

No. 22-1149

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**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 MARK 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 IN SUPPORT OF THE PETITION FOR REVIEW  
FOR PETITIONER THE STATE OF TEXAS**

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## ARGUMENT

### I. Determining How the Gift Clauses Apply to Public-Sector Unions Presents Important Public-Interest and First Amendment Questions.

#### A. Defendants' rote reliance on *Texas Municipal League* ignores serious public-integrity concerns that may arise when applied to public-sector unions.

Defendants frame this case exclusively under *Texas Municipal League*'s interpretation of the Gift Clauses, which forbid “gratuitous payments to individuals, associations, or corporations.” *Tex. Mun. League Intergovt’l Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383 (Tex. 2002) (emphasis omitted). Defendants insist that the association-leave payments at issue are permissible because they “(1) serve[] a legitimate public purpose” and “(2) afford[] a clear public benefit . . . in return.” *Id.* To show a legitimate public purpose under that theory, (1) a public purpose must predominate, (2) the City must “retain public control over [association leave] to ensure that the public purpose is accomplished and to protect the public’s investment,” and (3) the City must receive a return benefit. *Id.* at 384. Defendants’ reliance on *Texas Municipal League* raises at least two pure legal questions that are ripe for review.

First, this Court has not yet decided how the Gift Clauses apply in the context of public-sector unions. The Constitution prohibits granting public money “or thing[s] of value” to private interests “for private or individual purposes.” Tex. Const. art. III, § 52(a); *id.* art. XVI, § 6(a); *accord id.* art. III, §§ 50, 51. These provisions are “intended to prevent the application of public funds to private purposes,”

*Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. [Comm’n Op.] 1928), and thus prohibit “giving away . . . public money” or applying it “to other than strictly governmental purposes,” *Bexar County v. Linden*, 220 S.W. 761, 762 (Tex. 1920). The Court must give effect to that purpose.

This case presents an ideal vehicle to determine whether *Texas Municipal League*’s reasoning accomplishes the Gift Clauses’ purpose with respect to public-employee unions. The court of appeals’ decision means that paying City employees to attend galas, fishing trips, and boxing matches on the public dime is permissible under the Texas Constitution. *See* 4.RR.91-92, 94-96. Unless this Court grants review, the risk of undercutting the Gift Clauses through public-sector-union dealings with public employers will persist.

Second, Defendants reveal why *Texas Municipal League* is not a one-size-fits-all solution for the unique problems that arise with public-sector unions. Defendants do not deny the conflict-of-interest risk and potential for self-dealing that arise when a public-sector union bargains with a public employer—a problem implicit in Defendants’ repeated insistence that association leave is negotiated “between the City and [the Union].” *E.g.*, Resp. at 15; *see also Borgelt v. Austin Firefighters Ass’n, IAFF Local 975*, No. 03-21-00227-CV, 2022 WL 17096786, at \*5-7 (Tex. App.—Austin Nov. 22, 2022, pet. filed); CR.4209. Unions may represent and negotiate on behalf of their members, but they are also private entities with political aims of their own. *Cf., e.g., Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (describing topics on which public-sector unions could “speak out in collective bargaining”). When unions negotiate with public employers, they may seek

deals that principally benefit the unions themselves, not their members. Because masking fiscal abuse with negotiation would vitiate the purpose of the Gift Clauses, *see Byrd*, 6 S.W.2d at 740, the Court should grant review.

**B. Defendants’ position raises a serious First Amendment problem.**

Defendants also ignore the First Amendment problem raised by their one-note reliance on *Texas Municipal League*. As the State argued (at 11-12), the ruling below clashes with the U.S. Supreme Court’s First Amendment precedent. Defendants do not dispute that association leave implicates *Janus*: Not all Austin firefighters are Union members, 2.SCR.505, and association leave is in effect a payment to the Union, *see* 7.RR.24. If association leave is part of nonmember firefighters’ compensation, it benefits a union of which they are not members and political stances they may not even support. But a payment to a public-sector union that is “deducted from a nonmember’s wages” without the nonmember’s affirmative consent violates the nonmember’s freedom of speech. *Janus*, 138 S. Ct. at 2486.

*Texas Municipal League* would thus present a First Amendment conflict under Defendants’ theory about the benefits of association leave. *See* 74 S.W.3d at 383-86. Because this Court decided *Texas Municipal League* before *Janus*, it has not yet had an opportunity to resolve that legal question until now.

**II. Association Leave Is Gratuitous.**

Association leave is also improper because it principally benefits the Union, not firefighters. *See Tex. Mun. League*, 74 S.W.3d at 383. After all, Union members may use it only to conduct “business” for the Union. *See* 7.RR.24. The Court should

grant review to determine whether this arrangement satisfies the Gift Clauses' prohibition on grants of "public money or thing[s] of value," Tex. Const. art. III, § 52(a), for private or individual purposes, *see id.* §§ 50, 51, 52(a); *id.* art. XVI, § 6(a).

Association leave differs in kind from pensions or other forms of compensation from which the benefit flows directly to the employees. *See, e.g., Byrd*, 6 S.W.2d at 738-39 (pensions); *see also* State's Pet. at 10. The cases Defendants cite (at 18-19) are about these types of compensation. *Morales v. Hidalgo Cnty. Irrigation Dist. No. 6*, No. 13-14-00205-CV, 2015 WL 5655802, at \*3 (Tex. App.—Corpus Christi—Edinburg Sept. 24, 2015, pet. denied) (mem. op.) ("cash severance equal to the remaining compensation due for the term of his employment if the District terminates the contract for any reason other than death or disability"); *City of Corpus Christi v. Herschbach*, 536 S.W.2d 653, 655, 657 (Tex. App.—Corpus Christi—Edinburg 1976, writ ref'd n.r.e.) (workers' compensation); *City of Galveston v. Landrum*, 533 S.W.2d 394, 395 (Tex. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (sick leave); *Devon v. City of San Antonio*, 443 S.W.2d 598, 599-600 (Tex. App.—Waco 1969, writ ref'd) (pensions); *City of Orange v. Chance*, 325 S.W.2d 838, 839-41 (Tex. App.—Beaumont 1959, no writ) (sick leave). Defendants have not cited a case holding that a scheme resembling association leave, in which a public employer pays its employees to do work for a private entity that maintains its own political ends, passed muster.

In addition, the court of appeals suggested that the Union's "concessions" to the City, rather than firefighters' services alone, provide consideration for association leave. *Borgelt*, 2022 WL 17096786, at \*6-7. The conclusion that this type of bargain satisfies the Gift Clauses (a novel theory for which the court of appeals cited no



binding authority) amplifies the potential for impropriety and further vitiates the Gift Clauses' purpose. *See supra* Part I.A. This Court should grant review to vindicate that purpose.

### **III. Association Leave Does Not Serve a Legitimate Public Purpose.**

Association leave serves no legitimate public purpose. *See Tex. Mun. League*, 74 S.W.3d at 383-84. Defendants offer virtually no response to the State's arguments on this point. *Compare* State's Pet. at 12-17, *with* Resp. at 20 (paragraph asserting that "the trial court's conclusions were correct"). What little they do say fails for at least three reasons. First, whatever public purpose association leave may serve, that purpose does not *predominate* and thus cannot satisfy the Gift Clauses. Second, the City lacks sufficient control over association leave's use. And third, even if the Agreement as a whole benefits the City, that would not automatically render association leave appropriately beneficial.

#### **A. A public purpose does not predominate.**

As the State explained in its petition (at 13-14), and as Defendants do not dispute, *see* Resp. at 20, association leave funds Union business, 7.RR.24. The operative question is thus whether the purpose of that Union business comports with the Gift Clauses as a matter of law. It does not for the reasons explained in the State's petition (at 13-14). And Defendants' response highlights at least three ripe legal questions about whether a stated purpose is sufficiently "public" under the Gift Clauses.

First, the Court should determine whether a public purpose must *predominate* versus whether the mere existence of some arguably public purpose is sufficient. *See*

*Tex. Mun. League*, 74 S.W.3d at 383. Activities supporting the Union’s mission, 7.RR.24; 2.SCR.509, and role “as an employee organization,” 2.SCR.615, such as recruitment, conferences, and meetings, are not *predominantly* public. Nor are galas, boxing matches, and fishing trips. 4.RR.91-96. Instead, the courts below relied heavily on the fact that the Union’s mission “overlap[s]” with that of the Austin Fire Department (AFD). *See* Resp. at 7; CR.4209. But that reasoning ignores that the Union is a private entity with its own private and political aims, *cf. Janus*, 138 S. Ct. at 2476, and allows a union to claim that payments for *any* purpose are predominantly public just because its membership is comprised of public employees.

Second, the Court should hold that a purpose is not sufficiently “public,” and thus that the Gift Clauses are violated, when that asserted purpose is not “strictly governmental.” *Linden*, 220 S.W. at 762 (emphasizing that the Gift Clauses “positive[ly] and absolute[ly]” prohibit the “giving away of public money” or things of value for anything “other than strictly governmental purposes”). Like the galas, boxing matches, and fishing trips in which Union members participate, 4.RR.91-96, charity activities do not serve a strictly governmental purpose, *see, e.g.*, 4.RR.90, 91-92; 2.SCR.549-51; *cf. Boyd v. Frost Nat’l Bank*, 196 S.W.2d 497, 502 (Tex. 1946) (listing potential charitable purposes). While charitable purposes might include, among other things, “governmental or municipal purposes,” *Boyd*, 196 S.W.2d at 502, this Court has never held that charitable activities *per se* are strictly governmental. Answering that question has important ramifications for maintaining public trust and confidence.

Third, the Court should determine whether a pledge not to take positions hostile to a public employer's interests is a public purpose. The trial court and court of appeals pointed out that the Union "pledged in the [Agreement]" not to take positions hostile to City interests. *Borgelt*, 2022 WL 17096786, at \*8; CR.4209-10. Assuming that the Court may look to the entire Agreement in considering whether association leave serves a legitimate public purpose, the Union's promise contains a hidden threat: If the City did not agree to association leave, the Union would take steps to thwart City interests. Holding a public employer hostage is not a public purpose. *See Tex. Mun. League*, 74 S.W.3d at 384; *Linden*, 220 S.W. at 762.

**B. The City lacks sufficient public control to satisfy the Gift Clauses.**

This case also presents an ideal opportunity to decide what municipal controls are required to ensure that a public-union benefit is used for the asserted public purpose. *See Tex. Mun. League*, 74 S.W.3d at 384. Defendants do not dispute that controls must be "specifically tailored" to "the accomplishment of [the public] purpose[]." State's Pet. at 14-15; *see also* Tex. Att'y Gen. Op. No. MW-89, at 1, 2 (1979). But the court of appeals' decision does not demand that exacting standard, *see Borgelt*, 2022 WL 17096786, at \*9-12, and thus is inconsistent with ensuring the strict governmental purpose this Court requires, *Linden*, 220 S.W. at 762.

In any event, the purported "controls" that Defendants advance (at 10-15) fail to ensure that a strictly governmental purpose predominates. *Id.*; *see Tex. Mun. League*, 74 S.W.3d at 384. Defendants argue (at 10-12) that the City places sufficient controls on the Union president because he must follow the City's personnel policies and AFD's Code of Conduct, he must comply with credentialing requirements, he

is subject to discipline, and he “attends meetings with AFD management and [sometimes] meets with the Fire Chief.” CR.4211-12. But these “controls” are neither sufficiently obligatory nor specifically tailored.

First, these measures impose no binding obligation on the Union. *Cf. Davis v. City of Lubbock*, 326 S.W.2d 699, 704-07 (Tex. 1959) (explaining that adequate controls on use of property existed when they were enshrined in statute, such that the property served a “public use”); *id.* at 709 (explaining that “public purpose” is similar to “public use”); *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972) (orig. proceeding) (same); Tex. Att’y Gen. Op. No. MW-89, at 2 (noting the requirement of “adequate contractual or other controls”). For instance, Defendants cite no external requirement obliging the Union president to meet regularly (or at all) with AFD management, rendering that practice merely ad hoc and not controlling for Gift Clause purposes. *See Davis*, 326 S.W.2d at 704-07. Voluntary compliance, without imposing a binding obligation, cannot be said to *control* against misuse of funding.

Second, these measures are not specifically tailored to cabin the use of association leave. Indeed, the measures Defendants cite regarding the Union president are generally applicable policies that presumably apply to all firefighters or City employees. And reviewing or denying Union members’ requests to use association leave, Resp. at 13-14, is likewise not sufficiently tailored because, as the State’s petition for review details (at 13-14), it is untethered to the strictly governmental purpose required by the Gift Clauses.

The lack of tailoring has long been understood to pose constitutional concerns. For example, the Attorney General explained decades ago that a school-district

policy similar to association leave, allotting teachers' unions a certain number of days of "released time with full pay" for school personnel to pursue the unions' business during working hours, did "not specifically tailor[] the . . . expenditures to the accomplishment of school-related purposes." Tex. Att'y Gen. Op. No. MW-89, at 1, 2. Such a policy would have been unconstitutional because the leave was left to the "discretion of the professional organization for pursuing its business," even though that organization had "no obligation" to apply the benefit to a public purpose. *Id.* at 2. The court of appeals' departure from these principles merits review.

**C. The City receives no clear public benefit.**

As the State's petition noted (at 17), the court of appeals also erred in reasoning that because the overall Agreement may benefit the City, the association-leave provision must, too. *See, e.g., Borgelt*, 2022 WL 17096786, at \*7. If this reasoning were correct, virtually any provision in a collective-bargaining agreement with a city would confer a public benefit, no matter how little it actually benefitted the public. *But see supra* Parts I, II.A (explaining that association leave primarily benefits the Union). At minimum, that sweeping result warrants review.

## PRAYER

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

Respectfully submitted.

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