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***COMMENTARY***

*A Constitutional Tightrope: Release Time for Unionized Public  
Workers Hangs in the Balance*

BY ALETHEA CHANEY\*

When public sector unions come to the bargaining table with the government, they often walk away with a contract in which the government agrees to pay public workers to take a break from their official duties and instead work for the union. That’s a practice called release time, and it’s practiced at the state, local, and federal levels.<sup>1</sup> Right now, Arizona unions are spending hundreds of thousands of dollars in legal fees arguing in Court that release time is constitutional—and they may be losing. To get out of the courtroom, these unions need to restructure their agreements with the government to get onto firmer constitutional ground.

This April, in a split decision in *Gilmore v Gallego*, the Arizona Court of Appeals ruled that the City of Phoenix can continue to give unionized public workers release time.<sup>2</sup> Plaintiffs in that case—two public workers who are not part of the union that negotiates their wages—filed a petition for review to the Arizona Supreme Court.<sup>3</sup> Over the last decade, the Court has demonstrated a willingness to hear Gift Clause cases, and given that the Court of Appeals issued a split decision, the Court will likely hear the case.

In *Gilmore*, a union representing “Unit II” public workers negotiated an agreement with the City of Phoenix.<sup>4</sup> That agreement, called a Memorandum of Understanding (MOU), set wages and benefits for all Unit II employees—including non-union members. The MOU also included a very generous release time provision in which the City agreed

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\* J.D. Candidate, Class of 2025, Sandra Day O’Connor College of Law at Arizona State University.

<sup>1</sup> Jon Riches & Jacob Huebert, *Backgrounder: Gilmore v Gallego*, THE GOLDWATER INSTITUTE, <https://www.goldwaterinstitute.org/wp-content/uploads/2022/04/Gilmore-v-Gallego-Backgrounder.pdf> (last visited Sept. 6, 2023).

<sup>2</sup> *Gilmore v. Gallego*, 529 P.3d 562, 566 (Ariz. Ct. App. 2023).

<sup>3</sup> *Plaintiffs/Appellants Petition for Review* at 7, *Gilmore v. Gallego*, 529 P.3d 562 (Ariz. Ct. App. 2023), *petition filed*, (Ariz. May 18, 2023).

<sup>4</sup> *See Gilmore*, 529 P.3d at 566.

to pay for four full-time City employees to be released from their duties to work for the union with no strings attached. The agreement also gave the union a bank of 3,183 paid hours of additional release time. The release time provisions are valued at \$500,000. The *Gilmore* Plaintiffs argued that these release time provisions violated their rights to free speech, freedom of association, and the Arizona Gift Clause.<sup>5</sup>

The Plaintiffs' First Amendment claims stem from *Janus*, a recent Supreme Court decision about union dues.<sup>6</sup> In *Janus*, the Court held that public employees could not be forced to pay a union to bargain on their behalf when they did not wish to be part of that union, and strongly objected to that union's speech. That's because the First Amendment is violated when any portion of a non-consenting worker's compensation is used to subsidize a union, thereby forcefully and impermissibly funding private speech.<sup>7</sup>

Relying on *Janus*, the Plaintiffs argued that they were being forced to subsidize union speech because the union used their compensation as a bargaining chip to get release time.<sup>8</sup> Put another way, the union negotiates wages and benefits for all Unit II public workers—not just the Unit II workers who were also union members.<sup>9</sup> If the union negotiated for lower wages to offset the cost of release time, then the Plaintiffs would have been forced to fund speech they disagreed with.<sup>10</sup>

All three Arizona Court of Appeals judges rejected the Plaintiffs' First Amendment claims because the union strategically structured their MOU so that the Plaintiffs would not actually subsidize union speech. But in doing so, the dissent argued, the MOU instead violated the Arizona Gift Clause.<sup>11</sup>

The Gift Clause is a unique clause in the Arizona State Constitution that forbids the government from giving an association or corporation a subsidy without receiving adequate compensation.<sup>12</sup> In recent years, the Arizona Supreme Court has clarified the two-prong Gift Clause test; A government expenditure will be upheld if “(1) it has a public purpose, and (2) the consideration received by the government is not ‘grossly disproportionate’ to the amounts paid to the private entity.”<sup>13</sup>

This won't be the first time the Court examines whether a release time provision violates the Gift Clause. Seven years ago, in *Cheatham v. DiCiccio*, the Court examined an MOU that satisfied both prongs of the Gift Clause analysis.<sup>14</sup> Regarding the first prong, the Court said that an MOU serves a public purpose because it procures worker services for the government.<sup>15</sup> Even release time provisions, when viewed in isolation, may serve

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<sup>5</sup> *Id.*

<sup>6</sup> *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018).

<sup>7</sup> *Id.*

<sup>8</sup> *See Gilmore*, 529 P.3d at 568.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 576.

<sup>11</sup> *Id.*

<sup>12</sup> ARIZ. CONST. art. IX, § 7.

<sup>13</sup> *Schires v. Carlat*, 480 P.3d 211, 215. (Ariz. 2021).

<sup>14</sup> *Cheatham v. DiCiccio*, 379 P.3d 211, 213 (Ariz. 2016).

<sup>15</sup> *Id.* at 320.

a public purpose because the provisions provide benefits to government workers who are union members.<sup>16</sup>

But the *Cheatham* MOU is fundamentally different from the *Gilmore* MOU.<sup>17</sup> In *Cheatham*, the union accepted reduced wages and benefits to get release time. But when *Janus* was decided two years later, the union in *Gilmore* decided that it needed to protect itself from First Amendment liability. The *Gilmore* union decided to negotiate compensation and release time separately. The result was that the *Cheatham* MOU contained just one agreement, but the *Gilmore* MOU contained two agreements—a compensation agreement and a release time agreement.<sup>18</sup>

This completely changes the calculus for the second prong of the Gift Clause analysis. The value that the *Gilmore* MOU provides to the City of Phoenix cannot act as compensation for the release time provisions because the union deliberately did not accept decreased wages or benefits in exchange for release time. The union did not offer any benefit to the City of Phoenix, much less any benefit approaching \$500,000. This means that the release time provisions violate the Gift Clause because the consideration received by the City of Phoenix is “grossly disproportionate” to the amount paid to the union.<sup>19</sup>

Regardless of the way *Gilmore* is decided, Arizona unions should pursue one of two viable courses of action to protect themselves from future, costly litigation. Some unions may choose to begin funding release time with union dues instead of taxpayer money. However, if unions continue to bargain for government-funded release time, they need to explicitly outline what consideration they are offering for the release time, and why that consideration is proportional to the benefit they are receiving. Otherwise, unions will continue to run afoul of the First Amendment or the Gift Clause.

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<sup>16</sup> *Id.* at 321.

<sup>17</sup> *Gilmore v. Gallego*, 529 P.3d 562, 577 (Ariz. Ct. App. 2023) (Bailey, C., dissenting in part).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; *Schires v. Carlat*, 480 P.3d 211, 215. (Ariz. 2021).