IN THE SUPREME COURT
STATE OF ARIZONA

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.	Supreme Court No. CV-23-0130 PR Court of Appeals, Division One No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

PLAINTIFFS/APPELLANTS' RESPONSE TO STATE OF ARIZONA'S AMICUS 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

Constitutional Provisions

INTRODUCTION

The fact that the Attorney General ("AG") has seen fit to file a brief regarding this Petition only proves the importance of the questions involved, and the need for this Court to address them. In addition, the statute on which the brief relies so heavily says that "[t]he regulation of the use of public monies and public employees for union activities *is a matter of statewide concern and is necessary to enforce the Constitution of Arizona*." A.R.S. § 23-1431(E) (emphasis added). This, too, testifies to the importance of taking this case.

The AG's brief raises three arguments, none of which offer a good reason to disregard the important questions raised in this Petition.

First, the AG argues that A.R.S. § 23-1431 renders concerns with release time unworthy of this Court's attention. But that statute only prohibits use of release time for *direct electoral and lobbying activities*. It places no prohibitions on the many other political activities that release time employees perform, let alone the numerous other release time activities that advance the Union's private interests—and which are involved here. And given that the MOU at issue contains no provisions controlling how released employees spend release time, or even that require them to report *what* they do while on release time, the adoption of Section 23-1431 hardly resolves the legal questions presented here.

Second, the AG's conception of what constitutes lawful consideration under the Gift Clause is contrary to this Court's clear pronouncements and would eviscerate key constitutional protections by permitting all sorts of amorphous, indirect, and speculative benefits to be exchanged for public expenditures. Even if the AG's position were meritorious, they would mark significant changes in Arizona law that would require *granting*, not denying this Petition.

Finally, no stare decisis argument justifies denying review in this case, which involves free speech issues and other constitutional issues of statewide importance that are likely to recur.

ARGUMENT

I. Section 23-1431 doesn't render any of Petitioners' arguments or claims "inapposite."

The Attorney General says the Court should deny review because the Legislature enacted some restraints on release time in Section 23-1431. Br. at 6–8. But that Section only bars the use of release time for direct electoral and lobbying activities, not all political activities, and it places no restraints on uses of release time for most of the other private activities that are performed on release time and that are at issue here.

It's simply not true that Section 23-1431 makes it "no longer possible for any public employees to use release time for 'political activities.'" Br. at 6.

First, this Section does not apply to "any public employee." In fact, law enforcement officers and firefighters are expressly *exempt* from the prohibition. *See* A.R.S. § 23-1431(G)(2)(b). That means they're still free to lobby the government, endorse candidates for office, and engage in election speech toward voters, all at public expense—just as the release-time employees in this case do.[1]

Second, and more important, Section 23-1431 only limits paid release time for two uses: (1) "advocating for the election or defeat of any political candidate" and (2) direct lobbying activities. It does *not* limit release time for the majority of private union activities performed on release time, including political activities that involve things other than direct electoral and lobbying activities. That means many political activities performed on release time—which violate Petitioners' free expression and association rights (and Gift Clause protections)—are left unaltered by Section 23-1431.

---

[1] In fact, law enforcement and firefighter unions are enormously powerful; they spend millions every year to influence public policy. *See, e.g.*, Scheiber, et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. Times (June 6, 2020). An *Arizona Republic* analysis in 2017 found that in the previous two years, firefighter unions spent more than a quarter million dollars on 59 city council and mayoral elections in Arizona. Boehm, *Arizona Firefighters Have Grip on Financial Power in Local Elections—But Should They?*, Arizona Republic (Mar. 28, 2017). That's their right, of course (within constitutional boundaries), but it indicates that Section 23-1431 does nothing to render the constitutional violations at issue here "incapable of repetition." Br. at 8. On the contrary, given the statutory exemptions for the state's wealthiest and most powerful public sector unions, it's a virtual certainty that the constitutional violations here will recur absent this Court's action.

A. Petitioners' compelled speech, association, and Right to Work claims are unaffected by Section 23-1431.

The record shows that paid release time is used not just for direct electoral and lobbying activities, but also for a host of other things, such as collective bargaining, APP.019 ¶ 24, APP.169 at 70:2–19, and grievance adjudication, APP.164–65 at 53:4–55:6; APP.022 ¶ 63, which in the context of public sector unions, are categorically "political" in nature. *Janus v. AFSCME*, 138 S. Ct. 2448, 2476 (2018); *see also Harris v. Quinn*, 573 U.S. 616, 636 (2014) ("In the public sector, core issues such as wages, pensions, and benefits are important political issues.").

That means it violates the First Amendment and the Arizona Constitution to force the Petitioners to pay for those activities. *See Janus*, 138 S. Ct. at 2478. Section 23-1431 leaves these things entirely unchanged, which means its adoption does not alleviate the constitutional concerns involved here, let alone render this case "theoretical" or "unnecessary." Br. at 5.

The political activities of the Union in this case go far beyond those things, too. They include union recruiting, APP.006 ¶ 20; APP.018 ¶ 20; APP.168 at 67:3–68:24, participating in political action committee meetings, APP.035–36 ¶ 67–68, and preparing newsletters on ballot questions. APP.037–38 ¶¶ 91–92. These are also unaffected by Section 23-1431, which *only* prohibits direct electoral and lobbying activities. It doesn't prohibit or even limit the myriad other

political activities this Union engages in while on release time. Thus, Petitioners' compelled speech, association, and right to work claims are entirely unaffected.

B. Section 23-1431 has no impact on Petitioners' Gift Clause claim.

Of course, Section 23-1431 has *no* impact on Petitioners' Gift Clause claim. That Clause forbids the City from "mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. It is "intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). Few special interests in this country, if any, are more powerful than public sector unions. *See generally* Howard, *Not Accountable: Rethinking the Constitutionality of Public Employee Unions* (2023). And this Court has expressly applied the Clause to release time requirements. *Wistuber*, 141 Ariz. at 349; *Cheatham v. DiCiccio*, 240 Ariz. 314, 320 ¶ 21 (2016).

It's indisputable that paid release time is used for *private* union activities, both political and non-political, including candidate electioneering, APP.035–39 ¶¶ 62–108, recruitment, APP.006 ¶ 20; APP.018 ¶ 20; APP.168 at 67:3–68:24, grievance and disciplinary proceedings against the City, APP.164–65 at 53:4–55:8; APP.022 ¶ 63, union meetings, APP.035–36 ¶¶ 67–68, supporting other labor organizations, APP.177–78 at 105:5–106:18, and a host of other activities that are neither reported to nor supervised by the City. APP.036 ¶¶ 71–73.

Petitioners' Gift Clause claim is thus entirely unaffected by Section 23-1431, which only prohibits the use of release time for direct electoral and lobbying activities by *some* public sector unions (while allowing it for the biggest unions).

If anything, passage of Section 23-1431 is yet another reason to *grant* review. Like the *Cheatham* decision itself, 240 Ariz. at 317 ¶ 7, that statute specifically says that paid release time "is a matter of statewide concern," and involves questions of constitutional dimension. A.R.S. § 23-1431(E). That shows that the state's elected representatives agree with this Court that release time is an issue of pressing importance with constitutional ramifications—all of which makes granting this Petition all the more imperative. *State v. Arevalo*, 249 Ariz. 370, 373 (2020) (the Court may grant review in constitutional cases on recurring issues of statewide concern).

II. Release time serves the Union's interests, not those of the City or taxpayers.

The AG argues that release time serves a public purpose because it fosters "cooperative employment relationships," "efficient…labor-management concerns," and the "resolution of grievances." Br. at 10–11. That's not a good reason to deny the Petition.

First, these indirect, speculative benefits are "valueless" under the Gift Clause's consideration prong. Petitioners explain that point more fully in their Response to the Amicus Brief of Heidi Shierolz. But there's an additional reason

that these alleged benefits also don't satisfy the public purpose requirement: the City does not exercise any control or oversight over the use of release time to ensure that these (or any other) purposes are, in fact, achieved.

In *Kromko v. Arizona Board of Regents*, 149 Ariz. 319 (1986), this Court made clear that that the government may give public resources to a private entity—a business or a union—only if the "operations" of that entity "are…subject to the control and supervision of public officials," to ensure that public purposes are, in fact, being carried out. *Id.* at 321. *See also Cramer v. Mont. State Bd. of Food Distrib.*, 129 P.2d 96, 97 (Mont. 1942) (grant of aid to private entity was unconstitutional gift because the entity was not "under the control of the state [or] in the nature of a municipal corporation.")[2]

The lack of City control over release-time employees here is striking. The City exercises effectively *no* oversight over, or supervision of employees on full-time release—and there's no accountability for such persons. They set their own schedules and direct their own activities. APP.033 ¶ 43. Nobody in the City monitors their performance, gives them duty assignments, or places prohibitions on

[2] Arizona's Gift Clause was copied from Montana's 1879 Constitution, making Montana precedent helpful in this context. But the supervision requirement is found in the jurisprudence of many other states, too. *See, e.g.*, *State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 612 (Idaho 1959); *State ex rel. Wash. Nav. Co. v. Pierce Cnty.*, 51 P.2d 407, 411 (Wash. 1935); *Detroit Museum of Art v. Engel*, 153 N.W. 700, 703 (Mich. 1915); *Harrington v. Atteberry*, 153 P. 1041, 1045 (N.M. 1915); *Washingtonian Home of Chi. v. City of Chi.*, 41 N.E. 893, 895 (Ill. 1895).

their activities. APP.033 ¶¶ 44–45. Release time employees provide *no accounting of any kind* to the City about how they spend release time. APP.033–34 ¶ 46. Nobody 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.035 ¶ 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 release-time employees accomplish public purposes, and the explanation is simple: because they don't. Courts in Gift Clause cases are supposed to focus on "the realities of the transaction," *Turken v. Gordon*, 223 Ariz. 342, 345 ¶ 8 (2010) (cleaned up), not mere fictions, or speculations, or formalistic recitations. Yet the latter are all the AG relies upon—simply declaring the City's broad policy assertions reasonable, instead of showing that the City is even monitoring whether the purposes that (the AG claims) release-time accomplishes are actually being accomplished. The *realities* of this transaction show that they are not.

First, the MOU itself says that the full-time release positions are *not* provided to perform public services, but are instead provided to the Union "to engage in lawful *union* activities." APP.050 § 1-3(A)(1) (emphasis added). Second, the record shows that the vast majority of release-time activities—such as using

release time for political and ideological speech, or to recruit new members to the Union and attend union meetings and conferences—qualitatively *cannot* serve a public purpose. APP.035–36 ¶¶ 67–75; APP.038–39 ¶¶ 100–02. Recruitment and political speeches serve the Union's private purposes, not public purposes.

In short, the "the *reality* of the transaction," *Wistuber*, 141 Ariz. at 349 (emphasis added), is that the City makes no effort to supervise or monitor the uses of release time to ensure that any purported *public* interests are actually accomplished. The AG offers no argument to the contrary, except to say that how "the City views" things is "reasonable." Br. at 10. That's not enough.

Because the City has not put in place even minimal standards of review or control over release time, it has abused its discretion and failed to ensure that its grant of funds to the Union actually achieves a public purpose.

III. The Attorney General's novel theory about Gift Clause consideration would neuter constitutional protections.

The AG contends that the City receives adequate consideration for release time because, employing a "panoptic" view of the MOU, the release-time subsidy cannot be tested independently for consideration. Br. at 14–16. But "panoptic" does not mean—as the AG seems to think—"zooming out" so far as to blind oneself to the realities of the transaction. *Cf. id.* at 14. On the contrary, "panoptic" means "all-seeing…permitting everything to be seen," *Webster's Third New International Dictionary* 1631 (2002)—that is, paying attention to the actual facts.

And the actual facts of *this* transaction show that release time was negotiated here as a separate benefit, with specific trade-offs that reduced Petitioners' wages and benefits. It was removed from a previous MOU, whereupon the employees, including Petitioners, received an increase in wages and benefits—and then reinserted into this MOU, whereupon those wages and benefits were reduced. In short, the release time provision is its own element of the MOU and must be tested independently for consideration, just like this Court did in *Wistuber*, 141 Ariz. at 348.

The AG's interpretation of "panoptic" would "zoom out" so far that any gift or subsidy would evade the constitutional prohibition as long as it was embedded in a larger contract. Consider the helpful hypothetical offered in *Turken*, 223 Ariz. at 347 ¶ 16. There, this Court said that for a city to buy a garbage truck would certainly serve a public purpose—but paying twenty times what the truck is worth would be an unconstitutional subsidy. Here, however, the AG's "zoom out" theory is so deferential that the City could buy the Union president a $250,000 Lamborghini to drive to union offices to perform work on release time, as long as the car was included in a $2 million contract for union services. After all, in such a case, what "the City receives from *all* employees and the Union" would vastly outweigh the cost of the Lamborghini, Br. at 16—and would therefore not be a gift.

That's obviously wrong—and it's not "panoptic," since "zooming out" that far would mean *blinding* oneself to the realities of the transaction. Moreover, such a holding would contravene the goal of the Gift Clause, which is to prevent "giving advantages to special interests." *Wistuber*, 141 Ariz. at 349. **An illegal gift hidden within a larger contract is still a gift.**

The AG also argues, relying on *Kromko*, that "nonpecuniary benefits" must be evaluated in the consideration analysis. Br. at 16–17. It's true that *Kromko* said this—but it emphasized that it took "nonpecuniary" consideration into account *only* because the lawsuit concerned "the 'special case' of a municipality's relationship to a non-profit hospital." 149 Ariz. at 322 (quoting *Wistuber*, 141 Ariz. at 349 n.4). It need hardly be said that the Union does not qualify for "the judiciary's long-held accordance of a special status to…'charitable institutions.'" *Id.*

In any case, while it's possible for "nonpecuniary" benefits to be consideration under the Gift Clause, *Schires v. Carlat*, 250 Ariz. 371, 378 ¶ 21 (2021), made clear that they must still be susceptible of some objective, fair-market *valuation*, in order for the give/get comparison to work. (The AG concedes this: "[t]o be sure, an objective analysis is required." Br. at 18). The City might, for example, hire an artist to paint a mural to obtain an aesthetic benefit which is "nonpecuniary." But in order to ensure that the consideration is proportionate, the

artist's services must still have an objectively ascertainable fair-market value—otherwise, the City might pay her twenty times what the mural is worth, and that would violate the Gift Clause. *Cf.* *Turken*, 223 Ariz. at 347 ¶ 16.

Anyway, *Kromko* didn't fail to compare objective fair market values. In making the give/get comparison, it found that "substantial monetary benefits have in fact accrued to the [state]," because the state had eliminated a liability of between $20 million and $36 million annually in exchange for the rental payments. 149 Ariz. at 322. In other words, it relied on objective fair-market values, as *Schires* calls for.[3]

Here, even assuming the "nonpecuniary" theory applied, **the Union does not obligate itself to provide any benefits, pecuniary or otherwise, 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*, 223 Ariz. at 349 ¶ 31 (emphasis added), and *nothing* in the MOU or anything else requires the Union to engage in "cooperative employment relationships," Br. at 10, or provide any other direct services, pecuniary or nonpecuniary, to the City or the public.

[3] Of course, if there were a conflict between *Kromko* and *Schires*, *Schires* would control. The AG doesn't argue for overruling *Schires*—and couldn't consistently do so, given the AG's emphasis on stare decisis, Br. at 20—but overruling *Schires* would, again, require *granting*, not denying the Petition.

The MOU does not bind the Union to provide *any* benefits in return for release time. APP.039 ¶ 109; SAPP.009 at 27:5–28:11; APP.119–120 at 57:22–59:21. It is not required to spend a certain amount of time meeting with City officials or discussing employee concerns, APP.039 ¶ 111, APP.120 at 58:17–25, or resolving disputes "efficiently" or at the lowest level, APP.039 ¶ 110, APP.119–120 at 57:2–58:8, or any other specific service. Rather, under the release time provisions, the Union has expressly promised nothing but to "engage in lawful *union* activities." APP.039 ¶ 109; APP.050 § 1-3(A)(1).

Finally, the AG argues that the Court should adopt a "less mathematical analysis" for the give/get comparison. Br. at 19. It's unclear what "less mathematical" means, unless it means a *deferential* analysis, which *Schires*, 250 Ariz. at 378 ¶ 23, expressly and correctly rejected. **Combined with the "zooming out" theory of "panoptic" review, this "less mathematical" analysis would appear to let the government subsidize whatever private undertaking it asserts will benefit the public**. Obviously, that's not what the Gift Clause calls for. A subsidy "for a purpose that is deemed by the city fathers to be for the public good…falls squarely within the prohibition…. '[T]he constitution makes no distinction as between "donations," whether they be for a good cause or a questionable one. It prohibits them all.'" *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 362 (1974) (citation omitted). No Arizona precedent warrants

being "less mathematical" in the consideration analysis. And if this Court were to consider adopting the AG's newfangled "less mathematical" theory, it would have to *grant*, not deny, the Petition.

IV. Stare decisis does not counsel against granting the Petition.

The AG urges the Court to deny review based on stare decisis, but that argument is unpersuasive.

First, it's not true that "*Cheatham* resolved issues largely overlapping with those here." Br. at 20. Rather, ***Cheatham*** **went out of its way to state that it did not "address…[whether] the release time provisions violate either the 'right to work'…or the First Amendment rights of non-[union] members."** 240 Ariz. at 324 ¶ 43. Those issues are raised here.

Second, the AG says stare decisis is "at its zenith" when "the precedent established important settled expectations—especially those relat[ed] to contract rights." Br. at 20 (cleaned up, citation omitted). But this is a constitutional challenge, not a contract law case, and the doctrine of stare decisis "is at its weakest" in constitutional cases. *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also E.H. v. Slayton*, 249 Ariz. 248, 254 (2020). Indeed, as *Janus* observed, "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." 138 S. Ct. at 2478.

This Petition involves constitutional issues of major importance, as this Court—and now the Legislature, in passing A.R.S. § 23-1431—has recognized. *Cheatham*, 240 Ariz. at 317 ¶ 7. Phoenix and other cities continue to pay unions with public money to spend time doing private activities—including private, political activities. No principle of stare decisis warrants disregarding these concerns.

CONCLUSION

The Court should *grant* the petition.

Respectfully submitted August 29, 2023 by:

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

IN THE SUPREME COURT
STATE OF ARIZONA

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.	Supreme Court No. CV-23-0130 PR Court of Appeals, Division One 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 23(g)(2) of the Ariz. R. Civ. App. P., I certify that the body of the attached Plaintiffs-Appellants' Response to State of Arizona's Amicus Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 3,492 words, excluding table of contents and table of authorities.

Respectfully submitted August 29, 2023 by:

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

IN THE SUPREME COURT
STATE OF ARIZONA

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.	Supreme Court No. CV-23-0130 PR Court of Appeals, Division One No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

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 August 29, 2023, she caused the attached Plaintiffs/Appellants' Response to State of Arizona's Amicus 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

Alexander W. Samuels
Luci D. Davis
OFFICE OF THE ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
Alexander.samuels@azag.gov
Luci.davis@azag.gov
acl@azag.gov
Attorneys for Amicus Curiae State of Arizona

Gerald Barrett
WARD, KEENAN & BARRETT, PC
3838 N Central Ave, Ste. 1720
Phoenix, AZ 85012
gbarrett@wardkeenanbarrett.com

Leon Dayan
Joshua A. Segal
Bredhoff & Kaiser, PLLC
805 15th St. N.W., Ste. 1000
Washington, D.C. 20005
ldayan@bredhoff.com
jsegal@bredhoff.com
Attorneys for Amicus Curiae Heidi Shierholz

/s/ *Kris Schlott*
Kris Schlott