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 DEFENDANTS/APPELLEES' CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Respondents City of Phoenix ("City") and the American Federation of State, County, and Municipal Employees, Local 2384 ("Union") petition for review on questions that need no clarification and were correctly decided below.

The City first asks this Court to adopt a new standing rule that would require plaintiffs to satisfy some heightened evidentiary standard for standing at the summary judgment stage. Cross-Pet. at 9–10. That is contrary to Arizona's longstanding jurisdictional rules, and in any event, Petitioners alleged and proved their injuries to bring the claims in this case—injuries that are redressable because release time continues to be funded with public money that is part of Petitioners' total compensation. *See* Gilmore's Petition for Review ("Gilmore Pet.") at 9–10.

The City also asks this Court to impose a new "public interest" standing requirement in Gift Clause cases, a requirement that, if adopted, would bar plaintiffs who suffer economic and other injuries from bringing meritorious lawsuits.

Finally, Respondents (Cross-Petition at 12–14), ask the Court to grant review to "clarify" the policy principle established in *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346, 350 (1984), which holds that "[w]here aggrieved citizens, in good-faith, seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be awarded [under A.R.S.

§ 12-341.01]." But no such clarification is necessary. Instead, the court below correctly reversed an extraordinary $355,000 fee award against two equipment mechanics who brought a good-faith public interest case challenging the constitutionality of government action. There's no reason to revisit that holding, and doing so would chill meritorious cases that seek to vindicate the rights of all Arizonans.

I. The Court need not change the standing requirements.

A. Petitioners have alleged and proven their injuries.

The Cross-Petition (at 1–2) claims Petitioners "were not injured," and suggests that Arizona's rules governing standing need to be clarified to require "evidence of an actual injury" as opposed to "mere allegations." But there is no reason to raise the standing bar in Arizona in this way.

Arizona courts have long said that standing only requires plaintiffs to "*allege* a distinct and palpable injury," *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998) (emphasis added), sufficient to show "a personal stake in the outcome of the controversy." *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 562–63 ¶ 18 (App. 2003) (internal quotations and citations omitted).

Petitioners easily pass that test. Their individual compensation was reduced from what it would otherwise have been because funds were diverted to subsidize Union speech with which they disagree; they were forced to associate with the

Union against their wills; and the public revenue that funds their wages was used to pay for release time instead.[1] These injuries would suffice for standing in *federal* court, *see* *Janus v. AFSCME*, 138 S. Ct. 2448, 2462–63 (2018), so they certainly suffice for Arizona law, whose standing requirements are more relaxed. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279–81 ¶¶ 33–41 (2019).[2]

Since Petitioners have standing under existing standing rules, the City must show why those rules should be made stricter. It doesn't try, and the reason is clear: because their standing argument is just a disguised form of their merits argument. That gambit cannot work here, however. The City never asserted below that there was any factual dispute regarding Petitioners' injuries, even though it's their burden to do so if they believed such a dispute existed. *Doe v. Roe*, 191 Ariz. 313, 323 ¶ 33 (1998) ("Upon a moving party's prima facie showing that no genuine issue of material fact exists, the opposing party bears the burden of

[1] Petitioner Harder is also a City resident, Opinion at ¶ 11, and a City taxpayer, Pl./Appellants' Supp. App., SAPP.005–6, so he has standing with respect to the Gift Clause claim. *See* *Ethington v. Wright*, 66 Ariz. 382, 386 (1948) ("[I]t is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds.").

[2] Indeed, standing in Arizona "is not a constitutional mandate" in state court, but a matter of "prudential or judicial restraint." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005) (internal marks and citation omitted). Arizona courts can even decide case where there's no standing. *State v. B Bar Enters., Inc.*, 133 Ariz. 99, 101 n.2 (1982).

producing sufficient evidence that an issue of fact does exist."). Instead, the City cross-moved for summary judgement, thus *conceding* that there are no material factual disputes regarding Petitioners' standing.

In any event, even if the rules were changed as the City suggests, Petitioners did not, as the Cross-Petition claims, rely on "mere allegations" of harm. Cross–Pet. at 2. They *proved* their injuries through affidavit, deposition, and documentary evidence. *See, e.g.*, SAPP.005–6; APP.040 ¶¶ 115–123; APP.149–50 at 41:19–42:1, 42:3–21; SAPP.015–21 § 1-3; SAPP.010 at 49:3–8, 57:16–22, 61:8–14, 77:16–21; APP.123 at 71:9–24; SAPP.028; SAPP.029; APP.029 ¶ 7; APP.040 ¶ 117; APP.149–50 at 41:19–42:1, 42:3–43:21; SAPP.035 at 216:15–20 (Petitioner Gilmore testifying that paid release time violates his constitutional rights); SAPP.040 at 110:17–20 (Petitioner Harder testifying to the same); SAPP.038–39 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). They have suffered economic injuries, since their wages and benefits are lower under this contract as a result of the release time provisions, and because Petitioners' salary is paid by the City and Petitioner Harder is a City taxpayer. Petitioners therefore have all the "personal stake" that's required. *Aegis of Ariz.*, 206 Ariz. at 562–63 ¶ 18.

B. Petitioners' injuries are redressable and not "hypothetical."

Petitioners' injuries are also redressable because release time continues to be funded as part of Petitioners' total compensation.[3] Contrary to the City's assertion, Petitioners are not seeking—as the City claims—any "increase [in] personal compensation." *Id.* at 11. In this action for declaratory and injunctive relief, they are asking the City to stop funding release time with part of their compensation and public funds. Their complaint seeks equitable relief to block City from violating their constitutional rights, APP.014 ¶ A—the same relief the *Janus* Court ordered. 138 S. Ct. at 2486.

The City puts great emphasis on *Asarco Inc. v. Kadish*, 490 U.S. 605 (1989), but *Asarco*[4] is irrelevant. It said there was no standing because the plaintiffs could not prove that they "will receive any direct pecuniary relief," *id.* at 614, but Petitioners aren't seeking any kind of pecuniary relief. What they want is to stop the City from using their money—taxpayer dollars Petitioner Harder must pay, and that fund *their current compensation*—to pay for "the propagation of opinions" they disagree with, something that violates their constitutional rights. *Janus*, 138

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[3] And because Petitioners continue to be taxpayers.

[4] *Asarco* dealt with whether there was standing in *federal c*ourt when a state statute was challenged for violating federal law regarding the lease or sale of lands. 490 U.S. at 610. The Court went to great lengths to distinguish the absence of taxpayer standing in federal courts with robust taxpayer standing in Arizona courts. *Id.* at 617.

S. Ct. at 2464. *Asarco* has nothing to say about that.

Incidentally, the City also makes a false assertion when it says "Plaintiffs admitted … they received all compensation to which they were entitled, … and … nothing was deducted from their promised compensation to pay for release time." Cross-Pet. At 10. Petitioners made no such "admissions." *See* City's Supp. App. 003 at 13:17–23 (Petitioner Gilmore testified that he lost eight hours of vacation leave because of paid release time.); *see also* SAPP.035 at 215:3–8 (Petitioner Gilmore testified that his compensation pays for release time.); SAPP.040 at 110:11–15 (Petitioner Harder testifies to the same.).

The record is uncontroverted on this point: when release time was previously eliminated, Petitioners received eight additional hours of vacation pay; when release time was restored in *this* MOU, the City used those eight hours to pay for release time, instead. APP.040–41 ¶¶ 115–123; APP.149–50 at 41:19–42:1, 42:3–21; SAPP.015–21 § 1-3; SAPP.010–13 at 49:3–8, 57:16–22, 61:8–14, 77:16–21; APP.123 at 71:9–24; SAPP.028; SAPP.029. In other words, *these* Petitioners in *this* case had eight hours of vacation—amounting to $647.21 per employee—removed from their paychecks to fund release time. So the question is not whether Petitioners are injured because of what *might* happen *if* release time were eliminated, but whether they are injured because of what *did* happen to their compensation when the City funded release time in *this* MOU. The City's

assertions that Petitioners did not pay for release time because "nothing was deducted from their promised compensation," Cross-Pet. at 10, is provably false—and has been proven false.[5] It cannot be revived by re-dressing it as a standing argument.

C. A Gift Clause claim does not require additional elements to establish standing.

The City also tries to graft onto the Gift Clause a standing requirement that does not exist by contending that Petitioners' must prove their claim will "serve a public purpose," Cross-Pet. at 12, rather than advance any personal interests. No such requirement exists in Arizona's standing jurisprudence, and no Gift Clause precedent has ever required this.

Rather than showing how such a requirement would work, the City argues that Petitioners were "pursuing their private pecuniary interests," *id.*, and therefore lack standing to raise a Gift Clause claim.[6] That is absurd. Many Gift Clause

[5] We also know that the City has treated release time as individual compensation in *other* MOUs that it has with *other* labor organizations. When the City eliminated paid release time in the MOU with the firefighters'union, it gave each firefighter 8.5 hours of additional vacation time. APP.041 ¶ 126– 27; SAPP.022–27; APP.041 ¶ 128; SAPP.026 § 5-5(I).

[6] Notwithstanding the fact that there is no such standing requirement in order to bring a Gift Clause claim, this case *does* advance the dual purposes of the Gift Clause to (1) prevent the "depletion of the public treasury or inflation of public debt by engagement in non-public enterprise" and (2) to protect public funds for "the purely private or personal interests of any individual." *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 320–21 (1986) (marks and citations omitted). Those

cases involve plaintiffs pursuing their own pecuniary interests, including cases where the plaintiffs seek to advance a "private purpose," rather than a public interest. *See, e.g.*, *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 546–47 (1971) (private corporation alleging that town violated Gift Clause regarding water line construction); *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356 (1974) (private corporation challenging a municipal lease under the Gift Clause); *Grosvenor Holdings, L.C. v. Pinal Cnty.*, No. 2 CA-CV 2012-0019, 2013 WL 209731, at *1 ¶ 1 (Ariz. App. Jan. 18, 2013) (Gift Clause challenge brought by private developer); *Yeazell v. Copins*, 98 Ariz. 109, 112 (1965) (action by *public employee* for declaratory relief regarding application of the Gift Clause to public pensions).[7]

Not only is the City's attempt to invent a new standing requirement for Gift Clause claims unsupported by existing law, but it would also run counter to the entire theory of standing as it currently exists. Courts typically *require* plaintiffs to have a distinct, *personal* stake in a case, rather than seeking merely to vindicate some general social interest. The City's novel "public interest" standing rule would thus contradict the whole thrust of standing requirements (not to mention its

interests are advanced by this case, and by Petitioners' claim, exactly as they would be if they were brought by any other party.

[7] In any event, Petitioners cannot be pursuing their personal pecuniary interests in this equitable action for *declaratory and injunctive relief*.

own argument, *see ante*, Section I.A.). True, plaintiffs who have suffered an "injury in fact, economic or otherwise," *Aegis of Arizona*, 206 Ariz. at 562–63 ¶ 18 (marks and citation omitted), may *also* vindicate a broader public interest—as indeed, Petitioners are doing here. But no general, vague "public interest" showing is required by Gift Clause precedent, or by standing jurisprudence generally—in this or any other state—and the Court should decline the City's invitation to create such a new requirement.

Arizona's standing requirements are clear and are not in need of revision. They are also easily satisfied in this case on all counts.

But in any event, standing in Arizona is a prudential question, "not a constitutional mandate because Arizona has no counterpart to the 'case or controversy' requirement of the federal constitution." *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, 400 (2018) (marks and citation omitted). Because the practice of release time exists throughout Arizona, the legitimacy of the City's actions here is a matter of pressing statewide importance, as this Court said in *Cheatham v. DiCiccio*, 240 Ariz. 314, 317 ¶ 7 (2016): "whether the Gift Clause bars release time provisions in collective bargaining agreements for public employees is a legal issue of statewide importance." Like *Cheatham* and *Janus*, this case involves significant issues of public policy, and was brought for the purpose of examining the legality of government action. Thus,

while the Court should deny the Cross Petition, which would only serve to upend decades of settled law and convolute Arizona's model standing rules, the Court should grant review on Petitioner's questions—both because Petitioners have standing and as a prudential matter—to settle pressing constitutional issues of statewide concern.

II. The court below appropriately applied the policy set out in *Wistuber* in finding that Respondents are not entitled to an award of fees under A.R.S. § 12-341.01.

Respondents contend that this Court should grant review to "clarify that A.R.S. § 12-341.01 applies in constitutional cases that arise out of contract, even when they challenge government action." Cross-Pet. at 12. But no such clarification is necessary. *Wistuber* was already clear that "attorney's fees should *not usually* be awarded" in cases that "challeng[e] the constitutionality of the action of a public body." 141 Ariz. at 350 (emphasis added). That case said attorney fees may be proper if a case is brought in bad faith, or "is groundless or frivolous, or is brought for the purpose of harassing that body." *Id.* And that is a proper standard: one that preserves the crucial right to challenge the constitutionality of government action while still deterring baseless or bad-faith litigation. But since there is of course no allegation no evidence, and no finding that this case was brought for any such untoward purposes, the lower court simply and faithfully applied the *Wistuber* rule.

Respondents contend that "the decision below conflicts with *AFSCME [v. City of Phoenix*, 249 Ariz. 105, 113 ¶ 33 (2020)] and *Piccioli [v. City of Phoenix*, 249 Ariz. 113, 119 ¶ 24 (2020)]" because this case arose out of Petitioners' "contractual employment relationship with the City." Cross-Pet. at 13. But that is untrue.

First, the MOU in this case is not a contract of employment and Petitioners aren't parties to the MOU. A labor agreement is a contract "between labor organizations and employers," and "*[e]mployees are not parties to the agreement*." Williston, Contracts (3d ed., Jaeger 1959) § 379A (emphasis added). Employees are at most third-party beneficiaries to a collective bargaining agreement, *id.*, and third-party beneficiaries aren't parties. *Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson*, 211 Ariz. 485, 491 ¶ 33 (2005). 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.045, and goes on to say that it's an "agreement" between the "City" and the "Union," who are the "parties." It's also signed only by representatives of the City and the Union. APP.096.

Also, Petitioners never voted on or ratified the MOU, and never authorized AFSCME to be their exclusive representative. APP.112 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 the terms of

the MOU. They are not Union members, don't pay Union dues, and have never consented to fund release time. SAPP.005 ¶¶ 8–10; SAPP,003 ¶¶ 8–10; City's Supp. App. 035 at 178:20–179:1; *Id.* at 92:17–20; APP.004–5 ¶¶ 5–6; SAPP.005 at ¶¶ 5–6. Petitioners are not parties to the MOU—they're hostages to it.

What's more, this case does not "aris[e] out of a contract" in the sense used in both A.R.S. § 12-341.01 and in *Piccioli* and *AFSCME*. As those cases make clear, the term "arising out of contract" in that statute refers to a dispute over the *interpretation*, or *application*, or *breach* of a contract. This case is about the *legality of* the contract—and questions about a contract's constitutionality do not "arise out of" that contract. *Cf. Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001) ("disputes that are not related—with at least some directness—to performance of duties specified by the contract do not count as disputes 'arising out of' the contract."). Arizona courts have already held that disputes that involve "duties recognized by public policy" rather than duties imposed by contract—which is true here—do not "arise out of contract" for purposes of Section 12-341.01. *Barmat*, 155 Ariz. at 523. Neither do cases involving "duties created by the law without regard to expressions of assent." *Dooley v. O'Brien*, 226 Ariz. 149, 152 ¶ 11 (App. 2010) (cleaned up). Here, the duties in question arise from the Constitution and state law, not the MOU, so this case simply doesn't "arise out of contract." If a trustee's breach of fiduciary duty

doesn't "arise out of contract," *In re Naarden Trust*, 195 Ariz. 526, 530 ¶ 18 (App. 1999), neither does the City's violations of the Constitution.

Respondents say this case is unlike *Wistuber*, *AFSCME*, and *Piccioli*, because Petitioners are not "aggrieved citizens," but employees seeking "personal compensation." Cross–Pet. at 14. But, again, that is neither true factually nor legally. Petitioners bring this case for *declaratory and injunctive relief* to challenge the constitutionality of government action. APP.014 ¶ A. They seek no monetary relief whatsoever. Second, they do not assert any personal claims under any contract. *Id.* Instead, like the plaintiff in *Wistuber*, they brought this case to challenge the constitutionality of government action.

The lower court appropriately and faithfully applied the *Wistuber*, rule, and there's no reason to revisit that holding. Like *Wistuber*, *Cheatham*, and *Janus*, this case involves important 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 Section 12-341.01.

Respectfully submitted July 17, 2023 by:

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 23(g)(2) of the Ariz. R. Civ. App. P., I certify that the body of the attached Plainiffs-Appellants' Petition for Review appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 3,184 words, excluding table of contents and table of authorities.

Respectfully submitted July 17, 2023 by:

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CERTIFICATE OF SERVICE

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The undersigned certifies that on July 17, 2023, she caused the attached Plaintiffs-Appellants' Response to Cross-Petition for Review and Supplemental Appendix to be filed via the Court's Electronic Filing System and electronically served a copy to:

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