IN THE SUPREME COURT
OF THE STATE OF ARIZONA

WILLIAM R. CHEATHAM AND MARCUS HUEY, Plaintiffs and Appellees, v. SAL DICICCIO, et al., Defendants and Appellants,	No. CV-15-0287PR Arizona Court of Appeals, Division One No. 1 CA-CV 13-0364, 1 CA-CV 14-0135

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PLAINTIFFS AND APPELLEES**

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INTRODUCTION

Pursuant to Arizona Rule of Civil Appellate Procedure 16(d), Pacific Legal Foundation respectfully submits this brief amicus curiae in support of William R. Cheatham and Marcus Huey. Counsel for Cheatham and Huey and counsel for Petitioner Phoenix Law Enforcement Association consent to the filing of this brief. Counsel for the City of Phoenix did not respond to a request for consent.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has supporters across the country, including in the State of Arizona. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), and *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315, 48 Cal. Rptr. 87, 906 P.2d 1242 (1995); and participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), to *Friedrichs v. California Teachers Association*, No. 14-915 (U.S. Mar. 29, 2016). PLF has

represented clients in Arizona courts as well as filed amicus briefs on a range of public policy issues. PLF filed an amicus brief in this case in the court below. *Cheatham v. DiCiccio*, 238 Ariz. 69, 356 P.3d 814 (Ct. App. 2015). *See also*, *Biggs v. Cooper*, 236 Ariz. 415, 341 P.3d 457 (2014) (legislators' standing to challenge violation of supermajority voting requirement); *Turner v. City of Flagstaff*, 226 Ariz. 341, 247 P.3d 1011 (Ct. App. 2011) (litigating Arizona Private Property Rights Protection Act); *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009) (school vouchers); *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 108 P.3d 917 (2005) (standing for class actions); *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002) (constitutionality of Citizens Clean Elections Act).

PLF is particularly interested in this case because taxpayer money should be used exclusively for public purposes. The public purpose requirement of the Gift Clause reflects the state constitution's overall goals of fairness and accountability. Paying for "release time" means that taxpayers are funding employees whose sole function is to benefit the union, including lobbying. The city has no control over these release time employees, demonstrating that their loyalty and services are devoted to the union, not the taxpayers. As the trial and appellate courts correctly held below, this violates the state constitutional prohibition on using public funds to benefit private organizations.

ARGUMENT

I

THE GIFT CLAUSE SHOULD BE CONSTRUED IN HARMONY WITH THE ARIZONA CONSTITUTION'S OVERALL EMPHASIS ON PROMOTING REPRESENTATIVE DEMOCRACY AND PROTECTING TAX DOLLARS

Representative democracy depends on the ability of the people to hold their elected officials accountable for governmental actions. When officials give public funds to unelected, private organizations, it becomes extraordinarily difficult for voters to determine (1) *whom* to hold accountable, and (2) *how* to hold them accountable.

> The idea of a rational democracy is, not that the people themselves govern, but that they have security for good government. This security they cannot have by any other means than by retaining in their own hands the ultimate control. If they renounce this, they give themselves up to tyranny.

1 John Stuart Mill, *Dissertations and Discussions* 470-71 (London 1859), *quoted in* William V. Roth, Jr., *The "Malmanagement" Problem: Finding the Roots of Government Waste, Fraud, and Abuse*, 58 Notre Dame L. Rev. 961, 984 (1983). That is, the people must be able to hold accountable the government officials who collect and disburse tax dollars. To this end of "of fairness and accountability," Arizona's Constitution was "engineered to ensure that 'the players in the economy were on a level field, and that government would not unfairly favor particular enterprises or

individuals.'" Rebecca White Berch, et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 474 (2012) (citation omitted).[1]

This general framework is reflected in the Arizona Constitution's requirement that all taxes be levied for a public purpose, art. IX, § 1, the logical extension of which is that all public expenditures made from tax revenues must also serve public purposes. *See Proctor v. Hunt*, 43 Ariz. 198, 201, 29 P.2d 1058, 1059 (1934) ("[M]oney raised by public taxation . . . can only legally be spent for [public] purposes and not for the private o[r] personal benefit of any individual."). The Constitution's Gift Clause, art. IX, § 7,[2] also holds the legislature accountable for its expenditures of public funds by prohibiting government from making gifts of public money to private entities. *Turken v. Gordon*, 223 Ariz. 342, 346, 224 P.3d 158, 162 (2010) (The clause was "designed primarily to prevent the use of public funds raised by general taxation

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[1] Arizona's commitment to political accountability is reflected in statutes as well as constitutional provisions, such as open meeting laws (A.R.S. §§ 38-431, *et seq.*); *Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993) (noting "strong policy favoring open disclosure and access, as articulated in Arizona statutes and case law"), and the public records law (A.R.S. §§ 39-121, *et seq.*); *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007) ("[T]he purpose of the [public records] law is to open *government* activity to public scrutiny.").

[2] The clause provides, in relevant part, that "[n]either the state, nor any county, city, town, municipality, or other subdivision of the [S]tate shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7.

in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business.") (citation omitted).

As Alexander Hamilton observed in Federalist 30, "Money is, with propriety, considered as the vital principle of the body politic." The Federalist No. 30, at 188 (A. Hamilton) (C. Rossiter ed. 1961). Control over the purse strings is one of the most potent tools a government possesses. In this respect, there is little difference between the federal government and state or local governments. Taxpayers have a basic, and compelling, interest in tracking the expenditure of tax revenues. *See Millett v. Frohmiller*, 66 Ariz. 339, 348, 188 P.2d 457, 463 (1948) ("[L]oose control" of public funds would be "wholly foreign" to Arizona's state government.). Under the state constitutional structure, this Court must seek to fulfill the framers' intent for the Gift Clause—to promote accountability and to protect the public fisc. That is, "the government could not simply bargain for *some* benefit, or else vastly disparate consideration would act as a *de facto* subsidy and violate the intent of the clause." Berch, *supra*, at 480.

A contract containing union release time permits the city and the union to act in concert with virtually unchecked autonomy to spend millions of tax dollars in ways that no one can trace or control. Even politically savvy residents of Phoenix who follow the activities of the City Council by reading notices in the newspaper, and who register approval or disapproval of proposed ordinances, will not be permitted into

negotiations between city officials and the unions, A.R.S. § 38-431.03(A)(5),[3] nor will the specific contractual provisions be available for review and comment prior to the meeting at which they are adopted. This is precisely the type of "hidden" government activity that prevents accountability for how tax dollars are spent, and also violates Article IX, Section 7, of the Arizona Constitution.

II

THE UNIONS IMPROPERLY SEEK TAXPAYER SUBSIDIES FOR UNION EMPLOYEES

The ultimate question presented in this case is whether the city's subsidy of the salaries and benefits of employees of a public employee union violates the Gift Clause. Because the parties' briefs focus on Arizona's Gift Clause cases, amicus presents extrajurisdictional authorities that this Court should find persuasive.

In Texas, the state's Attorney General opined that release time violates that state's Gift Clause.[4] The Fifth Circuit in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1054 (5th Cir. 1985), *aff'd*, 479 U.S. 801, 107 S. Ct.

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[3] The statute provides that a public body may hold an executive session for the purpose of "[d]iscussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body." A.R.S. § 38-431.03(A)(5).

[4] There has been no litigation on the matter in Texas, suggesting that state and local government agencies, as well as the unions, believe this to be a settled question, based on the Attorney General Opinion.

801, 93 L. Ed. 2d 4 (1986), noted the Texas Attorney General's opinion that allowing public school teachers to perform employee organization business on a "release time" basis violated Texas Constitution Article III, Section 51, which provides:

> The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

The Attorney General found that such a program was unconstitutional as an unconditional grant of public funds to a private organization. *Id*. (citing Tex. Att'y Gen. Op. M.W. 89, 1979 WL 31300 (Nov. 27, 1979)).[5] Specifically, the Attorney General explained:

> the school district has neither articulated a public purpose to be served by the released time program *nor placed adequate controls on the use of released time to insure that a public purpose will be served*. The time is to be used at the discretion of the professional organization for pursuing its business. In our opinion, this policy grants a substantial benefit to a private professional organization which has no obligation to apply it to accomplish a public purpose.

Tex. Att'y Gen. Op. M.W. 89 at 2 (emphasis added).

The key point is whether the state agency retained *control* over the employees who were performing the union's business, a theme repeated in other Gift Clause opinions. *See*, *e.g.*, Tex. Att'y Gen. Op. JM-626, 1987 WL 269263, at *6 (Jan. 26,

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[5] https://www.texasattorneygeneral.gov/opinions/opinions/46white/op/1979/pdf/mw0089.pdf

1987)[6] ("When a governmental entity accomplishes a public purpose by granting funds to a private entity, it must maintain control over the use of the funds to see that the public purpose is achieved."). *See also New Jersey Citizen Action, Inc. v. County of Bergen*, 391 N.J. Super. 596, 604, 919 A.2d 170, 175 (App. Div.), *cert. denied*, 192 N.J. 597, 934 A.2d 639 (2007) (a loan may be permissible under the state constitution's Gift Clause if it achieves a public purpose and "the loan's 'use [is] confined to the execution of that purpose through a *reasonable measure of control* by a public authority'") (citation omitted; emphasis added). State control corresponds directly to the government's ability to "safeguard the interests of the public" in public assets, including tax dollars. *Lake Michigan Federation v. U.S. Army Corps of Engineers*, 742 F. Supp. 441, 445 (N.D. Ill. 1990).

The importance of "control" was also critical to the decision in *Dinicola v. Oregon, Dep't of Revenue*, 246 Or. App. 526, 268 P.3d 632 (2011), *cert. denied*, 134 S. Ct. 724, 187 L. Ed. 2d 579 (2013). This case did not address the validity of release time directly, instead addressing the issue of whether an employee of the state Department of Revenue who was working as union president while on release time from his job with the agency could recover overtime pay from the agency under the Fair Labor Standards Act. The opinion is helpful here because a union official on

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6 https://www.texasattorneygeneral.gov/opinions/opinions/47mattox/op/1987/pdf/jm0626 .pdf.

release time, who is considered an employee of the union for one purpose, would most likely be considered an employee of the union for other purposes. Plaintiff Dinicola worked "almost exclusively as president of Local 503, [though] he formally remained a continuing employee of Revenue in his permanent classification, on release time. . . . [H]e received his pay and employee benefits from Revenue rather than directly from the union, and he accrued vacation and sick leave time with Revenue." *Id.* at 532-33, 268 P.3d at 636.

These facts, however, were only the beginning of the court's analysis. The court needed to determine whether, as a matter of "economic reality," Dinicola was employed by the state agency or by the union. *Id*. at 533, 268 P.3d at 636. Revenue argued that Dinicola worked directly for and on behalf of the union, that the union provided Dinicola's work site and the tools to perform his job as president, and that the union reimbursed Revenue for Dinicola's salary. *Id.* at 534, 268 P.3d at 637. On this latter point—the union reimbursement—the court noted that collective bargaining agreements may or may not call for such reimbursement and that it is an insignificant factor in determining whether the agency or the union controls the work of the employee. *Id.* at 534, 538, 268 P.3d at 637, 639 (Although Dinicola received his pay directly from Revenue, including raises that other Revenue employees in his classification received, and who "remained theoretically subject to discipline and

termination by Revenue," none of these factors are "decisive or even very important" in determining whether the agency or the union controls the employee.).

The Oregon court considered two federal cases addressing the issue: *Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 107 F.3d 1052 (3d Cir.), *cert. granted*, 521 U.S. 1152, 118 S. Ct. 31, 138 L. Ed. 2d 1060 (1997), *cert. dismissed*, 523 U.S. 1015, 118 S. Ct. 1350, 140 L. Ed. 2d 463 (1998), and *Int'l Ass'n of Machinists and Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046 (9th Cir. 2004). In *Caterpillar*, the Third Circuit rejected the union's argument that shop stewards, on leaves of absence from their regular jobs, were joint employees of both the union and the employer because the stewards did nothing for the employer's benefit. *Caterpillar*, 107 F.3d at 1055. The mere fact that they "remain on the Caterpillar payroll and fill out the appropriate forms and time sheets to get paid is legally irrelevant." *Id.* Similarly, the Ninth Circuit rejected the argument that the full-time union steward "must be an employee of Goodrich simply by virtue of the fact that he remains on the company's payroll and continues to maintain a formal job classification." *Int'l Machinists*, 387 F.3d at 1057. However, because the steward in that case maintained an office on the employer's worksite, *and worked under the company's direct and immediate supervision*, the court held that he was, in fact, properly designated an employee. *Id*. at 1059.

The Oregon court took the lesson from these two cases: A court must "look to the reality of a specific situation and not to formal titles in determining whether a union member who is doing union work full time remains an employee . . . . Even the fact that the employer paid the employee's full compensation without union reimbursement was not decisive." *Dinicola*, 246 Or. App. at 536, 268 P.3d at 638. Reviewing these and other cases, the Oregon court found that courts "uniformly hold that work that is solely on behalf of the union is not work for an employer that nominally—or even actually—paid the employee's wages." *Id.* at 537, 268 P.3d at 638. Thus, "as a matter of economic reality, [Dinicola] was an employee of Local 503 for purposes of overtime pay under the FLSA during his terms as its president." *Id.* at 538, 268 P.3d at 639.

Here, too, this Court must not turn a blind eye to economic reality. *See State v. Butler*, 232 Ariz. 84, 88, 302 P.3d 609, 613 (2013) ("Courts should not blind themselves to . . . reality.); *cf. Thomas v. Thomas*, 142 Ariz. 386, 391, 690 P.2d 105, 110 (1984) ("The trial judge as well as this court need not be blind to the fact that an inexperienced untrained 56-year-old woman can usually enter the labor market only on the lowest rung of the ladder, if at all."). The trial court findings, accepted by the court below, *Cheatham*, 356 P.3d at 817, 820-21, plainly demonstrate that, as a matter of economic reality, Phoenix Law Enforcement Association (PLEA) has exclusive control over the taxpayer-subsidized employees on release time. *See* Under

Advisement Ruling (Jan. 24, 2014) ¶ 1 ("[T]he City does not control PLEA or PLEA's use of release time."); ¶ 2 ("PLEA assigns and directs officers on release time;" they do not report to any City supervisor, and no City supervisor directs or evaluates the release time employees' work"); ¶ 3 (The City does not control the release officers' assignments, "know what they are doing, choose the six FT release positions, or even require them to show that they worked overtime hours before being paid overtime."); ¶ 4 (The City does not decide the purposes for which the release time bank is used, nor does PLEA or the released officer have any obligation to inform the City as to that officer's activities while on release time.); ¶ 5 (There is an unlimited, additional amount of "representation" time banked, and the City does not track the number of hours used.). In short, under *Dinicola*'s analysis, the release time officers clearly are employed by the union to conduct the union's business. The City wholly lacks control over these officers, echoing the concerns raised by the Texas Attorney General and other courts.

The Court of Appeals in this case touched on this aspect in its adoption of the trial court holding that "the City's expenditure for the release time was grossly disproportionate to what it received in return, given *the lack of obligation* imposed on PLEA in the 2012-14 MOU release time provisions." *Cheatham*, 356 P.3d at 819. (emphasis added). A "lack of obligation" means that the City can try to direct the actions of the officers assigned to represent the union's interests, but those release

time officers are obligated to respond only to the union bosses, not the City.[7] In a conflict situation, where the City and the union disagree as to what the release time employee should be doing with this time, the employee will obey the union. *Id.* at 820 ("[T]he 2012-14 MOU release time provisions do not obligate PLEA to perform any specific duty or give anything in return for the release time."). Thus, the "lack of obligation" is the flip-side of the City's inability to control the actions of the PLEA employees.

As this Court said in another context, "[W]hile we may not be able to define a sweetheart deal, we know enough to recognize one when we see it. If ever there was such a deal, this was it . . . ." *In re Alcorn & Feola*, 202 Ariz. 62, 72, 41 P.3d 600, 610 (2002). In this case, PLEA most certainly negotiated a very sweet deal, enjoying the fruits of the labors of 6 full-time employees, including a lobbyist, and 35 part-time employees, with other officers at the union's beck and call, all at the expense of the taxpayers.

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[7] A lack of obligation expressly relieves someone from acting. *See*, *e.g.*, *Guerra v. State*, 237 Ariz. 183, 191, 348 P.3d 423, 431 (2015) ("police officers [are] under no obligation to conduct an investigation" (citation omitted)); *Mull v. Roosevelt Irr. Dist.*, 77 Ariz. 344, 347, 272 P.2d 342, 343 (1954) (landowner "is under no obligation to protect [a recreational licensee] against such danger" on the property); *Universal Underwriters Ins. Co. v. State Auto. and Casualty Underwriters*, 108 Ariz. 113, 116, 493 P.2d 495, 498 (1972) (insurance company has "no obligation to defend" lawsuits arising out of excluded accidents).

CONCLUSION

The court below appropriately weighed the public policies underlying the Gift Clause prohibition and affirmed the trial court's factual and legal findings that the agreement granting release time to the union was "grossly disproportionate" to any possible benefit received by the City. The decision below should be affirmed.

DATED: April 12, 2016.

Respectfully submitted,

By /s/ James S. Burling
JAMES S. BURLING

Attorney for Amicus Curiae
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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(4), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS AND APPELLEES uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 3,460 words.

DATED: April 12, 2016.

/s/ James S. Burling
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CERTIFICATE OF SERVICE
AND NOTICE OF ELECTRONIC FILING

I certify that the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS AND APPELLEES, was electronically filed this 12th day of April, 2016, using the AZTurboCourt electronic filing system to the parties listed below:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 12th day of April, 2016, at Sacramento, California.

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