COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARK GILMORE; and MARK HARDER, Plaintiffs / Appellants, v. KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; and CITY OF PHOENIX, Defendants / Appellees, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2384, Intervenor-Defendant / Appellee.	No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

APPELLANTS' OPENING BRIEF

Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Plaintiffs / Appellants

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INTRODUCTION

This case challenges the legality of a government practice called "release time" whereby the City of Phoenix ("City") employs four full-time City employees, and pays the equivalent of two other full-time employees, *not* to perform the government jobs they were hired to perform, but instead to work under the exclusive direction and control of American Federation of State, County, and Municipal Employees, Local 2384 ("AFSCME" or "Union"), a private labor organization.

While on release time, these "released" employees engage in political activities—including endorsing candidates for elected office and lobbying for and against policy proposals before the City Council—as well as recruiting new members and conducting various other activities that advance the Union's private interests, as opposed to discharging any public responsibilities.

The City finances this practice by forcing other City employees, including Appellants, to pay for it, even if those employees do not belong to the Union, and even if they object to supporting these activities. APP.036 ¶ 31–33. And that violates the Constitution.

Appellants Mark Gilmore and Mark Harder ("Appellants") are two heavy equipment mechanics employed by the City who do not wish to fund the Union or support its activities. APP.033 ¶ 2, APP.035 ¶ 21. They are not Union members,

do not pay Union dues, and have never affirmatively consented to fund release time. APP.033 ¶ 5. Yet, under a Memorandum of Understanding ("MOU") between the City and the Union, release time is expressly funded as part of "total compensation" to all Unit 2 employees, including Appellants. APP.036 ¶¶ 31–32, APP.046–47 ¶¶ 140–41. *Cf.* *Cheatham v. DiCiccio*, 240 Ariz. 314, 319 ¶ 14 (2016). Indeed, Appellants had their compensation—in the form of eight vacation hours per pay period—directly reduced to fund release time. APP.044 ¶ 117.

Consequently, Appellants are compelled to fund Union speech and activities as a condition of employment in violation of their free speech rights. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (compelling people to fund speech they disagree with is unconstitutional); *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 283 ¶ 52 (2019) (same). They are also forced to be associated with the Union and its political, lobbying, and other "non-germane" activities—activities that are not viewpoint neutral—and that also violate their rights against compelled association and Arizona's Right to Work protections. Ariz. Const. art. XXV; A.R.S. §§ 23-1301–1307. *Cf.* *May v. McNally*, 203 Ariz. 425, 428–29 ¶¶16–17 (2002) (compulsory association with ideological speech violates free association rights).

The release time provisions also violate the Constitution's Gift Clause, Ariz. Const. art. IX, § 7, because release time represents a subsidy of the Union's private

interests, *Turken v. Gordon*, 223 Ariz. 342, 347–48 ¶¶ 19–20 (2010) (subsidy of private entity is unconstitutional). The City exercises insufficient control and oversight over the use of release time to ensure that any purported public purpose is actually accomplished, *Kromko v. Arizona Board of Regents*, 149 Ariz. 319, 321 (1986) (such control is constitutionally required), and the Union is not contractually obligated to give the City any direct benefits in exchange for release time, which means there is insufficient consideration—which violates the Gift Clause, pursuant to *Schires v. Carlat*, 250 Ariz. 371, 376 ¶ 14 (2021).

STATEMENT OF THE CASE

On October 8, 2019, Appellants filed suit in Maricopa County Superior Court against the City to vindicate their constitutional rights, and the constitutional rights of countless government employees throughout Arizona. The Union intervened as a Defendant on January 10, 2020.

Both parties later moved for summary judgment. The trial court granted summary judgment to the City and the Union (APP.234–35), as well as an attorney fee judgment against Appellants under A.R.S. § 12-341.01, a statute intended to shift fees in contract cases, in an amount of $355,681.00 on November 8, 2021. (APP.236–44).

The trial court issued final judgment on December 14, 2021 (APP.245–49), and Appellants timely appealed on December 22, 2021 (APP.250–51).

This Court has jurisdiction pursuant to A.R.S. § 12-2101.

STATEMENT OF FACTS

Release time is a practice that provides paid time off to City employees to engage in Union activities—indeed, to *work for* the Union, rather than the City. Some release time employees work *full-time* for the Union, meaning they direct their own work schedules and activities, they report to Union headquarters—not to a City office—and the City does not supervise, direct, or control their daily activities, although they are paid as regular, full-time City workers. Other release time employees use a paid bank of hours to perform Union activities at the direction and control of the Union, not the City. The practice is financed as part of an MOU between the City and the Union, which was arrived at through a "meet and confer" process.

The Meet and Confer Process

Under Arizona law, employees are free to join a union, but cannot be compelled to join a union or provide financial support to a union as a condition of employment.

In Phoenix, if a majority of employees in a bargaining unit vote to be represented by a union, the union is designated the "exclusive bargaining representative" for that group of employees. APP.034 ¶ 11. Once a union is designated as a unit's exclusive representative, it is vested with broad powers,

including the sole right to negotiate with a public employer over wages, benefits, and pay. *Id.* ¶ 12.

In this case, the Union is the exclusive representative for Unit 2 employees in the City. Unit 2 employees include the City's "blue collar" working force and includes Appellants. The Union was certified as the exclusive representative in 1976 by a vote of employees who worked for the City 45 years ago. *Id.* ¶ 13. The Union has never been recertified since that original vote. *Id.* ¶ 15. Neither Appellants, nor *any* other current City employee, has ever voted to authorize the Union to be its exclusive representative. *Id.* ¶ 16.

There are at any given time between 1,515 and 1,542 Unit 2 employees in the City. APP.033 ¶ 7. Only 671 of those—less than 44 percent—belong to the Union and pay Union dues. *Id.*

Designating an exclusive representative for an employee group "substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. For example, once designated, the Union serves as the meet and confer agent for all employees in that unit. APP.034 ¶ 17. This means the Union enjoys the "unilateral right" to act as the sole agent representing all employees in the unit, and individual employees may not be represented by any other agent, nor may they negotiate directly with their employer. APP.034–35 ¶¶ 18–19. Additionally, only the exclusive representative may engage in collective negotiations with the City to

arrive at a MOU governing the terms and conditions of employment for all Unit 2 employees. APP.035 ¶ 20. This is true regardless of whether those employees belong to the Union, or wish to be bound by the MOU, or not. *Id.*

The Appellants

Appellants are heavy equipment mechanics employed by the City. APP.033 ¶ 2. They repair and maintain City trucks and other types of construction equipment. *Id.* They have worked for the City for over 15 years. *Id.* ¶ 3. They are not members of the Union and do not wish to subsidize it or its activities or be associated with the Union in any way. *Id.* ¶ 5, APP.035 ¶ 21.

The Release Time Provisions

This case involves certain "release time" provisions of the 2019-2021 MOU between the City and the Union.[1] The 2019-2021 MOU grants the Union multiple release time benefits, including: (1) funding four *full-time* release positions—i.e., four employees whose salaries are paid by the City but who devote their entire time working for the Union instead of the public; (2) an annual bank of 3,183 release time hours—equivalent to nearly two additional full-time employees—to be used by other Union representatives at the Union's direction; (3) 150 additional hours for Union members to attend seminars, lectures, and conventions; and (4) a

[1] The City entered a new MOU for 2021-2023 that contains release time provisions identical to those in the 2019-2021 MOU.

$14,000 direct payment to the Union for Union members to attend Union schools, conferences, and workshops. APP.035–36 ¶ 27.

How Is Release Time Used?

Release time is used by the Union to advance the Union's own mission and objectives. While on release time, release time employees engage in political activities, including meeting with and endorsing candidates for elected office, lobbying the City Council, recruiting new members, and conducting other activities that advance the Union's interests. APP.039–43 ¶¶ 62–108.

The use of release time for political and lobbying activities alone is extensive. The Union President, Mario Ayala, is employed by the City as a Senior Utility Operator but does not perform that job function because he is on full-time release. APP.036 ¶ 34. The same is true regarding the other full-time release employees. While on full-time release under the 2019-2021 MOU, Mr. Ayala met several times with candidates running for the U.S. Senate, the U.S. House, the state legislature, and the Phoenix City Council. APP.040–41 ¶¶ 71–87. The Union later officially endorsed several of these candidates. *Id.* Mr. Ayala also participated, while on release time, in meetings of the Union's Political Action Committee, PEOPLE, which endorses candidates and makes campaign contributions. APP.039–40 ¶¶ 67–68. Mr. Ayala and other full-time release employees also prepared and distributed Union newsletters advocating for and against ballot

questions, endorsed political candidates, and advocated for the election of a candidate that Union leadership and its release time employees called "our biggest ally" to the Phoenix City Council. APP.041–42 ¶¶ 92–96. The list of political activities on release time goes on and on. *See* APP.039–43 ¶¶ 62–108.

The Union also uses paid release time to recruit new members, APP.004 ¶ 20; APP.022 ¶ 20; APP.168 at 67:3–68:24, to file grievances against the City, APP.164–65 at 53:4–55:8; APP.026 ¶ 63, to engage in collective bargaining, APP.023 ¶ 24, APP.169 at 70:2-19, to support other labor organizations in other cities, APP.177–78 at 105:5–106:18, and to engage in other activities that advance the Union's interests.

The City exercises no meaningful oversight over or supervision of employees on full-time release, and there is no accountability for such persons. Release time employees set their own schedules and direct their own activities. APP.037 ¶ 43. No one in the City monitors their performance on a daily basis or provides duty assignments. *Id.* ¶ 44–45. The City also places no prohibitions on their activities. *Id*. ¶ 45. The full-time release employees report to the Union's offices daily, *not* to City offices. APP.038 ¶ 54. They are not required to report or otherwise account for their time to the City. APP.040 ¶¶ 71–73. Indeed, they provide *no accounting of any kind* to the City about how they spend release time. APP.038 ¶ 48. Although every other City employee faces *some* evaluation of work

performance, no such evaluation is conducted for the release time employees. *Id.* ¶ 50. And while every *other* public employee in the City has a direct supervisor, no one in the City supervises the work of full-time release employees. *Id.* ¶¶ 51–53. They simply have *no* City supervisor. *Id.*

The City also has no say over who becomes a full-time release employee. APP.038–39 ¶¶ 57–58. And neither the Union President nor any other Union officer on full-time release can be removed from their full-time release positions by the City. APP.039 ¶ 59. The other Union members utilizing release time from the bank of hours are not supervised or monitored by the City. They are instead directed by, and report to, the Union and its officers. APP.038 ¶ 56.

The reason, of course, is because these employees don't actually work for the City. They work for the Union. They are only *paid* by the City, through salaries provided for in the MOU. APP.036 ¶ 28.

The Cost of Release Time

The cost of these and other release time benefits under the MOU is $998,000. *Id.* ¶ 29. That amounts to roughly $647.21 per Unit 2 employee. APP.033 ¶ 7. Thus, the Union receives roughly $499,000 in release time payments per year. By comparison, the Union receives only $331,474 in paid union dues from its own members. *Id.* ¶ 8.

According to the MOU, that amount of money is part of total compensation paid by the City to all Unit 2 employees, including Appellants, whether they belong to the Union or not. APP.036 ¶ 31 ("[t]he cost to the City for these release time positions and release hours, including all benefits, has been charged as part of total compensation detailed in this agreement.").

But the employees do not actually receive this amount. Instead, the City gives it to the Union. In other words, every City employee who is part of Unit 2—including those who, like Appellants, have chosen *not* to join the Union or to finance its activities—is forced to fund the activities of the Union's release time employees out of what the MOU deems their compensation.

The MOU provides no mechanism for Appellants to either opt into or opt out of funding the release time positions. APP.035 ¶ 24.

The Union has not promised to provide any direct benefits to the City in exchange for the $998,000 release time payment. APP.043 ¶¶ 109–12. The Union has also not obligated itself, contractually or otherwise, to provide *any* benefits in return for release time. *Id.* ¶ 109. It has not promised to spend a certain amount of time meeting with City officials or discussing employee concerns, for instance, *id.* ¶ 111, or to resolve disputes at the lowest level, *id.* ¶ 110, or to provide feedback on matters that will prevent complaints from becoming more costly to the City. *Id.* ¶ 112. On the contrary, under the release time provisions, the Union has expressly

promised *nothing* but to "engage in lawful *union* activities," *id.* ¶ 109; APP.054 § 1-3(A)(1)—not to provide any services to the City for that money. And although the City argues that release time helps with labor relations, it has never tried to determine whether that's true, or what value, if any, the City receives in return for the money spent for release time. APP.043–44 ¶ 113, APP.039 ¶ 65.

STATEMENT OF THE ISSUES

1. Do the challenged release time provisions violate Appellants' free speech, free association, and Right to Work protections because they force Plaintiffs to fund Union speech and activities as a condition of employment without Plaintiffs' affirmative consent?

2. Even if not funded by Appellants, does release time violate Appellants' rights against compelled association and Arizona's Right to Work protections because Appellants are required to be represented by the Union, which uses release time for non-germane activities that are not viewpoint neutral?

3. Do the challenged release time provisions violate the Gift Clause because they primarily benefit the Union, a private labor organization, and the City does not receive direct, contractually obligatory benefits in exchange for the release time payments?

4. Did the trial court err in awarding attorney fees under A.R.S. § 12-341.01, a statute governing contract actions, in this public interest action where

aggrieved citizens are in good faith challenging the constitutionality of government action?

STANDARD OF REVIEW

This Court "determine[s] *de novo* whether … the trial court properly applied the law" and "view[s] the facts and inferences drawn from those facts in the light most favorable to the party against whom judgment was entered." *Korwin v. Cotton*, 234 Ariz. 549, 554 ¶ 8 (App. 2014). The application and interpretation of constitutional and statutory provisions is reviewed *de novo*. *Morrisey v. Garner*, 248 Ariz. 408, 410 ¶ 7 (2020).

ARGUMENT

The release time payments to the Union violate the Arizona Constitution and state statutes in several ways.

First, the release time provisions compel Appellants to fund the Union's activities without Appellants' affirmative consent, and thus violate Appellants' rights against compelled speech. *See Janus*, 138 S. Ct. at 2486 ("Neither an agency fee *nor any other payment* to the union may be deducted from a nonmember's wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmatively consents to pay." (emphasis added)). When government action compels speech, that action "operates as a content-based law" and is therefore subject to strict scrutiny. *Brush & Nib*, 247 Ariz. at 292 ¶ 100.

The City cannot meet this heavy burden because release time does not serve a compelling government interest, and even if it did, those interests could be achieved through means significantly less restrictive of Appellants' free expression rights than through forcing them to pay for Union activities.

Second, paid release time also violates Appellants' rights against compelled association and Arizona's Right to Work protections because Appellants are forced as a condition of employment to be associated with the Union, its activities, and its messages. The Constitution protects both the right to expressive association and the right *not* to associate. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Brush & Nib*, 247 Ariz. at 282 ¶ 47 (a violation of First Amendment principles "necessarily implies" a violation of Arizona's broader free expression principles). Arizona's Right to Work laws, Ariz. Const. art. XXV; A.R.S. §§ 23-1301–1307, also forbid the City and from imposing "the requirement that any person participate in *any form or design* of union membership." *AFSCME Local 2384 v. City of Phoenix*, 213 Ariz. 358, 367 ¶ 23 (App. 2006) (emphasis added). Because Appellants fund release time through the MOU, the arrangement violates their rights against compelled association and Arizona's Right to Work protections.

But even if Appellants "do not fund release time," as the trial court found, APP.235, they are still required to be represented by the Union, which uses release time to negotiate on their behalf, and engage in various Union activities—

including partisan political activities—that are not viewpoint neutral and that are not germane to the Union's representational duties. Because release time is used for activities that have nothing to do with union representation, and because Appellants are forced to associate themselves with those activities under the MOU, the release time provisions violate Appellants' associational rights and Arizona's Right to Work laws for that reason alone.

Finally, paid release time violates the Arizona Constitution's Gift Clause. That is because the release time payments would come from *the City* to the Union rather than from *Appellants* to the Union—which must necessarily result in an unconstitutional subsidy. The Gift Clause forbids government subsidies to private associations by requiring (1) that all public expenditures serve a public purpose and (2) that public entities receive adequate consideration in exchange for the expenditures. *Schires*, 250 Ariz. 374–75 ¶ 7. In this case, paid release time primarily serves the Union's interests, and the City receives insufficient consideration because it is not receiving any direct, contractually obligatory benefits in exchange for the release time payments.

I. The trial court erred in finding that Appellants do not fund release time.

The trial court determined that paid release time does not violate Appellants' free speech, associational, and right to work protections because it erroneously concluded that Appellants "do not fund release time." APP.235. This was in error

for three reasons. First, the plain language of the MOU specifically says that Appellants pay for release time as part of their compensation. APP.036 ¶ 31, APP.054 § 1-3(A). Second, the Arizona Supreme Court has already held that release time is part of total employee compensation and paid for by each *individual* employee. *Cheatham*, 240 Ariz. at 318–19 ¶ 14. Third, the defendants in this case have always treated paid release time as individual employee compensation.

The trial court first erred by ignoring the plain language of the MOU. The MOU expressly states: "[t]he cost to the City for these release time positions and release hours, including all benefits, has been charged as part of the total compensation." APP.054 § 1-3(A). That means what it says: release time is *compensation* to *all* Unit 2 employees. *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588 (1977) ("a court must give effect to the contract as it is written, and the terms or provisions of the contract, where clear and unambiguous, are conclusive.").

It works this way: Once total compensation is allocated under the MOU, wages and benefits are fixed for all Unit 2 employees for that agreement. *Ariz. Farmworkers Union v. Whitewing Ranch Mgmt., Inc.*, 154 Ariz. 525, 528 (App. 1987) (an exclusive representative represents the bargaining unit for "the purpose of collective bargaining on rates of pay, wages, hours and other employment conditions."). Because release time is expressly charged as part of total Unit 2

compensation, each individual employee, whether or not she belongs to the Union, is paying for the cost of release time. Under this MOU, there are between 1,515 and 1,542 Unit 2 employees at any one time. APP.033 ¶ 7. Divide the cost of release time ($998,000) by the total number of Unit 2 employees, and each employee, including each Appellant, is being required to contribute at least $647.21 to finance release time activities under the MOU.[2] APP.033 ¶ 7, APP.036 ¶ 29.

What's more, under this MOU, each Appellant had eight vacation hours *removed* from their wages and benefits to finance release time. APP.044 ¶ 117. In other words, every City employee who is part of Unit 2, including Appellants, is *required* to direct part of his or her *compensation* to finance release time under the MOU. Thus, contrary to the trial court's finding, the Defendants expressly intended that *all Unit 2 employees pay for release time* as part of total compensation—and said so in the MOU.

The trial court also ignored binding Supreme Court precedent on this question. In *Cheatham*, taxpayers challenged paid release time under the Gift Clause. In determining whether release time was a subsidy to the union in that

[2] Of course, Appellants themselves don't *receive* release time funds directly. Instead, the release time is diverted to the Union to pay Union employees (such as Mr. Ayala) to perform union activities. APP.041 ¶¶ 88–89.

case, the Court was directly confronted with the question of whether paid release time is part of individual employee compensation. It said yes. Observing that "[i]nterpreting the MOU is a legal question," the *Cheatham* court held that "release time is a component of the overall compensation package," and is paid "[i]n lieu of increased hourly compensation or other benefits … *per unit member*." 240 Ariz. at 318–19 ¶ 14 (emphasis added). In fact, the court went on to identify the exact cost of release time as $322 annually, or $644 over the course of the MOU, per unit member, *id.*, which is, not coincidentally, the same exact cost of release time per unit member in this case. APP.033 ¶ 7. *Cheatham* is simply dispositive of the question of whether Appellants fund release time. They do.

If there were any question remaining about whether release time is part of Appellants' compensation, it is answered by the record, which shows that the Defendants have always treated release time as individual employee compensation. As Arizona courts have made clear, if contract language is susceptible to more than one reasonable interpretation, "[t]he acts of the parties themselves, before disputes arise, are the best evidence of the meaning of doubtful contractual terms." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 266 (App. 1983). In this case, the actions of the parties—the City and Union—show that they have always treated paid release time as individual employee compensation.

In 2014, paid release time was eliminated from a prior MOU in favor of a

voluntary donation system for release time (meaning that each employee could decide whether to donate her personal leave to fund release time). When paid release time was eliminated, the City and the Union provided that time—that is, 8 additional hours of vacation leave—directly to each unit employee. When asked why, the City's Research and Budget Director explained that this was provided "in lieu of the union release bank of hours and full-time release positions." APP.044 ¶ 117. In other words, employees were not automatically deprived of this time through a mandatory paid release time system, that time—8 hours—went back into the compensation of each individual employee. That amount is nearly the exact value[3] of paid release time. What's more, when paid release time was implemented again in the 2019-2021 MOU, the additional eight hours per employee was eliminated. APP.045 ¶ 123. In other words, Appellants had vacation leave valued at $647.21 per employee over the course of the MOU *directly removed from their* pay in order to fund release time. In short, there is a direct correlation between how the parties treat paid release time: when paid release time exists, individual employee compensation decreases to fund it; when it is eliminated, individual employee compensation increases.[4] Paid release time is

[3] The cost of the additional vacation leave is $1,040,000 over the course of the MOU—nearly identical to the cost of release time. APP.232 ¶ 154.

[4] The City has done the same exact thing with other labor units. When paid release time was eliminated in the 2019-2021 MOU between the City and firefighters'

therefore directly tied to, and is treated as, *individual* compensation to each employee.

There is no doubt that paid release time is individual employee compensation, and thus that Appellants do fund release time under the MOU at issue here. The MOU says so; the Supreme Court says so; the parties say so. The trial court therefore erred in finding otherwise.

II. Paid release time violates Appellants' free expression rights because it forces Appellants to finance union activities without their affirmative consent.

The Arizona Constitution protects freedom of speech broadly and unambiguously. Ariz. Const. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). This protection "includes both the right to speak freely and the right to refrain from speaking at all." *Brush & Nib*, 247 Ariz. at 282 ¶ 48. Thus, no Arizonan may be forced "to host or accommodate another's message." *Id.* at 283 ¶ 51.

The Arizona Constitution's protections for freedom of speech are also broader than those provided by the First Amendment. The state Constitution "by its terms … provides broader protections for free speech than the First Amendment." *Id.* at 281 ¶ 45. Consequently, "a violation of First Amendment

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union, individual employee compensation increased by 8.5 additional vacation hours per unit employee. APP.045 ¶ 128.

principles 'necessarily implies' a violation of the broader protections of article 2, section 6 of the Arizona Constitution." *Id.* at 282 ¶ 47. Arizona courts may therefore "apply[] First Amendment jurisprudence … [to] address … state claim[s]." *Id.* And the First Amendment, too, protects the right of every person to decide "both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988). Several First Amendment cases, including *Janus*, 138 S. Ct. at 2481, bear directly on this case, and they uniformly hold that arrangements that require compelled financial contributions to government unions violate the Constitution.

Government rules that compel speech, as the release time payments here do, are content-based and subject to strict scrutiny. As the Arizona Supreme Court recently held, "[w]hen a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law." *Brush & Nib*, 247 Ariz. at 292 ¶ 100 (citing *Riley*, 487 U.S. at 795). Content-based laws must, of course, satisfy strict scrutiny, *id.* ¶ 96; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015), and are presumptively unconstitutional. *See State v. Evenson*, 201 Ariz. 209, 217 ¶ 30 (App. 2001) ("when a state seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed.").

Under strict scrutiny, the government bears the burden of proving the

constitutionality of its actions. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013). That means it must prove that its compulsion of Appellants' speech "(1) furthers a compelling government interest and (2) is narrowly tailored to achieve that interest." *Brush & Nib*, 247 Ariz. at 293 ¶ 105.[5] The release time provisions of the MOU fail that test.

A. It is black letter law that the government cannot compel government employees to fund the private speech of labor unions.

Because Appellants are *required* under the MOU to direct part of *their* compensation to pay for release time, which the Union then uses to engage in union speech and activities, the conclusion is inescapable: the MOU operates as compelled speech in violation of Appellants' free expression rights.

The U.S. Supreme Court could not have been clearer that forcing people to subsidize political activities they disagree with violates the First Amendment. This was the direct holding most recently in *Janus*, which struck down "agency fees" that a government employee was compelled to pay to a union as a condition of employment. The Court held that "[n]either an agency fee *nor any other payment*

[5] Because Arizona courts "apply[] First Amendment jurisprudence … [to] address … state claim[s]," *Id.* at 282 ¶ 47, if strict scrutiny doesn't apply, exacting scrutiny does. *Janus*, 138 S. Ct. at 2472 (applying exacting scrutiny to government arrangement that compelled public employees to pay "agency fees" to a labor union as a condition of employment). The MOU's release time provisions fail either test.

to the union may be deducted from a nonmember's wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486 (emphasis added). *Janus* built on previous cases finding that compelling employees to pay fees to finance a union's political activities violated those employees' rights against compelled speech. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310–11 (2012) (striking down fees to support union political activities and finding that "compelled funding of the speech of other private speakers or groups" imposes a "significant impingement on First Amendment rights."); *Harris v. Quinn*, 573 U.S. 616, 656 (2014) ("except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.").

As with the fees in *Janus*, *Knox*, and *Harris*, the release time provisions of the MOU here compel Appellants to finance the Union's political speech. That violates Appellants' rights against compelled speech. And as in *Janus*, *Knox*, and *Harris*, the City cannot meet its heavy burden under the applicable heightened scrutiny of showing that such compulsion is narrowly tailored to serve a compelling government interest.

B. The Union's activities on paid release, including its political, lobbying, and recruitment activities, serve no government interest at all, let alone a compelling government interest.

To satisfy strict scrutiny, the City must first prove that use of paid release

time furthers a compelling *government* interest. The record shows, however, that the Union uses release time to perform the *Union's* business, not the government's or the public's interests. The Union, not the City, directs, manages, and controls the activities of release time employees, including the four employees who are released *full time* from their City employment duties. APP.037–38 ¶¶ 43–46. Indeed, that is the entire point of release time: to release employees from the jobs they were hired to perform to work for the Union instead. What's more, use of release time for political, lobbying, and recruitment activities, categorically do not serve any government interest whatsoever, as is clear under existing law.

A compelling government interest must be a *state* interest, not the private interest of a private party. *See, e.g.*, *In re Young*, 82 F.3d 1407, 1420 (8th Cir. 1996) (compelling interests are "only those interests pertaining to survival of the republic or the physical safety of its citizens.'" (citation omitted)); *cf.* *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1, 22 (1994) (because "[p]rivate entities pursue private ends and interests, not those of government," their interests do not normally "establish a 'compelling *public* interest' or 'compelling *state* interest.'"); *Evenson*, 201 Ariz. at 213 ¶ 13 (to satisfy strict scrutiny statute must be "'narrowly tailored to promote a compelling *Government* interest.'" (citation omitted, emphasis added)).

Release time, however, exists to support the *Union's* activities—not to serve

the public. The most egregious example involves subsidizing the Union's self-interested political activities, which cannot be a compelling *state* interest. There is "no compelling governmental interest" in promoting one private party's free speech rights at the expense of another. *Mahoney v. Babbitt*, 105 F.3d 1452, 1458–59 (D.C. Cir. 1997), and to hold otherwise would make a mockery of democracy by allowing the state to force one side of a political dispute to fund the other side's message. That is doubtless why the City *prohibits* the use of public resources for political purposes in every *other* context.[6] And it is why the *Janus* Court said that "a public employer is flatly prohibited from permitting nonmembers to be charged for [political or ideological] speech." 138 S. Ct. at 2473.

The record here is clear: paid release time is used *extensively* for political and ideological speech by the Union. Specifically, Mr. Ayala, who is on full-time release, uses it to participate in meetings of AFSCME PEOPLE, the Union's political action committee. APP.039–40 ¶ 67–68. Among other things, AFSCME PEOPLE endorses and provides campaign contributions to political candidates. APP.040 ¶ 68. Release time is also used to prepare Union newsletters that endorse candidates and advocate regarding ballot questions. APP.041–42 ¶¶ 91–92. These newsletters include endorsements of candidates for City Council and the state

[6] City of Phoenix Administrative Regulation, Employee Political Activity.

legislature. APP.042 ¶¶ 93, 97. One newsletter, for example, reassured readers that the Union "will continue to push politically to keep good people such as Betty Guardado and other Union friendly brothers and sisters on the City Council," *id.* ¶ 94, and went on to say, "Our plan is to gear up politically in 2020, so that our allies will assist us with a positive contract." *Id*. ¶ 95. Another newsletter implored its readers to engage in political activities and campaign for certain candidates for Mayor and City Council. *See id.* ¶ 96 ("It cannot be emphasized how important [*sic*] that we get involved in the elections for Mayor and City Council. As City employees, it is vital that we have Labor friendly candidates in Council. … We will need help campaigning. … This is a huge opportunity for us, and we should not let it slip through our fingers.").

Release time is also used by Union officers to meet with candidates for office. Mr. Ayala, while on full-time release, met with U.S. Senate candidate Mark Kelly several times, including at the height of the campaign. APP.040 ¶¶ 71–72. Mr. Ayala also met with Tony Navarrete, candidate for the state legislature, while on release time, during an event the Union hosted at Union hall. *Id*. ¶ 79. Mr. Ayala later recommended that the Union endorse Mr. Navarrete. *Id*. ¶ 80. Mr. Ayala also regularly meets with City Council members whom the Union supports politically, while on paid release time. APP.040–41 ¶¶ 77–78, 81–83.

Release time is also used by the Union to lobby the government for the

Union's policy agenda. There are multiple entries on Mr. Ayala's calendar for City Council agenda items, as well as attendance and testimony at City Council on multiple policy matters. APP.042–43 ¶¶ 99–102.

All these uses of paid release time are "flatly prohibited" by the First Amendment and the Arizona Constitution. *Janus*, 138 S. Ct. at 2481 ("The Court rejected … out of hand" "a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses."). This is a long-settled area of the law. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768–69 (1961) (union may not, "over an employee's objection … use his exacted funds to support political causes which he opposes.").

The remaining uses of release time also serve the Union's *private* interests, not those of the government. For example, the Union uses release time for recruiting new members. APP.004 ¶ 20; APP.022 ¶ 20; APP.168 at 67:3–68:24. The U.S. Supreme Court, again, has directly rejected the use of payments from nonconsenting employees to fund recruiting. *See Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 452 n.13 (1984) ("it would be perverse to read [federal labor relations statute] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members."). The Union also uses paid release time to engage in collective bargaining and file grievances against the City, APP.164–65 at

53:4–55:8; APP.026 ¶ 63; APP.023 ¶ 24, APP.169 at 70:2–19. Those uses are inherently political, as *Harris* and *Janus* held, and they advance the Union's own interests, not a government interest. *Harris*, 573 U.S. at 636 ("In the public sector, core issues such as wages, pensions, and benefits are important political issues."); *see also Janus*, 138 S. Ct. at 2468 (representation at grievance proceedings "furthers the union's interest in keeping control of the administration of the collective-bargaining agreement."). The Union also uses release time to support other labor organizations in other cities, APP.177–78 at 105:5–106:18., which certainly serves private union interests, but is not a compelling government interest for the City of Phoenix.

For the remaining uses of release time, the reality is that the City is simply *unaware* of how that time is spent—because the Union controls and directs release time and is not obligated to provide an accounting of its use to the City. APP.037–38 ¶ 46 (The City has no "mechanism to determine or confirm how release time is in fact being used."). If the City does not know how release time is being used, it cannot show that release time serves *any* government interest, let alone a compelling one.

C. Any government interest in Union activities can be achieved through means significantly less restrictive of Appellants' constitutional rights, as the *Janus* Court held.

Even if release time did serve some abstract compelling government interest,

it is still unconstitutional because release time activities can be achieved through means significantly less restrictive of Appellants' rights. *Janus* is dispositive of this question, and, ultimately, of this case. The *Janus* Court directly held that any stated government interest in union activities, such as collective bargaining and grievance procedures, can be served though means significantly less restrictive of the First Amendment rights of non-members than by forcing them to fund Union speech. 138 S. Ct. at 2466.

In that case, Plaintiff Mark Janus was required as a condition of employment to pay a monthly fee of $44.58 to the union that represented his employee unit. *Id.* at 2461.[7] Like Appellants here, he did not join the union, and did not wish to subsidize its activities. *Id.* Yet he, like Appellants here, was forced to subsidize it as a condition of employment. *Id.* The Court struck this down as a violation of the First Amendment. The government argued that the subsidization served a compelling government interest in "labor peace," but the Court observed that the federal government and the governments of more than half of the states managed to serve that interest without mandatory subsidization. *Id.* at 2466. That proved that labor peace "can readily be achieved through less restrictive means," and consequently that forcing Mr. Janus to pay for the Union's speech, lobbying,

[7] By comparison, Appellants here pay approximately $26.97 per month over the course of the MOU to fund paid release time. PSOF ¶¶ 7, 29, 123.

grievance adjudication and political activities was unconstitutional. *Id.* "Neither an agency fee *nor any other payment*," the Court concluded, "may be deducted from a nonmember's wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.* at 2486 (emphasis added).

In this case, too, Appellants are forced to fund the Union's activities through paid release time, *see* APP.054 § 1-3(A), even though they are not Union members, do not wish to fund Union activities, and have never affirmatively consented to have any portion of their compensation directed toward such uses. *See* APP.033 ¶ 5, APP.035 ¶ 21. Indeed, their pay has been directly reduced by eight vacation hours per pay period to fund release time. APP.044 ¶ 117. That compulsion is unconstitutional under *Janus*.

In addition, the record indisputably shows that whatever abstract state interest is purportedly served by release time can be (and has been) achieved through means that do not require compulsory payments from Appellants.

First, the City entirely *eliminated* paid release with Unit 2 for a period of three years (2014-2016) in favor of a voluntary system that did not extract payments from nonconsenting members. And there is *no evidence* that this had any negative impact on labor relations between the City and Unit 2. APP.044–45 ¶¶ 115–20. During those years, the City eliminated the compulsory release time

provisions that previously existed (and exist in *this* contract), APP.044 ¶ 116, and gave that time instead to *every* Unit 2 employee; that's the additional eight hours of vacation time referred to above (page 17). And there was no deterioration of "labor peace" during the period when release time was eliminated. APP.045 ¶ 120. This proves that any purported interest in advancing "labor peace" or improving the efficiency of labor relations can be, and recently *has been*, achieved though less restrictive means.

Additionally, the *current* contract between the City and the *firefighters* union includes *no* paid release time provisions, although previous contracts did, *id.* ¶ 126—and labor relations with the firefighters' union is no worse than it was when paid release time was mandated. *Id.* ¶ 129. Previous MOUs with the firefighters' union included paid release positions and a bank of hours, but the current MOU with the firefighters' union replaced that with a voluntary bank of hours. *Id.* ¶¶ 126–27.[8] Once again, this change has resulted in no deterioration in "labor peace" or efficiency of labor relations. *Id*. ¶ 129.

Because any purported public interests in forcing Appellants to fund release time can be—and actually *have been*—served in ways less burdensome of free

[8] When the City eliminated paid release time in the firefighters' contract, the City provided each firefighter in the unit, whether union member or not, with 8.5 hours of additional vacation time, *id.* ¶ 128, once again showing that release time *is* part of individual employee compensation.

expression than the current mandatory regime, the existing MOU must fail the standard set out in *Janus*, 138 S. Ct. at 2466.

III. Paid release time violates Appellants' associational rights because they are compelled to be associated with the Union through the MOU, and the Union engages in activities while on paid release time that are not viewpoint neutral.

The City, through the MOU's release time provisions, has imposed on Appellants a government-appointed representative that purportedly works and speaks on their behalf, even though they do not wish to be represented by or associated with that "representative." Because Appellants are forced as a condition of employment to be associated with the Union, its activities, and its messages, and because those activities are not viewpoint-neutral, the MOU violates their right against compelled association.

The constitution protect the basic "right to associate for the purpose of engaging in those activities protected by the First Amendment," *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136 ¶ 13 (App. 2001), and, correspondingly, a "right to eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463. In other words, the freedom to associate includes the "freedom not to associate." *Roberts*, 468 U.S. at 623.

Appellants are forced through the MOU to be associated with the Union, its activities, and its messages as a condition of employment. The Union's activities while on release time are not viewpoint-neutral; indeed, the very purpose of a

union is to advance a specific viewpoint, and the very purpose of release time is to advance *this* Union's specific viewpoint.[9]

The government cannot compel individuals to associate with an organization or its message as a condition of employment. A long string of precedent has held precisely this. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977), the Court held that non-union members could not be forced, as a condition of employment, to support "ideological causes not germane to [a union's] duties as collective-bargaining representative." In *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990), it held that bar dues could only be used to fund activities "germane" to the practice of law. And, in *Janus*, it held that non-union member public employees cannot be compelled to subsidize *any* union activities, including even "germane" ones, because the speech and activities of public sector unions are "overwhelmingly of substantial public concern" and inherently involve "political issues." 138 S. Ct. at 2477, 2480. Indeed, *Janus* questioned whether compelling public employees to be associated with a union for purposes of collective bargaining *at all* violates the associational freedoms of those employees. *Id.* at 2478 (Unions acting as exclusive representatives is "itself a

[9] The Union is a private entity serving its own private interests. There is nothing objectionable about that—indeed, it is their obligation. The constitutional problem arises from forcing Appellants to be associated with, and to subsidize, its pursuit of those private interests.

significant impingement on associational freedoms that would not be tolerated in other contexts.").

Because release time is used for activities that have nothing to do with union representation, and because Appellants are forced to associate with those activities under the MOU, the release time provisions violate Appellants associational rights under *Janus*, and the many cases that preceded it.

The Arizona Supreme Court also had occasion to examine "the *Abood* line of cases" in *May*, 203 Ariz. 425. There, the court set out a framework relevant to examining compelled association cases like this one. "[G]overnment," it said, "may not condition involuntarily associated individuals' opportunity to receive a benefit or *ply their trade or profession* upon their compelled support of speech with which they disagree." *Id.* at 428 ¶ 15 (emphasis added). It then examined three factors to determine if a violation under the *Abood* line of cases has occurred.

First, it asked whether payment of the surcharge at issue was "a precondition to employment." *Id.* Here, of course, it is, since the terms of Appellants' employment are governed by the MOU. APP.035 ¶¶ 22–24, APP.034 ¶¶ 11–13, 17.

Second, *May* observed that "the *Abood* line of cases is predicated upon the existence of an association." 203 Ariz. at 428 ¶ 16. There is no doubt that

the Union is an association, organized for expressive purposes. APP.033 ¶¶ 6, 9.

Third, *May*, observed that the speech at issue in the *Abood* line of cases "was viewpoint driven," and that "the organization chose the funded speech based on its content," which meant that "the objectors were compelled to be associated with a group message with which they disagreed." 203 Ariz. at 429 ¶ 17. That is also true here. There is no doubt that the Union—not the City—controls, manages, and directs the Union's activities and speech when using release time. APP.037 ¶ 45. And the Union, of course, uses release time for political and lobbying activities, and other activities that express a clear and definitive *viewpoint* on pressing matters of public concern. APP.039–43 ¶¶ 61–108. Thus, the Arizona Supreme Court, in surveying federal precedent on these First Amendment issues, set out a test that the MOU plainly fails.

By virtue of being subject to the MOU and the release time provisions, Appellants are "linked" against their will to the Union's "specific message, position, [and] viewpoint." *May*, 203 Ariz. at 429 ¶ 17. Indeed, the City does not even require that release time be used for activities "germane" to the Union's role as an exclusive representative. Instead, the City lets the Union use release time when and how the Union sees fit to advance the Union's mission and objectives. In other words, "the organization chose the funded

speech based on its content," *id.*, while forcing Appellants to subsidize and be associated with those activities. For these reasons, paid release time fails the compelled association test set out in *May* and is therefore unconstitutional.[10]

IV. Paid release time violates Arizona's Right to Work laws because Appellants are forced to pay the Union and participate in "form and design" with release time activities that are unrelated to the Union's representational duties.

Arizona's Constitution and Right to Work laws prohibit compulsory union membership, payment of *any* mandatory fees to a union, or any other mandate whereby membership or participation in a union or a union's activities are, "in any form or design," required as a condition of employment. Ariz. Const. art. XXV; A.R.S. §§ 23-1301–1307; *AFSCME, Local 2384*, 213 Ariz. at 367 ¶ 23. Paid release time violates these protections because Appellants are forced to finance the practice. And even if release time were not charged as part of their compensation, it would still violate Right to Work laws because Appellants are forced to be associated with Union activities that are unrelated to the Union's role as exclusive representative.

Forcing Appellants to fund release time activities violates Arizona's Right

[10] For the reasons set out in Section II above, paid release time also fails the exacting scrutiny test used in *Roberts*, 468 U.S. at 623, because it does not serve compelling government interests, and because any purported government interest can be served through means significantly less restrictive of Appellants' associational freedom.

to work laws. In *Local 2384*, the Court of Appeals examined whether Right to Work protections prohibited the compulsory payment of union dues by non-union members as a condition of employment. *Id.* at 367 ¶ 24. It concluded that the Constitution and Right to Work statutes prohibit *any* mandatory payments by non-members to a union as a condition of employment, whether those payments amount to full dues or some share of union dues that the union attributes to exclusive representational duties. *Id.* The constitutional and statutory protections at issue "forbid both management and labor from imposing, as a condition of employment, the requirement that any person participate in *any form or design* of union membership," the court said. *Id.* at 367 ¶ 23 (emphasis added).

Appellants do not belong to the Union, do not pay Union dues, and do not wish to participate in Union activities—yet the MOU requires them to direct part of their compensation to the Union to underwrite its release time activities. That means each individual employee is forced to pay for release time—i.e., pay for Union activities—as a condition of employment. Since the cost of release time to Appellants is nearly as much as voluntary union dues, it is "in its practical effect … little different than mandatory membership dues." *Id.* at 366 ¶ 23.

Even if release time were not charged as part of Appellants' compensation, it would still be prohibited because Arizona's Right to Work protections forbid the City and the Union from imposing "the requirement that any person

participate in *any form or design* of union membership," whether directly or "indirectly." *Id.* at 366–67 ¶¶ 23–24 (emphasis added). Here, the Union is the exclusive representative of Unit 2 employees, including Appellants. Phoenix City Code ¶ 2-210(2), (5). This means the Union enjoys the "unilateral right" to act as the sole agent representing all Unit 2 employees—whether members or not, whether they consent or not—and individual employees may not negotiate directly with their employer, nor may they be represented by any other agent. APP.034–35 ¶¶ 18–20. In other words, pursuant to the MOU, the Union is Appellants' sole spokesperson with the City as a condition of employment—regardless of their choices.

Assuming this forced representation arrangement is even lawful under the Right to Work laws, release time goes a step further. Specifically, the Union uses release time for activities that have nothing to do with its "exclusive representational duties," including meeting with and endorsing candidates for political office, lobbying the City Council, recruiting new members, and conducting other activities that advance the Union's own interests. APP.039–43 ¶¶ 62–108. Because release time is provided for under the terms of an MOU in which the Union is Appellants' exclusive representative, Appellants are forced to support and to associate with the Union when it engages in these activities. They cannot direct these activities, or change them, or eliminate them.

Appellants are therefore unlawfully compelled as a condition of employment to participate in Union membership activities, in both "form" and "design"—activities they do not wish to subsidize, participate in, or be associated with.

As a result, the release time provisions violate Arizona's Right to Work laws.

V. The release time provisions violate the Gift Clause because the Union uses release time in ways that do not serve a public purpose at all, and the City is not receiving direct, contractually obligatory benefits in return for release time expenditures.

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. IX, § 7. This "constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests," *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346, 349 (1984), and Arizona courts have expressly applied this Clause to release time requirements. *Id.*; *see also Cheatham*, 240 Ariz. at 320 ¶ 21.

To survive a Gift Clause challenge, a transfer of public funds to a private entity must (1) serve a public purpose and (2) reflect adequate consideration. *Schires*, 250 Ariz. at 374–75 ¶ 7; *Turken*, 223 Ariz. at 345 ¶ 7, 348 ¶ 22. These are conjunctive requirements, so a failure of either requirement will violate the Gift Clause. *Id.*

Here, the City directs release time payments from Appellants' compensation to the Union without Appellants having any ability to "opt out." Paid release time, in other words, is a compulsory payment under the terms of the MOU. And because this compulsory payment is used for *private* rather than *public* purposes, and because the City is receiving constitutionally insufficient consideration for the release time payments, the arrangement fails both Gift Clause requirements.

A. Paid release time serves the Union's private interests, not public purposes.

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 interestsof any individual." *Turken*, 223 Ariz. at 347–48 ¶¶ 19–20. As the Supreme Court recently clarified, "a public purpose promotes the *public* welfare or enjoyment." *Schires*, 250 Ariz. at 375 ¶ 8 (emphasis added). Further, "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Turken*, 223 Ariz. at 346 ¶ 14.

Although government entities have broad discretion in determining what constitutes a "public purpose" under the Gift Clause, the release time provisions at issue are so plainly earmarked for private interests that they do not survive even this deferential inquiry for two reasons. First, most of the Union's use of release time, including for political and lobbying activities, directly advances the Union's

private interests, not the public interest. Second, even if paid release time *could* serve some abstract public purpose, the City fails to exercise control and oversight over the use of release time to ensure that any public purpose is, in fact, achieved.

Release time is predominantly used for activities that promote the Union's private interests. The MOU expressly states that the four full-time release positions are provided to the Union "to engage in lawful *union* activities." APP.054 § 1-3(A)(1) (emphasis added). In other words, full-time release is not granted to engage in *City* activities, or activities to "promote[] the public welfare," *Schires*, 250 Ariz. at 375 ¶ 8—but to engage in *private* "[U]nion activities." And that is exactly what the Union does while using release time.

As we know, paid release time is used extensively for political and ideological speech, which qualitatively *cannot* serve a public purpose. APP.039–40 ¶¶ 67–75; APP.042–43 ¶¶ 100–02.[11] But even if release time *could* somehow be said to serve a public purpose, the City has failed to supervise or monitor the use of release time to ensure that any purported public interests are, in fact, being accomplished.

In *Kromko*, 149 Ariz. at 321, the Supreme Court made clear that the government may give public resources to a private entity—a business or a union—

[11] Again, use of City resources for political activities "in any context that implies an employment relationship with the City" is expressly forbidden by City policy in every *other* contract. .

only so long as the "operations" of that entity "are … subject to the control and supervision of public officials" to ensure that public purposes are actually being carried out. That case involved a transaction between the Arizona Board of Regents ("ABOR") and a nonprofit corporation in which public property was given to the corporation to operate a hospital. The court said this was constitutional because, *inter alia*, (1) ABOR maintained authority to approve the "internal organization of the nonprofit," (2) the appointment of the nonprofit's directors had to satisfy strict limitations, (3) ABOR maintained authority to approve transactions by the nonprofit that affected the state, and (4) the nonprofit was required to make financial reports to ABOR. *Id.* These requirements ensured that the nonprofit was using public resources for public purposes instead of simply using those public resources for its own ends. *Id.*

But here, the MOU does exactly the opposite. The City exercises effectively *no* oversight over, or supervision of, employees on full-time release—and there is no accountability for such persons; they set their own schedules and direct their own activities. APP.037 ¶ 43. No one in the City monitors their performance or provides them duty assignments, or places prohibitions on their activities. *Id*. ¶¶ 44–45. Release time employees provide *no accounting of any kind* to the City about how they spend release time! APP.037–38 ¶ 46. No one in the City selects which officers use full-time release, and these officers can't be

removed from their release time positions by the City. APP.039 ¶ 59. This is extraordinary, because there is *no* other context in which control over on-duty City personnel is delegated entirely to a private entity.

In short, nothing is in place to ensure that the release-time employees are accomplishing public purposes, and the explanation is simple: because they aren't. The grant of release time is therefore not for a public purpose, but for a private one—which is unconstitutional. *Kromko*, 149 Ariz. at 321. Because public control is utterly lacking, the City has abused its discretion by failing to ensure release time achieves a public purpose.

B. There is insufficient consideration for paid release time because the City receives no direct, obligatory return for the release time payments.

To survive Gift Clause scrutiny, a challenged expenditure not only must serve a public purpose but must also be supported by adequate consideration. That means the recipient of public funds must make a binding contractual promise to give the public some measurable return value that is equivalent to what it receives. To resolve this part of the constitutional analysis the Court "focuses on what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires*, 250 Ariz. at 376 ¶ 14. Importantly, "anticipated indirect benefit[s]" are "valueless under [the consideration] prong" of the Gift Clause test, and therefore

cannot be included on the "get" side of the comparison. *Id.* at 377 ¶ 16. Instead, the comparison "focuses … on the objective fair market value[s]" on both sides. *Id.* at 376 ¶ 14 (emphasis added; citation omitted).

Here, the the Union receives $1 million—but gives *no* direct, contractually obligatory services in return. That is, the Union receives several full-time government workers at no expense who provide no public services in exchange. That violates the Gift Clause.

The City may contend that it is receiving "efficient labor relations" in exchange for release time, but even if that were true—which it is not[12]—it would not remedy the constitutional violation, because the Union has not "signed an enforceable promise to provide the City with any particular" degree of efficiency or harmonious labor relations (or anything else) in exchange for the release time. *Id.* at 377 ¶ 16. In other words, under the MOU the Union does not *promise* to do *anything* to ensure that efficient labor relations occur. APP.043 ¶¶ 109–12. As a result, as in *Schires*, "this contract term may be too indefinite to enforce, much less value." *Id.* at 378 ¶ 21. And any speculative, anticipatory benefits of paid release time are not constitutional consideration.

[12] In fact, the presence of paid release time may result in *worse*, not better, labor relations. *See* APP.044 ¶ 114; APP.207–10 (citing numerous examples of how paid release time underminesemployer-employee relations and "contradicts the normal employee/ employer relationship.").

Lacking both a public purpose and consideration, the release time payments violate the Constitution.

VI. The trial court's extraordinary attorney fee award should be reversed because it is contrary to existing law, including clear Supreme Court precedent, and, if sustained, would chill meritorious public interest litigation.

The trial court's attorney fee award for $355,681 from two heavy equipment mechanics employed by the City who brought a public interest free speech case challenging the constitutionality of government action is contrary to law and public policy. That award violates Supreme Court precedent, is an affront to the right of these Appellants—and all Arizonans—to seek redress for constitutional violations, and would chill cases across the ideological spectrum that challenge the legality of government action in good faith. The award was also made under a statute that applies to contract actions, not cases involving constitutional or statutory claims.

In *Wistuber*, the Supreme Court made clear that as a matter of judicial policy fees should *not* be awarded under Section 12-341.01 in cases that—like this one—challenge the constitutionality of government action. 141 Ariz. at 350. There is no sound basis for departing from that policy; on the contrary, this is precisely the type of case in which it is intended to be applied. This case seeks only declaratory and injunctive relief, not monetary damages, and it presents novel and meritorious claims of statewide concern. If upheld, the trial court's fee award would chill the

rights of citizens throughout the state seeking to vindicate their constitutional rights without fear of government reprisal.

A. The Arizona Supreme Court has directly rejected an award of attorney fees under A.R.S. § 12-341.01 in a nearly identical situation—and has instructed other Arizona courts to do the same.

The Supreme Court has squarely held that as a matter of judicial policy, attorney fees should not be awarded in cases that challenge the constitutionality of government action in good faith. In rejecting a fee request in a situation nearly identical to this one, *Wistuber* said:

> Here, petitioners are challenging the constitutionality of the action of a public body. An award of attorney's fees would be contrary to public policy in this case because it would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials. Where aggrieved citizens, in good faith, seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be awarded. Courts exist to hear such cases; we should encourage resolution of constitutional arguments in court rather than on the streets.

141 Ariz. at 350. The Supreme Court recently reiterated this point in two related cases, *Piccioli v. City of Phoenix*, 249 Ariz. 113, 119 ¶ 24 (2020), and *AFSCME Local 2384 v. City of Phoenix*, 249 Ariz. 105, 113 ¶ 33 (2020).

Wistuber, like this case, was a constitutional challenge to paid release time, and involved a collective bargaining agreement between a government agency and a union. Yet the Court said fees were *not* available because the constitutional claim in that case "differ[ed] from the type of contract action"

contemplated by Section 12-341.01. 141 Ariz. at 350. That is because fee awards assessed against citizens in constitutional cases, such as this one, would be against public policy.

Wistuber set forth a judicial policy that aims to shelter good faith claims regarding the lawfulness of government actions from fee awards that could deter such actions.[13] In this case, Appellants seek only equitable relief—and no monetary damages—for allegations that the City violated their constitutional and statutory rights. They were only able to file this case because they are represented by a public interest firm *pro bono*. *See* APP.015 ¶ 18. An award of attorney fees would discourage Appellants from "question[ing] the legitimacy of the actions of public officials." *Wistuber*, 141 Ariz. at 350. And Appellants should not be punished for seeking, in good faith, "a determination of the legitimacy of governmental actions." *Id.* In short, there is no sound reason to depart from the *Wistuber* rule in this case, and the trial court offered none.[14]

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[13] Courts obviously retain discretion to award fees in *frivolous* cases, but in non-frivolous cases like this one, they should avoid chilling important public-interest litigation. A fee award here would undermine the policy set out in *Wistuber* and other cases that seek to *encourage* participation in public interest litigation. *See also* *Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 334 (App. 1993) (fee awards under the private attorney general doctrine encourage private parties to challenge government actions).

[14] In addition to misapplying the *Wistuber* rule, the trial court misapplied every factor set out by the Supreme Court in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). First, Appellants alleged a meritorious claim for relief under the Arizona Constitution and statute on an issue of statewide importance.

B. Section 12-341.01(A) *does not* apply to statutory and constitutional claims, and *all* of Appellants claims are either statutory or constitutional.

The trial court also erred by awarding fees under A.R.S. § 12-341.01 because that statute only applies to *contractual* cases, not cases involving constitutional or statutory claims. Arizona courts have routinely held that it does not apply to constitutional or statutory causes of action.

In *Pettinato v. Indus. Comm'n of Ariz.*, 144 Ariz. 501, 504 (App. 1984), this Court rejected a fee motion brought under Section 12-341.01 because the appellants asserted their rights to worker's compensation under the Arizona Constitution. Even though there was an underlying employment contract, the Court said fees were unavailable, because "[t]he right to benefits under the Worker's Compensation Act is constitutional … and statutory. … Its benefits are triggered by a work-related injury, not the underlying employment agreement." *Id.* In other words, the court distinguished between claims "arising out of a contract"

No party alleged that these claims were frivolous, or moved to dismiss—and this Court adjudicated the merits of the claims. Second, this case sought only declaratory and injunctive relief, *see* App.012, and both the City and Union *agreed* that settlement could likely not be achieved. Third, Appellants are blue collar workers employed by the City; forcing them to pay a fee award would cause extreme hardship. Fourth, this case presents novel and important questions of constitutional law on issues of statewide importance, most of which are issues of first impression. Finally, three of the four claims have never been adjudicated in Arizona *at all*, and the only one that has, the Gift Clause claim, was decided in a manner later overruled by the Supreme Court in *Schires*, 250 Ariz. at 378 ¶ 23.

in the sense meant by Section 12-341.01(A) and constitutional and statutory cases where that Section should not apply. *See also Smith v. City of Phoenix*, 175 Ariz. 509, 516 (App. 1992) (granting attorney fees under Section 12–341.01(A) with respect "to the contract claim, *not the constitutional claims*." (emphasis added)).

Here, the rights Appellants seek to vindicate are *constitutional or statutory*,[15] not contractual. Appellants do not allege breach of contract, do not seek to have contractual terms enforced or clarified, are not asserting any rights under the MOU, and are not alleging "any contractual claim against the City of Phoenix, the Union, or anyone else." APP.015 ¶ 16, APP.018 ¶ 16. Indeed, Appellants are not even *parties* to the MOU. *See Hanley v. Pearson*, 204 Ariz. 147, 151 ¶ 19 (App. 2003) (fee award under Section 12-341.01 is "not justified" when parties against whom fees are sought were not parties to the contract forming the basis of dispute). They have never voted on or otherwise ratified the MOU. APP.116 at 28:3–29:9; APP.155 at 16:24–17:13. They have not "assent[ed] by either words or acts," *Barmat v, John & Jane Doe Partners A-D*, 155 Ariz. 519,

[15] Arizona law is clear that Section 12-341.01 also does not apply to statutory claims. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30 ¶ 11 (App. 2009) (it "does not apply … to 'purely statutory causes of action.'"); *see also Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325 (App. 1993) ("If a cause of action is purely statutory, Section 12-341.01(A) does not apply"). The Right to Work claim in this case is both constitutional and statutory.

521 (1987), to the MOU between the City and the Union. They had no choice in the matter. APP.014 ¶ 11, APP.017 ¶ 11; *see also* Phoenix City Code, Ch. 2, art. XVII.

Instead, Appellants allege that their *constitutional* rights are violated due to expenditures the City is making under the City Code and its collective bargaining agreement with a third party. And Section 12-341.01 does not apply where "the contract is a factual predicate to the action but not the *essential basis* of it." *Keystone Floor*, 223 Ariz. at 30 ¶ 11 (citations omitted; emphasis added). The essential basis of Appellants' claims here is the constitutional and statutory protections the City is violating—not the application of the MOU or any other contract.[16] Indeed, Appellants' claims would exist *even in the absence* of the MOU—for instance, if the City forced Appellants to finance Union activities through some other mechanism. *ML Servicing Co. v. Coles*, 235 Ariz. 562, 570 ¶ 31 (App. 2014) ("[t]he test [under Section 12-341.01] … is whether the plaintiff would have a claim 'even in the absence of a contract.'" (citation omitted)).

[16] A.R.S. § 12-341.01 is also inapplicable where, as here, the cause of action arises out of a duty implied in law, rather than a contractual obligation. *See, e.g.*, *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15–16 ¶ 27 (App. 2000). In this case, the City's duty to refrain from infringing on Appellants' rights derives from the Constitution and statute, not the MOU. "When the duty breached is one implied by law … it cannot be said that the plaintiff's claim would not exist 'but for' the contract." *Id.*; *accord*, *Morris v. Achen Const. Co.*, 155 Ariz. 512, 514 (1987). The City's duty to comply with the Constitution and state law exists independent of any contract.

The purpose of Section 12-341.01 is to encourage settlement of *contractual* disputes, not to punish citizens trying to resolve constitutional claims against the government. *Hall v. Read Dev., Inc.*, 229 Ariz. 277, 282 ¶ 18 (App. 2012) (Section 12-341.01 is intended to "promot[e] settlements and thus reduc[e] caseloads involving *contractual* matters" (emphasis added)); *see also Nationwide Mut. Ins. Co. v. Granillo*, 117 Ariz. 389, 395 (App. 1977) (Section 12-341.01 "allow[s] [fees], *on a very limited* basis…only when *the action was in the nature of a contract* and was disputed." (emphasis added)). Appellants are not parties to the collective bargaining agreement and would not be authorized to settle any dispute involving that agreement. The purpose of Section 12-341.01 would not be served by awarding fees in this case, and that statute is not and was never intended to apply to citizens seeking to vindicate their constitutional rights in good faith. Because Section 12-341.01 does not apply when a contract is merely a factual predicate to claims that arise from a party's duty to comply with the law, the Court should reverse the fee award against citizens who are challenging the constitutionality of government action.

C. A fee award in this context would penalize protected First Amendment activities.

Finally, a fee award here would amount to sanctions against protected First Amendment activities, thus penalizing protected constitutional concerns. The U.S. Supreme Court has held that public-interest litigation is a "mode[] of expression

and association protected by the First and Fourteenth Amendments." *NAACP v. Button*, 371 U.S. 415, 428–29 (1963). The protections specifically apply to nonprofit public interest legal organizations that "engage[] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *In re Primus*, 436 U.S. 412, 431 (1978). As the Court declared in *Button*, "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.* at 433.

A fee award in this case affects public interest litigation the same way. It would chill the activities of public interest organizations across the ideological spectrum. This is particularly true because clients of public interest firms and their attorneys would have to generate not only their own funding, but also sufficient resources to cover the other side's fees in the event of adverse determination. As the state and federal Supreme Courts have made clear, public interest cases should be *encouraged*, not *discouraged* through the threat of a fee award: "Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S.

379, 397 (2011); *see also* *Piccioli*, 249 Ariz. at 119 ¶ 24; *City of Phoenix*, 249 Ariz. at 113 ¶ 33.

Section 12-341.01 applies to and is intended to promote settlement of *contractual* claims. That statute would be perverted if used, as in this case, to bar citizens from challenging the legality of government action in good faith.

CONCLUSION

Based on the foregoing, Appellants request that the trial court's judgment be reversed on all claims and that the attorney fee award against Appellants be vacated.

NOTICE UNDER RULE 21(A)

Appellants request costs pursuant to A.R.S. § 12-341 and attorney fees under the private attorney general doctrine.

Respectfully submitted March 21, 2022 by:

/s/ *Jonathan Riches*
Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

COURT OF APPEALS
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DIVISION ONE

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CERTIFICATE OF COMPLIANCE

Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Plaintiffs / Appellants

Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Opening Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 12,642 words, excluding table of contents and table of authorities.

Respectfully submitted March 21, 2022 by:

/s/ *Jonathan Riches*
Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

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CERTIFICATE OF SERVICE

Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Plaintiffs / Appellants

The undersigned certifies that on March 21, 2022, she caused the attached Appellants' Opening Brief and Appendix to be filed via the Court's Electronic Filing System and electronically served a copy to:

John Alan Doran
Matthew A. Hesketh
LAW OFFICES SHERMAN & HOWARD L.L.C.
201 East Washington Street, Suite 800
Phoenix AZ 85004-2327
jdoran@shermanhoward.com
mhesketh@shermanhoward.com
lhinkel@shermanhoward.com
Attorneys for Defendant/Appellee

Daniel Bonnett
Jennifer Kroll
Martin & Bonnett, PLLC
4647 N. 32nd St., Ste. 185
Phoenix, AZ 85018
dbonnett@martinbonnett.com
jkroll@martinbonnett.com

Attorneys for Intervening Defendant/Appellee

/s/ *Kris Schlott*
Kris Schlott, Paralegal