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SUPREME COURT OF TEXAS
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No. 22-1149

IN THE SUPREME COURT OF TEXAS

ROGER BORGELT; MARK PULLIAM; JAY WILEY,
Petitioners,

TEXAS,
Intervenor-Petitioner,

v.

CITY OF AUSTIN; SPENCER CRONK,
IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND
AUSTIN FIREFIGHTERS ASSOCIATION LOCAL 975
Respondents.

On Petition for Review
From the Third Court of Appeals, Austin

PETITIONERS' REPLY BRIEF ON THE MERITS

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I. The Gift Clause test is a three-part, conjunctive test.

Respondents are engaged in an intellectual sleight-of-hand, which begins with trying to limit the scope of the Gift Clause in a way that is both illogical and contrary to the test this Court has established. Specifically, Respondents claim that Gift Clause analysis "focus[es] on *gratuitous* payments," Resp'ts Br. at 17 (emphasis in original)—disregarding the multi-factor test set forth in *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Comm'n*, 74 S.W.3d 377, 383–84 (Tex. 2002). They then argue that because the City gets something in exchange for *the CBA as a whole*, the Court should ignore the fact that the City gets *nothing* in exchange *for the release-time funding* at issue here. The Court should not fall for this shell-game.

To begin with the test: while Respondents are correct that the Court must examine whether a government payment is gratuitous—that is, whether it is supported by sufficient consideration—that is only part of the analysis in any Gift Clause case. *Texas Municipal League* held that a government expenditure violates the Constitution if it is (1) granted "gratuitously" to a private entity, ***or*** if the payment does not "serve[ ] a legitimate public purpose; and … afford[] a clear public benefit[1] … in return." *Id*. at 383–84. A three-part test *then* determines if the expenditure accomplishes a public purpose. Specifically, the government must: "(1) ensure that [the expenditure's] *predominant* purpose is to accomplish a

[1] The "clear public benefit" factor overlaps somewhat with the "predominately public purpose" test because if the public expenditure does not advance a predominantly public purpose, then it also does not afford a clear public benefit.

public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit." *Id.* at 384 (emphasis added).

In other words, whether a payment is gratuitous is only the first of three parts of the test. Even if a public payment is not gratuitous—and Association Business Leave ("ABL" or "release time") certainly is—the Court must *also* examine whether it serves a predominantly public purpose, *and* whether the government retains sufficient control over the expenditure. In short, the Gift Clause inquiry is a multi-part, *conjunctive* test.

If Respondents were correct that Gift Clause cases could be resolved solely by examining whether there was a "gratuitous payment," Resp'ts Br. at 17, then there would have been no reason for this Court to have tested the expenditures at issue in *Texas Municipal League* for a public purpose *after* it had already concluded that sufficient consideration existed. Instead, the Court went on to examine whether the challenged transaction "accomplish[ed] a legitimate public purpose" by testing it for both "predominant [public] purpose" and "control." 74 S.W.3d at 385. In other words, the Court applied all *three* prongs of the Gift Clause test.

Respondents also argue that a "gratuitous" test alone "has long been the explicit opinion of the Texas Attorney General as well." Resp'ts Br. at 20. Nonsense. Respondents omit that in the very same Attorney General Opinion they cite, the Attorney General said: "[t]he Supreme Court of Texas has established *a*

three-part test" for Gift Clause claims. *See* Tex. Att'y Gen. Op. GA-0664 (2008) (emphasis added).

That was, of course, consistent with other Attorney General Opinions, including one which found that a release time policy that was far less offensive than the one under review here violated the Gift Clause. Tex. Att'y Gen. Op. MW-89 (1979) (the Gift Clause "prohibit[s] the grant of public funds or benefits to any association unless the transfer *serves a public purpose and adequate contractual or other controls* ensure its realization." (emphasis added)).

Texas courts are not alone in requiring that public expenditures serve a public purpose.

In fact, *every single state constitution* that includes an anti-subsidy provision—as nearly every state constitution does—requires that public expenditures serve a public purpose.[2] The examples are numerous and consistently require that public funds be spent for public purposes. *See, e.g., Kromko v. Ariz. Bd. of Regents*, 718 P.2d 478, 480 (Ariz. 1986) ("[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely

[2] *See, e.g.,* Ala. Const. §§ 93, 94, 98; Ariz. Const. art. 9, § 7; Ark. Const. art. 12, § 5, art. 16, § 1; Cal. Const. art. 16, §§ 6, 17; Fla. Const. art. 7, § 10; Ga. Const. art. 3, § 6, ¶ 6; Haw. Const. art. 7, § 4; Ky. Const. §§ 177, 179; La. Const. art. 7, § 14; Mass. Const. art. 62, §§ 1–4; Mich. Const. art. 7, § 26, art. 9, §§ 18, 19; Minn. Const. art. 11, § 2; Miss. Const. art. 4, § 66, art. 7, § 183, art. 14, § 258; Nev. Const. art. 8, §§ 9, 10; N.H. Const. pt. 2, art. 5; N.J. Const. art. 8, § 2, ¶ 1, § 3, ¶¶ 2–3; N.M. Const. art. 9, § 14; N.Y. Const. art. 7, § 8, art. 8, § 1; Tenn. Const. art. 2, §§ 29, 31; Utah Const. art. 6, § 29; Va. Const. art. 10, § 10; Wash. Const. art. 8, §§ 5, 7, art. 12, § 9.

private or personal interests of any individual." (citation omitted)); *Bannon v. Port of Palm Beach Dist.*, 246 So.2d 737, 741 (Fla. 1971) (The Gift Clause is intended to "protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited."); *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 579 A.2d 288, 298 (N.J. 1990) (all public expenditures must serve to "benefit … the community as a whole," and "at the same time is directly related to the function of government." (citation omitted)); *City of Tacoma v. Taxpayers of City of Tacoma*, 743 P.2d 793, 801 (Wash. 1987) (Primary question under Washington's Gift Clause is whether the expenditure carries out a fundamental governmental purpose); *Opinion of the Justices*, 384 So.2d 1051, 1053 (Ala. 1980) (the public purpose test examines "whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit."). The list goes on.

Of course, it's true that the Gift Clause's "clear purpose … is to prevent the gratuitous application of [public] funds to private use." *Brazoria Cnty. v. Perry*, 537 S.W.2d 89, 90 (Tex. Civ. App.—Houston 1976). But the reason Respondents emphasize "gratuitous" at the expense of the other factors required by the *Texas Municipal League* test is because they are seeking to blind the Court to the unconstitutional gift included in the CBA: that is, the release-time funding.

It's obvious that an unconstitutional gift cannot be rendered constitutional by embedding it in a larger transaction that includes some kind of return for the government. If the City were to include in the CBA a provision that buys the

president of the union a Ferrari with taxpayer money for his own personal use, that would be an unconstitutional gift, even if the City got something in return for the other provisions in the CBA. The reason the *Texas Municipal League* test is a multi-factor test is precisely to ensure that no such impropriety gets past the constitutional barrier.

Yet Respondents are attempting to escape that barrier. Consider their baffling assertion that the Gift Clause "is not an abstract restriction on the government's ability to negotiate and enter into contractual arrangements." Resp'ts Br. at 18. That is plainly false. The Clause is a constitutional limit on the government giving public resources to private entities—in whatever form. An expenditure can violate the Gift Clause whether it is made pursuant to a policy, a contract, or—as is the case here—both. The whole point of the Clause is to restrict government's ability to enter into contractual arrangements *that include gratuitous payments or payments that do not serve public purposes, etc*.

Indeed, Respondents' argument that a "gratuitous" test alone is sufficient would render the Gift Clause inert, nonsensical, and counterproductive, because it would mean that any time the recipient of public funds gives *something* in return for the gift, it's no longer a gift. Under that reasoning, the City could give a real estate developer $100 million in cash to build a hotel for the developer's exclusive profit, and if the hotel cost $100 million to build, then that expenditure would not violate the Gift Clause because there would be sufficient "consideration" for the expenditure. This is true even though the hotel serves a private purpose and the City does not exercise control over it. This shows why this Court has always

required more than a mere "gratuitous" test. It has always required in addition that expenditure serve a public purpose and that there be adequate public control to ensure that the recipient of the public funds actually accomplishes that public purpose. *Tex. Mun. League,* 74 S.W.3d at 383–84.

In short, whether an expenditure is "gratuitous" is certainly one crucial question in Gift Clause cases, but it's only one part of the analysis. The Gift Clause and its *conjunctive*, *three-part* test applies to the City's grant of public resources to AFA to use at it sees fit.

II. The ABL provisions must be independently tested for legality, and do not represent compensation to all firefighters.

A. Like any other unlawful and severable contract provision, the ABL provisions must be tested independently for legality.

The next step in Respondents' sleight-of-hand is to contend that the release time provisions cannot be tested for legal sufficiency on their own, but rather that the CBA "must be considered as a whole." Resp'ts Br. at 21. What they mean is that consideration must be evaluated ***not*** by comparing what the City is giving AFA and what AFA gives in return, but rather what the City is giving to *all firefighters employed by the entire City* and what all firefighters are giving in return for *all expenditures referenced in the CBA*. This is incorrect legally and impossible in practice.

Taxpayers' challenge is not to the entire CBA, but to a discrete, unlawful portion of it. Taxpayers assert that the ABL provisions of Article 10—and the ABL provisions alone—violate the Gift Clause. As such, *those* provisions ought to

be enjoined, and the remaining lawful portions retained. *See Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 218 (Tex. App.—Dallas 2015) ("[I]f the subject matter of a contract is legal, and only an ancillary provision is illegal, the illegal provision may be severed, and the remainder of the contract enforced."). Just like any other government contract that includes illegal provisions, the discrete, unconstitutional gifts in this contract can and should be independently tested for legality and severed when found unlawful.[3]

Respondents' argument that consideration must be "considered as a whole," Resp'ts Br. at 21,[4] also fails as a practical matter. As noted above, Respondents' reasoning would allow any gift or subsidy to occur so long as it is contained within a larger contract: the City could give AFA's president a Ferrari as an outright gratuity, and escape the constitutional limit if it did so as one provision in a 100-page contract. In fact, the legislature could embed any number of gifts in a multi-

[3] Indeed, the CBA itself has a "savings clause" that expressly contemplates that certain provisions of the CBA—like the ABL provisions of Article 10—could be declared unlawful; it says if that occurs, the lawful provisions remain intact. 7.RR.90 (Joint Ex. 1, CBA art. 28) ("If any provision of this Agreement is subsequently declared by legislative or judicial authority to be unlawful … all other provisions of this Agreement shall remain in full force and effect …").

[4] Respondents contend that an Arizona case, *Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016), supports their position regarding consideration. But just last year, the Arizona Supreme Court "disapprove[d]" giving deference to public officials when evaluating consideration under the Gift Clause, *Schires v. Carlat*, 480 P.3d 639, 646 ¶ 23 (Ariz. 2021), thereby calling into question the continuing vitality of the consideration analysis in *Cheatham*. What's more, on October 17, 2023, that Court granted review in *Gilmore v. Gallego,* 529 P.3d 562 (Ariz. App. 2023), *review granted* (Oct. 17, 2023), on the question of whether paid release time, similar to that under review here, violates that state's Gift Clause.

million dollar omnibus bill. That is obviously wrong, and no Texas court has ever taken such a blindfolded view of the Gift Clause.[5] Indeed, it would contravene the purpose of the Clause, which is "to prevent the application of public funds to private purposes." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (citation omitted). Instead, unlawful provisions within a larger agreement must be tested for both public purpose and consideration. *An illegal gift hidden within a large contract is still an illegal gift.*

B. ABL is not compensation to *all* firefighters; it is a gift to AFA.

Perhaps the most glaring error in Respondents' consideration analysis lies in claiming that ABL is provided to the Union in exchange for the "performance of employment duties." Resp'ts Br. at 28. In other words, Respondents argue that ABL is a benefit provided to *all* firefighters (whether they belong to AFA or not) in exchange for "benefits and other compensation provided by a public employer." *Id.* at 28–29. But ABL is neither compensation nor a benefit to all firefighters.

By its own terms, ABL is not a benefit that runs to *individual* firefighters for services rendered. It is specifically earmarked and set aside for use *by AFA*. By contrast, actual *compensation* (taking the form of salary, vacation leave, sick leave, and other fringe benefits) *do* run directly to the individual employee for services

[5] It's noteworthy that the only cases Respondents cite (Resp'ts Br. at 21–22) to support their "as a whole" theory are inapposite cases about private arbitration contracts or contractual consideration—rather than cases involving a "mandatory" constitutional limit on government spending. *Texas & N. O. R. Co. v. Galveston Cnty.*, 161 S.W.2d 530, 532 (Tex. Civ. App.—Galveston 1942), aff'd 141 Tex. 34 (Tex. Comm'n App. 1943).

rendered by the employee. Release time is therefore a benefit that runs directly to AFA. 4.RR.58:19-25; 59:9-12; 62:19-22. *See also* 7.RR.451 ¶¶ 24–25.

It would be one thing if all City firefighters received a certain amount of leave time and then voluntarily donated it to AFA. (In fact, many municipalities follow this practice.) But that's not what is happening here. Instead, release time goes *directly* to AFA for AFA to use for its *own* purposes, in any manner it deems fit.

The contention that ABL is a bank of hours available to all firefighters is most obviously false with respect to AFA President Bob Nicks. Under the CBA, 2,080 hours of that "bank" are directed to his exclusive use—hours *no* other AFA member, or anyone else, can use. 7.RR.25 (Joint Ex. 1, CBA art. 10 § 2(C)). Indeed, how could ABL possibly be consideration for the "performance of employment duties," Resp'ts Br. at 28, since no other employee apart from Mr. Nicks can use *his* ABL? The answer is that ABL is *not* compensation to all employees for services rendered. It is instead given to AFA for it to use and control as it sees fit.

For this reason, Respondents' reliance on *Byrd v. City of Dallas*, 6 S.W.2d 738 (Tex. Comm'n App. 1928), is mistaken. Resp'ts Br. at 28. That century-old case upheld pension payments for public employees as "part of the compensation … for services rendered to the city." *Byrd*, 6 S.W.2d at 740. But ABL is not "part of compensation," because it is given to the Union for "Association business activities *consistent with the Association's purposes*." 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added).

Respondents appear to acknowledge serious First Amendment implications would arise if ABL were (as they claim) part of individual firefighter compensation. Resp'ts Br. 31–33. That is because *in Janus v. AFSCME,* 138 S. Ct. 2448 (2018), the U.S. Supreme Court found that it's unconstitutional to take money from nonconsenting employees and give it to a public-sector labor union to use for lobbying, political, and other private union activities. *Id*. at 2486. That means that if release time were a form of compensation to all employees, and the CBA requires them to give it to AFA for it to use as it wills, the CBA is unconstitutional.

This means Respondents' argument that release time "is an exchange of performance of employment duties," Resp'ts Br. at 28, of all fire employees, whether or not they belong to the Union, must fail. If it is true that release time is provided as compensation to *all* firefighters (whether they belong to the AFA or not) in exchange for "benefits and other compensation provided by a public employer." *Id.* at 28–29, then under *Janus*, that arrangement violates the First Amendment because it takes resources away from employees who have not affirmatively consented in order to fund release time.

But this Court need not get into that,[6] because the evidence shows that ABL does *not* pay for the "performance of employment duties." Resp'ts Br. at 28.

[6] Respondents cannot have it both ways. Either release time is part of overall compensation, which violates the First Amendment rights of non-members, or it's a subsidy to the Union that must be analyzed independently under the Gift Clause. *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 784 (Tex. App.—2021) ("When construing a statute in the face of a First Amendment challenge, courts have a duty

Instead, it pays for Mr. Nicks and other Union members to perform duties for AFA—and the City does not properly monitor, supervise, direct, or control it in any meaningful way. But that means it violates the Gift Clause.

III. The ABL provisions fail every prong of the Gift Clause test.

A. The items identified by the Respondents as valuable consideration primarily benefit AFA, and in any event, are disproportionate to the cost of ABL to taxpayers.

Respondents claim there are five contractual obligations that "directly bind the AFA," *Id*. at 25–26, and that these constitute valuable consideration for purposes of the Gift Clause analysis. These are: (1) AFA must perform tasks related to dues withholding, including furnishing a list of its members to the City (Article 7); (2) AFA may not engage in *ex parte* communications with members of the Civil Service Commission (Article 8); (3) AFA may not use "personal attacks or inflammatory statements" regarding the Fire Department or its policies (Article 11); (4) AFA will provide a class to academy personnel on contract compliance (Article 17); and (5) AFA agrees to process written grievances on behalf of unit members (Article 20).

None of these self-serving benefits *to AFA* qualify as valuable consideration *to the City* or the taxpaying-public, and even if they did, they are not remotely comparable to the $1.2 million of taxpayer money spent to fund ABL.

First, it is telling that, except for grievances, there is no record of ABL being used *for any of these things*. And, as the record establishes, only an infinitesimally

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to employ a reasonable, narrowing construction of a statute to avoid a constitutional violation if the statute at issue is readily susceptible to one.").

small part of ABL is used to process grievances. Under the existing CBA, only five hours out of a total of 8,714.50 hours—less than .06 percent!—of ABL was used by Authorized Association Representatives for grievance proceedings. 7.RR.113–15, 448.

Second, as a matter of law, none of these items counts as consideration, because AFA is *already* obligated, under other provisions of the CBA, to perform these activities. In *Pasadena Police Officers Association v. City of Pasadena*, 497 S.W.2d 388, 392–93 (Tex. App.—Houston [1st Dist.] 1973, writ ref. n.r.e.), the court of appeals held that "[w]here a party agrees to do what he is already bound to do by an original contract, there is not sufficient consideration to support a supplemental contract or modification." In other words, to the extent these items have value at all, they don't count as lawful consideration for release time because AFA is *already* obligated to perform them.

Third, the benefit of each of these "obligations" runs to AFA, not the City. Providing a membership list of AFA members to the City—to enable AFA to enjoy the unique and valuable benefit of having the City automatically process its dues deductions—obviously inures to AFA's own benefit. That is not a public service. Likewise, presentations to academy personnel serve as a valuable recruitment tool *for AFA*. Filing grievances *against the City* is also directly opposite the City's interests. 2.SCR.511 at 37:8. And to the extent they are benefits at all, agreeing to not engage in communications with an administrative body, or to attack the Fire Department management and its policies, are the sort of speculative and indirect benefits that cannot be valued as consideration. *See Meno*, 917 S.W.2d at 740 (To

be constitutional, a transfer of public funds to a private entity must include some "clear public benefit received in return."). The vagueness of these purported benefits means they do not qualify as clear public benefits.

Finally, to the extent any of these alleged "benefits" count as consideration at all, they have no reasonably ascertainable objective fair market value, *Schires*, 480 P.3d 644 ¶ 14, that would come anywhere close to equaling a $1.2 million dollar benefit to the City. The value of these things, if any, is so "grossly disproportionate" to what AFA receives in return that it violates the Gift Clause. *See Turken v. Gordon*, 224 P.3d 158, 164 ¶ 22 (Ariz. 2010).

B. ABL does not serve a public purpose because it *predominantly* benefits AFA, a private organization.

Unable to establish a public purpose to support the ABL provision at issue, Respondents focus on more general policy matters, none of which are at issue here.

First, Respondents emphasize the legal right of firefighters to engage in "collective bargaining." Resp'ts Br. at 35. But no one in this case has challenged that. Whatever benefits collective bargaining may have as a general matter are irrelevant to the question of whether the ABL provision challenged here passes constitutional muster.

Second, Respondents point to the fact that City Council "ratif[ied] the CBA" as proof that the City "recognized the CBA and its terms serve a public purpose." *Id*. at 35. Of course, anytime a government entity approves of a subsidy, the government will *think* it serves a public purpose. But the entire point of the Gift Clause is that it limits the authority of governmental bodies. *See, e.g.*, Tex. Const.

art. III, § 52(a) ("[T]he *Legislature* shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money."); *Seydler v. Border*, 115 S.W.2d 702, 704 (Tex. Civ. App.—Galveston 1938), writ refused ("This limitation upon the power of the Legislature is a wholesome one and is plainly stated in unequivocal terms.").

If the City's approval of its own expenditure is enough to prove that the expenditure furthers a public purpose, then any expenditure will automatically pass Gift Clause muster—the government can be relied upon to always claim that its acts are constitutional—and that would obviously make the Gift Clause meaningless.[7] But this Court has never given cities leave to decide the constitutionality of their own acts—generally, or in the context of the Gift Clause specifically. Instead, it has instructed lower courts to analyze whether an expenditure's "*predominant purpose* is to accomplish a public purpose, not to benefit private parties." *Tex. Mun. League*, 74 S.W.3d at 384 (emphasis added).

Third, the Respondents claim that release time serves to advance "a harmonious labor-management relationship." Resp'ts Br. at 36. As described in Appellants' Opening Brief (at 23–24), there is no evidence in the record to support this. In fact, it's more likely that the opposite is true: full-time Union officials have

[7] *Cf. Ex parte Townsend*, 144 S.W. 628, 647 (Tex. Crim. App. 1911) (Davidson, P.J., dissenting) ("the expediency of legislating on a given subject is a matter for the Legislature to determine, but the power of the Legislature to so legislate is a question to be determined by the courts. If the mere fact that the Legislature by assuming to exercise a given power precluded courts from an inquiry into the existence of the power, then the Legislature would be its own judge of the limits of its power, and the rights that are secured by written constitution would be lost." (citation and quotation marks omitted)).

used release time in ways that are contrary to the public's interest and directly in opposition to the City. For example, release time is used to negotiate against the City, 7.RR.113–115, 448, to represent Union members in charges brought by the City, 2.SCR.575, and to file costly grievances against the City where the City is "diametrically opposed" to the Union. 2.SCR.511 at 37:8. In fact, AFA's president himself used release time *to adjudicate allegations brought by the City regarding his own misconduct.* 2.SCR.523 at 85:7–25.

If release time is supposed to result in labor harmony, it's not being used for that purpose.

Instead of trying to show how release time actually serves a public benefit, Respondents argue there's no problem with furthering AFA's interests because its "mission 'overlaps with the mission of the AFD.'" Resp'ts Br. at 38 (citation omitted); *see also* CR.4209 ¶ 9. But this Court is tasked with analyzing not whether ABL might sometimes be used in a manner consistent with the public interest, but whether ABL's "predominant purpose is to accomplish a public purpose." *Tex. Mun. League*, 74 S.W.3d at 384. Here, the *predominant* purpose is the one guaranteed by the contract: doing private union business, not the City's business. Even if the City might *sometimes* receive *some* incidental benefit from ABL—something the record shows is rarely, if ever, the case—such incidental effects would not reveal a provision's *predominant* purpose. And it is plain from the text of the CBA that the *predominant* purposes of release time are "the Association's purposes." 2.SCR.36 (CBA art. 10); 7.RR.451 ¶ 17.

If all the activities performed using ABL promoted public purposes, the City would not have had to create ABL at all. It could have simply assigned its employees to further those purposes directly, as part of their official duties. Instead, it found a way to pay AFA, with *public* money, to further AFA's own *private* purposes. The use of a complicated workaround, rather than the straightforward employer-employee relationship, is by itself sufficient to show that ABL is not designed to further a public purpose.

C. The provisions at issue violate the Gift Clause because the City exercises insufficient control over the use of ABL.

When a public entity spends public resources, it must maintain "public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." *Tex. Mun. League*, 74 S.W.3d at 384. Adequate *control* is necessary to ensure that a public purpose is accomplished when public funds are expended; to prevent special interests from obtaining taxpayer resources on a mere pretext of doing a public service, and then not doing the service, but keeping the funds for their private use. *Key v. Comm'rs Ct. of Marion Cnty.,* 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987). *See further State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 606–12 (Idaho 1959) (explaining, with many citations to other state cases, the need for government to retain control over recipients of public expenditures sufficient to ensure that a public purpose is attained). The risk that special advantages will be given to private interests at public expense—particularly special interests that exert political power and engage

extensively in the political process, like the Union does here—is diminished if the government exercises sufficient and continuing control over public expenditures.

Respondents, however, contend that a "binding contract itself constitutes sufficient public control." Resp'ts Br. at 42. But *Key* dispositively rejected that notion. There, the court of appeals held that the transfer of control over a holiday light tour from a public historical commission to a private nonprofit organization violated the Gift Clause because there was "no retention of formal control"—even though the nonprofit shared the same mission as the historical commission. 727 S.W.2d at 669. The court did not find that a contract alone is sufficient control under the Gift Clause. Instead, it ruled that "the political subdivision must retain some degree of control over the *performance of the contract*." *Id.* (emphasis added). That is, monitoring the performance of a public contract—not the mere *existence* of that contract—is necessary for adequate and continuing control over the use of public resources.

That makes sense, because if the mere existence of a contract proved that there was sufficient public control, the government could insulate even the most obviously invalid gifts from legal scrutiny.

Respondents next cite a host of "management rights" to support their contention that sufficient control exists over the use of ABL, such as the purported right to hire, fire, discipline, and decide job qualifications for firefighters. Resp'ts Br. at 42–43. But the record establishes that none of these things apply to Mr. Nicks's use of ABL. Instead, the City has *no* say in who is appointed as AFA's

president,[8] 4.RR.57:11–13, cannot remove him as AFA president, 2.SCR.451 at 47:17–19, does not direct his activities, 4.RR.58:19–25, and does not monitor or otherwise supervise his performance. 4.RR.59:9–12; 62:19–22.

The same is true of other authorized association representatives using ABL, who are selected by AFA, and whose activities are controlled and monitored by AFA, not the City. 4.RR.84:11–24; *see* 7.RR.453 ¶ 51. To the extent these "management rights" exist at all with respect to the use of ABL, the City has not exercised them; it has abdicated them, and in so doing, forfeited control over ABL. In short, a City employee on ABL is working for AFA, not the City—and the lack of City control over such employees reflects that.

The City is thus left with three things that it characterizes as "control" over ABL: (1) the City has "administrative procedures and details regarding the implementation" of the ABL contract provisions; (2) the City may review ABL requests for CBA compliance; and (3) the City has, in fact, denied ABL requests. Resp'ts Br. at 43–44.

As a threshold matter, *none* of these apply to Mr. Nicks's use of ABL *at all*. The Austin Fire Department Policy and Procedure that the City references applies only to use of ABL by "other authorized association representatives," not to Mr. Nick's use of ABL. 7.RR.111. Moreover, Mr. Nicks does not need permission or prior approval from anyone in the Fire Department before he may use ABL.

[8] Of course, the City *should* not dictate who a union's president is, or what he may do. But it *must* dictate how public funds are spent. That dilemma is caused solely by the unlawful subsidy to the union in the form of release time.

4.RR.58:16–18. And the City has *never* disapproved the use of ABL by Mr. Nicks. 4.RR.65:16–18.

Notwithstanding the undisputed facts that *none* of the purported measures of City control over use of ABL apply *at all* to Mr. Nicks, the Respondents claim that his activities are controlled by the City because: (1) "he must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisors"; (2) he "is required to follow the City's Code of Conduct," (3) the City could terminate him from his employment with the City, (4) he engages in communications with other City employees, and (4) he is prohibited from "soliciting [political contributions] in uniform" or "delivering checks" to political candidates while on ABL. Resp'ts Br. 47–51. To the extent these are even straight-faced assertions of actual control over an employee, the record contradicts Respondents' claims.

First, in his nearly ten years as AFA President, Mr. Nicks has *never* been recalled for an emergency and has *never* been assigned any special project by the Fire Chief. 4.RR.64:1–4; 65:2–4. He was not even required to return to duty when the City experienced its most devastating water crisis in years: the flooding in October 2018. *Id.* at 64:11–13.

Second, *obviously* Mr. Nicks is "required to follow the City's Code of Conduct" and the City's personnel policies. Resp'ts Br. at 48. He is, after all, a full-time, paid employee of the Fire Department. Yet although *employed* by the Fire Department, he doesn't *work for* the Fire Department. Indeed, his relationship to the City as the President of AFA resembles no employer-employee relationship

anywhere in Texas, because the City cannot hire him, remove him from his position, assign him duties, or monitor his performance. *See Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 263 (Tex. App.—Fort Worth 2003, pet. denied) (in determining whether someone is an employee under Texas law, courts will review whether the alleged employer "had the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule.").

And the record is clear that his daily employment activities are simply not monitored at *all* by the City. 4.RR.58:19–25; *see* 7.RR.451 ¶¶ 24–25. Whether Nicks can theoretically be fired by the City for a violation of policies that apply to every employee is immaterial, because unlike every other employee in the City, *he cannot be fired if someone in the City becomes dissatisfied with his work performance*, assuming the City even knows what that performance is! 2:SCR.451 at 48:10–14.

Similarly, observing that Nicks may engage in *voluntary* communications with the City or take calls from City personnel, Resp'ts Br. at 48–49, does not prove control. Respondents are conflating *contact* with other employees with *control* by the City. Contact is not control. To say that would be like arguing that an attorney who has contact with opposing counsel, because they speak on the phone and have hearings and meetings together, *controls* the activities of the other lawyer. Or that the City controls the activities of a neighborhood association because it receives input from the association or goes to meetings with association members.

Finally, the "restrictions" on Mr. Nicks' political activities, to the extent they exist at all, are laughably (though disturbingly) meaningless. He purportedly cannot solicit political contributions in uniform or deliver campaign checks while on ABL. That's it.

But he can, and does, meet with political candidates, provide public endorsements for candidates, prepare political newsletters, make yard signs for political candidates, and lobby the City Council all while on paid ABL, while being paid public funds to do so.[9] 4.RR.66:12–68:10. This is true even though City policy *expressly* prohibits the use of City resources for political activities.

For example, the City's Personnel Policies state: "All employees of the City shall refrain from using their influence publicly *in any way* regarding any candidate for elective City office," and go on to prohibit supervisors from "participat[ing] or contribut[ing] money, labor, time, or other valuable thing to any person campaigning for a position on the City Council of the City of Austin." 7.RR.499–500. In fact, under the City Charter, it is a *criminal offense* for a City

[9] Respondents downplay the enormous dedication of taxpayer resources to the political activities of Mr. Nicks and the private organization he runs by contending that he works "significantly more" than 40 hours a week and that his political activities are "volunteer" hours. Resp'ts Br. at 39. Yet, this contention is contradicted by his own testimony: he agreed that he "could handle Union business and [his] duties as the AFA President with one weekly shift, and spend the rest of [his] time doing traditional fire fighter duties." 2.SCR.469–70 at 120:16–121:8. In other words, his own testimony is that he has *extra* time in his schedule. In any event, he is on *full-time* release. That means all his hours are paid by taxpayers. And he plainly performs extensive political activities while on taxpayer-funded time. 4.RR.66:12–68:10. Mr. Nicks cannot just decide which hours are "work" hours and which are dedicated to politics. The reality is that he's on the clock, receiving taxpayer-funded time, and engaging in extensive political activities. *Id.*

employee to use his office to influence elections for local political candidates. *See* City of Austin Charter, Art. 12, § 2. Yet, as Chief Wolverton testified, Mr. Nicks is "excused" from the political activities policies that apply to every other employee because "a different standard" applies to him. 4.RR.144:10–20.

The evidence plainly establishes that *none* of the measures of control offered by the Respondents apply to Mr. Nicks or establish any reasonable basis to conclude that the City controls his use of ABL in the manner required to satisfy the Gift Clause.

The same is also true with respect to "other Authorized Association Representatives." As we have seen, the City's administrative procedures for the review and approval of ABL has led to a situation in which *the AFA* effectively decides who is granted ABL and what activities are performed and monitored while AFA members are on ABL. Mr. Nicks and the AFA Executive Board decide, with no input from the City, who becomes an Authorized Association Representative. 2.SCR.452 at 50:4–6, 51:24–52:2.

Use of ABL by "other Authorized Association Representatives" is "monitored by Nicks and members of the AFA's Executive Board." 7.RR.453 ¶ 51. During the time AFA members use ABL, Mr. Nicks and other AFA officers, not City management or City personnel, "direct [their] activities." 2.SCR.456 at 68:1–9. Requests to use ABL are approved in the first instance by Mr. Nicks, and thereafter, the City approves 96.7 percent of all requests that are initially approved by AFA. 7.RR.452–53 ¶¶ 45–46; 2.SCR.546–68; 2.SCR.517 at 61:16–22. The record thus makes plain that it is AFA, not the City, that is controlling ABL.

To emphasize, the City need not control every small detail of ABL or how it is used. But the Gift Clause *requires* the City to put in place *some* measures to oversee and manage the expenditure of public funds to ensure that public business is actually being accomplished, and that the public is receiving adequate value for its significant release-time expenditures. *Tex. Mun. League*, 74 S.W.3d at 384 (government must maintain "public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment."). That is plainly not happening here.

IV. The Texas Citizens Participation Act Order Should Be Reversed.

This Court should reverse the district court's order granting AFA's Motion to Dismiss pursuant to the Texas Citizens Participation Act ("TCPA"). The TCPA was enacted to protect the exercise of First Amendment rights *and* to "protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002.[10] The lower court's order sustaining dismissal and ordering attorney fees and sanctions in this taxpayer action—which challenges the legality of government spending—is directly contradictory to the letter and purpose of the TCPA. What's more, that order of dismissal is incompatible with the district court's later orders and with AFA's voluntary re-intervention into the case after it was dismissed as a party.

First, at the TCPA stage, there was overwhelming evidence that ABL violates the Gift Clause, and certainly more than "the 'minimum quantum of

[10] Citations to the Texas Citizens Participation Act refer to the version of the Act in effect at the time of the referenced order of dismissal.

evidence necessary to support a rational inference that the allegation of fact is true.'" *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (citation omitted). *See* Taxpayers' Op. Br. at 39–42.

Second, the district court entered orders denying the City's Plea to the Jurisdiction, denying the City's Motion to Abate, and partially denying the City's and AFA's Joint Motion for Summary Judgment, finding that a justiciable issue remained for trial on the merits. By doing so, the district court necessarily ruled that Messrs. Pulliam and Wiley properly pleaded a *prima facie* Gift Clause claim against the City.

Third, the text of the TCPA offers a moving party a single remedy: dismissal. Tex. Civ. Prac. & Rem. Code § 27.005(b). AFA moved to be dismissed from the case and the district court granted its request. *Then,* after being dismissed, AFA filed a Petition in Intervention in which it argued it *was* a necessary party to the case. (The district court disagreed by striking AFA's intervention.) By arguing that its participation was necessary for this case to proceed, AFA undermines the express purpose of the TCPA to dismiss unnecessary parties, and effectively waived the relief it sought and was granted by the district court. In short, AFA's *own filings* demonstrate that being a defendant did not infringe upon its members' rights.

Finally, AFA argues, Resp'ts Br. at 59–62, that Taxpayers Pulliam and Wiley should be sanctioned to deter them from filing hypothetical lawsuits—cases they have not filed and that no evidence shows that they would or could file. *See* CR.2243–2415. AFA imagines that these specific taxpayer plaintiffs *might* file

other "lawsuits against public employee associations in Texas." Resp'ts Br. at 61. But these imaginary lawsuits brought against different parties in different cities is pure conjecture, and obviously has not been borne out. The TCPA allows a court to impose sanctions sufficient to "deter the party who brought the legal action from bringing similar actions described in this chapter." Tex. Civ. Prac. & Rem. Code § 27.009(a). Since there is no such risk here, sanctions are inappropriate. This Court should reverse the award of sanctions and fees.

CONCLUSION

The Court should *reverse* the opinion of the court of appeals and enter judgment in favor of Taxpayers and the State of Texas.

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I certify that this document complies with the word-count limitations in Tex. R. App. P. 9.4(i)(2)(B) because it contains 7,079 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ *Robert Henneke*
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