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 INTERVENOR-DEFENDANT/APPELLEE'S ANSWERING 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Answering Brief of Intervening-Defendant/Appellee, the American Federation of State, County and Municipal Employees, AFL-CIO, Local 2384 ("Union") raises most of the same arguments made by Defendant-Appellee City of Phoenix, et al. ("City") in its Answering Brief. Those arguments were addressed in Appellants' Reply to the City's Answering Brief.

Appellants submit this Reply to address the Union's contention that the trial court properly awarded fees under A.R.S. § 12-341.01, a fee-shifting statute intended to apply to contractual disputes, not constitutional cases.

I. The trial court erred in assessing fees under A.R.S. § 12-341.01 in this public interest case challenging the legality of government action.

The Union contends that the *Wistuber* rule, which announced a public policy that fees should not be awarded in cases brought by aggrieved citizens challenging the constitutionality of government action, should not apply in this case because Appellants brought this case "as beneficiaries of the MOU rather than aggrieved citizens." Union Br. at 63; see also City Br. at 53. The *Wistuber* rule, according to the Union, should apply only when plaintiffs are "taxpayers." Union Br. at 65. But *Wistuber* imposes no requirement that a citizen challenging the legality of government action must do so as a taxpayer. Instead, the Supreme Court set out a categorical rule that "Where aggrieved citizens, in good-faith, seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be

awarded." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350 (1984). Such cases are not limited to taxpayer actions but extend to any case that "would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials." *Id.*

In this case, Appellants' employment with the City creates the constitutional violation; it does not excuse it. As City employees, Appellants are aggrieved by the City's unconstitutional conduct. To allow for an award of fees against public employees seeking to challenge unlawful actions of a government employer would chill other parties seeking to have their day in court just as an award against taxpayers would.

Trying to avoid the Supreme Court's declared public policy against fee awards in cases challenging the legality of government action, the Union declares that Appellants brought this case as "employees claiming an entitlement to compensation…." Union Br. at 65. This is not true as a factual matter or a legal one. First, Appellants bring this case for *declaratory and injunctive relief* to challenge the constitutionality of government action. APP.012 ¶ A. They seek no damages or monetary relief whatsoever. Second, Appellants do not assert any personal claims under a contract. Indeed, Appellants bring no contractual claims at all. *Id.* Thus, like the plaintiff in *Wistuber*, Appellants brought this case to

challenge the constitutionality of government action, not to assert contractual claims.

Indeed, based on the *equitable* relief requested, to contend that Appellants brought this case "to benefit themselves personally," Union Br. at 66, is simply an absurd falsehood. It is tantamount to arguing that government employees, or other third-party beneficiaries who challenge unlawful conduct, can never vindicate an issue of public concern. But that is not the law. *Ansley v. Banner Health Network*, 248 Ariz. 143, 153 ¶ 40 (2020) (awarding attorney fees to patient members of Medicaid program against hospitals because they vindicated "important public rights" that benefitted a large number of people). Indeed, Mark Janus, was a public employee who sued to invalidate a collective bargaining provision that required him to direct part of his compensation to the union. *Janus v. AFSCME*, 138 S. Ct. 2448, 2461 (2018) ("Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee…). And that case plainly and obviously vindicated a right of pressing national concern for millions of Americans. *Id.* at 2462 ("We granted certiorari to consider this important question.").

Because the practice of release time exists throughout Arizona, the legitimacy of the City's actions here is also a matter of pressing statewide importance, as the Arizona Supreme Court previously found in *Cheatham v. DiCiccio*, 240 Ariz. 314, 317 ¶ 7 (2016) ("We granted review because whether the

Gift Clause bars release time provisions in collective bargaining agreements for public employees *is a legal issue of statewide importance*.") (emphasis added). Like *Wistuber*, *Cheatham*, and *Janus*, this case involves significant issues of public policy brought for the purpose of examining the legality of government action. In an action for equitable relief challenging the legality of government actions, like this one, attorney fees should not be awarded under A.R.S. § 12-341.01.

II. Appellants are not parties to the MOU.

The Union next cites to *AFSCME, AFL-CIO, Local 2384 v. City of Phoenix*, 249 Ariz. 105, 113 ¶ 33 (2020); *Piccioli v. City of Phoenix*, 249 Ariz. 113, 119 ¶ 24 (2020); Union Ans. Br. at 63–64 to argue that the *Wistuber* rule should not apply. *See also* City Ans. Br. at 53–54 ("This case is on all fours with *Local 2384* and *Piccioli* … because the plaintiffs brought their claims 'as parties to a contract rather than as aggrieved citizens."). But the Defendants cannot seriously assert that Appellants are parties to the MOU between *the City* and *the Union*. That is emphatically not the case, and the law does not support such a position.

First, as a matter of law, a labor agreement is "a contract between the union and the contractor and does not even purport to be a contract of employment between the contractor and the individual union member," let alone *nonmembers*. *Posey v. Indus. Comm'n*, 87 Ariz. 245, 249 (1960). The MOU itself is captioned as an agreement between the "City of Phoenix and American Federation of State,

County and Municipal Employees Local 2384." APP.049. The preamble goes on to discuss the MOU as an "agreement" between the "City" and the "Union," and specifies the City and the Union as the "parties" to the MOU. APP.052. It is also signed only by representatives of the City and the Union. APP.100. The MOU is, in short, an agreement between the City and the Union, not between the City and Appellants or the Union and Appellants.

Second, Appellants have never voted on or ratified the MOU, and they have never authorized AFSCME to be their exclusive representative. APP.116 at 28:3–29:9; APP.155 at 16:24–17:13. Nor have they in any way "assent[ed] by either words or acts," *Barmat v. John & Jane Doe Partners*, 155 Ariz. 519, 521 (1987), to enter the terms of the MOU with either the City or the Union. They are not Union members, do not pay Union dues, and have never consented to fund release time. APP.014 ¶¶ 8–10; APP.017 ¶¶ 8–10; SAPP.103 at 178:20–179:1; SAPP.107 at 92:17–20; APP.002–3 ¶¶ 5–6; APP.021 at ¶¶ 5–6. Thus, Appellants are not parties to the MOU—they are hostages to it.

Consequently, contrary to the Defendants' contentions, *Local 2384* and *Piccioli* support Appellants' position that attorney fees should not be awarded here. Both of those cases involved challenges by the *union* and *union officers* who *were* part of a contract, to enforce the contractual terms. The plaintiffs in those cases were the Union—in fact, the same Defendant Union as here—and union officers in

"a contractual relationship" with the City. *Piccioli*, 249 Ariz. at 117 ¶ 11. They alleged that "the City *breached those contracts*." *Id.* at 119 ¶ 22 (emphasis added). Therefore, the claims in those cases were *contractual* claims brought by *parties* to the contract. By contrast, the claims here are constitutional and statutory—there are no contractual claims—and the Appellants are not and have never been parties to the MOU.[1]

What's more, rather than retreat from the *Wistuber* rule, the Supreme Court instead went out of its way in both *Piccioli* and *Local 2384* to *reaffirm* that rule, writing in both cases: that "courts should generally refrain from awarding fees under § 12-341.01 against citizens who sue to challenge the legitimacy of government action because it would 'chill' such suits." *Piccioli*, 249 Ariz. at 119 ¶ 24; *Local 2384*, 249 Ariz. at 113 ¶ 33. And that it was awarding fees only because the plaintiffs brought the case "as parties to a contract rather than as aggrieved citizens." *Id*. Here, by contrast, Appellants are not parties to the contract, and *did*

[1] Although they do not wish to be part of the MOU, at most, Appellants can be characterized as third-party beneficiaries. *MacKay v. Loew's, Inc.*, 182 F.2d 170, 172 (9th Cir. 1950) ("The employee … may sue directly on the collective bargaining contract as a third-party beneficiary to enforce the provisions in the contract which have been made for his benefit."); *See also* Williston, Contracts (3d ed., Jaeger 1959) § 379A ("Collective bargaining agreements are between labor organizations and employers." "*Employees are not parties to the agreement*, [instead] they are being recognized as third party beneficiaries…"). The Supreme Court has held that third party beneficiaries are non-parties. *Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson*, 211 Ariz. 485, 491, ¶ 33 (2005).

bring this case as aggrieved citizens. Thus, an award of attorney fees under A.R.S. § 12-341.01 is not appropriate.

III. The MOU is the factual predicate to, not the essential basis for, Appellants' constitutional claims.

The Union next contends that Appellants "directly challenged the contract." Union Br. at 65; *see also* City Ans. Br. at 49 ("Plaintiffs' claims would not exist but for the MOU."). But the question of whether to award attorney fees under A.R.S. § 12-341.01 is not whether a plaintiff challenges a contract, but rather whether "the contract is a factual predicate to the action but not the *essential basis* of it." *Keystone Floor & More, LLC v. Registrar of Contractors*, 223 Ariz. 27, 30 ¶ 11 (App. 2009) (citations omitted; emphasis added). Here, the MOU is the factual predicate for the constitutional claims, but it is not the essential basis of those claims. The MOU, in other words, created the factual circumstances for the constitutional claims in this case, but the case does not involve contract claims, it involves constitutional violations, and fees should not be awarded in cases involving constitutional claims. *Smith v. City of Phoenix*, 175 Ariz. 509, 516 (App. 1992).

It would be as if the MOU at issue required all Unit 2 members to swear allegiance to one political party as a condition of their employment. While that contract would serve as the factual predicate for a constitutional claim, it would not

be the essential basis for it. And fees there, like here, would be improper under A.R.S. § 12-341.01.

What's more, the City's rule, if adopted, would mean that any government entity anywhere in the state, could deter constitutional challenges to its actions by simply codifying a constitutional violation in a contract. Such a rule does not align with the purpose of § 12-341.01 to encourage settlement of contractual disputes, *Hall v. Read Dev., Inc.*, 229 Ariz. 277, 282 ¶ 18 (App. 2012), or the public policy announced in *Wistuber* to encourage, not discourage, cases challenging the legality of government action in good faith. 141 Ariz. at 350.

IV. A fee award would be contrary to nearly every factor the Arizona Supreme Court has set out in guiding fee awards under A.R.S. § 12-341.01.

The Union finally contends that the *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570 (1985), factors tilt in the Union's favor. Union Br. at 66. In addition to the *Wistuber* rule, the Supreme Court has also set out several factors "to assist the trial judge in determining whether attorney's fees should be granted" under A.R.S. § 12-341.01. *Warner*, 143 Ariz. at 570. These include: (1) the merits of the claim presented by the unsuccessful party; (2) whether the litigation could have been avoided or settled; (3) whether assessing fees would cause extreme hardship; (4) the novelty of the legal question presented; (5) the extent of success of the prevailing party; and (6) whether such claims have previously been

adjudicated in this jurisdiction. *Id.* Nearly *all* these factors tilt in favor of Appellants.

First, Plaintiffs alleged a meritorious claim for relief under the Arizona Constitution and state statute on an issue of statewide importance. No party alleged that these claims were frivolous, or moved to dismiss, or for judgment on the pleadings—and the trial court adjudicated the merits of the claims. Indeed, the City and the Union were so concerned with the constitutionality of paid release time that they entered a separate "side agreement" for a negotiation contingency in the event "a lawsuit is filed that alleges that City Phoenix employees' First Amendment rights are violated by the paid release time provisions…" SAPP.097. That alone is a party admission as to the merits of Appellants' claims.

Second, it is exceedingly unlikely this case could have been settled, as it seeks only declaratory and injunctive relief, APP.012, and both the City and Union *agreed* that settlement could likely not be achieved.[2] Appellants are also not parties to the MOU, so they are not authorized to settle *any* dispute involving the MOU anyway.

[2] SAPP.020 ¶ 4. ("Given that legal issues underlie the resolution of the dispute, the parties do not believe that a Rule 16.1 settlement conference would be productive at this time, although the parties remain open to the possibility of settlement as the case progresses.")

Third, Appellants are blue collar workers employed by the City who make $29 an hour. SAPP.102 at 168:13-15; APP.033 ¶ 2, App.035 ¶ 21. Upholding a fee award against Appellants would discourage other parties of limited means from bringing constitutional cases against government action because of the extreme financial hardship that would cause.

Fourth, this case presents novel and important questions of constitutional law on issues of statewide importance, most of which are issues of first impression. *See Cheatham*, 240 Ariz. at 317 ¶ 7 (Finding that a Gift Clause Challenge to paid release time is a "legal issue of statewide importance.")

Fifth, three of the four claims in this case have never been adjudicated in Arizona *at all*, and the only claim that has, the Gift Clause claim, was decided in a manner later "disapprove[d]" by the Supreme Court. *Schires v. Carlat*, 250 Ariz. 371, 378 ¶ 23 (Ariz. 2021).

Thus, of the six factors identified in *Warner*, Appellants establish five of them, having only failed to prevail below. Consequently, the trial court erred by ignoring the public policy set out in *Wistuber* and failing to properly weigh the *Warner* factors.

This Court should correct that monumental and disturbing error, reverse the attorney fee award, and clarify that attorney fees should not be awarded in important public interest cases, like this one, that challenge the legality of

government action. "Courts exist to hear such cases," and trial courts "should encourage resolution of constitutional arguments in court rather than on the streets." *Wistuber*, 141 Ariz. at 350.

CONCLUSION

Based on the foregoing, and for the reasons stated in Appellants' Opening Brief and their Reply to the City'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:

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

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

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' Reply to Intervenor-Defendant/Appellee's Answering Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 2,536 words, excluding table of contents and table of authorities.

Respectfully submitted July 8, 2022 by:

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

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

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 **CERTIFICATE OF SERVICE**

The undersigned certifies that on July 8, 2022, she caused the attached Appellants' Reply to Intervenor-Defendant-Appellee's Answering Brief 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.
2555 E. Camelback Rd., Ste. 1050
Phoenix AZ 85016
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
kpasley@martinbonnett.com

Attorneys for Intervening Defendant/Appellee

/s/ *Kris Schlott*
Kris Schlott, Paralegal