No. 03-21-00227-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

Roger Borgelt; Mark Pulliam; Jay Wiley,

Plaintiffs/Appellants,

Texas,

Intervenor-Plaintiff/Appellant,

v.

City of Austin; Marc A. Ott, in his official capacity as City Manager of Austin; and Austin Firefighters Association, Local 975,

Defendants/Appellees.

On Appeal from the
419th Judicial District Court, Travis County

BRIEF FOR PLAINTIFFS/APPELLANTS AND TEXAS

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Oral Argument Requested

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Record References

"[Volume Number].RR.[Page Number]" refers to the seven-volume reporter's record of July 22, 2021. "CR.[Page Number]" refers to the clerk's record of May 28, 2021. "SCR.[Page Number]" refers to the supplemental clerk's record of June 10, 2021. "2.SCR.[Page Number]" refers to the clerk's record of September 27, 2021.

Statement of the Case

***Nature of the Case*:**

This suit involves a constitutional challenge to a specific provision of the 2017-2022 collective bargaining agreement ("2017-2022 CBA") between the City of Austin ("City") and the Austin Firefighters Association, Local 975 ("AFA"), which provides paid leave for City firefighters to perform work for the AFA, a private labor organization, at taxpayer expense. Because this arrangement results in the application of public funds for private activities, Taxpayer Plaintiffs challenged this contractual provision on the ground that it violates Article III, §§ 50, 51, 52-a, and Article XVI, § 6-a of the Texas Constitution, provisions that are collectively known as the "Gift Clauses." The State of Texas intervened into this lawsuit to protect Texas taxpayers and uphold these constitutional principles

This suit also involves an appeal from a Texas Citizens Participation Act ("TCPA") dismissal order. The AFA filed a motion to dismiss under the TCPA, which the district court granted as to the Taxpayers' claims, leaving intact their claim against the City as well as Texas' claim against both the City and the AFA. Taxpayers appeal the TCPA order of dismissal, including the award of fees and sanctions.

The course of proceedings in this matter are long and complex. For the Court's convenience, we have highlighted the proceedings and decisions from below that are most germane to the disposition of this appeal.

***Course of Proceedings*:**

- Plaintiffs Mark Pulliam and Jay Wiley initially filed suit against the City, City Manager Marc Ott, in his official capacity, and the AFA. CR.9–115.

- The State of Texas filed its Plea in Intervention joining as an Intervenor-Plaintiff. CR.119–222.

- The AFA filed a motion to dismiss Plaintiffs' claims against the AFA pursuant to the TCPA on November 21, 2016. CR.226–414.

- The City filed a plea to the jurisdiction on December 8, 2016 to the Taxpayers' Petition and Texas' Plea in Intervention, contending that the petition should be dismissed because Plaintiffs purportedly did not state a claim for relief in their pleadings. 2.SCR.3–12.

- The district court granted AFA's TCPA motion to dismiss on February 7, 2017, dismissing the Taxpayers' claims—but only Taxpayers' claims—against the AFA. CR.1392.

- Taxpayers filed their Notice of Appeal of the order granting the AFA's TCPA motion to dismiss on February 21, 2017. CR.1404–1406. Texas filed its Notice of Appeal of the district court's Order Granting the AFA's TCPA Motion to Dismiss on February 27, 2017. SCR.3–7. This Court dismissed taxpayers' appeal without prejudice to refiling once a final, appealable order was entered by the district court. It abated Texas' appeal and remanded to the district court for it to clarify whether its order was intended to operate as a denial of Texas' Plea to the Jurisdiction and dismissal of Texas' claims against the AFA.

- On September 19, 2017, the district court entered an Order and Certification Clarifying the Order Granting AFA's TCPA Motion to Dismiss, stating that the dismissal order was not intended to function as a ruling on Texas' Plea to the Jurisdiction and applied only to Taxpayers. CR.1407–1411. On October 11, 2017, the Third Court of Appeals dismissed Texas' appeal.

- On November 2, 2017, Appellants filed an Amended Original Petition and Application for Injunctive Relief because the City and the AFA had entered

into a new collective bargaining agreement, the 2017–2022 CBA, which contained an association business leave clause identical to the association business leave clause contained within the previous, expired agreement. CR.1412–1534.

- On December 1, 2017, Texas filed its First Amended Plea in Intervention, reflecting that the City and the AFA had entered into the 2017–2022 CBA, and a Notice of Nonsuit of all claims against the AFA. CR.1757–1882.

- On January 9, 2018, the City filed a Motion to Abate Taxpayers' Amended Original Petition and Texas' First Amended Plea in Intervention, arguing that the AFA was a necessary party to this litigation and seeking abatement of the suit until Taxpayers and Texas named AFA as a party. CR.1900–1906.

- On January 19, 2018, the City filed an Amended Plea to the Jurisdiction to Taxpayers' Amended Petition and Texas' First Amended Plea in Intervention, contending that collateral estoppel barred Plaintiffs from amending their petition because their claims had purportedly already been litigated and resolved with the trial court's TCPA order. CR.1907–1921.

- The district court denied the City's Motion to Abate on February 8, 2018. CR.1942.

- The district court denied the City's Amended Plea to the Jurisdiction on April 11, 2018. CR.1969.

- On August 10, 2018, the AFA sought to rejoin the lawsuit by filing an Amended Plea in Intervention, Answer, Special Exceptions, and Affirmative Defenses, seeking to defend against Taxpayers' and Texas's claims. CR.2236–2242.

- On August 30, 2018, the AFA filed a Motion for an Award of Costs, Attorneys' Fees, Other Expenses, and Sanctions pursuant to the Texas Citizens Participation Act. CR.2243–2415. On the same day, the City and the AFA filed a Joint Motion for Summary Judgment. CR.2416–2826.

- On December 21, 2018, Taxpayers and Texas filed a Joint Motion for Summary Judgment. 2.SCR.251–696. Taxpayers also filed a Motion to Strike the AFA's Amended Plea in Intervention. CR.3242–3255.

- On January 25, 2019, the City and the AFA filed their Joint Cross-Motion for Summary Judgment, Plea to the Jurisdiction, and Motion to Strike Texas' Plea in Intervention. CR.3256–3280.

- On July 18, 2019, the district court denied the City's Pleas to the Jurisdiction and Motion to Strike, CR.3816–3819, Taxpayers' and Texas' Joint Motion for

Summary Judgment, CR.3811–3812, and Taxpayers' Motion to Reconsider the AFA's TCPA Motion to Dismiss. CR.3809–3810. The district court granted the AFA's Motion for an Award of Fees and Sanctions, CR.3805–3806, and Appellants' Motion to Strike the AFA's Amended Plea in Intervention. CR.3807–3808. The district court granted in part and denied in part the City's and AFA's Joint Cross-Motion for Summary Judgment leaving a triable fact issue remaining for trial. CR.3813–3815.

- Pulliam filed his Notice of Nonsuit without prejudice of all claims against the City and City Manager on November 19, 2019. CR.3820–3821.

- Taxpayer Plaintiff Roger Borgelt joined the suit as a plaintiff by filing an Amended Petition on October 27, 2020. CR.3822–3945.

- Wiley filed his Notice of Nonsuit without prejudice of all claims against the City and City Manager on November 3, 2020. CR.3946–3949.

- The City filed a Motion to Strike Mr. Borgelt as a party on November 18, 2020, CR.3962–4004, which the district court denied on December 2, 2020. CR.4022–4024.

- The case was heard as a bench trial on all remaining claims on March 8–9, 2021.

Trial Court:

419th Judicial District Court, Travis County, The Honorable Jessica Mangrum Judge Presiding.

Trial Court Disposition:

On February 7, 2017, the district court entered an Order Granting AFA's TCPA Motion to Dismiss. CR.1392. This order dismissed Taxpayers' claims against the AFA. On July 18, 2019, the district court entered an Order Granting AFA's Motion for an Award of Costs, Attorneys' Fees, Other Expenses, and Sanctions, granting fees and costs in the amount of $115,250.00 and sanctions of $75,000.00. CR.3805–06.

On March 24, 2021, the 419th District Court, following a two-day bench trial, entered a Final Judgment denying Roger Borgelt's and Texas' claims. CR.4163–66. The Final Judgment, together with the summary judgment order and fee order, disposed of all claims of all parties. Appellants and Texas timely appealed the district court's final judgment. CR.4220–25; SCR.3–7.

Statement Regarding Oral Argument

Given the complexity of the procedural history in the court below and the novel constitutional claims involved in this litigation, Appellants believe that the Court would benefit from oral argument.

Issues Presented

1. Do the Texas Constitution's Gift Clauses prohibit the City from paying the salary and benefits of City employees to work for the AFA—a private organization—when the City does not control the activities of those employees, when those employees are not obligated to provide services to the City, and when those employees work primarily to advance the private interests of the AFA, not the public interests of the City?

2. Did the trial court err in granting the AFA's motion to dismiss under the TCPA against Taxpayers, including awarding sanctions under the TCPA, by finding that Taxpayers failed to establish a prima facie Gift Clause violation while simultaneously finding sufficient evidence for the case to go to trial, and when the AFA failed to prove that this public interest, taxpayer action relates to the AFA's constitutional rights?

Statement of Facts

In 2017, the City entered into the 2017–2022 CBA with the AFA, which is a labor union representing certain employees within the Austin Fire Department. 7.RR.449–50 (Am. Joint Stip. Facts ¶¶ 2–3, 9; *see also* 7.RR.13 (Joint Ex. 1 art. III).

This case centers on one provision of the 2017–2022 CBA between the City and the AFA: the section establishing Association Business Leave ("ABL"). 7.RR.24 (Joint Ex. 1 art. X). ABL generally allows City employees to receive their public salaries while "conduct[ing] [AFA] business" rather than working for the City. *Id.* § 1.A. The 2017–2022 CBA establishes two categories of ABL: (1) leave for the AFA President, and (2) leave for other union members. *Id.* §§ 1.A–B.

The AFA President (currently, Bob Nicks) "may use ABL for any lawful Association business activities consistent with *the Association's* purposes." *Id.* § 1.B.1. (emphasis added); *See* 7.RR.451 ¶ 19. The AFA President is allotted up to 2,080 hours per year. Because he is "assigned to a 40 hour work week," the AFA President effectively has a full-time, no-show job that allows him to receive a salary from the City while devoting his entire work week to union, not City, business. 7.RR.25 (Joint Ex. 1 art. X, § 2.C); *See* 7.RR.451 ¶¶ 18, 20.

AFA President Nicks takes full advantage of this provision. He "us[es] ABL on a full-time basis, meaning that he spends 40 hours on ABL per week." CR.4212 (Am. FOF 38). Mr. Nicks devotes "all of his time" to working on behalf of the union, not the City. 4.RR.57:17–20. He considers himself under "a fiduciary obligation to rep-

resent AFA members" rather than the interests of the City. 4.RR.250:7–12. Pursuant to the 2017–2022 CBA, the City pays Mr. Nicks for the time he spends opposing the City in contract negotiations and grievance proceedings, including when Mr. Nicks himself was subject to a disciplinary investigation. *See* 4.RR.98–102; 7.RR.451 ¶ 31.

The City does not oversee how Mr. Nicks uses ABL. It has not "put in place any controls in terms of how [the 2017–2022 CBA] is implemented to ensure that" Mr. Nicks uses ABL for purposes that are "of assistance to the City." 4.RR.106:15–107:9. Mr. Nicks does not "physically report to the City offices on a daily basis," nor "[d]oes anyone at the City direct Mr. Nicks' activities on a daily basis." 4.RR.58:19–25; *see* 7.RR.451 ¶¶ 24–25. Although Mr. Nicks submits time sheets, those time sheets do not "show[] the activities that he's actually performing." 4.RR.59:9–12; *see also* 4.RR.74:6–11. Free of City oversight, Mr. Nicks uses ABL time for political and lobbying activities, among other things. 4.RR.67:23–68:6.

The 2017–2022 CBA also exempts Mr. Nicks from the City's normal policies regarding supervisors. Each Austin firefighter, even senior personnel, has a direct supervisor. 7.RR.451 ¶ 27. For "Fire Department Chiefs," the City uses "a highly regimented and hierarchical reporting structure, where Battalion Chiefs report to Division Chiefs who report to an Assistant Chief who reports to the Chief of Staff who reports to the Fire Chief." *Id.* ¶ 28. This system of "direct reports from … immediate supervisors" ensures that each firefighter "is performing his or her job." *Id.* ¶ 26; *see also* 4.RR.198:18–24. But Mr. Nicks is an exception. Although he is a Battalion Chief, he "nominally reports directly to the Chief of Staff." 7.RR.451 ¶ 29.

That is "not typical." *Id.* ¶ 30; *see* 4.RR.225. Indeed, the Deputy Director for the Labor Relations Office did not even know who was within Mr. Nicks' "chain of command." 4.RR.203:14–19.

Aside from the AFA President, "[a]ny member of the bargaining unit may request to use ABL as an 'other authorized representative.'" CR.4212 ¶ 41. Such other representatives may use ABL "for [AFA] business activities that directly support the mission of the Department *or* the [AFA], but do not otherwise violate the specific terms of this Article." 7.RR.24 (Joint Ex. 1 art. X, § 1.B.2) (emphasis added). Thus, city employees "can use ABL for activities that directly support the mission of the AFA" rather than the Department's mission. 4.RR.69–70. In those situations, the AFA President, not the City, "direct[s] the activities" of other employees using ABL. 4.RR.84; *see* 7.RR.453 ¶ 51.

In theory, the City can reject proposed uses of ABL by employees (other than the AFA President), but in practice, only "a very small number" of requests "were actually denied," "maybe only about one percent." 4.RR.88:20–89:2; *see* 7.RR.453 ¶ 46. City employees used ABL to attend private, charitable events (*e.g.*, "a gala," a boxing match called "Battle of the Badges," "fishing fundraisers") and meetings of the union's "political action committee." 4.RR.90:6–96:18. Even after the fact, the City does not know how a large portion of ABL time is spent. In the City's reporting system, most ABL hours used by "other Authorized Association representatives" are simply categorized as "other Association business" without further detail. 7.RR.453 ¶¶ 48–50. The relatively few ABL hours explained in more detail plainly advanced the AFA's interests, not the City's, as they were used for activities

like attending union conferences and meetings and recruiting new AFA members. *See id.*; 4.RR.75:12–77:18.

During all of these activities, though, "AFA members using ABL receive their ordinary City salaries, benefits, and pensions." 7.RR.451 ¶ 21. ABL costs the city roughly $200,000 to $250,000 per year. *See* 4.RR.158:1–10. Those costs are ultimately borne by taxpayers like Plaintiff Borgelt. *See* 7.RR.449–51 ¶¶ 5–7.

Summary of the Argument

The Texas Constitution's Gift Clauses prohibits public subsidies of private enterprises that are not controlled by the state without a public purpose. The framers of the Gift Clauses understood that, absent such control, public funds could be allocated to private, special interests. Unfortunately, that is precisely what the City of Austin did here. It devoted taxpayer resources to subsidizing the local firefighters' union.

At issue in this case is "Association Business Leave" ("ABL" or "release time"), a practice that diverts full-time firefighters away from one of the most crucial services the City provides, and places them instead under the direction and control of the AFA, a private labor organization, for its sole use and benefit—all at taxpayers' expense. The evidence shows that no meaningful limits, controls, or accountability are placed on the AFA's use of the public resources it receives.

In exchange for this grant of taxpayer funds, the AFA is not obligated to perform any duties for the City, and in fact, does not perform specific activities for the

City. The consideration required by the Gift Clauses is absent. Moreover, the predominant purpose of ABL is to advance the private interests of the AFA, not the public interests of City taxpayers. ABL is, in short, taxpayer funding of a private entity without a public purpose, without adequate public oversight, and in exchange for which the public receives inadequate consideration.

This arrangement violates the Gift Clauses—a series of provisions that forbid any gift of public funds for private enterprises and activities, and prohibit the allocation of public funds to private, special interests. Tex. Const., art. III, §§ 50, 51, 52-a; art. XVI, § 6-a. The Gift Clauses require that public control must be maintained over all public expenditures to ensure that those expenditures achieve predominately public purposes and that the public receives adequate consideration.

None of these safeguards is satisfied in the City's release time arrangement with the AFA. Austin taxpayer Roger Borgelt ("Taxpayer") brought this action to enforce the Gift Clauses' constitutional protections and to prevent the City from engaging in the unlawful expenditure of taxpayer dollars that they are obligated to replenish. The State intervened to uphold and vindicate the constitutional protections enjoyed by all Texans. The release time provisions under review violate the Texas Constitution and should be enjoined.

Furthermore, the dismissal order and award of attorney fees and sanctions under the TCPA against Appellants Pulliam and Wiley was in error and should be reversed. In granting the TCPA motion, the court below erred in three ways.

First, it erred in finding that Taxpayers failed to establish a prima facie case for purposes of the TCPA, while simultaneously finding that Taxpayers had established

a prima facie case, as evidenced by the court denying two pleas to the jurisdiction filed by Defendants, partially denying Defendants' motion for summary judgment, and ultimately ordering a trial on the merits. Because Taxpayers pleaded and presented sufficient evidence to go to trial, they necessarily presented a prima facie case under the TCPA.

Second, the trial court erred in finding that the AFA met its burden of proof that this case relates to its constitutional rights. The AFA has no constitutional right to taxpayer financing for its activities, and the AFA would remain entirely free to associate and communicate even if Taxpayers received all of the relief they seek.

Finally, by voluntarily intervening back into a case from which it sought to be dismissed as a party, the AFA has shown that this case does not implicate its constitutional rights, and it should be estopped from asserting the protections of the TCPA in a case that it voluntarily joined. If allowed to stand, the trial court's TCPA order would interfere with Taxpayers' right to challenge the constitutionality of government action in good faith and would chill other meritorious public interest cases.

Standard of Review

The standard of review of the trial court's conclusions of law is de novo. *Botter v. Am. Dental Ass'n*, 124 S.W.3d 856, 860 n.1 (Tex. App.—Austin 2003, no pet.) For mixed questions of law and fact, this Court should defer to the trial court's factual determinations if supported by the evidence, but review its legal determinations de novo. *Brainard v. State*, 12 S.W.3d 6, 30 (Tex. 1999).

This Court reviews de novo the trial court's ruling on a TCPA motion to dismiss. *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 873 (Tex. App.—Austin 2018, rev. denied) ("In reviewing trial court's ruling on a motion to dismiss under the TCPA, we apply a de novo standard of review."). De novo review applies to "whether each party has met its respective burden under the Act's two-step dismissal mechanism." *Id.* at 873.

Argument

I. The release time provisions at issue violate the Gift Clauses.

The Constitution's Gift Clauses prohibit any city from "lend[ing] its credit or … grant[ing] public money or thing of value in aid of, or to any individual, association or corporation whatsoever." Tex. Const. art. III, § 52-a; *see also id.* art. III, §§ 50, 51; art. XVI, § 6-a. The purpose of the Gift Clauses is "to prevent the application of public funds to private purposes." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 739–40 (Tex. 1995) (citation omitted). In other words, it "prohibits the expenditure of public funds for private gain." *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.—Austin 1996, writ denied).

A government expenditure violates the Gift Clauses if a government payment is granted "gratuitously" to a private entity, meaning that the government does not receive sufficient consideration in exchange for the payment, or if the payment does not serve a legitimate public purpose. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383–84 (Tex. 2002). A three-part test, in turn, determines if an expenditure accomplishes a public pur-

pose. Specifically, the government must: "(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 to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit." *Id.* at 384 (emphasis added).

These are *conjunctive* requirements. A government expenditure will violate the Gift Clauses if it fails *any* of these tests. In other words, the Gift Clauses are violated if *any* of the following are true: (1) the release time provisions do not serve a public purpose because *they either predominantly benefit a private party or do not afford a clear public benefit in return*; or (2) the release time provisions do not serve a public purpose because *the City does not maintain adequate control* over release time employees; or (3) the release time provisions are gratuitous because *the City does not receive sufficient consideration* in return for the money spent.

A failure of any one of these requirements is enough to establish a violation. As the evidence shows, the ABL provisions at issue fail all three.

A. The release time provisions at issue violate the Gift Clauses because the City exercises virtually no control over the use of ABL.

Of the *conjunctive* requirements necessary for the City's expenditures on ABL to avoid a Gift Clauses violation, the failure to establish adequate—indeed *any* control—is the most obvious. *Texas Municipal League Intergovernmental Risk Pool* stands for the proposition that when a public entity spends public resources, that entity must maintain "public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." 74 S.W.3d at 384.

Or, as the court put it in *Key v. Commissioners Court of Marion County*, "the unifying theme of the [Gift Clause] cases [is] that some form of continuing public control is necessary to insure that the State agency receives its consideration." 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no writ).

In short, public contracts must include sufficient controls to ensure that the agency both receives its promised consideration and fulfills whatever public purposes are promised within the 2017–2022 CBA. That is why the Attorney General found a release time arrangement in one public-school district contract violated the Gift Clause, which "prohibit[s] the grant of public funds or benefits to any association unless the transfer serves a public purpose and adequate contractual or other controls ensure its realization." Tex. Att'y Gen. Op. MW-89, 1979 WL 31300 at *1 (1979).

In this case, the City does not control the use of ABL in any meaningful way, either in the language of the CBA or in practice. The AFA—a private organization—can use ABL when and how it pleases.

This is most obviously true with respect to AFA President Nicks. *All* of Mr. Nicks's time spent working for the City is on ABL—he is released full-time from his regular firefighting duties. 7.RR.24, art. 10 § 1(B)(1); 7.RR.451 ¶¶ 17, 18, 20; 2.SCR.447 at 29:18–23; 4.RR.57:17–20. Although his salary is paid for with public dollars, no one at the City directs his activities while on ABL, 7.RR.451 ¶ 24; 2.SCR.507 at 21:1–3; 4.RR.58:19–25; 7.RR.451 ¶¶ 24–25, he does not need permission from anyone in the City regarding his use of ABL, 2.SCR.506 at 20:19–22; 4.RR.106:21–107:4, and the City places no prohibitions on his activities. 2.SCR.506–

07 at 20:6–12, 21:12–16; 2.SCR.448 at 33:9–12, 34:20–22. He is not required to report to the Fire Department Headquarters, or any other City office, on a regular basis. 7.RR.451 ¶ 25; 2.SCR.506 at 20:23–25; 2.SCR.449 at 40:3–7; 4.RR.58:19–22. Instead, he reports to AFA offices. 2.SCR.449 at 40:13–15. While there, or anywhere else, he is not required to punch a time clock or record his arrival or departure time, or otherwise account for his working hours. *Id.* at 42:9–24.

Indeed, he provides *no accounting of any kind* to the City about his daily activities or how he spends release time. *Id.*; 2.SCR.507 at 21:20–22, 2.SCR.513–14 at 48:21–49:2; 4.RR.59:2–8; *see also* 4.RR.74:3–11; 2.SCR.540, RFA 12 ("[The] City admits the CBA does not require the AFA to provide an accounting for the members on [sic.] use of ABL.").

In fact, the plain language of the CBA not only allows, but *mandates*, that Nicks devote *all* his time to "[AFA] business activities." 7.RR.25; 7.RR.451 ¶ 17. That alone is enough to establish a lack of control (as well as lack of public purpose), because a public agreement must be structured such that "'the political subdivision must retain some degree of control over the performance of the contract.'" *Key*, 727 S.W.2d at 669 (citation omitted) (holding that the transfer of control over a holiday light tour from a public historical commission to a historical nonprofit violated the Gift Clause because there was "no retention of formal control" in a contractual agreement). Here, the CBA does not require such control, nor does the overwhelming weight of the evidence in the record show such control.

There are other factors that show a lack of control with respect to Nicks, including that *every other* firefighter has a direct supervisor to whom he or she reports, but no one in the City directly supervises Nicks's work. 7.RR.451 ¶¶ 27, 29-30. 2.SCR.504–05 at 12:25–13:2; 2.SCR.526 at 100:15–20. This reporting structure is unlike any other within the Austin Fire Department and ensures that Nicks is, in the words of Assistant Fire Chief Woolverton, "clearly outside the…regular chain of command." 2.SCR.527 at 101:6–7. Although other City employees must undergo some form of evaluation of their work performance, no evaluation is conducted for Nicks. 7.RR.451 ¶ 26; 2.SCR.318 at 9:12–25; 2.SCR.450 at 44:1–16.

The City also has no say in who becomes the AFA President, or any other Authorized Association Representative, and the City cannot remove Nicks from his job. 2.SCR.506 at 18:8–10; 2.SCR.451 at 47:17–19. That is as it should be, since the AFA is a private entity. The problem is that its staff is on the government payroll.

That makes use of ABL by Nicks and other union members unlike any other employer-employee relationship in Texas, or anywhere else for that matter. Under Texas law, in order to determine if an individual is an employee, courts consider "whether the alleged employer had the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule." *Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 263 (Tex. App.—Fort Worth 2003, pet. denied); *see also Thompson v. Travelers Indem. Co. of R.I.*, 789 S.W.2d 277, 278–79 (Tex. 1990) (A worker is an employee if "the employer has the right to control the progress, details, and methods of operations of the employee's work…The employer *must control* not merely the end sought to be accomplished, but also the

means and details of its accomplishment as well.") (emphasis added). Here, none of those factors apply to Nicks. The City cannot "hire" him as AFA President, or remove him as AFA President; it does not supervise him or his activities or set his work schedule. Yet, he is putatively a "full-time" City employee. The reality is that he is actually an employee of the AFA, and his time is spent advancing its private mission, not that of the taxpaying public. Yet his paycheck comes from the taxpayer.

The same lack of public control over public funds exists with respect to other Authorized Association Representatives who use ABL. Nicks and the AFA Executive Board decide who becomes an Authorized Association Representative, and do so with no input from the City. 2.SCR.452 at 50:4–6, 51:24–52:2. Requests to use ABL are approved in the first instance by Nicks, and thereafter, the City approves 99 percent of all requests that were initially approved by the AFA. 7.RR.452–53 ¶¶ 45–46; 2.SCR.546–68; 2.SCR.517 at 61:16–22. The *vast* majority of ABL used by other Authorized Association Representatives—75 percent[1]—is spent on "other association business," which is an undefined, unaccounted-for category of time, where the AFA gets to determine *how* this time is spent. 7.RR.113–15, 448.

Additionally, use of ABL by "other Authorized Association Representatives" is "monitored by Nicks and members of the AFA's Executive Board." 7.RR.453 ¶ 51.

[1] From the fourth quarter of 2017 (when the CBA began) through calendar year 2020, 6,542.25 hours out of 8,714.50 hours of ABL was used by "other Authorized Association representatives" on "other Association business." 7.RR.453 ¶¶ 48–50; 7.RR.113–15, 448.

During the time AFA members use ABL, Nicks and other AFA officers, rather than City management or other City personnel, "direct [their] activities." 2.SCR.456 at 68:1–9.

In short, the record shows that there are simply *no indicia of public control* over ABL under the CBA or in practice. Obviously, the City can and should enter into appropriate contracts to accomplish the extraordinarily important objective of providing fire and public safety resources to the citizens of Austin. But those contracts must contain sufficient conditions and controls to ensure that *public* objective is met. *See Texas Mun. League*, 74 S.W.3d at 384. Nothing like that is found in the 2017–2022 CBA with respect to ABL.

The Texas Attorney General previously examined whether another release time policy, far less generous than the one under review here, violated the Gift Clause, and concluded that it did. In that case, the Fort Worth Independent School District permitted nine days of release time for every 100 union members to "be used at the discretion of the professional organization for pursuing the business of the organization by its officers or members." Tex. Att'y Gen. Op. MW-89, 1979 WL 31300 at *1. The Attorney General found that the teachers' union used 301 days of release time at a cost of nearly $23,000 in teacher salaries in one year, which the Attorney General determined resulted in "the transfer of a valuable benefit to the professional association." *Id.* Examining this policy under the Gift Clause, the Attorney General concluded that "the school district has neither articulated a public purpose to be served by the released time program nor placed adequate controls

on the use of released time to insure that a public purpose will be served." *Id.* at *2.

As the record plainly establishes, the release time provisions at issue here likewise allow for release time to "be used at the discretion of the [AFA] for pursuing the business of the [AFA] by its officers or members." *Id.* at *1.

There is no question who controls release time here. The AFA does. The AFA President and other Authorized Association Representatives direct their own activities, with no input from, or prohibitions placed on, those activities by the City—and with no accounting of those activities to the City. Release time employees cannot be hired or fired by the City, are not evaluated by the City, and are not supervised by the City. Consequently, release time as it exists in the CBA and as used by the AFA includes no public control. It is a direct subsidy of public tax dollars to the AFA. It is a gift, in violation of the Gift Clauses.

B. The ABL provisions do not serve a public purpose because the primary benefit runs to the AFA, not the City.

Not only has the City failed to put in place the necessary controls to ensure that a public purpose is actually advanced by release time, but the record also shows that release time fails to serve a public purpose, because the *predominant* beneficiary of release time is the AFA, not the City or its taxpayers. A public expenditure achieves a public purpose only if the expenditure's "*predominant* purpose is to accomplish a public purpose, not to benefit private parties." *Tex. Mun. League*, 74 S.W.3d at 384 (emphasis added).

It is axiomatic that public funds should be spent for public purposes, not to promote the private interests of any individual or organization. That is the entire purpose of the Gift Clauses. *Brazoria Cnty. v. Perry*, 537 S.W.2d 89, 90 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) ("The clear purpose of this constitutional provision is to prevent the gratuitous application of funds to private use.") Thus, an expenditure that *primarily*, rather than *incidentally*, benefits a private entity, is unconstitutional. *Tex. Mun. League*, 74 S.W.3d at 384.

The release time provisions at issue here benefit the AFA, not the City as a whole. The plain language of the 2017–2022 CBA makes this obvious: "The Association President may use ABL for any lawful Association business activities consistent with the Association's purposes." 2.SCR.36; 7.RR.451 ¶ 17. The 2017–2022 CBA does not say that Nicks must devote *some* of his time to AFA business and *some* time to the City and its business. Instead, it *mandates* that the AFA President devote *all* of his time to "[AFA] business activities." *Id.*

Both parties agree that this means ABL is used for AFA, not City, activities. When asked what ABL means, Nicks responded plainly, "Association Business Leave is leave that can be used to do *Association* business." 2.SCR.446 at 26:6–7 (emphasis added). When asked to state the meaning of "association business leave" in the CBA, the City responded similarly, "[a]ctivities by the AFA in connection with Article 10 are those that support their role as an employee organization." 2.SCR.615, Resp. No. 18. Thus, both the AFA and the City recognize that the purpose of ABL is not to serve the City, but to advance the interests of the AFA and its membership.

The AFA is a private labor organization, whose mission is to advance the private interests of its members. *Id.* Because Nicks and other Authorized Association Representatives are required under the 2017–2022 CBA to devote their time to Association business, and because the City recognizes that Association business means activities that support the AFA, the provisions under consideration are advancing private, not public purposes.

This observation becomes particularly acute when so many ABL activities place the AFA in an *adverse* or *adversarial* relationship to its public employer, the City. For example, ABL is used to finance AFA contract negotiations *against* the City. 7.RR.113–115, 448. During these negotiations, the AFA has its own negotiator, pursuing the AFA's interests and the best possible deal that AFA can negotiate for itself and its members. That negotiator is literally on the opposite side of the bargaining table from the City's own negotiator. 2.SCR.322 at 26:4–11. Yet these AFA negotiations are funded with City taxpayer money under the 2017–2022 CBA.

The same is true of grievances and disciplinary proceedings. During the grievance process, the AFA represents its members in grievances brought *against* the City and City supervisors. 2.SCR.510 at 34:5–13, 36:4–15. Assistant Fire Chief Woolverton indicated that AFA representation of AFA members during contract grievances filed against the City result in instances in which the AFA's interests and those of the City are "diametrically opposed." *Id.* 511 at 37:8.

Similarly, during the disciplinary process and at disciplinary hearings, the AFA represents its members *against* disciplinary charges brought *by* the City where the City is acting on behalf of the City's interests and the AFA is acting on behalf of its

members against whom discipline was brought. 2.SCR.575, Resp. 14. In fact, on at least one occasion, Nicks *himself* was subject to a disciplinary action brought by the City for alleged violation of the City's social media policy. 7.RR.451 ¶ 31. During the investigation and adjudication of Nick's own alleged misconduct, Nicks used ABL. 2.SCR.523 at 85:7–25.

Perhaps the most striking example of how use of ABL does not, and in fact legally cannot, serve a public purpose is when ABL is used for political activities—and it is extensively used for political activities. The AFA is a political organization. Among other things, it advocates for the election and defeat of candidates and provides financial support to candidates. 2.SCR.461 at 127:12–128:6. Nicks and other Austin firefighters determine which candidates to support or oppose during Political Action Committee meetings that are attended using ABL. *Id.*; 4.RR.139:21–140:24. Nicks also arranges for the placement of political candidate yard signs while on ABL 2.SCR.471 at 126:24–127:5. And he produces written materials that provide AFA endorsement for or against political candidates "during [the] workweek." *Id.* at 125:18–126:1. Nicks estimates that approximately 25–30 percent of his time is spent on political activities and lobbying. *Id.* 470 at 122:21–123:6. And several other Authorized Association Representatives use ABL for political meetings. *See* 2.SCR.550, 551, 554, 559, 565.

Nicks uses ABL to engage in political activities at taxpayer expense, even though City policy *expressly* prohibits the use of City resources for political activities. For example, the City of Austin Personnel Policies states, "All employees of the City shall refrain from using their influence publicly *in any way* regarding any

candidate for elective City office." 7.RR.500 § H(3). The policy goes on to prohibit supervisors from "participat[ing] or contribut[ing] money, labor, time, or other valuable thing to any person campaigning for a position on the City Council of the City of Austin." *Id.* § H(2).[2]

Yet, Nicks and other Authorized Association Representatives meet and dedicate their time, while using City resources, to determine which candidates for elective office the AFA is going to support or oppose. Nicks also arranges for the placement of yard signs and prepares written endorsement materials for political candidates while using ABL. 2.SCR.471 at 126:24–127:5, 125:18–126:1. Of course, if City policy prohibits use of official position, resources, and time for certain political activities, it is difficult to see how use of ABL for those activities could possibly advance a public purpose. In fact, that would be the definition of *failing* to advance a public purpose.

Although the vast majority of ABL activities *that we know of* advance the AFA's interests instead of the City's, the record shows that the City does not even know how the vast majority of ABL time is actually spent. Under the 2017–2022 CBA, from the fourth quarter of 2017 through calendar year 2020, 6,542.25 hours out of 8,714.50 hours of ABL was used by "other Authorized Association representatives"

[2] In fact, under the City Charter, it is a *criminal offense* for a City employee to use his or her office to influence elections for local political candidates. *See* City of Austin Charter, Art. 12, § 2 ("Any officer or employee of the city who by solicitation or otherwise shall exert his/her influence directly or indirectly to influence any other officer or employee of the city to favor any particular person or candidate for office in the city shall be guilty of a misdemeanor.").

on an undefined, unaccounted-for category of time identified only as "other Association business." 7.RR.113–15, 448. *Id.* 453 ¶¶ 48–50. In other words, of the time reported to the City for ABL used by "other Authorized Association Representatives," less than 25 percent was specifically identified by use! *Id.*

Because the AFA controls and directs the activities of "other Authorized representatives" while on release time, this means the AFA decides *in its sole discretion* how the vast majority of all ABL is used, and *also* provides no accounting for *how* it is used. Indeed, many of these uses of ABL appear to advance no public interest whatsoever. For example, some use of ABL for "other association business" included participating in nonprofit activities such as the "Firefighter Combat Challenge," "Battle of the Badges Boxing Charity Event," and the "Austin Firefighters Relief and Outreach Fishing Fundraiser." 2.SCR.546–68.

What's more, the remaining uses of ABL by "other Authorized representatives" plainly advance the AFA's private interests because that time was used for union recruitment and to attend union conferences and meetings. Of *all* the ABL reported by "other Authorized representatives," **96.4%**—a total of 8,404.50 out of 8,714.50 hours—was used for union recruitment activities, to attend union conferences and meetings, or to engage in the undefined and unaccounted-for category of "other Association business." 7.RR.113–15, 448. *Id.* 453 ¶¶ 48-50.

As a result, the vast majority of all ABL time that is reported indisputably advances the AFA's and only the AFA's private interests.

And this does *not* include Nicks's time spent working for AFA exclusively, where he alone determines what he does and when he does it. Because he uses all of his

time for Association business and affairs, and entirely controls when and how he uses ABL, and because the AFA spends nearly all of the rest of ABL time on recruiting union members, attending union meetings, and engaging in "other association business," the AFA is the *predominant* beneficiary of the time.

To repeat: it is *right* for AFA to advocate for its members' private interests. It has a legal and ethical obligation to do so. But it is unconstitutional for it to do so with a gift of public funds. Political activities, recruitment activities, attending union meetings, etc., do not *primarily* benefit the public, and many uses of ABL are adverse to, or prohibited by, the City. For taxpayers to fund it is therefore a gift of public funds to AFA for AFA's own private use.

Even if there were some *incidental* public benefits to these activities, the *primary* beneficiary of ABL, which is paid for by the public, is the AFA, a private entity. And the Gift Clauses do not permit the *predominant* benefit of public expenditures to run to a private organization. *Tex. Mun. League*, 74 S.W.3d at 384; *see also Young v. City of Houston*, 756 S.W.2d 813, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

C. The public receives constitutionally insufficient consideration for its ABL expenditures because the provisions at issue do not obligate the AFA to provide anything to the City.

In order to survive Gift Clause scrutiny, the challenged expenditures not only must serve a public purpose, but also must be supported by sufficient consideration. *Tex. Mun. League*, 74 S.W.3d at 383–84. To be constitutional, a transfer of public funds to a private entity must include some "clear public benefit received in return." *Edgewood Indep. Sch. Dist.*, 917 S.W.2d at 740. What's more, "[l]ack of

consideration occurs when the contract, at its inception, does not impose *obligations* on both parties." *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.—Tyler 2010, no pet.) (emphasis added); *see also Key*, 727 S.W.2d at 669 (A recipient of public expenditures must "*obligate[] itself contractually* to perform a function beneficial to the public.") (emphasis added)).

In other words, the Gift Clauses require a contractual obligation, to ensure that the public's business will in fact be effectuated by the public expenditure. Absent obligation on the part of the private party, there is nothing to ensure that the public's business will, in fact, be done. Thus, the lack of obligation by the private party demonstrates a lack of lawful consideration under the Gift Clause test. *See also Turken v. Gordon*, 224 P.3d 158, 165 ¶ 31 (Ariz. 2010) (only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration under the Gift Clauses) (emphasis added)). Receiving something without a contractual obligation to provide something in return, as is the case with the ABL provisions at issue, is by definition a gift, due to insufficient consideration.

This Gift Clause principle, of course, is directly in line with general principles of contract law. "To be enforceable, a contract must be based on consideration, also known as mutuality of *obligation*." *TLC Hospitality, LLC v. Pillar Income Asset Mgmt., Inc.*, 570 S.W.3d 749, 760 (Tex. App.—Tyler 2018, pet. denied) (emphasis added). As the court of appeals observed, "The contract lacking consideration lacks mutuality of obligation and is unenforceable." *Id.* at 761.

In this case, the AFA has not obligated itself to perform any duties, or give anything in return, for the ABL hours it receives. The CBA itself makes this obvious. It allows the AFA President to use ABL for "any lawful [AFA] business" and other Authorized Association Representatives to use ABL for "[AFA] business activities that directly support the mission of the … Association," which means that ABL can be used for activities that "*exclusively* support the mission of the AFA." 7.RR.24; *Id.* 451 ¶ 17; 2:SCR.509 at 31:25–32:2 (emphasis added). *See TLC Hospitality*, 570 S.W.3d at 761 ("Lack of consideration occurs when the contract, *at its inception*, does not impose obligations on both parties") (emphasis added)). In other words, the CBA itself, rather than imposing obligations on the AFA to perform activities *for* the City, expressly frees the AFA from doing so.

In addition to the language of the CBA, the record makes plain that there is nothing that obligates or requires Nicks and other Authorized Association Representatives using ABL to perform specific activities for the City, and as described *supra*, we know the AFA is using release time to advance its private interests, not those of the City.

The evidence showing lack of contractual obligation is conclusive. Every single witness for the City and Nicks testified that there is *nothing* in the CBA, or anywhere else, that obligates or requires Nicks and other Authorized Association Representatives using ABL to perform specific activities for the City. 2.SCR.523–24 at 88:23–89:3, 91:3–6, 92:1–15; *Id.* 488 at 20:14–17; *Id.* 321–23 at 24:13–26:25, 30:21–31:6; *Id.* 472 at 129:1–4. Like the other witnesses, the Assistant Director of the Fire Department responsible for finance and human resources stated it plainly. Asked if

"there [is] anything, in Article 10, that requires the AFA President to perform specific activities for the City," she answered, "No." *Id.* 488 at 20:14–17. Nicks agreed. He was asked, "Is there anything that requires you to perform specific activities, for the City, while using ABL?" He answered, "Specific activities? No." *Id.* 472 at 129:1–4.

Indeed, the City's stated understanding of the meaning of "association business leave" in the 2017–2022 CBA, is as follows: "Activities by the AFA in connection with Article 10 are those that support their role as an employee organization." *Id.* 615, Resp. No. 18. In other words, Article 10 of the 2017–2022 CBA not only does not obligate the AFA to perform functions for the City; its entire purpose is to allow the AFA President and other Authorized Association representatives to perform services for the private entity. These admissions by the City and the AFA are conclusive on the question of consideration.

The *Key* case is dispositive on this point. There, a citizen challenged the transfer of a "Christmas Candlelight Tour" from the Marion County Historical Commission, a public entity, to the Historic Jefferson Foundation, a private nonprofit organization, as a subsidy in violation of the Gift Clauses. The Commission argued that the transfer did not amount to a gift because the nonprofit organization shared "the same stated goals as the commission." 727 S.W.2d at 669. The court of appeals rejected that argument, holding that "contractual obligation" was necessary to establish consideration. Or, as the court wrote, "[h]ad the Historic Jefferson Foundation *obligated* itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration." *Id.* Here, even assuming

the City and the AFA share the same goals (which as explained above, they do not), that shared interest is not consideration in the absence of obligation.

Likewise, the AFA has not promised to do anything in exchange for release time. Contracts may be voided when based on an illusory promise, and a promise is illusory "if it does not bind the promisor, such as when the promisor retains the option to discontinue performance." *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010). Retaining the option to discontinue performance is exactly the state of affairs with respect to Nicks. When asked, "[I]f someone at the City was not satisfied with your job performance, could they ask you to step aside or remove you from your position as the AFA President?" he responded "No." 2:SCR.451 at 48:10–14. Even assuming the AFA is performing functions for the City while using ABL, that performance is illusory. "When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation, and therefore, no contract." *In re 24R, Inc.*, 324 S.W.3d at 567.

The Arizona case, *Wistuber v. Paradise Valley Unified School District*, 687 P.2d 354, 355 (Ariz. 1984), is instructive here. There, the court analyzed a release time provision contained within a school district collective bargaining agreement which set forth a number of specific responsibilities that the teacher/union representative would have to fulfill. *Id.* at 356 n.3. The costs of the salary were shared by the union and the district, and the collective bargaining agreement at issue included binding language: "the CTA *shall*…" *Id.* at 359 (Cameron, J., dissenting) (emphasis added). The Court held that "the duties imposed upon [the teacher] by the proposal are substantial, and the relatively modest sums required to be paid by the

District not so disproportionate as to invoke the constitutional prohibition." *Id.* at 358. Therefore, it held that the Gift Clause was not violated.

The situation here is the opposite: the "duties" imposed on the AFA are non-existent and the costs are substantial. Absent contractual obligation and an express promise to perform some commitment in exchange for release time, there is simply no valid consideration. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991) ("Consideration is a present exchange bargained for in return for a promise … [and] consists of either a benefit to the promisor or a detriment to the promisee.")

Even assuming that release time provided non-obligatory, indirect benefits to the City, there is no way of knowing the value of those benefits because the City has not assessed them. The City's chief witness on finances and human resources for the Fire Department could not "think of any financial benefit that comes in as a direct consequence [of ABL]." 2.SCR.488 at 18:8–16. Not only are there no direct benefits from ABL, but the City has never conducted any studies or prepared any reports to ascertain the indirect benefits, if any, of ABL. *Id.* at 19:10–13.

We know that release time costs taxpayers over $1.25 million throughout the course of the CBA. *Id.* 491 at 30:19–23; *id.* 415 § 3; 4.RR.158:1–5. We also know that the City has not provided any assessments or studies, or provided any facts or figures that reflect the value of what, if anything, it receives in return. 2.SCR.488 at 19:10–13. Without that information, neither the City nor this Court can ascertain the proportionality of consideration or quantify the benefits of release time to the City and its taxpayers.

In fact, the unfortunate reality is that neither Taxpayers, the State of Texas, nor the City can determine precisely what release time employees *do* while on ABL. That's because the AFA does not provide an accounting of *how* it uses ABL to the City; and employees using ABL don't either. *See* 2.SCR.540 (Request 12: "Admit that after ABL is used, AFA is not required to provide an accounting to the City for how its members used association business leave." Answer: "City admits the CBA does not require the AFA to provide an accounting for the members on use of ABL."); *see also Id.* 513–14 at 48:21–49:2. (The Fire Department does not capture *how* Mr. Nicks uses his ABL hours.).

If the AFA can use release time, whenever, wherever, and however it sees fit, with no direction or oversight from the City that is paying for those ABL hours—which it does—and if the City does not require an accounting of ABL time or an assessment of its purported value, if any—which it does not—then the ABL provisions at issue simply are not supported by adequate consideration and cannot advance a public purpose. *Key*, 727 S.W.2d at 669.

Absent these modest requirements—contractual obligation, a promise to perform specific services, and a meaningful assessment of the value—there is simply no legal consideration received for the release time expenditures at issue. And that means the public money the City spends for ABL time is a gift to the AFA. For that reason alone, the ABL provisions violate the Gift Clauses.

D. Taxpayers and Texas have standing to prosecute the Gift Clause claim.

1. Taxpayers have standing.

Appellant Borgelt has standing to prosecute the Gift Clause claim because he (1) pays *ad valorem* property taxes to the City; and (2) public funds are expended to fund ABL. "[U]nder Texas law … a taxpayer has standing to sue to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury." *Andrade v. Venable*, 372 S.W.3d 134, 137 (Tex. 2012). This long-standing rule has "two requirements: (1) that the plaintiff is a taxpayer; and (2) that public funds are expended on the allegedly illegal activity." *Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001). Appellant Borgelt is a property taxpayer in the City of Austin, 7.RR.449–50 ¶¶ 4-7, and it is indisputable that public funds are expended to finance the challenged ABL provisions. 4.RR.158:1–10; 7.RR.450–51 ¶¶ 8–23.

Appellant Borgelt has plainly established taxpayer standing.

2. Texas has standing.

The State has standing to sue municipalities and their officers for constitutional violations. Although Defendants previously challenged Texas's standing, *see* CR.3256–64, they seemingly abandoned that argument at trial. In any event, the district court implicitly rejected any standing challenges by entering a judgment on the merits. When a court concludes that a plaintiff lacks standing, it must dismiss the plaintiff's claims without prejudice. It cannot enter a take-nothing judgment or dismiss with prejudice. *See Odeh Grp., Inc. v. Sassin*, No. 02-20-00112-CV, 2021 WL 733086, at *3 (Tex. App.—Ft. Worth Feb. 25, 2021, no pet.); *cf. Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam) (same for mootness). In this case,

the district court entered a take-nothing judgment and dismissed with prejudice. *See* CR.4163–64. It could not have done so if it concluded Texas lacked standing.

The district court was right to conclude that Texas has standing. "That the state has a justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt." *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926). When the City violates state law, including the Texas Constitution, the State is injured. In fact, this Court has previously held that the City's violation of the Texas Constitution "inflicts irreparable harm on the State." *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied).

For these reasons, the constitutionality of ABL is properly before the Court. Regardless of whether Plaintiff Borgelt has taxpayer standing, Texas's standing prevents Defendants from evading judicial review. "[I]f [Texas] prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 78 (Tex. 2015). Thus, "the court need not analyze [Plaintiff Borgelt's] standing." *Id.* at 77.

II. The trial court's TCPA order should be set aside because Plaintiffs established a prima facie Gift Clause violation and the AFA failed to prove that this public interest, taxpayer case challenging *government* action relates to the AFA's constitutional rights.

The TCPA ruling from the court below is inherently contradictory and violates both the letter and purpose of the TCPA. If allowed to stand, the TCPA order would

invert the purpose of a statute that is intended to protect the exercise of constitutional rights, and would instead chill public interest litigation brought by citizens seeking in good faith to vindicate their constitutional rights in court.

The purpose of the TCPA "is 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. It is intended to "protect[] citizens who [associate,] petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018) (citation omitted). The statute is thus "designed to protect *both* a defendant's rights of speech, petition, and association and a claimant's right to pursue valid legal claims for injuries the defendant caused." *Montelongo v. Abrea*, 622 S.W.3d 290, 295–96 (Tex. 2021).

There is a two-step procedure to determine if the TCPA applies. First, the Court must determine "whether the defendant established that the plaintiff's suit was in response to the defendant's having exercised [his or] her *constitutional* right to free speech, petition, or association." *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 846 (Tex. 2018) (emphasis added); *see* Tex. Civ. Prac. & Rem. Code § 27.005(b). The movant must prove by a preponderance of evidence that the TCPA applies and implicates the movant's constitutional rights. Second, if and only if the movant can prove that the case infringes on its constitutional rights, the burden

shifts to the nonmoving party to establish a prima facie case for each essential element of the claim in question. *Youngkin*, 546 S.W.3d at 679; *see* Tex. Civ. Prac. & Rem. Code § 27.005(c). Establishing a prima facie case means "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (citation omitted). The AFA cannot establish that this case infringes on its constitutional rights, and the court below plainly erred in finding that Plaintiffs failed to establish a prima facie case.

A. The court below erred as a matter of law by finding that Taxpayers failed to present a prima facie case for purposes of the TCPA while simultaneously finding that Taxpayers plead and produced sufficient evidence to go to trial.

The court below erred as a matter of law by finding (a) that plaintiffs failed to present a prima facie case while simultaneously finding (b) that plaintiffs pleaded and produced evidence sufficient to deny defendants' motion for summary judgment and (c) ordering trial on the merits of plaintiffs' constitutional claims. These three things are logically incompatible. It is a matter of blackletter law that if a party has produced sufficient evidence to go to trial, the party has presented a prima facie case.

As the Supreme Court held in *Coward v. Gateway Nat'l Bank of Beaumont*, the term prima facie evidence "mean[s] that the proponent has produced sufficient evidence to go to the trier of fact on the issue." 525 S.W.2d 857, 859 (Tex. 1975). Here, there is no question that is precisely what occurred. Despite multiple attempts by the Defendants to obtain dismissal of this matter—first by two pleas to

the jurisdiction and then by a summary judgment motion—the court below determined that this case should be tried on the merits. Because the court below found there was a triable issue of fact, and because it denied Defendants' motions for summary judgment, Plaintiffs established a prima facie case as a matter of law. *Gold v. Exxon Corp.*, 960 S.W.2d 378, 381 n.2 (Tex. App.—Houston [14th Dist.] 1998) ("the failure to establish a prima facie case generally means that there are no material facts at issue."). The trial court, therefore, plainly erred by finding that Plaintiffs did not present a prima facie case for purposes of the TCPA on the very same claims. That is reversible error.

Indeed, the trial court's orders show that Plaintiffs *did* establish a prima facie case on three distinct occasions.

First, the trial court denied two separate Pleas to the Jurisdiction. On December 8, 2016—two weeks after the AFA filed its motion to dismiss under the TCPA—the City filed a Plea to the Jurisdiction, contending that even if all allegations in the petition were taken as true, Taxpayers failed to state a claim for relief. 2.SCR.3–12. After the AFA's TCPA motion to dismiss was granted, the City filed *another* Plea to the Jurisdiction, contending that collateral estoppel barred Taxpayers' amended petition because the TCPA order purportedly resolved all of Appellants' claims. CR.1907–1921. The trial court also denied that Plea to the Jurisdiction. CR.1969. The denials of these two separate Pleas to the Jurisdiction show that Taxpayers did establish a prima facie case. As the Supreme Court has held, failure to demonstrate a prima facie case "means the court has no jurisdiction and the claim should be dismissed." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex.

2012). But despite the TCPA ruling, Taxpayers' claims *were not* dismissed by the trial court. If Taxpayers had, in fact, failed to establish a prima facie case under the TCPA, those Pleas should have been granted.

Second, the City and the AFA filed a joint motion for summary judgment, contending that no material facts were disputed, and that judgment should be entered in their favor as a matter of law. CR.2416–34. That motion was also partially denied by the trial court, which specifically held that there was a triable issue of fact related to "implementation of [the 2017–2022 CBA] by the City." CR.3804. Summary judgment can only be granted if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp v. Catrett*, 477 U.S. 317, 322–23 (1986). Once again, Taxpayers made a prima facie showing *as a matter of law*, because the trial court denied Defendants' joint motion for summary judgment.

Finally, this case ultimately went to trial *on the merits*. When a party has "produced sufficient evidence to go to the trier of fact" the party *has* established a prima facie case. *Coward*, 525 S.W.2d at 859; *Gold*, 960 S.W.2d at 381. *Coward* and *Gold* are dispositive on this issue. Because the trial court found that Taxpayers produced enough evidence to go to trial, Taxpayers met the "minimal showing [necessary] in order to establish a *prima facie case*." *Gold*, 960 S.W.2d at 382.

The trial court's initial grant of the AFA's TCPA motion to dismiss is thus both contradictory and legally unsupported given its multiple other orders finding a triable issue of fact. Because the trial court held—multiple times—that Taxpayers

pleaded and produced sufficient evidence to go to trial, as a matter of law, Taxpayers established a prima facie case, and the AFA's TCPA motion therefore must be set aside.

B. The AFA cannot meet its burden of establishing that this public interest, taxpayer action impairs its right of association.

1. This case challenging *government* action does not infringe upon the AFA's exercise of its association rights because the AFA has no right to the public financing of its activities and would remain free to associate and communicate even if Taxpayers received all the relief they are requesting.

Nor can the AFA meet its burden of establishing by a preponderance of evidence that this case relates to the exercise of its constitutional right to association. In fact, its admissions in the court below establish that this lawsuit has not infringed, and cannot infringe, on any of the AFA's constitutional or statutory rights.

The "[e]xercise of the right of association" is defined in the TCPA as "join[ing] together to collectively express, promote, pursue, or defend common interests." Tex. Civ. Prac. & Rem. Code § 27.001(2). The AFA argued below that this case is based on AFA's right of association because release time is used for "communications between AFA members about AFA business." CR.232. But this case does not impair AFA's communications *at all*.

The AFA communicated with its members prior to the existence of ABL and would continue to communicate with them in its absence. In other words, even if Plaintiffs receive the relief they request in this case—viz., a cessation of taxpayer-financed release time—the AFA's ability and right to communicate will be entirely unaffected.

Second, AFA existed as an organization before the implementation of the release time provisions at issue. In other words, the AFA was free to associate and communicate—and in fact, was actively associating and communicating—before taxpayers funded ABL. And the AFA will still be free to associate even if taxpayers cease to finance its private activities while using ABL. *See Tex. Dep't of Human Res. V. Tex. State Emps. Union CWA/AFL-CIO*, 696 S.W.2d 164, 171 (Tex. App.—Austin 1985, no pet.).

To the extent the AFA contends that it has a *right* to public financing of its private activities, that argument is squarely foreclosed by Supreme Court precedent. It is a matter of blackletter law that an entity's First Amendment rights are not infringed if the government chooses not to subsidize its activities. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the [First Amendment] right." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983); *see also Tex. Dep't of Human Res.*, 696 S.W.2d at 171 ("It is one thing to say that the State may not affirmatively act to interfere with one's freedom of association … it is quite another thing entirely to say that the State must subsidize one's exercise of his 'liberty.'").

Indeed, the U.S. Supreme Court has expressly rejected the argument that withholding government subsidies from a labor union violates the union's free speech rights. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007) ("unions have no constitutional entitlement to the fees of nonmember-employees."). It has also directly held that forcing citizens to subsidize the associational activities of some particular group itself offends the First Amendment. *See Knox v. SEIU, Local 1000*, 132

S. Ct. 2277, 2295–96 (2012) ("First Amendment values [would be] at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors." (citation omitted)).

Plaintiffs do not challenge the activities of the AFA; they challenge the public financing those activities. In other words, the question here is not whether AFA can engage in assembly or speech, but whether the Texas Constitution allows the City to *subsidize* those activities with taxpayer money, and to cede control over its employees during scheduled work hours. If the AFA wants to pursue its private interests, it can and should do so. But it may not demand that Taxpayers finance those interests.

In short, this is a constitutional challenge to the financing of private activities, not to those activities themselves. This lawsuit and the relief sought does not in any way impair the AFA's associational rights—even if all of Taxpayers' relief were granted, AFA would continue to be free to associate and speak in any lawful manner it desires. As a result, this case simply does not implicate the rights of the AFA under the TCPA or otherwise.

2. The AFA's voluntary intervention back into a case from which it sought to be dismissed as a party shows that this case does not implicate its associational rights and the AFA should be estopped from taking contradictory positions.

By intervening back into a case from which it originally sought to be dismissed as a party, the AFA has waived any right to relief under the TCPA. Under the TCPA, the court shall dismiss the "*moving party*" to a suit if *that party* can show that the

suit "is based on or is in response to" the defendant's exercise of the right to free speech, the right to petition, or the right of association. Tex. Civ. Prac. & Rem. Code § 27.005(b) (emphasis added). Thus, the express language of the TCPA permits only *one* remedy: dismissal of the "moving party," *not* dismissal of an entire suit with *multiple* parties.

That, of course, makes sense, as the purpose of the TCPA is to allow certain defendants whose rights have been implicated to exit a case quickly and cost-effectively. A dismissal under the TCPA is thus defendant-specific, not claim-specific.

Here, the AFA intervened *back into* a lawsuit from which it had previously asked (successfully) to be dismissed. CR.2236–2242. After the trial court entered its TCPA Order dismissing the AFA as a party with respect to Taxpayers' claims, Intervenor Texas and Taxpayers continued to prosecute their constitutional claims against the City. Apparently unwilling to take "yes" for an answer, the AFA then intervened back into the same lawsuit. *Id.* But the AFA cannot have it both ways. For dismissal to have been proper under the TCPA, the AFA had to show, by a preponderance of the evidence, that "the action is based on or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association." Tex. Civ. Prac. & Rem. Code § 27.005(b). In other words, the AFA had to show that it was named as a defendant in this lawsuit in response to its exercise of its First Amendment rights. But the AFA then joined this lawsuit of its own accord after it had been dismissed, which reveals that that cannot have been the case.

Either this lawsuit implicated the AFA's rights, and AFA was properly dismissed as a party under the TCPA, or the case never did implicate their rights, and the TCPA

motion should never have been granted. The AFA's voluntary intervention demonstrates that it is the latter.[3]

Consequently, the AFA should be estopped from claiming relief under the TCPA. By voluntarily intervening back into a case from which it sought to be dismissed, AFA took a position clearly inconsistent with its former position that it should be dismissed as a party. The doctrine of "[j]udicial estoppel 'precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding'" … "'as a means of obtaining unfair advantage.'" *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008) (citations omitted). The doctrine is intended "to prevent parties from playing fast and loose with the judicial system for their own benefit." *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009). *See also Miller v. Gann*, 842 S.W.2d 641, 641 (Tex. 1992) ("The applicability of judicial estoppel is not limited to oral testimony, but applies with equal force to any sworn statement—whether oral or written—made in the course of a judicial proceeding."). This Court should estop the AFA from taking inconsistent positions.

For purposes of the TCPA motion, the AFA took the position that it should be dismissed. Tex. Civ. Prac. & Rem. Code § 27.005(b). That was granted by the trial court, and the AFA was dismissed as a party. The case then proceeded with live

[3] What's more, the trial court later *struck* the AFA's intervention. CR.3807–3808. This shows that—despite another judge previously granting the TCPA motion—the trial court did *not* believe the AFA was a necessary party to this action, or that this action implicated the AFA's rights.

claims by Taxpayers against the City. Later, when the initial collective bargaining agreement expired, Taxpayers amended their petition to address the 2017–2022 CBA, and consistent with the trial court's TCPA order, Taxpayers named only the City as a party. Because the AFA was no longer a party in the case, this amended petition challenging a new CBA constitutes a subsequent proceeding. The AFA then re-intervened, arguing that it was an "essential party" to the case. That voluntary intervention is obviously inconsistent with the position that AFA took when it sought to be dismissed as a party under the TCPA. And allowing it would allow AFA an unfair advantage, because it would allow the AFA to receive the benefit of dismissal under the TCPA, but still remain a party. That is impermissible under the doctrine of judicial estoppel,[4] *Pleasant Glade Assembly of God*, 264 S.W.3d at 6, and the Court should prevent the AFA from having its cake and eating it too.

C. The trial court erred by awarding sanctions in an amount that is punitive and far greater than the evidentiary record indicates is warranted.

Sanctions imposed pursuant to the TCPA must be tied to the Act's purpose of deterrence, and not set at an amount that is more than the evidentiary record specifically demonstrates is necessary to deter a party from the future filing of a lawsuit. To do otherwise would chill the meritorious exercise of First Amendment

[4] The AFA's TCPA motion requesting that it be dismissed as a party also serves as a judicial admission that it is *not* an indispensable party in this case challenging the constitutionality of government action, and as a result, the case does not interfere with or relate to the AFA's constitutional rights. *See Louviere v. Hearst Corp.,* 269 S.W.3d 750, 755 (Tex. App.—Beaumont 2008, no pet.) (A judicial admission "results when a party makes a statement of fact which conclusively disproves a right of recovery or defense currently asserted." (citation omitted)).

rights. Although no sanctions should be awarded in this matter, should this Court choose to uphold some sanctions award, a nominal amount of sanctions would be a sufficient deterrent.

The framework under which sanctions are awarded should be analyzed by first examining the text of the TCPA. *Sylvester v. Tex. Ass'n of Bus.*, 453 S.W.3d 519, 526 (Tex. App.—Austin 2014, no pet.) ("Of primary concern in construing a statute is the express statutory language."). This Court must "construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results." *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010).

The sole purpose of a sanctions award under the TCPA is "to deter the party who brought the legal action from bringing similar actions[]." Tex. Civ. Prac. & Rem. Code § 27.009(a). Here, however, the district court awarded sanctions in an amount that goes beyond that level and is punitive in nature.

The proper rule is set forth in the two-factor test described in *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) "First, a direct relation-ship must exist between the offensive conduct and the sanction imposed," *id.*, which means that the sanction should be "directed against the abuse and toward remedying the prejudice caused the innocent party." *Id.* "Second, just sanctions must not be excessive," *id.*, meaning that it should be "no more severe than neces-sary to satisfy its legitimate purposes." *Id.* "It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.*

These considerations are important because a sanction award must comply with the fundamental fairness requirements of due process. *Id.; see also Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 358 (Tex. 2014) ("Few areas of trial court discretion implicate a party's due process rights more directly than sanctions."). Here, the excessive sanctions award fails both prongs of the *Trans American* test. The record contains no evidence that Mark Pulliam or Jay Wiley have ever filed a frivolous lawsuit. There is also no evidence that they have indicated any intention to file a meritless legal action in the future. Given that they have no history of filing meritless cases in the past, and that there is no reason to think they are likely to do so in the future, the severe sanctions imposed here are improper, and would transform the TCPA into a tool to bar litigants from petitioning the government for a redress of grievances.

The record contains no evidence that Taxpayers filed this legal action in bad faith. Additionally, the case law against their position was not so well developed that it should have been clear that a court would hold the claim was without merit. Neither Pulliam or Wiley is likely to abuse the judicial process, burden the court system, or harass other parties by filing meritless lawsuits in the future. A nominal sanction would deter them from filing meritless lawsuits, while complying with the purpose of the TCPA. This Court should reverse the TCPA award in its entirety, but if any sanctions are upheld, they should be substantially reduced.

D. The TCPA Order violates Taxpayers constitutional right to bring this public interest lawsuit challenging the constitutionality of *government* activity.

Finally, the TCPA order and the order granting attorney fees and sanctions against Taxpayers violates Taxpayers' and their attorneys' First and Fourteenth Amendment rights and upends the purpose of the TCPA. In *NAACP v. Button*, the U.S. Supreme Court held that the activities of a public-interest law firm and its litigation "are modes of expression and association protected by the First and Fourteenth Amendments." 371 U.S. 415, 428–29 (1963). "[A]ssociation for litigation," the Court wrote, "may be the most effective form of political association." *Id.* at 431. When the First Amendment rights of public-interest litigation are implicated by a sanctions order, the Court said, a sanctions order must be narrowly tailored to a compelling government interest, *id.* at 439—a standard that is nearly always fatal, and certainly is in this case.

Indeed, the purpose of the TCPA itself "is to encourage and safeguard the constitutional rights of persons to … 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. This taxpayer, public interest lawsuit is itself a constitutionally protected action by citizens seeking a determination of the legitimacy of government action in good faith. "Courts exist to hear such cases; [and] we should encourage resolution of constitutional arguments in court rather than on the streets." *Wistuber*, 687 P.2d at 358 (finding that an award of attorney fees against taxpayer plaintiffs challenging publicly funded release time is inappropriate because such an award "would be

contrary to public policy" and "would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials.").

The fact that a TCPA motion as well as attorney fees and sanctions were granted in a public interest case where aggrieved citizens are challenging the constitutionality of government activity turns the TCPA on its head, and in the process violates the constitutional rights of Taxpayers. If the trial court can punish citizens for exercising their right to prosecute constitutional claims in court, those rights are illusory. Because the TCPA order cannot survive strict scrutiny, and as a matter of equity and public policy, the TCPA order and the order for attorney fees and sanctions against Taxpayer plaintiffs must be set aside.[5]

Conclusion

Based on the foregoing, this Court should *reverse* the trial court's judgment and enter judgment in favor of Texas and Taxpayers. The Court should also *reverse* and vacate the Court's TCPA order, including the trial court's assessment of attorney fees and sanctions.

[5] Texas joins Part I regarding the unconstitutionality of ABL, but Texas takes no position on the issues addressed in Part II.

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Certificate of Service

On October 22, 2021, this document was served electronically on Paul Matula, lead counsel for Defendant City of Austin, via paul.matula@austintexas.gov and counsel for Defendant Austin Firefighters Assoc., Local 975, B. Craig Deats, cdeats@ddollaw.com; Matt Bachop, mbachop@ddollaw.com; Diana J. Nobile, djn@mselaborlaw.com; and John W. Stewart, jws@mselaborlaw.com.

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Certificate of Compliance

Microsoft Word reports that this brief contains 11,867 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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Robert Henneke

APPENDICES TO
BRIEF FOR PLAINTIFFS/APPELLANTS AND TEXAS

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Appendix 1

NO. D-1-GN-16-004307

MARK PULLIAM AND JAY WILEY, Plaintiffs	§	**IN THE DISTRICT COURT**
and	§	**Filed in The District Court of Travis County, Texas**
TEXAS, Intervenor,	§	**FEB - 7 2017 NNR** At 4:09 P M. Velva L. Price, District Clerk
v.	§	**419th JUDICIAL DISTRICT**
CITY OF AUSTIN, TEXAS; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN, AND AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975	§	**TRAVIS COUNTY, TEXAS**

ORDER GRANTING DEFENDANT AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975'S TEXAS CITIZENS PARTICIPATION ACT MOTION TO DISMISS

On January 17, 2017 came before the court Defendant Austin Firefighters Association, Local 975's (hereafter "Defendant") Texas Citizens Participation Act Motion to Dismiss.

The parties appeared through their attorneys of record. After careful consideration of the Motion and evidence, considering the pleadings, supporting and opposing affidavits, and the arguments of counsel, the Court finds that the Motion is well taken and should be, and hereby is, in all respects GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Texas Citizens Participation Act Motion to Dismiss is GRANTED in all respects.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all claims of Plaintiffs against Defendant are hereby DISMISSED with prejudice in their entirety. Plaintiffs shall take nothing from these claims.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in accordance with Texas Civil Practice & Remedies Code Section 27.009(1), Defendant is entitled to recover its attorneys' fees and costs in bringing its Motion to Dismiss and defending against these claims. The parties are therefore ORDERED to set this matter for a hearing before the Hon. Orlinda L. Naranjo to submit evidence of their fees and costs, and to do so within thirty (30) days of the date of this Order, unless otherwise agreed to by the parties.

SIGNED on this the 7 day of February, 2017.

Judge Orlinda L. Naranjo

Appendix 2

CAUSE NO. D-1-GN-16-004307

ROGER BORGELT,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
AND	§	
	§	
THE STATE OF TEXAS,	§	**TRAVIS COUNTY, TEXAS**
	§	
INTERVENOR-PLAINTIFF,	§	
v.	§	
	§	
CITY OF AUSTIN, TEXAS; et al.	§	
Defendants.	§	**419TH JUDICIAL DISTRICT**

FINAL JUDGMENT

On July 18, 2019, the Court granted Defendants' Cross-Motion for Summary Judgment. Because the order left certain matters undecided, it was interlocutory. On March 8 and 9, 2021 came to be heard by the court the remaining claims in this matter. Over two days the Court heard evidence, and having considered the evidence and the arguments of counsel, the Court finds that the Plaintiff Roger Borgelt and Intervenor-Plaintiff the State of Texas have not shown themselves to be entitled to any relief on their claims against the Defendants.

On May 1, 2019, came to be heard Defendant Austin Fire Fighters Association, Local 975's (AFA)'s Motion for an Award for Costs, Attorneys' Fees, Other Expenses, and Sanctions against non-suited Plaintiffs Mark Pulliam and Jay Wiley. On July 18, 2019, the Court GRANTED Defendant AFA's Application for Attorneys' Fees related to the Order Granting Defendant Austin Firefighters' Association, Local 975's Texas Citizen Participation Act Motion to Dismiss in the amount of $115,250.00 and sanctions of $75,000.00.

It is therefore ORDERED that Plaintiff Roger Borgelt and Intervening Plaintiff the State of Texas take nothing, that their claims against the Defendants be dismissed with prejudice and

that final judgment is hereby ENTERED in favor of the Defendants the City of Austin and Marc Ott, in his official capacity. It is also ORDERED that Mark Pulliam and Jay Wiley shall pay the Austin Firefighters Association, Local 975 the amount of $190,250. All other relief requested by these parties and not granted herein is DENIED. This order, together with the summary judgment order and the fee order, disposes of all claims and all parties. This order is intended to be an appealable final judgment.

SO ORDERED.

SIGNED on the 24th day of March, 2021.

Jessica Mangrum

THE HONORABLE JESSICA MANGRUM
JUDGE PRESIDING

Appendix 3

CAUSE NO. D-1-GN-16-004307

ROGER BORGELT, *Plaintiff,* And TEXAS, *Intervenor-Plaintiff,* v. CITY OF AUSTIN, TEXAS; MARC A. OTT, in his official capacity as City Manager of the City of Austin, *Defendants*.	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 419th JUDICIAL DISTRICT

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following amended findings of fact and conclusions of law:

I. AMENDED FINDINGS OF FACT

1. The purpose of the Collective Bargaining Agreement (CBA) between the Austin Fire Department (AFD) and the Austin Firefighters Association, Local # 975 (AFA), as stated in the agreement, is to achieve and maintain harmonious labor relations between the parties, to establish benefits, rates of pay, hours of work, and other terms and conditions of employment for all members of the bargaining unit and to provide for the equitable and orderly adjustment of grievances that may arise during the term of the agreement.

2. The Austin City Council ratified the CBA in a public vote.

3. As stated in the CBA, the parties agreed that the City maintains all inherent rights to manage AFD and its work force which it enjoys under appliable law, subject to applicable federal and statute statutes, local ordinances, resolutions, and rules, except as provided in the CBA.

4. The CBA allows the City and the AFA to agree on terms of hiring and promotion beyond those that are specified in Chapter 143 of the Local Government Code, which allows the AFD to hire and promote candidates based on more than just the candidate's test score.

5. Employing a staff of individuals who are trained to effectively suppress fires and protect public safety is a public purpose.

6. Good labor relations between the City and the AFA, including a duly negotiated and ratified labor agreement, are integral in AFD achieving its purpose, mission, vision, goals and core values.

7. The AFA pledged in the CBA to support the service and mission of the AFD, to constructively support the goals and objectives of the AFD, and to abide by the statutorily imposed no strike or work slowdown obligations placed on it.

8. The mission of the AFA includes furthering professional standards for firefighters, promoting fire fighter and public safety, and working towards more harmonious labor relations.

9. The missions of the AFD and AFA overlap and are not mutually exclusive.

10. The CBA benefits the public in general.

11. The City does not give any public funds to the AFA.

12. The CBA constitutes a bargained-for exchange of valid consideration on all sides.

13. The policy of the State of Texas as stated in Chapter 174 of the Texas Local Government Code is that firefighters, like employees in the private sector, should have the right to organize for collective bargaining.

14. Collective bargaining between the City and AFA is a fair and practical method for determining compensation and other conditions of employment for AFD firefighters.

15. Collective bargaining and the establishment of "expeditious, effective, and binding" contractual arbitration and enforcement procedures promotes the health, safety, and welfare of the public by ensuring "high morale of fire fighters . . . . and the efficient operation of the departments." TEX. LOCAL GOV'T CODE § 174.002(b), (e).

16. Achieving and maintaining harmonious relations between public safety employees and local government is a public purpose.

17. Agreeing to a method of equitable and orderly adjustment of firefighter grievances, as described in the CBA, is a public purpose.

18. The use of association business leave (ABL) by City of Austin firefighters is governed by Art. 10 of the CBA.

19. ABL is a type of paid leave available to City of Austin firefighters.

20. The individual who was designated by the AFD Fire Chief to review ABL requests for most of the period at issue in this case was Assistant Chief Aaron Woolverton.

21. Art. 10, Sec. 1(C) of the CBA requires that requests for ABL made by other authorized representatives of the AFA be made in writing and submitted to AFD HQ support staff at least three days in advance, and may be made in person, by fax, or by e-mail by noon of the day the request is due.

22. AFD, through Woolverton, has denied ABL requests that are untimely and do not comply with Art. 10 of the CBA.

23. Individual AFD firefighters must submit their own requests to use ABL and may not make a request on behalf of another member.

24. AFD management including Woolverton can and do review the written requests for ABL made by other authorized representatives of the AFA and has denied those requests when they do not comply with Art. 10 of the CBA or when the requests would interfere with the operational needs of the department.

25. The City is not aware of any instance where ABL was utilized by an authorized representative of the AFA for legislative and/or political activities at the State or National level, except for activities that relate to wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit, as described in Art. 10, Sec. 1(B)(2) of the CBA.

26. The City is not aware of any instance where ABL was utilized by an authorized representative of the AFA for legislative and/or political activities at the local, state, or national levels that were contrary to the City's adopted legislative program, as described in Art. 10, Sec. 1(B)(2) of the CBA.

27. The City is not aware of any instance where ABL was utilized by the AFA President or an authorized representative of the AFA for activities prohibited by Section 143.086 of the Texas Local Government Code or the Texas Ethics Commission, as described in Art. 10, Sec. 1(B)(2) of the CBA.

28. AFD has authorized firefighters' use of ABL to compete in the Fire Fighter Combat Challenge event, which promotes firefighter fitness and furthers the Department's mission of maintaining a healthy and highly performing workforce.

29. Ensuring that first responders like AFD firefighters are physically fit serves a public purpose.

30. All AFD members are expected to comply with applicable personnel policies and AFD's Code of Conduct while they are out on leave, including ABL.

31. The City has and continues to monitor ABL usage by compiling quarterly ABL usage reports, which show the amount of ABL used and the general nature of the business that was conducted while the AFD firefighters used that leave.

32. AFA president Bob Nicks is required to follow the personnel policies of the City and the AFD.

33. Bob Nicks is required to follow AFD's Code of Conduct at all times when using ABL.

34. Bob Nicks is required to comply with continuing education requirements, EMT requirements, and any applicable credentials by the Austin/Travis County Office of the Medical Director, just as any other member of the AFD.

35. As an AFD member, Bob Nicks may be disciplined by the City for failing to follow applicable personnel policies, AFD's Code of Conduct, or applicable continuing education and medical credentialing requirements.

36. Bob Nicks regularly attends meetings with AFD management and meets with the Fire Chief when requested to do so.

37. If there were ever a conflict between Bob Nicks' duties as AFA president under the Association's bylaws and the personnel policies and Code of Conduct of the AFD, Nicks would have to comply with AFD's personnel policies and Code of Conduct.

38. AFA President Bob Nicks is currently using ABL on a full-time basis, meaning that he spends 40 hours on ABL per week. In addition to his time on ABL, he estimates that he spends many hours more per week performing work as AFA President, while not on ABL.

39. The AFA uses ABL for "other association business" including station visits.

40. The AFA uses ABL for "other association business" including organizing and working third-party charity events.

41. Any member of the bargaining unit may request to use ABL as an "other authorized representative."

II. AMENDED CONCLUSIONS OF LAW

1. Plaintiff argues that the City's implementation of ABL under the CBA violates what it refers to as the "gift clause" or the "gift clauses" of the Texas Constitution, referring to sections 50, 51, and 52-a of Art. III, and section 6-a of Art. XVI of the Texas Constitution.

2. The primary purpose of the gift clause is to prohibit the *gratuitous* grant of public funds. *See Tex. Mun. League v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 389 (Tex. 2002) (stating that the purpose of Art. III, Sec. 52 is to prevent the "***gratuitous*** appropriation of public money or property" (emphasis added)); *State v. Austin*, 331 S.W.2d 737, 742 (Tex. 1960) (same, addressing a challenge based on Art. III, Sec. 50-51, and Art. XVI, Sec. 6); *Byrd v. Dallas*, 6 S.W.2d 738, 740 (Tex. 1928) (same, concerning Art. III, Sec. 51-52, Art. XVI, Sec. 6, and others).

3. The Texas Constitution's prohibition on "authorizing a political subdivision 'to grant public money' means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations. A political subdivision's paying public money is not 'gratuitous' if the political subdivision receives return consideration." *Tex. Mun. League*, 74 S.W.3d at 383 (emphasis in original) (citations omitted). If there is valid consideration, there is no gift clause violation: "consideration renders the provisions constitutional." *Id*. at 384.

4. When analyzing contractual consideration, "individual paragraphs of a contract are not separate and divisible contracts." *Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 86-87 (Tex. App.—Amarillo 1994, writ denied) (citing *Pace Corp. v. Jackson*, 284 S.W.2d 340, 344 (Tex. 1955)). Rather, the contract must be analyzed as a whole, even when only one article or clause has been challenged. *See, e.g., In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) ("[W]hen an arbitration clause is part of a larger, underlying contract, the remainder of the contract may suffice as consideration for the arbitration clause."); *see also Howell*, 890 S.W.2d at 86-87 ("[A]n individual paragraph is merely a part of an entire, integrated contract between the contracting parties. Mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole."); *Farmers' State Bank v. Mincher*, 290 S.W. 1090, 1091 (Tex. 1927) ("[T]he provision relating to interest is subsidiary to the principal contract and is supported by the same consideration. When a promise is thus supported by a valuable consideration, the fact that the promise is not also supported by a corresponding

obligation on the part of the promisee becomes of no importance."); *Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 77 (Tex. App.—Austin 1982, no pet.) ("A basic principle of contract law is that one consideration will support multiple promises by the other contracting party." (citing Restatement (Second) of Contracts, § 80(1) (1981))).

5. "Moreover, [the Texas Supreme Court] has determined that section 52(a) does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit in return." *Tex. Mun. League*, 74 S.W.3d at 383-84 (citations omitted). In turn, a payment "serves a legitimate public purpose" if (1) "the statute [rendering the payment]'s predominant purpose is to accomplish a public purpose, not to benefit private parties;" (2) the municipality "retain[s] public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment;" and (3) "the political subdivision receives a return benefit." *Id*. (citations omitted).

6. The City's implementation of ABL under the CBA does not violate the requirements of Art. III, §50 of the Texas Constitution.

7. The City's implementation of ABL under the CBA does not violate the requirements of Art. III, §51 of the Texas Constitution.

8. The City's implementation of ABL under the CBA does not violate the requirements of Art. III, §52(a) of the Texas Constitution.

9. The City's implementation of ABL under the CBA does not violate the requirements of Art. XVI, §6(a) of the Texas Constitution.

10. The CBA, containing the ABL article, is supported by an exchange of valid, bargained-for consideration on both sides.

11. The CBA, including the ABL article and the City's implementation of ABL under the CBA, accomplishes a predominantly public purpose and is not predominantly a benefit to private parties.

12. The CBA, including the ABL article and the City's implementation of ABL under the CBA, permits the City to maintain sufficient public control over City funds to ensure they accomplish a public purpose and the public's investment is protected.

13. The CBA, including the ABL article and the City's implementation of ABL under the CBA, ensures that the City receives a return benefit, and the City receives a clear public benefit in return.

14. The City's implementation of ABL under the CBA is not a "gift" to any individual or entity. *See Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928) ("There is no reason why a city may not engage its servants and employees upon any terms of payment acceptable to both parties.").

15. ABL is a bargained-for provision of a CBA that sets, among other things, the conditions of employment for the City of Austin's firefighters. The CBA, City policies, and in particular the rules and practices AFD follows in approving and accounting for the use of ABL by AFA president Bob Nicks and other Austin firefighters provides sufficient control to ensure that the public purposes of the CBA and the ABL provision are accomplished and to protect the public's investment.

16. Plaintiff and the State of Texas have not established that they will be irreparably harmed by the alleged actions of the City if they are not restrained by a permanent injunction.

17. Plaintiff and the State of Texas are not entitled to a permanent injunction against the City, as prayed for in their pleading, as a matter of law or equity.

18. Plaintiff and the State of Texas are not entitled to recover any attorneys' fees from the City under Texas Civil Practices and Remedies Code §37.009.

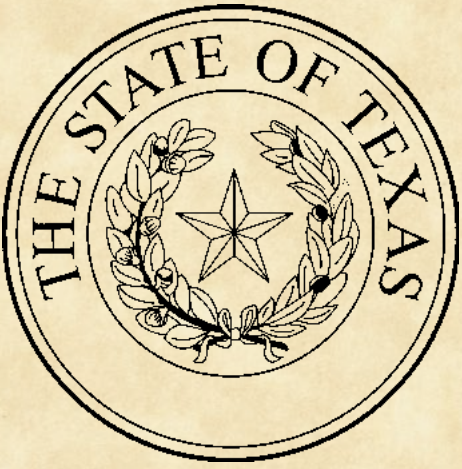
19. Plaintiff and the State of Texas are not entitled to recover any court costs from the City under Texas Civil Practices and Remedies Code §37.009.

SIGNED AND ENTERED this 11th day of May, 2021.

Jessica Mangrum

JESSICA MANGRUM, JUDGE PRESIDING

Appendix 4



Texas Constitution

Includes Amendments Through the November 5, 2019, Constitutional Amendment Election

Sec. 49-p. GENERAL OBLIGATION BONDS FOR HIGHWAY IMPROVEMENTS. (a) To provide funding for highway improvement projects, the legislature by general law may authorize the Texas Transportation Commission or its successor to issue general obligation bonds of the State of Texas in an aggregate amount not to exceed $5 billion and enter into related credit agreements. The bonds shall be executed in the form, on the terms, and in the denominations, bear interest, and be issued in installments as prescribed by the Texas Transportation Commission or its successor.

(b) A portion of the proceeds from the sale of the bonds and a portion of the interest earned on the bonds may be used to pay:

(1) the costs of administering projects authorized under this section;

(2) the cost or expense of the issuance of the bonds; and

(3) all or part of a payment owed or to be owed under a credit agreement.

(c) The bonds authorized under this section constitute a general obligation of the state. While any of the bonds or interest on the bonds is outstanding and unpaid, there is appropriated out of the first money coming into the treasury each fiscal year, not otherwise appropriated by this constitution, an amount sufficient to pay the principal of and interest on the bonds that mature or become due during the fiscal year, including an amount sufficient to make payments under a related credit agreement.

(d) Bonds issued under this section, after approval by the attorney general, registration by the comptroller of public accounts, and delivery to the purchasers, are incontestable and are general obligations of the State of Texas under this constitution. (Added Nov. 6, 2007.)

Sec. 50. LOAN OR PLEDGE OF CREDIT OF THE STATE. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

Sec. 50a. (Repealed Nov. 5, 2013.)

Sec. 50b. (Repealed Nov. 2, 1999.) (Temporary transition provisions for Sec. 50b: see Appendix, Note 1.)

Sec. 50b-1. (Repealed Nov. 2, 1999.) (Temporary transition provisions for Sec. 50b-1: see Appendix, Note 1.)

Sec. 50b-2. (Repealed Nov. 2, 1999.) (Temporary transition provisions for Sec. 50b-2: see Appendix, Note 1.)

Sec. 50b-3. (Repealed Nov. 2, 1999.) (Temporary transition provisions for Sec. 50b-3: see Appendix, Note 1.)

Sec. 50b-4. ADDITIONAL STUDENT LOANS. (a) The legislature by general law may authorize the Texas Higher Education Coordinating Board or its successor or successors to issue and sell general obligation bonds of the State of Texas in an amount authorized by constitutional amendment or by a debt proposition under

Sec. 50-g. GENERAL OBLIGATION BONDS FOR MAINTENANCE, IMPROVEMENT, REPAIR, OR CONSTRUCTION PROJECTS AND FOR PURCHASE OF EQUIPMENT. (a) The legislature by general law may authorize the Texas Public Finance Authority to provide for, issue, and sell general obligation bonds of the State of Texas in an amount not to exceed $1 billion and to enter into related credit agreements. The bonds shall be executed in the form, on the terms, and in the denominations, bear interest, and be issued in installments as prescribed by the Texas Public Finance Authority.

(b) Proceeds from the sale of the bonds shall be deposited in a separate fund or account within the state treasury created by the comptroller of public accounts for this purpose. Money in the separate fund or account may be used only to pay for:

(1) maintenance, improvement, repair, or construction projects authorized by the legislature by general law or the General Appropriations Act and administered by or on behalf of the Texas Building and Procurement Commission, the Parks and Wildlife Department, the adjutant general's department, the Department of State Health Services, the Department of Aging and Disability Services, the Texas School for the Blind and Visually Impaired, the Texas Youth Commission, the Texas Historical Commission, the Texas Department of Criminal Justice, the Texas School for the Deaf, or the Department of Public Safety of the State of Texas; or

(2) the purchase, as authorized by the legislature by general law or the General Appropriations Act, of needed equipment by or on behalf of a state agency listed in Subdivision (1) of this subsection.

(c) The maximum net effective interest rate to be borne by bonds issued under this section may be set by general law.

(d) While any of the bonds or interest on the bonds authorized by this section is outstanding and unpaid, from the first money coming into the state treasury in each fiscal year not otherwise appropriated by this constitution, an amount sufficient to pay the principal and interest on bonds that mature or become due during the fiscal year and to make payments that become due under a related credit agreement during the fiscal year is appropriated, less the amount in the sinking fund at the close of the previous fiscal year.

(e) Bonds issued under this section, after approval by the attorney general, registration by the comptroller of public accounts, and delivery to the purchasers, are incontestable and are general obligations of the State of Texas under this constitution. (Added Nov. 6, 2007.)

Sec. 51. GRANTS OF PUBLIC MONEY PROHIBITED. The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity. (Amended Nov. 6, 1894, Nov. 1, 1898, Nov. 8, 1904, Nov. 8, 1910, Nov. 5, 1912, Nov. 4, 1924, Nov. 6, 1928, Nov. 5, 1968, and Nov. 2, 1999.) (Temporary transition provisions for Sec. 51: see Appendix, Note 1.)

(b) Under Legislative provision, any county, political subdivision of a county, number of adjoining counties, political subdivision of the State, or defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of two-thirds majority of the voting qualified voters of such district or territory to be affected thereby, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit:

(1) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(2) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(3) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

(c) Notwithstanding the provisions of Subsection (b) of this Section, bonds may be issued by any county in an amount not to exceed one-fourth of the assessed valuation of the real property in the county, for the construction, maintenance, and operation of macadamized, graveled, or paved roads and turnpikes, or in aid thereof, upon a vote of a majority of the voting qualified voters of the county, and without the necessity of further or amendatory legislation. The county may levy and collect taxes to pay the interest on the bonds as it becomes due and to provide a sinking fund for redemption of the bonds.

(d) Any defined district created under this section that is authorized to issue bonds or otherwise lend its credit for the purposes stated in Subdivisions (1) and (2) of Subsection (b) of this section may engage in fire-fighting activities and may issue bonds or otherwise lend its credit for fire-fighting purposes as provided by law and this constitution.

(e) A county, city, town, or other political corporation or subdivision of the state may invest its funds as authorized by law. (Amended Nov. 8, 1904; Subsecs. (a) and (b) amended and (c) added Nov. 3, 1970; Subsec. (d) added Nov. 7, 1978; Subsec. (a) amended Nov. 4, 1986; Subsec. (e) added Nov. 7, 1989; Subsecs. (a), (b), and (c) amended Nov. 2, 1999.) (Temporary transition provisions for Sec. 52: see Appendix, Note 1.)

Sec. 52-a. PROGRAMS AND LOANS OR GRANTS OF PUBLIC MONEY FOR ECONOMIC DEVELOPMENT. Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on

agriculture, or the development or expansion of transportation or commerce in the state. Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue. A program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character. (Added Nov. 3, 1987; amended Nov. 8, 2005.)

Sec. 52-b. LOAN OF STATE'S CREDIT, GRANT OF PUBLIC MONEY, OR ASSUMPTION OF DEBT FOR TOLL ROAD PURPOSES. The Legislature shall have no power or authority to in any manner lend the credit of the State or grant any public money to, or assume any indebtedness, present or future, bonded or otherwise, of any individual, person, firm, partnership, association, corporation, public corporation, public agency, or political subdivision of the State, or anyone else, which is now or hereafter authorized to construct, maintain or operate toll roads and turnpikes within this State except that the Legislature may authorize the Texas Department of Transportation to expend, grant, or loan money, from any source available, for the acquisition, construction, maintenance, or operation of turnpikes, toll roads, and toll bridges. (Added Nov. 2, 1954; amended Nov. 5, 1991, and Nov. 6, 2001.)

Sec. 52-c. (Blank.)

Sec. 52d. COUNTY OR ROAD DISTRICT TAX FOR ROAD AND BRIDGE PURPOSES IN HARRIS COUNTY. (a) Upon the vote of a majority of the qualified voters so authorizing, a county or road district may collect an annual tax for a period not exceeding five (5) years to create a fund for constructing lasting and permanent roads and bridges or both. No contract involving the expenditure of any of such fund shall be valid unless, when it is made, money shall be on hand in such fund.

(b) At such election, the Commissioners' Court shall submit for adoption a road plan and designate the amount of special tax to be levied; the number of years said tax is to be levied; the location, description, and character of the roads and bridges; and the estimated cost thereof. The funds raised by such taxes shall not be used for purposes other than those specified in the plan submitted to the voters. Elections may be held from time to time to extend or discontinue said plan or to increase or diminish said tax. The Legislature shall enact laws prescribing the procedure hereunder.

(c) The provisions of this section shall apply only to Harris County and road districts therein. (Added Aug. 23, 1937; amended Nov. 2, 1999.) (Temporary transition provisions for Sec. 52d: see Appendix, Note 1.)

ARTICLE XVI

GENERAL PROVISIONS

Sec. 1. OFFICIAL OATH OF OFFICE. (a) All elected and appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God."

(b) All elected or appointed officers, before taking the Oath or Affirmation of office prescribed by this section and entering upon the duties of office, shall subscribe to the following statement:

"I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God."

(c) Members of the Legislature, the Secretary of State, and all other elected and appointed state officers shall file the signed statement required by Subsection (b) of this section with the Secretary of State before taking the Oath or Affirmation of office prescribed by Subsection (a) of this section. All other officers shall retain the signed statement required by Subsection (b) of this section with the official records of the office. (Amended Nov. 8, 1938, and Nov. 6, 1956; Subsecs. (a)-(c) amended and (d)-(f) added Nov. 7, 1989; Subsecs. (a) and (b) amended, Subsecs. (c) and (d) deleted, and Subsecs. (e) and (f) amended and redesignated as Subsec. (c) Nov. 6, 2001.) (Temporary transition provision for Sec. 1: see Appendix, Note 3.)

Sec. 2. EXCLUSIONS FROM OFFICE FOR CONVICTION OF HIGH CRIMES. Laws shall be made to exclude from office persons who have been convicted of bribery, perjury, forgery, or other high crimes. (Amended Nov. 6, 2001.) (Temporary transition provision for Sec. 2: see Appendix, Note 3.)

Sec. 3. (Repealed Aug. 5, 1969.)

Sec. 4. (Repealed Aug. 5, 1969.)

Sec. 5. DISQUALIFICATION FROM OFFICE FOR GIVING OR OFFERING BRIBE. Every person shall be disqualified from holding any office of profit, or trust, in this State, who shall have been convicted of having given or offered a bribe to procure his election or appointment.

Sec. 6. APPROPRIATIONS FOR PRIVATE PURPOSES; ANNUAL ACCOUNTING OF PUBLIC MONEY; ACCEPTANCE AND EXPENDITURE OF CERTAIN MONEY FOR PERSONS WITH DISABILITIES. (a) No appropriation for private or individual purposes shall be made, unless authorized by this Constitution. A regular statement, under oath, and an account of the receipts and expenditures of all

public money shall be published annually, in such manner as shall be prescribed by law.

(b) State agencies charged with the responsibility of providing services to those who are blind, crippled, or otherwise physically or mentally handicapped may accept money from private or federal sources, designated by the private or federal source as money to be used in and establishing and equipping facilities for assisting those who are blind, crippled, or otherwise physically or mentally handicapped in becoming gainfully employed, in rehabilitating and restoring the handicapped, and in providing other services determined by the state agency to be essential for the better care and treatment of the handicapped. Money accepted under this subsection is state money. State agencies may spend money accepted under this subsection, and no other money, for specific programs and projects to be conducted by local level or other private, nonsectarian associations, groups, and nonprofit organizations, in establishing and equipping facilities for assisting those who are blind, crippled, or otherwise physically or mentally handicapped in becoming gainfully employed, in rehabilitating and restoring the handicapped, and in providing other services determined by the state agency to be essential for the better care or treatment of the handicapped.

The state agencies may deposit money accepted under this subsection either in the state treasury or in other secure depositories. The money may not be expended for any purpose other than the purpose for which it was given. Notwithstanding any other provision of this Constitution, the state agencies may expend money accepted under this subsection without the necessity of an appropriation, unless the Legislature, by law, requires that the money be expended only on appropriation. The Legislature may prohibit state agencies from accepting money under this subsection or may regulate the amount of money accepted, the way the acceptance and expenditure of the money is administered, and the purposes for which the state agencies may expend the money. Money accepted under this subsection for a purpose prohibited by the Legislature shall be returned to the entity that gave the money.

This subsection does not prohibit state agencies authorized to render services to the handicapped from contracting with privately-owned or local facilities for necessary and essential services, subject to such conditions, standards, and procedures as may be prescribed by law. (Amended Nov. 8, 1966.)

Sec. 7. (Repealed Aug. 5, 1969.)

Sec. 8. (Redesignated as Sec. 14, Art. IX, Nov. 6, 2001.) (Temporary transition provision for Sec. 8: see Appendix, Note 3.)

Sec. 9. NO FORFEITURE OF RESIDENCE BY ABSENCE ON PUBLIC BUSINESS. Absence on business of the State, or of the United States, shall not forfeit a residence once obtained, so as to deprive any one of the right of suffrage, or of being elected or appointed to any office under the exceptions contained in this Constitution.

Sec. 10. DEDUCTIONS FROM SALARY OF PUBLIC OFFICER FOR NEGLECT OF DUTY. The Legislature shall provide for deductions from the salaries of public

Appendix 5

V.T.C.A., Civil Practice & Remedies Code § 27.001

§ 27.001. Definitions

Effective: September 1, 2019
Currentness

In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) “Governmental proceeding” means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) “Legal action” means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

(B) alternative dispute resolution proceedings; or

(C) post-judgment enforcement actions.

(7) “Matter of public concern” means a statement or activity regarding:

(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;

(B) a matter of political, social, or other interest to the community; or

(C) a subject of concern to the public.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Credits

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 1, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.001, TX CIV PRAC & REM § 27.001

Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Appendix 6

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.002

§ 27.002. Purpose

Effective: June 17, 2011
Currentness

The purpose of this chapter is 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.

Credits
Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011.

V. T. C. A., Civil Practice & Remedies Code § 27.002, TX CIV PRAC & REM § 27.002
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Appendix 7

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.005

§ 27.005. Ruling

Effective: September 1, 2019
Currentness

(a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date the hearing on the motion concludes.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to:

(1) the party's exercise of:

(A) the right of free speech;

(B) the right to petition; or

(C) the right of association; or

(2) the act of a party described by Section 27.010(b).

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

Credits
Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 2, eff. June 14, 2013; Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 3, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.005, TX CIV PRAC & REM § 27.005

Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Appendix 8

V.T.C.A., Civil Practice & Remedies Code § 27.009

§ 27.009. Damages and Costs

Effective: September 1, 2019
Currentness

(a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court :

(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action; and

(2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.

Credits
Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 8, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.009, TX CIV PRAC & REM § 27.009
Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

Appendix 9

§ 2. - OFFICERS, ETC. — IMPROPER ACTS OF.

Any officer or employee of the city who by solicitation or otherwise shall exert his/her influence directly or indirectly to influence any other officer or employee of the city to favor any particular person or candidate for office in the city shall be guilty of a misdemeanor and upon conviction thereof shall forfeit his or her office or employment and be punished by a fine not exceeding $200.00. Officers and employees shall not be permitted to take an active part in any political campaign of another for an elective position of the city if they are in uniform or on active duty. The term "active part" means making political speeches, passing out cards, or other political literature, writing letters, signing petitions, actively and openly soliciting votes, and making public derogatory remarks about candidates for such elective positions. City officers and employees are prohibited from contributing or using city resources, equipment, or money for election campaigning.

Officers and employees coming under the provisions of this act are not required to contribute to any political fund or render any political service to any person or party whatsoever; and no person shall be removed, reduced in classification or salary, or otherwise prejudiced by refusing to do so; and any official who attempts the same shall be guilty of violating the provisions of this section.

Amendment note: *Section 2 appears as amended at the election of January 19, 1985. It had been derived from the Charter of 1909, § 12, Art. XV, Sp. laws of Texas, 1909, 31st Leg., P. 8, Ch. 2.*

Source: Ord. No. 20180809-113 , Pt. 7, 8-20-18/election of 11-6-18.

Appendix 10

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

CITY OF AUSTIN

AND

AUSTIN FIREFIGHTERS ASSOCIATION

LOCAL 975

EFFECTIVE OCTOBER 1, 2017

ARTICLE 10
ASSOCIATION BUSINESS LEAVE

Section 1. Association Business Leave

A. Creation of Association Business Leave

Authorized Association Representatives shall be permitted to have paid time off, designated as Association Business Leave (ABL), to conduct Association business under the conditions specified in this Article.

B. Permitted Uses of ABL

1. The Association President may use ABL for any lawful Association business activities consistent with the Association's purposes.

2. For other Authorized Association Representatives, ABL may be used for Association business activities that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of this Article. Association business is defined as 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. It is specifically understood and agreed that ABL shall not be utilized for legislative and/or political activities at the State or National level, unless those activities relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit. At the local level, the use of ABL for legislative and/or political activities shall be limited to raising concerns regarding firefighter safety. Association Business Leave shall not be utilized for legislative and/or political activities related to any election of public officials or City Charter amendments. Association Business Leave shall not be utilized for legislative and/or political activities that are sponsored or supported by the Association's Political Action Committee(s). Association Business Leave shall not be utilized for legislative and/or political activities at the local, state, or national levels that are contrary to the City's adopted legislative program. No Association Business Leave shall be utilized for activities prohibited by Section 143.086 of Chapter 143 or by the Texas Ethics Commission. Nothing contained in this Subsection is intended to limit the use of the individual firefighter's vacation time for legislative and/or political activities.

C. Written Request Required

All requests for ABL must be in writing and submitted at least 3 business days in advance to HQ support staff. To be considered timely, the request must be received in person, by fax, or by e-mail by noon of the day notice is due.

D. Approval of ABL Requests

The Fire Chief or the Fire Chiefs designee shall approve timely ABL requests, subject only to the operational needs of the Department.

Section 2. Funding and Administration of the Association Business Leave Pool

A. Manner of Funding

For the timeframe between the effective date of this Agreement and through December 31, 2017, the City will fund a pro rata number of hours of Association Business Leave

to a pool of leave time to be used in accordance with this Article. Beginning January 1, 2018, and each subsequent year during the term of this Agreement, during the first ten (10) days of the calendar year, the City will contribute 5,600 hours of Association Business Leave to a pool of leave time which may be used in accordance with this Article. The City will track deductions from the pool as Association Business Leave is used.

B. Administration of Pool

Up to one thousand (1,000) hours remaining at the end of a calendar year will remain in the pool for use in the following year. However, at no time may the pool exceed sixty six hundred (6,600) hours. Up to one thousand (1000) hours in the pool at the end of the Agreement will be available for use in the following year for Association Business Leave activities. The City and the Association shall track utilization of ABL.

C. Use of Association Business Leave by Association President

Beginning January 1, 2018, the Association President shall be permitted up to 2080 hours of Association Business Leave from the pool balance per year, less accrued leave time, which must be used under AFD policies, and shall be assigned to a 40 hour work week. The Association President shall account for all leave time taken under such status through the Fire Chiefs office and such time shall be subtracted from the Association leave pool. The Association President will not be entitled to overtime pay from the City for any hours using ABL leave. The Association President may at any time be required to return to duty if an emergency situation exists. The Association President may also be assigned to any special projects at the discretion of the Fire Chief. The pool balance will not be reduced by any hours that the President actually works at the direction of the Fire Chief. At the end of his/her term, the Association President will be allowed to return to the assignment s/he occupied before commencing ABL to perform duties as Association President.

D. Administrative Procedures

Administrative procedures and details regarding the implementation of this Article shall be specified in Departmental policy.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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