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 NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REVIEW

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IDENTITY OF AMICUS CURIAE

The National Right to Work Legal Defense Foundation, Inc., is a non-profit, charitable organization formed to provide free legal aid to individuals subject to compulsory unionism.[1] The Foundation has supported several major cases involving employees' First Amendment rights to refrain from subsidizing union activities. This recently includes *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and *Harris v. Quinn*, 573 U.S. 616 (2014). There the United States Supreme Court held it violates the First Amendment for states and unions to compel public employees and homecare providers, respectively, to subsidize unions and their speech.

SUMMARY OF ARGUMENT

The Foundation submits this amicus brief to make a singular point: the Third Court of Appeals' reasons for holding that it does not violate the Texas Constitution's Gift Clauses to require taxpayers to subsidize union activities through association benefit leave conflicts with the Supreme Court's reasons for holding in *Janus* that it violates the First Amendment to require public employees to subsidize union activities.

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[1] Texas Rule of Appellate Procedure 11 statement: This brief is submitted on behalf of the National Right to Work Legal Defense Foundation, Inc., which is source of all fees paid for preparing this brief. The brief was served on all attorneys of record as reflected in the certificate of service.

ARGUMENT

A. The United States Supreme Court's Decision in *Janus*.

The United States Supreme Court in *Janus* reached three conclusions relevant to the issue before this Court when holding that compulsory union payments violate the First Amendment.

First, the Court recognized that union collective bargaining and related activities in the public sector constitute speech and petitioning on matters of political and public concern. *Janus*, 138 S. Ct. at 2474-78. The reason is simple: a public-sector union's function in collective bargaining and grievance proceedings is to speak with, or more accurately to petition, government officials to influence governmental policies. *See id*. These governmental policies often are matters of substantial public concern, such as how much money the government expends on wages and benefits. *Id*. The Court earlier recognized this in *Harris*, holding that "in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government" and that, "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues." 573 U.S. at 636-37.

Second, the *Janus* Court rejected the notion that union officials act as public employees performing their official duties when those officials bargain with the government or otherwise represent employees. *Id*. at 2474. In *Janus*, the respondents argued the Court should apply a low level of First Amendment scrutiny to compulsory union fees because, according to the respondents, "union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, i.e., as speech 'pursuant to [an employee's] official duties.'" *Janus*, 138 S. Ct. at 2474 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

Under *Garcetti*, "when public employees are performing their job duties, their speech may be controlled by their employer." *Janus*, 138 S. Ct. at 2474. The reason is that this type of speech "owes its existence to a public employee's professional responsibilities" and "reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22. In *Janus*, the respondents were "[t]rying to fit union speech into this framework" and were "suggest[ing] that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech." 138 S. Ct. at 2474.

The United States Supreme Court rejected that suggestion, holding:

> This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees*, not the employer*. Otherwise, the employer would be negotiating with itself and disputing its own actions.

Janus, 138 S. Ct. at 2474 (emphasis added). The *Janus* Court thus recognized that union officials do not act for public employers when negotiating against public employers on behalf of employees.

Finally, the *Janus* Court held that a public employer's interest in so-called "labor peace" does not require compelling employees to subsidize exclusive union representatives. 138 S. Ct. at 2465-66. The Court recognized that regimes of exclusive representation often exist without compelled subsidization of the union. *Id.* The reason is that exclusive representative status is a significant power and benefit that unions will avidly seek without subsidies. *Id.* at 2467. The Court concluded that it was "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." *Id.* at 2465 (quoting *Harris*, 573 U.S. at 649).

In sum, *Janus* recognized that public-sector unions' activities are political in nature, are not performed for public employers, and need not be mandatorily-subsidized to maintain labor peace. As discussed next, the lower courts' findings that a public employer subsidizing a unions' activities with association business leave predominantly serves the public interest, supports the employer's public mission, and maintains labor peace cannot be reconciled with *Janus*' conclusions.

B. The Lower Courts' Rationales Are Inconsistent with *Janus*.

An expenditure violates the Texas Constitutions' Gift Clauses if the government pays a private entity without receiving sufficient consideration in exchange or if the payment does not serve a legitimate "public purpose" and afford "a clear public benefit in return." *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383–84 (Tex. 2002). An expenditure serves a public purpose only if the government can: "(1) ensure that [the expenditure's] predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and protect the public's investment; and (3) ensure that the political subdivision receives a return benefit." *Id.* at 384.

The City of Austin ("the City") violates the Gift Clauses by giving association business leave to Austin Firefighters' Association ("Union") officials to, among other things, petition the City in bargaining and grievance proceedings. The City is subsidizing Union activities that *Janus* recognized to be political and ideological. The City also is subsidizing Union advocacy that the City does not control. These taxpayer-funded subsidies to union officials are no more necessary to maintain labor peace than the mandatory employee subsidies *Janus* held unconstitutional. Consequently, association business leave does not predominantly serve a public purpose or provide a clear public benefit, but rather principally serves private Union interests in violation of the Gift Clauses.

The Third Court misapplied each test in *Texas Municipal League* in a manner inconsistent with *Janus*. *See Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786 (Tex. App.—Austin, Nov. 22, 2022).

First, the Third Court held that granting association business leave to Union officials is not a gratuitous use of public funds unsupported by consideration because that leave supposedly is part of firefighters' com-

pensation for their services and because the Union plays a role in administering grievances. *Borgelt*, 2022 WL 17096786 at ** 5-7. This holding conflicts with *Janus*' recognition that public employees do not act as government agents pursuing their official job duties when they act as union officials. 138 S. Ct. at 2474. For example, in granting paid leave to employee Bob Nicks to act as the Union's president, the City is not paying Mr. Nicks for his services as a firefighter or as a public servant. The City is paying Mr. Nicks for his services as an agent of a private organization—the Union—in violation of the Gifts Clauses.

Second, the Third Court irrationally reasoned that subsidizing Union officials' activities with association business leave predominantly serves a public purpose, as opposed to the Union's self-interests, because "it facilitates the [Union's] ability to carry out its business of supporting the Fire Department's mission and maintaining good labor relations between the City and its public-servant firefighters." *Borgelt*, 2022 WL 17096786 at *9. The notion that Union business is the City's business conflicts with *Janus'* conclusion that union representatives do not act for their public employer, but for the union. *See* 138 S. Ct. at 2474. Here, the Union's function is not "supporting the Fire Department's mission" or otherwise

performing a public service for the Fire Department, as the Third Court incorrectly found, *Borgelt*, 2022 WL 17096786 at *9. The Union negotiates *against* the City Fire Department in collective bargaining and represents employees *against* City management in grievance proceedings.

The Third Court's reasoning also ignores that the City is using taxpayer monies to subsidize Union officials' speech and petitioning on matters of political and public concern. *See Janus*, 138 S. Ct. at 2474-78; *Harris*, 573 U.S. at 636-37. This includes not just political activities unrelated to directly dealing with the City.[2] A Union official bargaining with the City, or representing employees in grievances against the City, is itself expressive advocacy under *Janus*, 138 S. Ct. at 2474-78, and *Harris*, 573 U.S. at 636-37. Indeed, this Union activity is quite literally "petition[ing] the Government for a redress of grievances" under First Amendment to the United States Constitution. U.S. Const., Amend. I.

[2] The State of Texas' Petition for Review details how "Union members across the board use association leave for political activities," such as for "attend[ing] PAC meetings, where they determine which candidates to support." *Id.* at 5. Indeed, the City's agreement with the Union expressly authorizes association business for "attending union conferences and meetings" and for "legislative and/or political activities at the State or National level" if they "relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit." *Borgelt*, 2022 WL 17096786 at *10-11.

With its administrative business leave policy, the City is effectively paying individuals to lobby the City for a private advocacy organization and its members. The notion that this political advocacy predominantly serves a public purpose, as opposed to predominantly benefiting the private organization, is untenable.

Third, the lower court's conclusion that the City retains sufficient control over how Union officials use administrative business leave, *see Borgelt*, 2022 WL 17096786 at ** 9-12, conflicts with the United States Supreme Court's recognition that employers do not control how unions represent employees vis-à-vis their employer. *Janus*, 138 S. Ct. at 2474. Regimes of collective bargaining necessitate an arm's length relationship between the employer on one side of the table and the union on the other side. "Otherwise, the employer would be negotiating with itself and disputing its own actions." *Id.*

Indeed, "[c]ollective bargaining is 'a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals.'" *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 268 (1938) (quoting H.R. Rep. No. 74 1147, *18 (1935)). Thus, federal labor law "requires that the employees in bargaining be completely independent of the

employer so that in the bargaining, labor will be represented by persons or organizations having only its interest in mind, and acting wholly uninfluenced by fear or favor, of or from the management." *NLRB v. Brown Paper Mill Co.*, 108 F.2d 867, 871 (5th Cir. 1940).

Consequently, even if the City strictly ensured that Union officials used association business leave only for bargaining and dealing with the City—which the City does not[3]—the City's lack of control over how Union officials bargain and deal with the City proves this subsidy is an unlawful gift to a private entity. This conclusion is reinforced by the fact that Union officials often demand policies and outcomes that the City *opposes* in bargaining and grievance proceedings. Indeed, a union grievance almost always involves a union contesting an action that a public employer wants to take or has already taken—like instituting a desired policy change or disciplining an employee. The City clearly does not control how Union officials use association business leave when those officials use the leave to advocate *against* the City's preferred policies and outcomes.

[3] Union officials often use association business leave for other activities, such as to attend union conferences and political meetings. *See supra* footnote 2; Petition for Review by Borgelt et. al., 3-4; Petition for Review by State of Texas, 5.

Finally, with respect to whether the City "receives a return benefit" and is afforded a "clear public benefit in return" for associational business leave under *Texas Municipal League*, 74 S.W.3d at 383–84, the Third Court found "the City benefits from the Provision because the Provision enables the Association to conduct its business, and the Association's business serves the public purpose of facilitating harmonious labor relations between the firefighters and the City." *Borgelt*, 2022 WL 17096786 at *12. This flawed rationale is indistinguishable from the "labor peace" rationale for compulsory union fees that the United States Supreme Court rejected in *Janus*, 138 S. Ct. at 2465-67.

The *Janus* Court recognized that systems of collective bargaining do not require compelled subsidization of unions because exclusive representative status is itself a tremendous benefit to unions. *Id*. at 2467. The United States Court of Appeals for the Seventh Circuit recognized this point years earlier, finding that a union vested with exclusive representative authority, but that lacked the power to compel employees to subsidize it, was "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table." *Sweeney v. Pence*, 767

F.3d 654, 666 (7th Cir. 2014); *see Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (similar).

Given that compelling employees to subsidize unions is not necessary to ensure labor peace under *Janus*, it follows that compelling taxpayers to subsidize unions through business leave policies also is not needed to ensure labor peace. Unions will exercise their powers as exclusive representatives without the taxpayer subsidy of association business leave. Thus, the City need not grant Union officials association business leave to ensure "harmonious labor relations" with the Union.

Indeed, the implicit suggestion that there would be a breakdown in "harmonious labor relations" if the City did *not* give Union officials association business leave is troubling. If respondents contend that Union officials would disrupt City services if they did not receive association business leave, that would make the benefit akin to the City paying protection money to Union officials for refraining from harming the public interest. If respondents contend that Union officials would be unwilling to make concessions if they did not receive association business leave, that would make the policy akin to a bribe to Union officials to compromise their members' interests at the bargaining table or in grievances. Either

way, the notion that harmonious labor relations depend on the City giving things of value to Union officials is unpalatable. The Court should reject that notion and see association business leave for what it plainly is: a gratuitous taxpayer-funded gift to a private advocacy group that violates the Texas Constitution's Gift Clauses.

Prayer

This Court should grant the petition, reverse the judgment of the Third Court, and render judgment for Plaintiffs.

Respectfully submitted,

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