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 CITY MANAGER OF THE CITY OF AUSTIN,
Respondents.

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

REPLY BRIEF FOR PETITIONER THE STATE OF TEXAS

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To the Honorable Supreme Court of Texas:

Association leave violates the Gift Clauses. It does not serve as compensation to firefighters. It does not serve a strictly governmental purpose, as firefighters use it to attend galas, fishing trips, and retirement parties. Defendants did not even bargain for some of the uses to which the Union puts association leave. And the City does not have constitutionally adequate controls in place over the leave's use.

In their response brief, Defendants largely fail to engage the relevant standards. They practically ignore the State's argument that the Court should hew closely to the Gift Clauses' text. They ignore the argument that, under *Texas Municipal League*, association leave is not compensation to firefighters. But that argument is relevant to whether the firefighters would have deemed their consideration sufficient absent association leave. Defendants largely ignore this Court's precedent mandating that gifts of public resources be used only for a strictly governmental purpose. And they ignore that controls over association leave's use must be specifically tailored to cabin that use. Refusing to engage with these standards is fatal.

Defendants also commit the same overgeneralization error as the lower courts: They assume that because the association-leave provision is located in the Agreement, and the Agreement might serve a public purpose, then the association-leave provision must, too. But that assumption would permit public contracts to conceal unlawful provisions and escape Gift Clause scrutiny. That result is untenable.

Supplement to Statement of Facts

After Plaintiffs submitted opening briefs in this case, an "arbitration panel involving the City" and the Union "defined the terms of a new labor contract." *City of Austin and Austin Firefighters Association have a New Labor Contract*, austintexas.gov (Sept. 8, 2023), https://austintexas.gov/news/city-austin-and-austin-firefighters-association-have-new-labor-contract. This new Agreement "conclude[d]" the "arbitration proceeding" that the Union initiated in July 2022 and thus ended over a year of negotiations between the two Defendants. *Id.* The new Agreement was "effective immediately." *Id.* It contains an association-leave provision whose operative language is nearly identical to the language in the same provision in the former (2017-2022) Agreement. But the new Agreement provides for *more* association-leave hours.

While Defendants have not argued that this case is moot, the new Agreement demonstrates that it is not. *See Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of Am.-Airline Div. & Teamsters Local 19 v. Sw. Airlines Co.*, 875 F.2d 1129, 1132-33 (5th Cir. 1989). As this Court may take judicial notice of facts outside the record to aid a determination of its own jurisdiction, *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 624 (Tex. 2012), it may take judicial notice of the new Agreement, Tex. R. Evid. 201(b)-(d).

ARGUMENT

I. The Court Should Give Effect to the Gift Clauses' Text.

Defendants refuse to engage with the State's historical analysis of the Gift Clauses. They say (at 17) only that "the *Texas Municipal League* standard needs no clarification." But they did not offer a cogent reason why or otherwise wrestle with the State's arguments. Resp. Br. 17.

Instead, they attempt to distract from those arguments by insisting (at 17) that Plaintiffs "fail[ed] to challenge the trial court's findings of fact or otherwise provide a basis to find any element of th[e] [*Texas Municipal League*] standard . . . lacking." This "one-note response," which Defendants have echoed throughout this litigation, is ineffective. State's Br. 3. As the State has explained, Plaintiffs challenge the lower courts' erroneous interpretation of *the law*—which, if appropriately applied, would have produced a different result regardless of whether Plaintiffs challenged the trial court's factual findings. State's Br. 3. And even assuming that Plaintiffs did not challenge those findings of fact, that does not mean they cannot make legal challenges. *See* State's Br. 20 (standard of review).

Defendants cannot make the Gift Clauses' history and original meaning disappear by ignoring them. For example, calling *Bexar County v. Linden*, 220 S.W. 761 (Tex. 1920), an outdated, "century-old case," Resp. Br. 17, does not change the fact that it shows how this Court understood the Gift Clauses within the lifetime of those who ratified the 1876 Constitution, *see* State's Br. 6-9, 21-23. The court of appeals did not give full effect to the Gift Clauses' text and original meaning, and this Court

should reverse the court of appeals' judgment for all the reasons the State explained in its opening brief (at 20-26).

II. The Gift Clauses Can Apply to Contracts.

To the extent Defendants argue (at 18-20) that the Gift Clauses do not apply to contracts because the Clauses prohibit only *gratuitous* grants of public resources for private purposes, nothing in the Clauses' text suggests that result. Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a). The State does not dispute that the Gift Clauses prohibit gratuitous grants of public resources. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002); Tex. Att'y Gen. Op. No. GA-0664, at *2 (2008). But that does not mean that the Clauses can never apply to contracts. Defendants' contrary argument seems premised on a notion that no contract can ever be gratuitous. But in some instances, one contracting party's obligation may be said to be gratuitous—for example, when purported consideration for a contract is "[g]ross[ly] inadequa[te]." Restatement (Second) of Contracts § 79 cmt. c (Am. L. Inst. 1981 & Supp. Oct. 2023).

Even if the consideration for a contract is sufficient, a challenged provision in a non-gratuitous contract to render public resources to private entities can still violate the Gift Clauses under *Texas Municipal League* if that provision does not serve a public purpose. *Tex. Mun. League*, 74 S.W.3d at 383-85. Concluding otherwise would permit otherwise unlawful grants of public benefits for private purposes to slip under the constitutional radar just because they are buried in a contract. The Gift Clauses do not countenance that result.

III. Under *Texas Municipal League*, Association Leave Violates the Gift Clauses.

The association-leave arrangement does not pass muster under *Texas Municipal League*. Association leave is not compensation to firefighters, and its use in this case does not pass the public-purpose test. *See id.* at 383-84.

A. Association leave is not compensation to firefighters, and the Union did not bargain for certain ways it uses that leave.

Under *Texas Municipal League*, "[a] political subdivision's paying public money is not 'gratuitous' if th[at] . . . subdivision receives return consideration." *Id.* at 383. But the court of appeals held that association leave was not gratuitous because it "was part of [firefighters'] agreed compensation" under the Agreement. *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786, at *5 (Tex. App.—Austin Nov. 22, 2022, pet. filed) (mem. op.). Before this Court, Defendants do not defend that holding, instead touting (at 24-29) what the City receives in return for association leave. They also attack Plaintiffs (at 20-24) for allegedly "insisting that each party must share a balanced mutuality of obligation on each individual term of the contract." Resp. Br. 20. But before this Court, the State has not disputed that parties to a contract need not "share a balanced mutuality of obligation" on each contract term. Resp. Br. 20; *see Tex. Mun. League*, 74 S.W.3d at 384; *Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 86-87 (Tex. App.—Amarillo 1994, writ denied); State's Br. 38. *Contra* Resp. Br. 21-22. The State thus has not contradicted other state supreme courts' statements that "[i]n analyzing the adequacy of consideration," courts do not "consider particular provisions in isolation." *Cheatham v. DiCiccio*, 379 P.3d 211, 218, 219 (Ariz. 2016), *disapproved of on other grounds by Schires*

v. Carlat, 480 P.3d 639 (Ariz. 2021); *e.g.*, *Rozenblit v. Lyles*, 243 A.3d 1249, 1265-66 (N.J. 2021); *Gilmore v. Gallego*, 529 P.3d 562, 571 (Ariz. Ct. App. 2023, *rev. granted in part*). *Contra* Resp. Br. 19-24. Rather, the State has argued (at 28-35) that the court of appeals was wrong that association leave is consideration to firefighters. *See Borgelt*, 2022 WL 17096786, at *5-6.

Even if the City receives consideration in return for association leave, Resp. Br. 24-30, the question whether association leave counts as consideration to firefighters is relevant to the gratuitousness issue. True, if association leave does not constitute compensation, the firefighters receive other compensation for their services. *E.g.*, 7.RR.20-23 ("Wages & Benefits"), 28, 37. But while "the parties to transactions are free to fix their own valuations" and determine for themselves the consideration that they will accept, Restatement (Second) of Contracts § 79 cmt. c, eliminating association leave from the consideration the firefighters receive raises a question of whether the firefighters would have accepted the consideration package the Agreement gave them without association leave. After all, as the court of appeals pointed out, the Union gave up counting sick leave as "productive leave" to obtain association leave. *Borgelt*, 2022 WL 17096786, at *7.

The court of appeals concluded that association leave is compensation to firefighters. *Id.* at *5. That cannot be right for all the reasons the State explained in its opening brief (at 28-36). Defendants' counterarguments are unavailing.

1. Association leave would violate the First Amendment if construed according to the court of appeals' reading.

Treating association leave as compensation to all firefighters, as the court of appeals did in its own discussion of the gratuitousness question, *Borgelt*, 2022 WL 17096786, at *5-6, would mean that a portion of non-Union firefighters' compensation would benefit a union to which those firefighters do not belong and which they may not support, State's Br. 29-32. This would violate the firefighters' free-speech rights. The Court should not read the association-leave provision in a way that would render it unconstitutional. State's Br. 29-32.

Defendants contend (at 32-33) that Plaintiffs do not have standing to raise a First Amendment challenge. But standing is beside the point because Plaintiffs did not bring a First Amendment challenge, nor do they purport to do so now. The First Amendment is relevant to the State's gratuitousness argument because it reveals the weaknesses of the court of appeals' conceptualization of association leave as firefighters' compensation.

Nor did the State waive its First Amendment argument. *Contra* Resp. Br. 32. In this Court and the courts of appeals, litigants can make new arguments to support preserved issues. After all, the issues that the parties list on "Issues Presented" pages "will be treated as covering every subsidiary question that is fairly included." Tex. R. App. P. 38.1(f) (courts of appeals), 55.2(f) (this Court). The gratuitousness issue was preserved, as Plaintiffs have contested it at every level of this litigation. That issue fairly includes an argument about whether association leave can count as consideration to firefighters, which it cannot if such a reading would violate the First

Amendment. *Id.* R. 55.2(f); *see Lewis v. Davis*, 199 S.W.2d 146, 149 (Tex. 1947). Plaintiffs did not waive the First Amendment argument.

Defendants argue (at 30-31) that the State's "misplaced First Amendment arguments" fail because firefighters who use association leave receive payment from the City for time they spend using association leave. They cite an Arizona case holding that an association-leave arrangement called "release time" did not violate public employees' rights of free speech or association under the Arizona Constitution because the city government, not the employees, paid for the release time. *Gilmore*, 529 P.3d at 568. But if, for example, a non-Union firefighter does not support unions and therefore does not use association leave, he is receiving less compensation for his public service than Union-member firefighters or those who feel comfortable using the leave. This is, in effect, a deduction from his wages. *See* State's Br. 29-32.

Moreover, unlike "vacation, sick [leave,] or paid time off," Resp. Br. 31, association leave cannot be used for whatever purposes the firefighters see fit. Their wages are dedicated to the Union. *See* 7.RR.24 (declaring that firefighters may use association leave only to accomplish Union business). What Defendants characterize (at 31) as "their own time" is not their own at all, as they can use association leave only for Union purposes. 7.RR.24; *see* State's Br. 29-32.

Defendants additionally contend (at 31) that the State's First Amendment argument fails because even non-Union firefighters can use association leave. But the Union is the bargaining unit, Tex. Loc. Gov't Code § 174.101; 7.RR.13, so it makes sense to conclude that the trial court referred to Union members when it said that only members of the "bargaining unit" could use association leave. CR.4212. And

Defendants' argument likewise ignores a potential non-Union firefighter who, even if he can use association leave, might not want to because he does not support unions. A portion of that firefighter's wages should not be dedicated to the Union. *See* State's Br. 29-32.

2. Association leave primarily benefits the Union.

Defendants do not dispute that association leave does not qualify as compensation to firefighters because its primary benefit flows to the Union. *See* State's Br. 32-35. It does not matter that "no funds are paid directly to the [Union] whatsoever." Resp. Br. 30. The Union is association leave's primary beneficiary because the point of association leave is to accomplish Union business. 7.RR.24.

Instead of disputing this, Defendants take issue with the State's assertion (at 34) that "only Union members may use association leave," describing that statement as a "misunderstanding" of the term "bargaining unit member." Resp. Br. 31. But as discussed above, *supra* pp. 8-9, it is natural to read the trial court's findings of fact here to refer to Union members, *see* CR.4212.

The Union's "concessions" to the City, *see* Resp. Br. 24-27, merely highlight that the real beneficiary of association leave is the Union, not the firefighters, State's Br. 32-35. This makes sense because the entire point of association leave is to perform "association business" for the Union. 7.RR.24. That association leave cannot count as compensation to firefighters reveals that the Union, in its capacity as "exclusive bargaining agent for the fire fighters" of the Austin Fire Department (AFD), Tex. Loc. Gov't Code § 174.101; 7.RR.13, has negotiated a provision that benefits itself, not the firefighters it represents.

3. Defendants did not bargain for some of the uses to which the Union puts association leave.

For the reasons explained above, *supra* pp. 7-8, the State has not waived its argument (at 35-36) that Defendants did not bargain for extra-contractual uses of association leave. The gratuitousness issue fairly includes an argument about whether the parties bargained for those uses of association leave and thus whether consideration was given for them. *See* Tex. R. App. P. 55.2(f). But Defendants attempt to show that those uses of association leave are *not* extra-contractual, insisting (at 27-28) that they, the parties, understand the "association business" definition to include items that that definition does not specifically enumerate. *See* 7.RR.24. They do this by pointing to parol evidence—specifically, evidence of the City's process of approving requests to use association leave. Resp. Br. 27-28.

That is improper. Defendants have never contended that the association-leave provision is ambiguous. They could use parol evidence to interpret the contract only if they had made that contention. *E.g.*, *Cmty. Health Sys. Prof. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017) ("A court may consider the parties' interpretation of the contract and [use] extrinsic evidence to determine the true meaning of its terms only after the court has determined that the contract is ambiguous."); *Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam) (same). The association-leave provision is unambiguous. And even if it were ambiguous, under this Court's precedent, Defendants cannot use their course of performance to make their Agreement mean something it does not.

a. The association-leave provision is not ambiguous. A contract is ambiguous only if, after applying "established rules of construction," the contract is "susceptible to more than one meaning." *DeWitt Cnty. Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). Conversely, contractual language that "lends itself to a clear and definite legal meaning . . . is not ambiguous and will be construed as a matter of law." *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017). Ambiguity "does not arise merely because a party offers an alternative conflicting interpretation, but only when the contract is actually 'susceptible to two or more reasonable interpretations.'" *Id.* (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003)); *accord ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 874 (Tex. 2018). If the language the parties used "is plain, complete, and unambiguous . . . their intention must be ascertained from that language, and from that language alone." 11 Williston on Contracts § 31.4 (4th ed. 2023 updated). That is especially so where the contract contains a merger clause, *e.g.*, *ISG State Operations, Inc. v. Nat'l Heritage Ins. Co.*, 234 S.W.3d 711, 719 (Tex. App.—Eastland 2007, pet. denied); *see also* 11 Williston on Contracts § 33.23, as the Agreement does, 7.RR.88 ("Entire Agreement").

The association-leave provision is not susceptible to multiple meanings. It states that authorized representatives may use association leave for "[a]ssociation business activities that directly support the mission of [AFD] or the [Union], but do not otherwise violate the specific terms of this Article." 7.RR.24. Defendants recite this statement (at 11-12) as if it created a catchall "other" category. It does not. In the very next sentence, the association-leave provision unambiguously states that

"[a]ssociation business" includes only the items listed—no more. 7.RR.24. "Association business is defined as"—not *includes*, *contra* Resp. Br. 27—"[c]ollective [b]argaining negotiations[,] adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training . . . , and attending union conferences and meetings," 7.RR.24. Under the well-established rules of contract interpretation, "[t]he expression of one thing implies the exclusion of others." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012) (emphasis omitted); *see Parks*, 1 S.W.3d at 100 (explaining that courts use "established rules of construction" to determine a contract's meaning before deciding that a provision is ambiguous). Thus, under "established rules of construction," *Parks*, 1 S.W.3d at 100, the association-leave provision unambiguously states that "[a]ssociation business" includes only what is listed, 7.RR.24.

True, "[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Restatement (Second) of Contracts § 202 cmt. g; *see* Resp. Br. 27-28. But this kind of "'practical construction' is not conclusive of meaning. Conduct must be weighed *in the light of the terms of the agreement* and their possible meanings." Restatement (Second) of Contracts § 202 cmt. g (emphasis added). That is why this Court "decline[s] to consider the parties' course of performance to determine [a contract's] meaning" where the contract is unambiguous. *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 206 (Tex. 2019).

b. Nor can Defendants use extrinsic evidence to create ambiguity. Parol evidence can never be used to create ambiguity where none exists. *Friendswood Dev. Co.*

v. McDade & Co., 926 S.W.2d 280, 283 (Tex. 1996) (per curiam). True, the parol-evidence rule "does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text," *Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011), "even when a contract is ambiguous," *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 889 (Tex. 2019). But "'courts may not rely on evidence of surrounding circumstances to make the language say what it unambiguously does not say' or 'to create an ambiguity.'" *Id.* (quoting *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 765, 767 (Tex. 2018)). Thus, the Court will consider only surrounding circumstances that help "discern the parties' 'objective intent.'" *Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 615 S.W.3d 144, 153 n.5 (Tex. 2020). Where a contract is unambiguous, the Court will not examine extrinsic evidence of subjective intent, including "'acquiescence' to another party's actions and other 'course-of-performance evidence.'" *Id.* (first quoting *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 453 (Tex. 2015); and then quoting *Burlington*, 573 S.W.3d at 206).

While "[f]acts attending the execution" of an agreement "may or may not shed light on contract meaning and may or may not cross the parol-evidence line," and "[a] certain degree of latitude is inherent in the inquiry," "absolute limits on the use of surrounding circumstances are abundantly clear." *URI*, 543 S.W.3d at 768, 768-69. Parties cannot rely on extrinsic evidence "to 'give the contract a meaning different from that which its language imports,' 'add to, alter, or contradict' the terms contained within the agreement itself, 'make the language say what it unambiguously does not say,' or 'show that the parties probably meant, or could have

meant, something other than what their agreement stated.'" *Id.* at 769 (first quoting *First Bank v. Brumitt*, 519 S.W.3d 95, 109-10 (Tex. 2017); and then quoting *Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011)). That is why, though "express terms of an agreement and any applicable course of performance . . . must be construed whenever reasonable as consistent with each other," when such a construction is unreasonable, text wins. Tex. Bus. & Com. Code § 1.303(e)-(f).

c. Because nobody contends that the association-leave provision is ambiguous, and "[t]he conduct of the parties is ordinarily immaterial in the determining of the meaning of an unambiguous instrument," Defendants' course of performance is "irrelevant." *E. Montgomery Cnty. Mun. Util. Dist. No. 1 v. Roman Forest Consol. Mun. Util. Dist.*, 620 S.W.2d 110, 112 (Tex. 1981) (per curiam). But even if the provision were ambiguous, Defendants' proposed extrinsic evidence would not inform the meaning of the "association business" definition's terms. None of those terms could reasonably be construed to include galas, fishing trips, and parties, *see Nat'l Union*, 907 S.W.2d at 521 (explaining that extrinsic evidence may be admissible in cases involving ambiguous contracts, but only to "give the words of a contract a meaning consistent with that to which they are reasonably susceptible, *i.e.*, to 'interpret' contractual terms"); 7.RR.24, and Defendants have not suggested otherwise.

Defendants contend (at 27-28) that some of the things that are grouped within the "other association business" category fall within the definition of "association business" as the Agreement uses that term. But the State's brief to this Court does not take issue with the "other association business" category per se. While the

"other association business" category is not included in the definition of "association business," 7.RR.24, and therefore may not itself be part of the parties' bargain, the category is not the root of the problem. That root is the items for which the Union uses association leave, for which the parties did not bargain, and that do not fall into *any* category in the definition of "association business." *See* State's Br. 35-36. Defendants have offered no defense for those items—indeed, they ignore them altogether.

B. Association leave fails the public-purpose test.

Even if association leave is not gratuitous, it fails *Texas Municipal League*'s public-purpose test. To prevail in this case, Defendants must show that they pass all three prongs of the public-purpose test, as well as the gratuitousness prong. 74 S.W.3d at 383-84. They do not.

1. Association leave does not serve a strictly governmental purpose.

Association leave must serve a predominantly public purpose. *Id.* at 384. It does not for the reasons the State has explained. State's Br. 37-42. Defendants' responses do not show otherwise. They incorrectly assume that association leave serves a public purpose because the Agreement may. And even apart from the Agreement, association leave does not serve a strictly governmental purpose.

Defendants' arguments do not meet the standard that the Gift Clauses' original understanding sets up. As this Court has explained, the Gift Clauses do not countenance bestowing public funds for anything other than a "strictly governmental" purpose. *Linden*, 220 S.W. at 762. Defendants contend (at 38) that association leave's "primary use is to allow [Union] members to participate in collective bargaining,

labor-management meetings, membership meetings, disciplinary and grievance proceedings, or other activities that support" AFD's mission. Leaving aside that Defendants misconstrue the definition of "association business," *see supra* Part III.A.3, the way firefighters actually use association leave does not satisfy *Linden*'s standard. Defendants do not deny that Union members use association leave to attend activities that are not strictly governmental. So, even if some uses of association leave are "governmental," not all are. *See* State's Br. 39. Even if association leave's *main* purpose is to allow Union members to participate in collective bargaining, grievance proceedings, and other enumerated activities, 7.RR.24, that does not satisfy the "strictly governmental" standard because association leave is still used for items that are not strictly governmental. *See* State's Br. 38-39. It is no answer to say, as Defendants do (at 38-40) that the Union's mission overlaps with AFD's because, as the State has pointed out (at 40), an overlap in the two entities' missions does not imply a *complete* overlap such that everything for which the Union uses association leave is governmental. But that is what *Linden* requires. 220 S.W at 762.

Defendants commit the same error as the lower courts by conflating the association-leave provision with the Agreement as a whole, contending that because the Agreement may serve a public purpose and the association-leave provision is located in the Agreement, association leave must serve a public purpose, too. *E.g.*, *Borgelt*, 2022 WL 17096786, at *8; CR.4214; Resp. Br. 35-37. They therefore argue (at 35) that the "appropriate" lens through which to judge whether association leave serves a public purpose is a "panoptic" one but cite no authority for that notion. Defendants are right that the "policy of this [S]tate is that fire fighters and police officers . . .

should have the right to organize for collective bargaining." Tex. Loc. Gov't Code § 174.002(b). And the State has never disputed that the Agreement, as a whole, may serve a public purpose. *See* Resp. Br. 36. But in determining whether association leave has a public purpose, the proper focus is on the association-leave arrangement itself, not the larger Agreement. That is because Plaintiffs have never challenged the constitutionality of the Agreement, as opposed to the association-leave provision. State's Br. 38. Defendants' position would require Plaintiffs to challenge the whole Agreement if they wanted to challenge the association-leave arrangement that the Agreement creates. But Plaintiffs are the masters of their lawsuit, and Defendants cannot require them to challenge the entire contract.

Moreover, assuming that any provision located within a contract whose constitutionality is not in question must be constitutional *because* it is located in that contract would, in this case, vitiate the Gift Clauses. Such a holding could permit public contracts to conceal unlawful benefits to private interests. *See* State's Br. 51. Those unconstitutional benefits would be immune from Gift Clause scrutiny just because they were located within an otherwise lawful public contract. Even if Texas courts look to the contract as a whole in determining whether a provision is gratuitous, *see supra* pp. 5-6, they should focus on the individual, challenged provision to determine whether that provision serves a public purpose. Looking at the entire contract for both inquiries raises the risk of unnecessarily invalidating an entire contract.

Defendants are thus wrong when they characterize Plaintiffs as arguing that association leave "must be severed from the Agreement because they challenge" only the association-leave provision but "claim it is unlawful because it has been

severed." Resp. Br. 36. Plaintiffs have merely noted the unremarkable proposition that they can challenge a single provision of a contract—something that happens all the time. Because the association-leave arrangement is unlawful, the Court can sever it from the rest of the Agreement. 7.RR.90.

Defendants fear that "analyzing only the public purpose of a challenged provision of an agreement rather than the agreement as a whole . . . could render essentially all government contracts unconstitutional." Resp. Br. 37. But this fear is unfounded. It is based on their conflation of the consideration inquiry with the public-purpose inquiry. *See* Resp. Br. 37 ("[Plaintiffs'] approach would invite litigants to bring suits to dissect government contracts in an effort to determine whether isolated terms, standing alone, were supported by sufficient consideration."). In any event, a court conducting a Gift Clause analysis would conclude that, say, a public employee's wages ("challenged independently" from an agreement as a whole) still obviously serve a public purpose: providing compensation for public services. *Contra* Resp. Br. 37.

When properly "considered in isolation," Resp. Br. 37, association leave does not serve a predominantly public purpose, *see Linden*, 220 S.W. at 762. Defendants do not even attempt to explain why the Court should not use the "strictly governmental" standard to judge Defendants' use of association leave. *See* Resp. Br. 16-17. At most, they dismiss *Linden* (at 17) as a "century-old case," implying that its age makes it somehow less precedential. This Court has never overruled *Linden*, which remains good guidance for how Texas courts—this one in particular—originally understood the Gift Clauses. *See* State's Br. Part I.

In some applications, tension may exist between the "strictly governmental" standard, *Linden*, 220 S.W. at 762, and the predominant-public-purpose standard, *Tex. Mun. League*, 74 S.W.3d at 384. The "strictly governmental" standard could prohibit any non-governmental activities, or, when read in conjunction with *Texas Municipal League*, it could require strictly governmental activities to predominate over those that are not strictly governmental. Because the former reading best tracks the original meaning of the Gift Clauses, to the extent any tension exists, the Court should resolve it in favor of that original meaning. *See* State's Br. Part I. Applied here, that reading reveals that association leave is unconstitutional.

2. The City does not exercise sufficient controls over the way Union members use association leave.

The City does not retain specifically tailored controls over the way the Union uses association leave to ensure that the leave accomplishes a strictly governmental purpose. Defendants insist (at 43) that "it is the right to control," not the actual exercise of control, "that is material." But they cite no authority for that proposition. Resp. Br. 43. Nor could they, as *Texas Municipal League* says nothing about the mere right to control, speaking instead in terms of whether the relevant public entity "retain[ed]" control. 74 S.W.3d at 384, 385.

To be sure, the City has the right to control its public employees, including firefighters, in ways that Defendants have pointed out (at 42-43). And it may indeed exercise that control over public employees generally—a proposition with which the State does not take issue. But the City does not exercise (or retain) sufficient control

in the only way relevant here: control specifically tailored to cabin the use of association leave. State's Br. 43-47.

Defendants again attempt to misdirect by over-generalizing the issue—namely, by proffering the City's retained controls over its workforce generally. But as the State has explained (at 44-49), the mechanisms that the City uses to retain control over private use of public resources are adequate only if they are "specifically tailored" to accomplish their purpose (a purpose that must itself be strictly governmental). Tex. Att'y Gen. Op. No. MW-89, at *2 (1979). Defendants do not engage with this standard or explain why the Court should view it differently. The Court must therefore determine whether the City's purported control over association leave's use is specifically tailored not to controlling the City's workforce generally, but to the use of association leave itself. *See id.*

Here, any controls the City has are not so tailored. Defendants point to the City's "contractual right to specify through department policy the '[a]dministrative procedures and details regarding the implementation' of the [association-leave] provision." Resp. Br. 42 (quoting 7.RR.25). And they describe (at 43-44, 46) the City's process of reviewing requests to use association leave and state that it has actually denied some requests. But this alleged control is not sufficiently tailored because, as Defendants do not deny, the City also approves activities that do not fall within the definition of "association business"—such as galas, fishing trips, and retirement parties. State's Br. 48. Defendants further contend (at 44-47) that the City's review process sufficiently apprises the City about how Union members use association leave. But mere awareness does not count as control. The City approves almost all

requests, even those to participate in activities that do not fall within the definition of "association business," let alone fulfill the "strictly governmental" requirement. State's Br. 48.

Defendants also assert (at 46-47) that "members of AFD management attend [Union] meetings and witness first-hand what goes on there." But they once again ignore the most egregious examples of misuse of association leave. The record shows that City personnel are not "available to supervise" some of the charitable activities categorized as "other association business." *See, e.g.*, 4.RR.9192-; *see also* State's Br. 39 ("[T]his Court has never held that charitable activities per se are strictly governmental."). But those activities do not serve a public purpose. State's Br. 39. Assuming that Union meetings and "cadet hiring oversight committee meetings" serve a public purpose, *see* Resp. Br. 46-47, Defendants have at most shown that the City may supervise activities that serve an arguably public purpose but does not supervise the activities that serve no public purpose. This gets the controls requirement backwards. *See* Tex. Att'y Gen. Op. No. MW-89, at *2 (requiring specific tailoring).

Defendants take issue with Plaintiffs' characterization of the controls (or lack thereof) on the Union president, insisting that the president "identified several prohibitions on his conduct," such as being subject to the Code of Conduct and reporting to AFD "for an emergency or a special project when" supervisors "direct[]" him to do so. Resp. Br. 47-48 (emphasis omitted) (quoting 7.RR.452). These claimed controls are insufficient for the reasons the State explained in its opening brief (at 46-47). In particular, following the Code of Conduct is not specifically tailored to curb improper uses of association leave, as presumably all City employees must

comply with that Code. State's Br. 46-47. Nor is firing the president sufficiently tailored. *See* Resp. Br. 50; State's Br. 45. With regard to the latter, it is no answer to say that "an employer exercises management control over an employee" by exercising its right to inflict disciplinary consequences, Resp. Br. 50-51, if those consequences do not target the purpose for which he used association leave, State's Br. 47. Nor does the fact that the Union president received discipline for time he was on association leave, Resp. Br. 51, prove anything because his forty-hour work week consists of association leave, 7.RR.25, and Defendants have not shown any way to differentiate between times he is using association leave and times he is not, State's Br. 47. And even if the Union president is prohibited from "soliciting in uniform" or "delivering checks," Defendants have pointed to nothing that imposes those prohibitions as a binding obligation, rather than an ad hoc practice that does not bind the Union. *See* Resp. Br. 47; State's Br. 46.

That the Union president is not required to account for how he uses his leave time is particularly alarming, as his forty-hour work week consists solely of association leave, 7.RR.25, but the City says he is accountable because he attends meetings with AFD management and is "'responsive' to communications from the Fire Chief or Assistant Chiefs and others." Resp. Br. 48 (quoting 4.RR.129). Defendants again cite nothing to show that this practice is anything more than ad hoc or unilateral, rather than something to which external controls bind the Union. Resp. Br. 48-49. Stating that "there would have been an issue" if the Union president did not "heed those regular calls," Resp. Br. 49 (quoting 4.RR.129), does not suffice for the same reasons. Nor have Defendants shown that the Union president actually accounts for

his activities at those meetings. *See* Resp. Br. 9-11, 48-49. And even if he did, the City's awareness of those activities would not necessarily constitute control.

While parties may agree to "adequate contractual" controls to govern the way a recipient uses public benefits, State's Br. 43 (citing Tex. Att'y Gen. Op. No. MW-89, at *1-2), the mere fact that the parties have entered into a contract does not mean that such "adequate contractual" controls exist, *contra* Resp. Br. 43. *Key v. Commissioners Court* is not to the contrary. 727 S.W.2d 667 (Tex. App.—Texarkana 1987, no writ) (per curiam). There, the court of appeals stated that if an alleged gift had involved *both* a contractual agreement with sufficient consideration on both sides *and* "retention of formal control," the Gift Clauses would not apply. *Id.* at 669. But *Key* treats those two things—a contract and formal control—as separate. *See id.* It does not say that the existence of a contract alone means that the City has retained formal control. *See id.*

Nor does *Chisholm Trail SUD Stakeholders Group v. Chisholm Trail Special Utility District*, No. 03-16-00214-CV, 2017 WL 2062258 (Tex. App.—Austin May 11, 2017, pet. denied) (mem. op.). There, public entities retained public control over a water system after a transfer because the Special Utility District had contractually agreed "to continue in its role" as the holder of a certificate of convenience and necessity. *Id.* at *7. The municipality had also agreed to "specified obligations, including operating and maintaining the District's water utility system." *Id.* And the parties "also ha[d] the right to terminate based on non-compliance." *Id.* In other words, the parties' contracts expressly provided adequate contractual controls. *Id.*; s*ee* Tex. Att'y Gen. Op. No. MW-89, at *1-2.

Here, the Agreement does not provide comparably tailored controls. *See* 7.RR.24-25; State's Br. 43-49. It does allow AFD management to "change those benefits, privileges, and working conditions which it determines . . . interfere with [AFD's] operation." 7.RR.89. But like the City's other purported controls, this one is not specifically tailored to cabin improper use of association leave. *See* Tex. Att'y Gen. Op. No. MW-89, at *2. After all, the City could hardly take away association leave itself if abuse of the leave "interfere[d]" with AFD's operation, 7.RR.89, as the Agreement itself provides for association leave, 7.RR.24-25. Defendants lack evidence that the City has other such measures in place. Nor have they identified an Agreement provision that they believe provides constitutionally adequate controls. Instead, they argue (at 45-46) that the City's system of approving requests to use association leave provides those controls. But Defendants point out nothing about that system that binds the City to implement it or an external requirement obliging the City to have such a system in place.

3. Assuming that a provision conveys a clear public benefit because it is in a collective-bargaining agreement would vitiate the Gift Clauses.

As the State has pointed out (at 51), if Texas law states that "*any* provision in a collective-bargaining agreement serves a public purpose or conveys a public benefit simply by virtue of its presence in the agreement—irrespective of whether that provision actually benefits the public—such agreements could hide unlawful benefits for private interests." Defendants offer no response. Instead, as described above, *supra* Part III.B.1, they repeat the court of appeals' error by assuming that because the

Legislature has stated that Texas firefighters "should have the right to organize for collective bargaining," Tex. Loc. Gov't Code § 174.002(b), and the overall Agreement results from collective bargaining and may serve public benefits, then the association-leave provision must also serve a clear public benefit, *see, e.g.*, *Borgelt*, 2022 WL 17096786, at *7-*8. That is wrong for the reasons the State has already discussed. State's Br. 50-51; *supra* Part III.B.1. The court of appeals' faulty reasoning contravenes the Gift Clauses and must be rejected.

Prayer

The Court should grant the petitions for review, reverse the judgment of the court of appeals, and render judgment for Plaintiffs.

Respectfully submitted.

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