OFFICE OF THE ARIZONA ATTORNEY GENERAL

STATE OF ARIZONA

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VIA EMAIL

Tom Belshe, Executive Director
The League of Arizona Cities and Towns
1820 W. Washington Street
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Re: Arizona Supreme Court's *Gilmore v. Gallego* Decision

Dear Director Belshe and the League of Arizona Cities and Towns:

I am writing regarding the Arizona Supreme Court's recent opinion in *Gilmore v. Gallego*, 552 P.3d 1084 (Ariz. 2024). I understand that in light of the Court's decision, public entities, unions, and workers across the state are expressing confusion and concern about "release time" and how to safeguard productive employer-employee relations in compliance with the Arizona Constitution. Regardless of one's views about the issue, I am sure we can all agree that clarity about the law is critical to be able to collectively bargain and plan for the future with confidence.

I want to be clear that my Office cannot "directly or indirectly engage in the private practice of law" by giving legal advice to members of the public. A.R.S. § 41-191(B). For that reason, I cannot opine here on what sort of release-time provisions might satisfy the Gift Clause or survive other legal challenges. I would encourage any public entities or officials (and private parties) with fact-specific questions about the implications of the decision to seek legal counsel and continue working cooperatively to reach constitutional solutions.

That said, I will offer a few observations about the decision as my Office reads it, while again cautioning that these high-level observations should not be construed as legal advice or a legal opinion in any way.

First, the Court struck down the particular release-time provisions at issue in *Gilmore* based on problematic features in that case. Among other reasons, the Court found that under the memorandum of understanding (MOU) in *Gilmore*, the City of Phoenix's "costs [for release time were] substantial, but the benefits [were] so negligible as to render them largely illusory," and the union's obligations in exchange were "microscopic compared to the City's expenditure." 552 P.3d at 1093 ¶¶ 39-40.

Second, the Court did not hold that all release-time provisions necessarily violate the Arizona Constitution's Gift Clause. For instance, the Court distinguished the City's union-wide release-time provisions and minimal obligations in *Gilmore* from the release time that it upheld in *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346 (1984). That case involved release time that was granted to a single "teacher who served as union president," "the duties imposed upon [the union president] … [were] substantial," and the school district paid "relatively modest sums." *Gilmore*, 552 P.3d at 1090 ¶¶ 25, 27 (citation omitted).

Similarly, the Court—at least for now—did not overrule its most recent precedent upholding release time in *Cheatham v. DiCiccio*, 240 Ariz. 314 (2016). The Court found that "[u]nlike in *Cheatham*, the release time provisions [in the *Gilmore* MOU were] not directed towards the overall purpose of the collective-bargaining agreement" because they were bargained for separately and were not part of employee compensation. *Gilmore*, 552 P.3d at 1091-92 ¶ 33. Notably though, the Court explained that it had not overruled *Cheatham* because the challengers did not make that request until oral argument and the stare decisis principles had not been briefed, so it did not rule out that possibility in the future. *Id.* at 1091 ¶ 33 n.2.

Third, although the Court did not necessarily foreclose release time for all cases, it expressed some doubt about how public entities ensure that release time serves a public purpose. *Id.* at 1092-93 ¶¶ 37-38. Accordingly, public entities and unions seeking to enter into arrangements that include release time will need to think carefully about how release time will (or won't) serve an adequate public purpose under the Court's case law. The Court's opinion does not prescribe a one-size-fits-all answer to these difficult questions—public entities and unions will need to carefully evaluate particular arrangements, hopefully with the aid of counsel.

Finally, the Court rejected the challengers' free-speech, free-association, and right-to-work theories because it found that the City—not the employees—paid for the release time. *Id.* at 1089 ¶ 20. But the Court stated that "[i]f the Employees paid for release time through reduced or diverted compensation, it would present colorable claims under [the U.S. Supreme Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018)] and Arizona's right-to-work laws because the Employees would be required, against their will, to support union activities (including collective bargaining) with which they might disagree." *Gilmore*, 552 P.3d at 1089 ¶ 20. Thus, moving forward, public entities and unions should be mindful of this issue as well. *See id.* 1089, 1094 ¶¶ 20 & n.1, 42.

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Arizona Attorney General