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' REPLY TO CITY'S ANSWERING BRIEF

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I. Appellants pay for release time as part of their compensation.

Nearly the entirety of the Defendants' defense of paid release time hinges on the argument that Appellants do not pay for release time. This is legally and factually incorrect for three reasons: (1) the plain language of the MOU says that Appellants fund release time "as part of…total compensation," APP.054 § 1-3(A); (2) the Arizona Supreme Court has squarely held that release time is paid for by each *individual* employee, *Cheatham v. DiCiccio*, 240 Ariz. 314, 318–19 ¶ 14 (2016); and (3) the City and the Union have *always* treated release time as individual employee compensation. Appellants' Opening Br. ("Op. Br.") at 14–19.

That Appellants fund release time is so obvious that the City originally *admitted it* in their Answer to the Complaint by agreeing that release time expenditures in the MOU "are paid for by all Field Unit II employees, in the form of reduced wages and benefits, whether those employees belong to the Union or not." APP.006 ¶ 34; SAPP.008 ¶ 34. The City also agreed that "City employees who are members of the Field Unit II bargaining unit, including Plaintiffs, are obligated to finance release time." *Id.* at ¶ 35.[1] When that position no longer suited

[1] The City also took the position that release time is funded out of employee compensation in a previous challenge to paid release time. *See Cheatham v. DiCiccio*, 238 Ariz. 69, 72 ¶ 8 (App. 2015) ("The City and PLEA argued that…release time was…part of the officers' compensation package."). Until, of course, that position did not suit the City's litigation strategy in *this* case. Collateral estoppel should bar the City from asserting an inconsistent position from the position it took and benefited from in *Cheatham* on an identical issue that it

the City's litigation strategy, it sought to deny what it previously admitted by amending its Answer.[2]

The City's ever-changing position on this issue remains unconvincing.

A. The City's reduction of Appellants' wages to fund release time violates Appellants' rights just the same as withholding compulsory union dues.

The City first asserts that Appellants lack standing and purportedly suffer "only indirect harm," because "the City is *directly* responsible for funding release time using public funds." City Br. at 19 (emphasis added). But that is nonsensical semantics. Of course, the City pays Appellants "using public funds"—that is axiomatic and undisputed. They are government employees. Just as Mark Janus's salary was paid using public funds, including the union dues that were deducted from his paycheck, *Janus v. AFSCME*, 138 S.Ct. 2448, 2461 (2018), so too are Appellants' salary and benefits funded with public money. But compulsory payment of publicly-funded wages to the Union does not excuse the constitutional violation, it *is* the constitutional violation.

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fully litigated. *Marriage of Thorn*, 235 Ariz. 216, 222 ¶ 27 (App. 2014); *Mecham v. City of Glendale*, 15 Ariz. App. 402, 404 (1971).

[2] The City should be judicially estopped from attempting to change the undisputable facts to fit the law. *E.g.*, *Martin v. Wood*, 71 Ariz. 457, 459 (1951) ("It is a general rule that a party is bound by his judicial declarations and may not contradict them in a subsequent action or proceeding.") (*quoting* 19 Am.Jur., Estoppel, § 74, p.712).

The City tries to distinguish *Janus* by claiming that "no money is taken directly from [Appellants'] paychecks" to fund release time. City Br. at 19; *see also* Union Br. at 31 (the money that funds release time "was never included in [Appellants'] gross pay.") But *how* release time is deducted from Appellants' compensation makes no difference. An "indirect" payment to the Union violates Appellants' constitutional rights just the same as a "direct" payment to the Union. *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 396 (1923) ("It is axiomatic in law that what cannot be done directly may not be done by indirection."). Indeed, *Janus* held exactly that: "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 affirmativelyconsents to pay." 138 S.Ct. at 2486 (emphasis added). Just like the agency fees in *Janus*, release time is indisputably a "payment to the Union" that has been deducted from Appellants' pay.

That is precisely what the MOU says: "[t]he cost to the City for these release positions and release hours, including all benefits, has been charged as part of the total compensation." 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) ("Where parties bind themselves by a lawful contract…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." (citation omitted)). Yet the City and the Union never even attempt to address the plain language of their contract.

Instead, Defendants try a new definition of "total compensation" as "the total cost … of all economic items in the MOU." City Br. at 26; Union Br. at 28. Even if the phrase "total compensation" were ambiguous in the MOU—it is not[3]—it is a fundamental tenet of contract law that ambiguities must be construed against the parties who drafted the contract. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 260 (App. 1983). In this case, the City included the "total compensation" provision in the MOU because it thought it could avoid a Gift Clause violation (from its experience in the *Cheatham* case) by including that provision. The City now contends that the provision means something else entirely because it "hopes the court will adopt a construction by which [the contract terms] would mean another thing more to his advantage." *Hamberlin v. Townsend*, 76 Ariz. 191, 196 (1953). That is impermissible under the doctrine of judicial and collateral estoppel, and in any event, any ambiguity the City has attempted to create with its conflicting definitions of "total compensation" must be resolved against the City.

[3] *Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277 (App. 1993) (A contract is not ambiguous just because the parties to it disagree about its meaning.).

The Defendants' also attempt to deflect from the plain language of the MOU by analogizing release time to "coworkers' wages and benefits," City Br. at 26, and *other* types of compensation, such as overtime payments like "Call Out Pay," Union Br. at 30. But release time, and the way it is funded, is nothing like "Call Out Pay" or other types of compensation. First, the MOU says release time "has been charged as part of the total compensation," APP.054 § 1-3(A), and that language *only* appears with respect to paid release time, *not* to other forms of compensation. *Herman Chanen Const. Co. v. Guy Apple Masonry Contractors Inc.*, 9 Ariz. App. 445, 447 (1969). ("[T]he expression in a contract of one or more things of a class, implies the exclusion of all things not expressed."). Second, Call Out Pay is provided to individual employees, but release time is provided *directly to the Union* for the *Union* to determine how, when, and where it is used. Thus, other forms of compensation do implicate the free expression, association, and Right to Work rights of Unit 2 employees, because it is not used for Union political activities against Appellants' will. Third, Call Out Time and allowances involve *de minimis* sums. By contrast, release time costs Unit 2 employees nearly $1,000,000 over the course of the MOU, which is nearly 20%[4] of the annual pay raise for all of Unit 2—money that, although deemed part of employee

[4] The entire pay raise for Unit 2 employees in 2020 was approximately $2.5 million. SAPP.115.

compensation in the MOU, was not given to them, but was instead allocated to the Union for its own political purposes. Thus, there is no question that release time affects Appellants' compensation. And quibbling about Call Out Pay or other compensation has no application to the question of whether release time is part of total compensation or whether use of release time for Union activities violates Plaintiffs' constitutional rights.

But this Court need not indulge the Defendants' attempts to redefine "total compensation," because "[i]nterpreting the MOU is a legal question." *Cheatham*, 240 Ariz. at 318–19 ¶ 14. And the legal question of whether release time is paid for as part of individual compensation to Unit 2 employees was definitively resolved by the Supreme Court in *Cheatham*, where it 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*." *Id.* (emphasis added). That finding, in fact, was the *ratio decidendi* of that case. *Cheatham* is dispositive on the issue of whether release time is paid for as part of Appellants' individual compensation. It is.

The City tries to contort the record by contending that Appellants "repeatedly admitted" that they "do not pay for release time" in their depositions. City Br. at 27. No, they did not. Instead, Appellants' testimony was that the money used to fund release time was not paid to them because it was *illegally*

diverted from their pay. SAPP.105 at 214:6-215:8. In other words, the money used to fund release time was not in their possession because Appellants' compensation was reduced to pay for release time. *That* was Appellants' testimony and has been the basis of Appellants' complaint since this case was filed. APP.008–10 ¶¶ 53–54, 65, 70. *See* SAPP.110 at 110:11–15. (When asked, "Is it also your understanding that this MOU that does currently exist charges paid release time as part of total compensation to all Unit 2 members?" Plaintiff Harder answered, "Yes."). *See also* SAPP.105 at 215:3–8 (When asked, "[I]s it also your understanding that part of your compensation as a Unit 2 member is then directed for paying release time?" Plaintiff Gilmore responded, "Yes.").

Appellants' testimony was equally consistent regarding their objections to the uses of paid release time. When asked, "Is it your contention that having part of your compensation as it's funded under the MOU directed towards union activities also [is] a violation of your associational, free expression, and protections under Arizona's right-to-work laws?" Plaintiff Gilmore responded, "Yes." SAPP.105 at 216:15–20. Similarly, when asked, "[I]s it also true that you object to have any portion of your compensation directed toward paid release time?" Plaintiff Harder responded, "Yes." SAPP.110 at 110:17–20; *see also* SAPP.108–9 at 105:21–106:7 (objecting to paid release time for political activities); 108:18–21

(objecting to paid release time for recruiting activities); 109:17–19 (objecting to paid release time to process grievances).

Thus, despite crafty deposition questioning directed at two blue-collar City employees, Appellants have been abundantly clear about two things since the outset of this litigation: (1) Appellants' compensation is directed toward funding release time, and (2) Appellants object to having their compensation used for Union activities. The Defendants' contentions to the contrary are a semantics game. Appellants fund release time in the form of wages and benefits that the City unlawfully reallocated from Appellants to the Union to use for union activities.

B. Appellants' compensation was reduced in *this* MOU, and continues to be reduced, to fund release time.

The City next claims that Appellants are not injured in this case because they "might have received more compensation *if* release time were eliminated." City An. Br. at 20. In other words, the City argues that Appellants' free expression and association claims are based on the Appellants having not received a hypothetical increase to their personal compensation. *Id.* at 22.

But this misconceives the nature of the injury. Appellants would have no free expression claim if the City were to redirect the release time money in this MOU to fixing potholes.[5] Rather, Appellants' constitutional injuries are a result of

[5] Appellants are not asking for some "hypothetical compensation increase." City Ans. Br. At 28. Their complaint seeks declaratory and injunctive relief to halt City

the City forcing them to subsidize Union speech against their will—by directing funds that the MOU identifies as Appellants' compensation to Union's activities, including its political and lobbying activities.

That argument is not predicated on hypotheticals at all, because in *this* contract, challenged in *this* case, *these* funds were given to the Union to fund release time as part of Appellants' pay. Here, the record is uncontroverted. When release time was previously eliminated, Appellants received 8 additional hours of vacation pay; when release time was restored in *this* MOU, the City used those 8 hours of vacation leave provided to every Unit 2 employee, including Appellants, to pay for release time. APP.045 ¶¶ 115–123; SAPP.044–45 at 41:19–42:1, 42:3–21; SAPP.035–41 § 1-3; SAPP.027–30 at 49:3–8, 57:16–22, 61:8–14, 77:16–21; APP.127 at 71:9–24; SAPP.098; SAPP.099. According to the City's Research and Budget Director the 8 hours that the City took from Appellants' compensation was provided "in lieu of the union release bank of hours and full-time release positions." APP.033 ¶ 7; APP.044 ¶ 117; SAPP.044–45 at 41:19–42:1, 42:3–43:21; SAPP.035–41 § 1-3. In other words, *these* Appellants in *this* case had 8 hours of vacation leave—amounting to $647.21 per employee—directly removed from their paychecks to fund release time.[6] Thus, the question is not whether

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actions that are currently infringing on their constitutional rights. APP.012 ¶ A. That is precisely the relief the *Janus* Court ordered. 138 S.Ct. at 2486.

[6] Nor are Appellants claiming "a right in perpetuity" to additional vacation hours,

Appellants' have "received all compensation to which they were entitled," City Br. at 18, or whether Appellants are injured because of what *might* happen *if* release time were eliminated. They are injured because of what *did* happen to their compensation when the City funded release time in *this* MOU.

The City also makes the factually incorrect assertion that "Plaintiffs … admitted they were not deprived of anything promised to them." City. Br. at 26. Appellants made no such "admissions." In fact, Appellant Gilmore directly testified that he lost vacation leave because of paid release time. SAPP.101 at 13:17–23 ("At the beginning of the year, we were given time put in our vacation bank, and the City and the union would send us an email to donate the time back to the union for release time. Well, they just took it away."). Thus, there is nothing "speculative," City Br. at 20, about the harm to Appellants. On the undisputed record, they had their wages reduced to fund release time. The Defendants' assertions that Appellants did not "pay for release time through a reduction to their promised compensation," City Ans. at 18–19, is provably false—and has been proven false. The record plainly shows that release time is funded with Plaintiffs' compensation.[7]

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as the Union asserts. Union Br. at 32. They are instead asking that their current compensation not be diverted to Union activities in the form of declaratory and injunctive relief. If release time were funded by something other than Appellants' compensation, it would not raise the constitutional issues present here.

[7] We also know that this outcome is not some outlier because it also happened in

Appellants' injuries are also redressable because release time continues to be funded as part of Appellants' total compensation. Contrary to the City's assertion, Appellants are not attempting to "force the City to increase their compensation." City Br. at 28. They are asking the City to stop funding release time with part of their compensation. And, unlike *Asarco Inc. v. Kadish*, Appellants are not seeking to reallocate future tax revenue to future tax relief. 490 U.S. 605, 614–15 (1989). They are instead seeking to stop the City from using *their current compensation* to fund release time. If the City were enjoined from using Appellants' compensation to fund release time, then the City may "increase Plaintiffs' personal compensation," City Br. at 22, as they have in the past, APP.044 ¶ 117, and as they have with every other labor group. APP.045 ¶ 128. Or they may not. But Appellants' free expression and association injuries would be redressed because the City would not be diverting their compensation to fund Union activities.

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other MOUs that the City has with *other* labor organizations. Although previous MOUs with the firefighters'union included paid full time release positions, the City's current MOU with the firefighters' union replaces paid release time with a voluntary bank of hours. APP.045 ¶ 126– 27; SAPP.071–76. In exchange for release time, the City now provides each firefighter in the unit, whether a union member or not, with 8.5 hours of additional vacation time. APP.045 ¶ 128; SAPP.075 § 5-5(I). Thus, the record is clear on exactly what the City does when it eliminates paid release time: it increases compensation to *all* unit employees.

II. Paid release time violates Appellants' rights against compelled expression and association.

A. The Defendants' attempt to invert the standard of review in this case.

The City contends that "Plaintiffs cannot meet the heavy burden necessary to invalidate the City Council's legislative decisions," City Br. at 24, in an attempt to invert the standard of review in this case. *See also* Union Br. at 32–33. But it is not Appellants who bear the burden; it is the City.

It is a matter of black-letter law that when a government restriction impairs speech or associational rights, the *government* bears the burden of justifying the restriction. *See* *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *see also* *State v. Stummer*, 219 Ariz. 137, 144 ¶ 25 (2008) (when case involves content-based speech restrictions, the government bears the burden of proof to demonstrate constitutionality).

As the Arizona Supreme Court recently explained, a government action that compels speech, "operates as a content-based law," and is therefore subject to strict scrutiny, the highest form of judicial review. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 292 ¶ 100 (2019).

Since the release time provisions also impair Plaintiff's associational rights, those provisions can only be sustained if they satisfy exacting scrutiny, meaning

the government bears the burden of proving that these provisions "serve compelling state interests…that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The City cannot offer narrowly tailored justifications to support forcing Appellants to finance release time, and its attempt to recast its burden in this case should be rejected.

B. Release time is not government speech.

The City contends that release time is actually government speech because "the speech at issue is the City's funding of release time." City Br. at 31. This argument is expressly foreclosed by *Janus*. There, the Court found the government speech argument with respect to union activities "totally inapposite." 138 S.Ct. at 2474. Such an argument, the Court said, "distorts collective bargaining and grievance adjustment beyond recognition." *Id.*

Janus explained that if the speech at issue could be characterized as government speech, that would mean "the employer could dictate what the union says," because government speech occurs only when "[t]he employee is effectively the [government] employer's spokesperson." *Id.* But the notion that the union members are mere spokespersons for the government should "appall[]" any union. *Id.* Indeed, if the City *did* try to direct the Union's speech and activities while on

release time, the City would likely be subject to "a PERB[8] charge for attempting to do so." APP.126 at 67:24–68:2.

Government speech occurs when the government is "convey[ing] a Government message," *Matal v. Tam*, 137 S.Ct. 1744, 1760 (2017), but Union employees on release time are not conveying a government message—on the contrary, they are speaking for the Union,[9] most often on the *opposite side* of the bargaining table from the City. And, as the record makes plain, the City maintains no control over the content of the messages conveyed by release time employees. Not only would it be unlawful for the City to direct the Union's speech according to the City, but as the record makes plain, the City maintains no effective control over release time employees *anyway*, APP.037–38 ¶¶ 43–45, 48, 51-53, APP.040 ¶¶ 71-73, let alone over the content of their speech. Release time is private Union speech, and "simply affixing a government seal of approval," *Tam*, 137 S.Ct. 1758, does not transform it into government speech.

Nor is *May v. McNally* helpful to the City. Ans. Br. at 30. There, the Arizona Supreme Court held that "a ten percent surcharge on civil and criminal

[8] PERB is the Phoenix Employee Relations Board. It adjudicates unfair labor practices between the City and the Union. The City's witness here was opining that if the City tried to direct the City's activities or speech, the Union would bring an unfair labor practice against the City for unlawful interference with the Union. APP.039 ¶ 60.

[9] To say otherwise would endanger the Union's free speech as much as anyone else's.

fines" used to finance Clean Elections did not violate the First Amendment because the fines applied to all Arizonans, there was "no expressive content inherent in paying a traffic fine," and there was "viewpoint neutrality in the allocation of funds." 203 Ariz. 425, 431 ¶ 27 (2002). But paid release time is nothing like the surcharge on civil and criminal fines in *May*. Release time is funded as part of all Unit 2 employees' total compensation not as a generally applicable fine or fee, it is obviously used for expressive activity by the Union, including political and lobbying activities, APP.039–43 ¶¶ 62–108, and there is not viewpoint neutrality in the either the "funding" or use of release time. Indeed, the very purpose of a union is to advance a specific viewpoint, and the very purpose of the City's funding of release time is to advance *this* Union's specific viewpoint. Release time is not government speech, and the City's funding of the practice under the MOU does not transform it into government speech.

C. The Union's release time activities do not serve a compelling government interest, and any government interest in the practice can be achieved through means less restrictive of Appellants' rights.

The City makes no attempt to respond to Appellants' assertions that most uses of release time do not serve a compelling government interest. A compelling government interests must be a *state* interest, but release time exists to advance the *Union's* private interests, not those of the City. Op. Br. at 22–27. And several uses of release time, including for political and lobbying activities, are

categorically excluded as state interests. The City never explains how paid release time used for political activities can possibly advance a compelling government interest.

Nor does the City respond to Appellants' observation that even if paid release time served some abstract government interest, it is still unconstitutional because release time activities can and have been achieved through means significantly less restrictive of Appellants' rights.

Instead, the City vaguely suggests that paid release time is necessary to "promote[] labor peace." City Br. at 8. But the central holding of *Janus* was that any purported government interest in promoting "labor peace," "can readily be achieved" through means significantly less restrictive than extracting compulsory payments from nonunion members. 138 S.Ct. at 2466. The record here is undisputed that when the City previously eliminated paid release time in this *MOU* in favor of a voluntary system of donated hours, there was no evidence that this had any negative impact on labor relations between the City and Unit 2. APP.044–45, ¶¶ 115–20; SAPP.029 at 61:8–14. The same is true with respect to the City's relations with other labor organization. APP.045 ¶ 129. In other words, as the record makes clear, the City's purported interest in achieving labor peace *was* achieved through means less restrictive of Appellants' rights. The City Manager's testimony is both succinct and dispositive on this issue. When asked, "So it's fair

to say that the City was able to come up with an alternative means to serve the purported benefits of release time through the donated bank of hours?" The City Manager responded, "[W]e made it work." SAPP.029 at 58:5–12. Whatever the benefits of release time, the City can and has achieved those benefits through means that do not require compulsory payments from Appellants.

III. The release time provisions violate Appellants' Right to Work protections because under the MOU they are required to participate in "form and design" in Union activities as a condition of employment.

In *AFSCME, AFL-CIO, Local 2384 v. City of Phoenix*, this Court held that that no person may be compelled , as a condition of employment, to pay fees to a union or participate "in any form or design of union membership." 213 Ariz. 358, 367 ¶ 23 (App. 2006). Because Appellants are forced to fund release time activities under the MOU, Op. Br. at 14–19, and because the Union uses release time for "non-germane" activities, including political and lobbying activities, that only serve the Union's interests and have nothing whatsoever to do with exclusive representation, the release time provisions violate Appellants' Right to Work protections.

The City again argues that the Right to Work protections do not apply because "no money is deducted from [Appellants'] paychecks to pay for release time." City Br. at 32. But it makes no difference that Appellants' payments to the Union are financed out of their total compensation instead of taking the form of

separate union dues, because "*indirectly* making union membership *or participation* mandatory by the compulsory payment of dues *or similar fees*," violates Arizona's Right to Work just as *direct* mandatory payments do. *Local 2384*, 213 Ariz. at 367 ¶ 24 (emphasis added). Additionally, Appellants' wages *were* reduced by eight additional vacation hours per year to fund release time in *this* MOU. SAPP.044 at 41:7–42:1. This direct reduction of wages and benefits "is no less onerous to freedom of employment than a compulsory arrangement requiring the payment of full union dues," and is "in its practical effect…little different than mandatory membership dues." *Local 2384*, 213 Ariz. at 366–67 ¶ 23.

The Defendants contend that this case is a challenge to "the Union's status as Unit II's exclusive representative." City Br. at 33–38; *see also* Union Br. at 37–43. It is not. This case is about the City violating non-union employees' constitutional rights and has nothing to do with the union's exclusive representation of Unit II. The purpose of exclusive representation is to allow the Union to "enter into discussions with affirmative willingness to resolve grievances and disputes relating to wages, hours and working conditions." City Code § 2-209. In the absence of compelled funding, assuming *arguendo* that release time was used for those sorts of traditional representational activities, it would not raise the same Right to Work concerns.

But that is *not* what the Union does while on release time. Instead, while on release time, release time employees engage in political activities, including meeting with and endorsing political candidates for elected office, lobbying the City Council, recruiting new members, and conducting other activities that advance the Union's own interests. APP.039–43 ¶¶ 62–108.[10] In other words, while on release time, Union members engage in a wide array of *non*-germane, union membership activities. Because release time is provided for under the terms of an MOU *purportedly for the benefit of Appellants*, Appellants are forced as a condition of employment to participate in non-germane Union activities, in both "form" and "design," *Local 2384*, 213 Ariz. at 367 ¶ 23, that they do not wish to participate in. By including release time in the MOU without any constraints that it be used only for germane representation duties, Appellants are compelled as a condition of employment to be associated with those activities. That violates Arizona's Right to Work protections.

[10] *See also*, APP.179–80 at 113:22–115:8; SAPP.050–70; SAPP.046–49; APP.054–59; SAPP.026 at 26:5–10; APP.123 at 54:5–11; SAPP.043 at 34:25–35:5; SAPP.083; APP.192–93 at 165:1–166:13; APP.179 at 110:9–111:6; APP.176 at 100:14–25; APP.177 at 103:14–18, 103:20–25; APP.181 at 120:3–121:3; APP.180 at 117:12–25; APP.181 at 118:1–15; APP.180 at 114:3–11, 114:30–115:22; APP.174 at 90:15–21, 91:9–13; APP.175 at 97:18–22; APP.177–78 at 105:1–106:18, 107:3–7; APP.169 at 70:6–19; APP.164 at 50:20–25; APP.173 at 89:19–25; APP.189 at 152:19–153:4; APP.170 at 76:9–13; APP.182–83 at 123:20–127:17, 127:23–128:14; APP.169 at 70:2–19; APP.170 at 74:11–17; SAPP.113–14; APP.022 ¶ 19; SAPP.032; APP.023 ¶ 24; APP.004 ¶ 20; APP.019 ¶ 20; APP.168 at 67:3–68:24; APP.164–65 at 53:4–55:8; APP.166 at 60:18–61:9.

This is also why the City's reliance on *Local 2384* is bizarre. That case established the *breadth* of Arizona's Right to Work laws, not their narrowness. 213 Ariz. at 366 ¶ 23. The City says that the *Local 2384* court "relied on release time as a justification for precluding 'fair share' fees." City Br. at 33 (emphasis deleted). But that is not true. While the *Local 2384* court referred to the fact that the City subsidized the union through release time, and therefore "negate[d] to a large extent" the union's concern about free riders, 213 Ariz. at 365 ¶ 21, n.19, it went on to hold that concern about free riders was irrelevant anyway, because in Arizona, "the imposition of a mandatory contribution" to support a union is unlawful for *any* reason. *Id.* at 366 ¶ 23. What's more, a decade after *Local 2384* was decided, the *Janus* case rejected outright the free rider argument as a justification for compelled union subsidization, 138 S.Ct. at 2466 ("avoiding free riders is not a compelling interest. As we have noted, free-rider arguments...are generally insufficient to overcome First Amendment objections.") (internal citations omitted).

In any event, the record shows that release time is not predominantly used for representational activities. Rather, it is used for a whole range of activities that have nothing whatsoever to do with representing employees, but instead are directly related to the Union's own private concerns. Because Appellants pay for these activities as part of their compensation and must also participate in them in

both "form" and "design"—because release time is provided to the Union under the MOU without constraints that it be used for representational activities—the release time provisions violate Arizona's Right to Work laws.

IV. Paid release time violates the Gift Clause.

The City's Gift Clause arguments are self-contradictory. On the one hand, it argues that Appellants "do not pay for release time—the City does." City Br. at 27. If that's true, release time violates the Gift Clause. If that is not true, and release time is part of Appellants' compensation, then it violates Appellants' free speech, association, and Right to Work protections. In actuality, paid release time is unconstitutional for all these reasons. It specifically violates the Gift Clause because the Union is receiving a subsidy that it uses for private purposes and for which it does not provide direct, contractually obligatory consideration.

A. Release time must be tested independently for a public purpose and consideration.

The City argues that release time does not violate the Gift Clause because we must take a "panoptic view" of the MOU, and *Cheatham* purportedly forecloses a Gift Clause claim under this analysis. Ans. Br. at 38–40; *see also* Union Br. at 48–52. "Panoptic" means "being or presenting a comprehensive…view," PANOPTIC, Meriam-Webster, , which of course, the Court must take of any Gift Clause transaction. *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 320–21 (1986). But the Court cannot ignore "[t]he reality of the transaction both in terms

of [public] purpose and consideration." *Ariz. Ctr. Law in Pub. Int. v. Hassell*, 172 Ariz. 356, 368 (App. 1991). And the reality of *this* transaction is that release time is given to the Union as part of the MOU to advance the Union's private interests without reciprocal, objectively valued benefit to the City. It was also negotiated as a separate benefit with specific trade-offs that reduced Appellants' wages and benefits. Thus, as the Arizona Supreme Court did in *Wistuber v. Paradise Valley Unified School District*, release time must be tested independently for public purpose and adequate consideration. 141 Ariz. 346, 348 (1984).

The City argues that "*Cheatham* squarely foreclosed this approach." City Br. at 40. But the *Cheatham* Court evaluated adequacy of consideration based on *the City's* claim that release time must be evaluated based on the totality of the contract, and therefore it did not violate the consideration prong of the Gift Clause test. *Cheatham*, 240 Ariz. at 318–19 ¶ 14. In *Cheatham*, the court deferred to the City's position in finding adequate consideration. *Id.*, but *Schires v. Carlat*, 250 Ariz. 371, 378 ¶ 23 (2021) overruled *Cheatham* and held that courts should "*not* give deference to the public entity's assessment of value." *Schires*, 250 Ariz. 378 ¶ 23.

Thus, under *Schires*, the deference that was previously afforded to the City under *Cheatham*, no longer applies, including the City's position that consideration

must be assessed based on the entire MOU.[11] Instead, release time is simply a direct payment and a discrete subsidy to the Union, and as such, it must be tested for consideration separately from the other provisions in the MOU. That release time subsidy should be tested for public purpose and adequacy of consideration by itself—as, the *Wistuber* court did. 141 Ariz. at 348.

What's more, the record shows that the release time provisions were negotiated and paid for individually, not as a total package. Specifically, the record shows that the City has diverted eight hours of vacation time that Appellants once received, but no longer receive, to fund the release time provisions at issue in this MOU. APP.045 ¶ 123; SAPP.044–45 at 41:7–42:1. In other words, the Defendants negotiated separately for the paid release time provisions and made a specific trade-off for them in the form of Appellants' salary and wages. As a result, those provisions should be separately examined for public purpose and consideration.

B. The City does not receive direct, objectively valued consideration for release time.

In evaluating adequacy of consideration, the Court's role is to "focus[] on

[11] Contrary to the Union's contention, Union Br. at 55, the holding in *Schires* was not limited to "economic development agreements." *Schires* expressly disapproved the consideration analysis in *Cheatham*, which was a case involving paid release time, not economic development. 250 Ariz. 378 ¶ 23.

what the public is giving and getting from anarrangement and then ask[] 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.

Here, the Defendants identify *no* direct benefits that can be objectively valued that the City receives in return for the release time payments. The City contends "that release time pays for itself by (a) avoiding lawsuits and resolving disputes more efficiently, (b) facilitating collective bargaining with the Union, and (c) making it more efficient to schedule meetings to address labor disputes and other issues." City Br. at 101, 47; *see also* Union Br. at 56 ("The City values and pays…to have representatives of Unit II employees carry out the tasks that are required under the MOU and the Meet and Confer Ordinance."); Union Br. at 58 (essentially restating the "labor harmony" argument). But these are exactly the sort of speculative, indirect benefits that are "valueless" under the Gift Clause. *Schires*, 250 Ariz. 377 ¶ 16.

The Union does not promise or otherwise obligate itself to provide *any* of these services or benefits to the City in the MOU. 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 under the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342, 349 ¶ 31 (2010) (emphasis added). Here, there is *nothing* in the MOU, or anywhere else, that requires the Union to "avoid lawsuits," "resolve disputes more efficiently," or "to efficiently address labor disputes." City Ans. Br. at 47. On the contrary, the Union has not obligated itself, in the MOU or anywhere else, to provide *any* benefits in return for release time. APP.043 ¶ 109; SAPP.026 at 27:5–28:11; APP.123–124 at 57:29–59:21. It has not promised to spend a certain amount of time meeting with City officials or discussing employee concerns, APP.043 ¶ 111, APP.124 at 58:17–25, or to resolve disputes "efficiently" or at the lowest level, APP.043 ¶ 110, APP.123–24 at 57:2–58:8, or to provide feedback on matters that will prevent complaints from becoming more costly to the City, in the form of lawsuits or otherwise. APP.043 ¶ 112; APP.124 at 59:11–18. Rather, under the release time provisions, the Union has expressly promised nothing but to "engage in lawful *union* activities," APP.043 ¶ 109; APP.054 § 1-3(A)(1), *not* to provide any services to the City. In the absence of mandatory contractual obligations on the part of the Union, there is not adequate consideration under the Gift Clause for any of the purported benefits the City identifies.

Even if the Union *were* performing these functions for the City, and even if release time *did* assist with labor relations, the City cannot evaluate adequacy

of consideration because it has never attempted to determine what *value*, if any, the City receives in return for the money spent for paid release time. APP.043 ¶ 10, APP.039 ¶ 65. The contract that was invalidated in *Schires* contained an equally vague promise, which the court said was insufficient to satisfy the Gift Clause because it was "too indefinite to…value." 250 Ariz. at 378 ¶ 21. In this case, the City Manager testified that release *time has no monetary value*. SAPP.025 at 23:16–21. Other City witnesses uniformly testified that the City has never conducted any research or studies to assess the value, if any, of any purported benefits of paid release time.SAPP.026 at 26:5–10; SAPP.043 at 34:17-35:5; APP.123 at 54:5–11. Consequently, like *Schires*, "this contract term may be too indefinite to enforce, much less value." 250 Ariz. 378 ¶ 21. Without valuation, there cannot be adequate consideration under the Gift Clause.

In sum, absent direct, contractually obligatory benefits of which the City can determine an objective fair market value, there is not adequate consideration under the Gift Clause. The Defendants could easily have valued and made obligatory any purported release time benefits. They did not do that. As a result, there is inadequate consideration for paid release time.

C. Release time does not serve a public purpose.

Nor does paid release time serve a public purpose as required by the Gift Clause. The City and the Union contend that release time serves a public purpose

because it "promotes peaceful labor relations and allows employees the opportunity to participate in formulating the terms and conditions of their employment." City Br. at 41; Union Br. 52–54. But there is no evidence in the record that release time actually promotes harmonious labor relations (except for conclusory or self-serving statements that collective negotiation itself is a good thing). The reality is that release time probably undermines good labor relations and increases labor tensions. *See* APP.044 ¶ 114; Brown Report, APP.209–10 (citing numerous examples of how paid release time undermines employer-employee relations and "contradicts the normal employee/ employer relationship."). What's more, most of the uses of release time promote the *Union's* private interests, *not* the interests of the City or the broader public. While the public purpose inquiry is a deferential one, release time is so clearly earmarked for private purposes that it fails to survive even this deferential standard.

Additionally, although the Gift Clause *requires* that the City maintain continuing "control and supervision" over the expenditure of public funds, for the expenditure to serve a public purpose, *Kromko*, 149 Ariz. at 321; *see also McRae v. Cnty. of Cochise*, 5 Ariz. 26, 33 (1896), the City admits (and the evidence plainly establishes) that the City does *not* control or supervise the use of release time to ensure that any public benefit is ever actually realized. APP.037–39 ¶¶ 43–58. Nor do the release time "monitoring" provisions cited by the Union, Union Br. at 60–

61, even remotely rise to the level of actual supervision and control. Indeed, *none* of those purported controls, such as submitting a "Union/Association Release Time Request," Union Br. at 61, apply to the full-time release employees, who are entirely free to set their own schedules and direct their own work. If release time could, hypothetically serve a public purpose in "promot[ing] peaceful labor relations," City Br. at 41, the City has surrendered any means by which it can ensure that this happens. Thus, the City has "unquestionably abused" its discretion, *Turken*, 223 Ariz. at 349 ¶ 28, in approving and then failing to oversee the use of release time.

CONCLUSION

Based on the foregoing, and for the reasons stated in Appellants' Opening Brief and their Reply to the Union's Answering Brief, the Court should reverse the trial court's judgment on all claims, vacate the attorney fee award, and enter judgment in favor of Appellants.

Respectfully submitted July 8, 2022 by:

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Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Reply to City's Answering Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 6,982 words, excluding table of contents and table of authorities.

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The undersigned certifies that on July 8, 2022, she caused the attached Appellants' Reply to City's Answering Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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