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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,
AND THE STATE OF TEXAS,
Petitioners,
v.

AUSTIN FIREFIGHTERS ASSOCIATION, IAFF LOCAL 975; CITY OF AUSTIN; AND MARC A. OTT, IN HIS OFFICIAL CAPACITY AS THE MANAGER OF THE CITY OF AUSTIN
Respondents.

On Petition for Review
From the Third Court of Appeals, Austin, Texas
Cause No. 03-21-00227-CV

BRIEF *AMICUS CURIAE* OF FREEDOM FOUNDATION IN SUPPORT OF PETITIONERS

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Texas Rule of Appellate Procedure 11(c)..1

To the Honorable Supreme Court of Texas:

The Freedom Foundation respectfully submits this brief *amicus curiae* in support of Petitioners Roger Borgelt, Mark Pulliam, Jay Wiley, and the State of Texas, pursuant to Texas Rule of Appellate Procedure 11.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Freedom Foundation (the "Foundation") is one of the most active and well-known national nonprofits working to protect the First Amendment rights of public workers. The Foundation's mission since its founding in 1991 is to advance individual liberty, free enterprise, and limited, accountable government through education, litigation, legislation, and community activation. Pursuant to this mission, the Foundation regularly files *amicus curiae* briefs. *See, e.g.*, *Todd v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021), *appeal docketed*, No. 21-3749 (8th Cir. 2021); *Hoekman v. Educ. Minnesota*, 335 F.R.D. 219 (D. Minn. 2020), *appeal docketed*, No. 21-1366 (8th Cir. July 28, 2021); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018). Given the Foundation fights the power of public sector labor unions to use employee and public funds to subsidize their own private political speech, the Foundation's expertise and perspective will aid the Court in deciding the merits of the instant case.

[1] In accordance with Texas Rule of Appellate Procedure 11(c), *Amicus* affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amicus* made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief discusses two additional, but relevant, issues outside of those briefed by the parties: 1) the impact the Supreme Court of the United States' holding in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) has on the question whether the Austin Firefighters Association, IAFF Local 975's (the "Association") bank of shared leave is regular compensation for employees, and in the public interest, and 2) whether individual taxpayers may be deterred in filing actions against public-employee unions, and other large and powerful organizations, because of the Texas Citizens Participation Act ("TCPA").

The Court of Appeals found that the Association's time bank qualifies as regular employee compensation and that it also serves a public purpose. *Borgelt v. Austin Firefighters Ass'n*, *IAFF Loc. 975*, 2022 WL 17096786, at *5-9 (Tex. App. Nov. 22, 2022). Even if these conclusions were tenable at the time this case was originally filed in 2016, a dubious proposition in any event, neither conclusion can stand under the principles since laid down by the Supreme Court of the United States in *Janus*. Additionally, the purpose of the TCPA is to protect the chilling of speech through abusive lawsuits. Thus, enabling powerful organizations like the Association to use the TCPA against individuals and taxpayers flips the TCPA's purpose on its head.

For these additional reasons, the Court should rule in favor of the Petitioners.

ARGUMENT

A. The Association's Time Bank Is Neither Regular Compensation, Nor Serves a Public Purpose under *Janus v. AFSCME*

In *Janus*, the Court premised its conclusion that constitutional deductions from public employees' lawfully earned wages for union purposes must be preceded by a waiver of their First Amendment rights, 138 S. Ct. 2448 (2018), based on several presuppositions directly relevant to this case.

First, the Court found that in the collective bargaining process, labor unions representing public employees, like the Association, discuss any number of political topics of their own choosing. *Id.* at 2473. These topics include education policy, child welfare, healthcare, minority rights, climate change, the Confederacy, sexual orientation, gender identity, evolution, and minority religions. *Id.* at 2473-76. Of course, these topics have nothing to do with the wages, hours, and working conditions of employees, the traditional subjects of collective bargaining.

But even if constrained to the limited scope of collective bargaining, the Court found that such speech still represents the inherently political private politicking of private organizations. *Id.* at 2480 (collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently political" speech). Instead of normal employee compensation, or serving a public purpose, the Association time bank is a mechanism for a private political organization to subsidize its own private politicking and political speech, to the

annual tune of $200,000 to $250,000 per year of taxpayers' money. *Borgelt*, 2022 WL 17096786, at *16. The fact that this mechanism arose as a bargained-for term of the collective bargaining agreement, is irrelevant. The Association time bank advances the union's private political speech, not a public purpose. This is true whether the Association's speech concerns wages, hours, and working conditions, or American history, gender identity, or current events. Even if this private politicking somehow touched upon the public interest, which it does not, access to this funding being made available only to those firefighters working to advance the union's private speech would remove it from the ambit.

Second, even accepting the argument that the Association time bank serves a legitimate public purpose, and affords a clear public benefit, this purpose and benefit cannot be satisfied by concerns over so-called "labor peace" and "free riders."

In *Abood v. Detroit Board of Education*, the case *Janus* overturned, the main justification for the forced subsidy of the political speech of a private union representing public employees was that the subsidy served the government's interest in promoting "labor peace," 431 U.S. 209, 224 (1977), *overruled by Janus*, 138 S. Ct. at 2448. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if employees within a bargaining unit were represented by more than one union. In such a situation, the Court predicted,

"dissension within the work force" would result as employers faced "conflicting demands from different unions." *Id.* at 220–221.

However, in *Janus,* the Court undermined and undid this supposed interest in "labor peace." *Janus*, 138 S. Ct. at 2465 ("*Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood's* fears were unfounded."). Relying upon the example of federal and state employees not bound to forced political subsidies for unions, yet nonetheless existing in jurisdictions without any significant labor disruptions, the Court concludes that "labor peace" is possible "through means significantly less restrictive of associational freedoms." *Id.* at 2466. "Labor peace" is not a public purpose justifying the Association's time bank.

Abood also cited the risk of "free riders" as justification for the forced subsidy for private public union's political speech, contending it was necessary to create fairness for unions forced to represent entire bargaining units, members, and non-members alike. 431 U.S. at 224. However, in addition to arguments concerning "labor peace," *Janus* dispensed with arguments concerning the potential public interest in seeing to it that private public unions like the Association are enabled to collectively bargain without shouldering the cost of "free riders." 138 S. Ct. at 2467. While the Association time bank in this case does not appear to directly concern such a subsidy, it is nonetheless important to consider, and dispel, potential arguments

concerning a public interest in covering the cost of Association's private interests in collective bargaining. As the Court notes in *Janus*, no union is ever compelled to seek the designation as exclusive representative. 138 S. Ct. at 2467. Instead, this designation is sought because of the statutory power the union receives once it is achieved, as well as many other benefits accruing to recognized exclusive representatives. *Id.* ("These benefits greatly outweigh any extra burden [of] representation for nonmembers."). In other words, unions like the Association seek the power of exclusive representation, and any coordinate burden in representing nonmembers is more than made up for by the power it receives. Bearing the cost of "free riders" is not a public purpose justifying the Association's time bank.

In this case, the Association wants to have its cake and eat it, too. On the one hand, the Association claims the time bank is just normal compensation for a firefighter. But on the other hand, it is clear that this compensation is available only to those firefighters approved by the Association to take part in advancing the Association's private political speech. The Association also argues that the time bank, a subsidy to advance the union's private political speech, is justified in that it serves a public purpose. However, neither the promotion of so-called "labor peace" nor supporting the additional cost of "free riders" is a sufficient public purpose. Rather, the Association, like all private labor unions representing public workers,

serve their own interests, the public be damned; a clear diversion from the Supreme Court's directive in *Janus*.

B. The Court of Appeals' Application of the TCPA Results in an Unjust Outcome That Contradicts the Purpose of the TCPA

On June 17, 2011,[2] the State of Texas enacted the TCPA, colloquially referred to as "anti-SLAPP," by modeling its legislation after California's anti-SLAPP statute, which was the first state with a statute to swiftly dismiss strategic lawsuits meant to chill public participation.[3] Thus, the resulting TCPA authorizes a motion to dismiss if a lawsuit can be shown to be based on suppressing the lawful exercise of a person's right to free speech, petition, or association.[4]

In adding a new chapter to the Texas Civil Practice and Remedies Code, the Texas Legislature included a brief statement of dual purpose for the TCPA, which is crucial to understand why its application to the instant case is unjust: 1) "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law" and 2) "at the same time to protect the rights of a person to file

[2] *See* Tex. Civ. Prac. & Rem. Code Ann. ch. 27.
[3] California's anti-SLAPP statute is one of the broadest because it protects "any act of [a] person in furtherance of the person's right of petition or free speech." Cal. Civ. Proc. Code § 425.16. An act in furtherance of the right to petition includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or ... any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id*.
[4] *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a).

meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code Ann. § 27.002. Indeed, this Court has cautioned against the potential overreaching use of the TCPA to dismiss meritorious cases when it made it clear that "[t]he TCPA's purpose is to identify and summarily dispose of lawsuits designed *only to chill* First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (emphasis added).

Because California has the most robust anti-SLAPP case authority, it is helpful to refer to California case law when considering the pitfalls of anti-SLAPP statutes. Specifically, it has become clear over time that anti-SLAPP statutes are used by powerful organizations and corporations to obtain unjust outcomes contrary to the original goals of anti-SLAPP legislation.

For example, in *Hunter v. CBS Broad. Inc.*, 221 Cal. App. 4th 1510 (2013), a multibillion-dollar corporation filed an anti-SLAPP motion to prevent one individual's discrimination case from allegedly interfering with its (the corporation's) free speech rights. Based on its legislative history, the original intent of the anti-SLAPP motion was to encourage public participation. Yet now, a giant corporation could use such a tool against one individual.

Hunter illustrates exactly how far anti-SLAPP motions have come: from providing protection to plaintiffs who are exercising their free speech and public participation rights to acting as an impediment to an individual bringing an

employment discrimination claim against a giant corporation. In short, just because the defendant may be, as a matter of business, engaged in speech activity, it does not mean that everything the defendant does entails conduct "in furtherance" of speech.

Another example of anti-SLAPP's overreach and unjust results that the Foundation is intimately aware of is in *H.K. et al. v. United Teachers Los Angeles, et al.*, No. 21STCV12510 (Los Angeles Cnty. Super. Ct., filed Apr. 1, 2021). In *H.K.,* a group of parents represented by the Foundation, sued the city over school closures brought on by the COVID pandemic. They alleged that persisting in school closures violated the Education Code because the school closures were the result of political demands, such as defunding the police, made by the teachers' union (UTLA) during negotiations with the school district regarding school re-openings. The teachers' union moved to dismiss under California's anti-SLAPP statute, and the court granted that motion, reasoning that the negotiations between the teacher union and the school district, which kept the schools closed albeit for political demands, were speech. Order Granting Special Motion to Strike, *H.K. et al. v. United Teachers Los Angeles, et al.*, No. 21STCV12510 (Los Angeles Co. Super. Ct., July 12, 2021). Such an extremely broad interpretation of the anti-SLAPP law shielded the union and the district's actions, which hurt vulnerable children, from judicial review, since all contracts between the district and the union resulted from negotiations.

The instant case presents a similar conundrum. Here, appellants Pulliam and Wiley claim that the leave the City of Austin granted the Association is used to further the interests of the Association rather than the City of Austin's interests. *Borgelt*, 2022 WL 17096786 at *15. In support of this claim, the appellants alleged in their petition that the collective bargaining agreement allows the Association's representatives to use Association bank of paid leave for "time spent in Collective Bargaining negotiations[,] adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training (with prior approval of the time and content by the Fire Chief, or his/her designee), and attending union conferences and meetings." Pet. at 4.

Because these acts are "communication[s] between individuals who join together to collectively express, promote, pursue, or defend common interests," Tex. Civ. Prac. & Rem. Code § 27.001(2), the Court of Appeals found that Pulliam and Wiley's pleading falls squarely within the TCPA's first prong: "that the legal action is based on, relates to, or is in response to the party's exercise of . . . the right of association." Tex. Civ. Prac. & Rem. Code § 27.005(b)(3). But such an interpretation leads to the unjust result that a taxpayer could never sue a public sector union for its contract negotiations since those negotiations always relate to the union's exercise of its right of association.

One possibility to resolve this inequity comes from California. On January 1, 2012, California enacted what is known as the "public interest exception" to its own anti-SLAPP statute, stating that cases in the "public interest" would not be subject to anti-SLAPP dismissals. Cal. Civ. Proc. Code § 425.17. In enacting this exemption, the California legislature explained that "there has been a disturbing abuse of Section 425.16…which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16." Cal. Civ. Proc. Code § 425.17. As such, the legislature believed that public participation in civic life "should not be chilled through abuse of the judicial process or Section 425.16." *Id.* Applied here, because Pulliam and Wiley are suing on behalf of all taxpayers and are not seeking personal gain from the suit and are only seeking injunctive and declaratory relief, if Texas had such an exemption, Pulliam and Wiley would be able to continue their suit without being subject to a TCPA motion to dismiss.

Alternatively, and until Texas implements such an exemption, this Court could also consider that the "gravamen" test for allegations. Under the gravamen test, the Court asks whether the plaintiff's allegations arise from the free speech activity itself or from the *result* of the free speech activity. *See, e.g.*, *Martin v. Inland Empire Utilities Agency*, 130 Cal. Rptr. 3d 410, 418-23 (Ct. App. 2011)(where an African-American plaintiff brought a retaliation and race discrimination claim, the

Court found that "the actual heart and soul of this case stems from retaliation" and not the plaintiff's performance, and thus applying the anti-SLAPP statute would mean "[employers] could discriminate . . . with impunity knowing any subsequent suit for . . . discrimination would be subject to a motion to strike and dismissal."). If the gravamen of Pulliam and Wiley's complaint focuses on the protected activity, the collective bargaining negotiations, then their suit may be subject to a TCPA motion to dismiss. If, however, as seen here, the gravamen of the suit is a complaint about an increase in spending on public sector unions to the detriment of the taxpayer, then it should fall outside of the TCPA's swift dismissal vehicle.

In other words, while Pulliam and Wiley's claims are, broadly speaking, "based on or is in response to a party's exercise of the … right of association," the purpose of the lawsuit and the gravamen of the claims relate to improper gifting by a government entity to a public sector union. Pulliam and Wiley were not seeking to quash the Association's right to associate, only to quash their right to do so on the taxpayer's dollar. In fact, the suit does not in any way chill the Association's right to associate when not done on the public dime. At risk here is the expansion of the Appellate Court's decision to other cases resulting in no taxpayer ever suing a public sector union for anything that was negotiated in collective bargaining since collective bargaining always "relates," broadly, to freedoms of speech, petition, and association. Worse still, a taxpayer could never challenge the fraudulent acts of any

private party that contracted with the government. This result is out of line with the purpose of the statute and is patently unjust.

CONCLUSION

For the foregoing reasons, the Court should rule in favor of the Petitioners.

Dated: March 22, 2023

Respectfully Submitted,

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This brief contains 3,039 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate procedure.

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I certify that on March 22, 2023, I caused a true and correct copy of the foregoing Amicus Curiae Brief of Institute for Justice in Support of Petitioner to be served electronically to the following counsel of record:

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