¶¶ 22, 23. As a result,

release time cannot be part of total compensation for Unit 4 officers without violating the First Amendment rights of Unit 4 officers who are not members of PLEA.

Ultimately, it does not matter whether release time is considered a part of total compensation under the MOU. As *Wistuber* establishes, each and every component of a contract must be tested for public purpose and consideration, considering the "reality of the transaction." 141 Ariz. at 349. The reality of this transaction is that although the MOU established the salaries and benefits of Unit 4 officers, it also provided PLEA with a very generous gift. The citizens of Phoenix are entitled to have their resources directed exclusively toward public purposes, especially the highly important objective of public safety. To divest a significant portion of those resources to PLEA's private use without adequate consideration, as was done here, fails the consideration requirement and violates the Gift Clause.

Conclusion

The evidentiary record in this case is substantial, and the decisions below faithfully apply this Court's Gift Clause jurisprudence. Taxpayers respectfully request that this Court affirm the judgment of the court of appeals that release time is unconstitutional, and further hold that directing public resources to private union activities does not serve a public purpose under the Gift Clause.

RESPECTFULLY SUBMITTED this 4th of April, 2016 by:

/s/ Jonathan Riches
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Respondents