

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;
MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN,
Respondents.

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

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REVIEW

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IDENTITY OF AMICUS CURIAE

Mountain States Legal Foundation (“MSLF”) is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of state and federal statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (*amicus curiae* in support of petitioner); *303 Creative LLC v. Elenis*, — S. Ct. — (2022) (*amicus curiae* in support of petitioner). As an institution dedicated to limited and ethical government, MSLF has a particular interest in the proper interpretation of the Texas Constitution and an appropriate ruling in this matter.

SUMMARY OF ARGUMENT

If this Court does not reverse the lower court's decision, Texans' ability to hold local governments accountable for public spending will be seriously impaired. When the court of appeals affirmed the trial court's decision regarding the TCPA motion and sanctions on the basis that Petitioners had challenged the Austin Firefighter union's constitutional "exercise of the right of association," it significantly expanded Texas courts' application of the TCPA. Not only was this expansion mistaken as a matter of law, but as a matter of policy it created a problematic loophole that would insulate governments, or any other party benefiting from government action, from similar citizen challenges in court. If left intact, the lower courts' erroneous interpretation of the TCPA would chill taxpayer challenges to unconstitutional state funding of private organizations' political lobbying.

ARGUMENT

I. The Third Court of Appeals’ decision will chill meritorious litigation that questions the propriety of public–private funding arrangements.

The purpose of the TCPA is clear from the statute: “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, *at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.*” Tex. Civ. Prac. & Rem. Code § 27.002 (emphasis added). Holding that the TCPA bars a taxpayer’s challenge to their city’s use of public funding to pay for union activities would insulate government actors and their beneficiaries from taxpayer accountability. The TCPA was not intended to, and should not, apply to such legal action.

a. The Third Court of Appeals erroneously expanded the TCPA beyond its intended scope.

Petitioners challenge the Association Business Leave provision in the Collective Bargaining Agreement between the City of Austin and the Austin Firefighters Association (“Union”). The provision provides for a bank of paid time off, subsidized by public funds, which Union members can use for Union activities. This includes everything from lobbying activities—sometimes against the City—to fishing trips.

Respondents claim this challenge violates their right of association, but in agreeing with that argument, the Third Court of Appeals expands the TCPA beyond the text of the statute. The pre-2019 TCPA defined the “exercise of the right of association” as “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” Former Tex. Civ. Prac. & Rem. Code § 27.001(2). The TCPA allows for a defendant to file a motion to dismiss where “a legal action is based on, relates to, or is in response to a party’s exercise of the right of free speech, right to petition, or right of association.” *Id.* § 27.003(a).

But the lower courts here bafflingly decided that by challenging the City’s use of public funds to pay firefighters to engage in union activities, Petitioners were impinging on the firefighters’ “exercise of the right of association.” Petitioners challenge the mechanism of the funding—that the City of Austin uses taxpayer dollars to subsidize the Union—not the Union’s existence, its operations, or its members’ right to associate in the Union, communicate, or express views of the Union. Petitioners are not challenging firefighters’ right to join a union or to use any other form of general paid leave to engage in union activity. Instead, Petitioners are challenging the government’s direct and exclusive funneling of tax dollars directly to promoting the Union, a private organization.

b. The Third Court of Appeals’ decision actively discourages future meritorious litigation.

This is not a problem that is specific to Austin. Other Texas cities are granting employees—including teachers, police officers, and firefighters—thousands of hours of paid time off to engage in union activities, all paid out of public coffers. For instance, in 2012 and 2013, the San Antonio Fire Department and San Antonio Police Department granted a cumulative total of 52,921 hours of union time, all subsidized by city payrolls. See Trey Kovacs, *A Remedy for the Lone Star State’s Taxpayer Giveaway to Unions*, Competitive Enter. Inst., No. 203 (July 23, 2015), <https://www.cei.org/wp-content/uploads/2015/07/Trey-Kovacs-A-Remedy-for-Texas-Taxpayer-Giveaway-to-Unions.pdf>.

The cost of release time to public coffers is clear from other states, as well. For example, California supports a variety of union release time. Teacher unions are provided release time for educators to participate in union activities, instead of being in the classroom. One report estimated the total value of the release time subsidy to teacher unions across California is over \$100 million per year in taxpayer dollars. See Edward Ring, *How “Release Time” Causes Taxpayers to Fund Government Union*, Cal. Pol’y Ctr. (July 17, 2019), <https://californiapolicycenter.org/how-release-time-causes-taxpayers-to-fund-government-unions/>. The statewide union is milking the public coffers to conduct union business.

Nor would this issue be limited to unions. If the lower courts' interpretation of the TCPA is affirmed, it will severely impede the taxpayers of Texas from challenging city budget measures that unconstitutionally fund *any* private organization—precisely the sort of state-sponsored funding of private activity that the Texas Constitution meant to prohibit through the Gift Clauses.

In passing the TCPA, the legislature explicitly desired “to protect the rights of a person to file meritorious lawsuits for demonstrable injury.” Former Tex. Civ. Prac. & Rem. Code § 27.002. Texas taxpayers have the right, recognized by statute, to bring meritorious lawsuits to challenge government overreach through public spending. No private organization, including unions, should be allowed to silence legitimate arguments about the propriety of receiving benefits from the government.

But in awarding sanctions, the Third Court of Appeals has actively discouraged future litigation. Whether Petitioners are right on the merits of the TCPA argument (and they are), affirming the sanctions the trial court entered against Petitioners would have a grave chilling effect on future Texas citizens fairly questioning how their tax dollars are spent. Texas government entities and the private organizations they wish to support will run unchecked. And Texas taxpayers will shy away from ever questioning the propriety of public–private partnerships. This is not what the Texas legislature intended.

PRAYER

This Court should grant the petition and reverse the judgment of the Third Court.

Respectfully submitted on this 21st day of April 2023,

/s/ Joseph A. Bingham _____

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/s/ Joseph A. Bingham

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CERTIFICATE OF COMPLIANCE

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/s/ Joseph A. Bingham

Joseph A. Bingham

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