No. 03-21-00227-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AT AUSTIN, TEXAS

ROGER BORGELT, MARK PULLIAM, JAY WILEY, AND THE STATE OF TEXAS,
Plaintiffs/Appellants,

v.

CITY OF AUSTIN, TEXAS; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975,
Defendants/Appellees.

APPELLEES CITY OF AUSTIN, TEXAS; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975'S BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellees join Appellants' request for oral argument in this case.

ISSUES PRESENTED

Appellees submit that the issues presented by the Appellants' appeal are more accurately stated as follows:

1. Have Appellants established a genuine issue of material fact as to whether a bargained-for contract term that provides for a shared leave bank to the City of Austin's fire fighters and that is subject to numerous rules, restrictions, and approval requirements, constitutes an unconstitutional "gift" of public funds?

2. Have Appellants established that the trial court's bench trial verdict determining that the challenged, bargained-for contract term—which provides for a shared leave bank to the City of Austin's fire fighters and that is subject to numerous rules, restrictions, and approval requirements—was not an unconstitutional "gift" of public funds, should be overturned?

3. Did the trial court err in granting Appellee AFA's motion to dismiss under the TCPA and, if not, did the trial court abuse its discretion in awarding statutorily mandated sanctions as a result? (Appellees City of Austin and its City Manager Marc A. Ott take no position in this brief with regard to Issue 3 for the reason set out in fn. 16.)

SUPPLEMENTAL STATEMENT OF THE CASE

Nature of the Case

This appeal arises from a challenge to a leave provision of the Austin Fire Department's Collective Bargaining Agreement ("CBA"), which Appellants wrongly argue is an unconstitutional "gift" of public funds to the City's hardworking fire fighters and their employee association, called the Austin Firefighters' Association, Local 975 ("AFA" or "Association"). The leave provision in question, Article 10 of the CBA, allows for a shared bank of "Association Business Leave" to be used by Austin fire fighters for activities consistent with the Fire Department's or the Association's missions, and subject to numerous rules, restrictions, and approval requirements. The fire fighters' CBA was extensively negotiated and can in no sense be considered a "gift" of public funds, and yet according to Appellants, this indisputably bargained-for provision of an indisputably valid agreement is somehow a gratuitous grant of public funds to private interests in violation of the Texas Constitution's "Gift Clause."

The trial court correctly rejected the merits of Appellants' claims several times over. On February 7, 2017, the trial court dismissed Appellants Jay Wiley and Mark Pulliam's claims against AFA pursuant to the Texas Citizens Participation Act and later awarded fees and sanctions. Despite having their claims adjudicated meritless,

Appellants persisted in litigating their case as "against" the City of Austin only.

On November 2, 2017, Appellants repleaded their claims against a *new* CBA entered into by the City and its fire fighters, necessitating the AFA's return to the case, and on July 18, 2019, the trial court granted summary judgment in favor of the Appellees on all claims relating to the CBA and its terms but allowed the narrow issue of the City's implementation of the CBA to proceed to trial. Following a two-day bench trial on March 8 and 9, 2021, the trial court issued a final judgment in Appellees' favor on all claims. Having had their claims ruled meritless three times over by the trial court, Appellants now appeal.

Supplemental Course of Proceedings

Appellees respectfully provide the following supplemental procedural summary:

On September 7, 2016, Plaintiffs Mark Pulliam and Jay Wiley initiated this case by filing a petition against the Defendants-Appellee Austin Firefighters Association, Local 975 ("AFA" or "Firefighters") and the City of Austin ("City"), seeking a declaratory ruling that a bargained-for term of a valid Collective Bargaining Agreement was an unconstitutional "gift." *See* CR.9-115 (Original

Pet.).[1] On October 18, 2016, the State of Texas intervened, asserting identical claims to those asserted in Plaintiffs' Petition. *See* CR.119-222 (Plea in Intervention of Tex.).

On November 21, 2016, the AFA filed a motion to dismiss pursuant to the TCPA, and following a hearing, the trial court granted the TCPA motion on February 7, 2017. *See* CR.226-414 (AFA TCPA Mot. to Dismiss); CR.1392 (Order). Plaintiffs and Intervenor Texas appealed the February 7, 2017 order, and both appeals were dismissed on jurisdictional grounds. CR.1404-06 (Pl. Notice of Appeal (Feb. 21, 2017)); *see also Pulliam v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 3325, at *3 (Tex. App.—Austin Apr. 14, 2017); *State v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 9510, at *2 (Tex. App.—Austin Oct. 11, 2017).[2] Because the City, as a public entity, could not join the TCPA motion and

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[1] For consistency, Appellees use the same method of record citation adopted in Appellant's Brief. "[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, and 3.SCR.[Page Number]" refers to the clerk's record of January 19, 2022.

Where record citations have been made to deposition or trial testimony, the name of the witness has been added in parenthetical and/or additional parenthetical references are also included where they may be helpful.

[2] Prior to the trial court's February 7, 2017 TCPA ruling, Texas had argued that it was excepted from the TCPA pursuant to TEX. CIV. PRAC. & REM. CODE § 27.010. *See* CR.466-77

because Texas argued an exemption from the TCPA, the case remained pending even with Plaintiffs' claims dismissed on the merits by the February 7, 2017 order.

On November 2, 2017, Plaintiffs Pulliam and Wiley filed an amended petition stating an identical—but new—gift clause claim with respect to the Defendants' new CBA. CR.1412-1534 (Am. Pet.). Even in the amended petition, and despite the fact that the claims against AFA had been dismissed, the AFA remained as a named defendant. CR.1412 (Am. Pet.) at 1. With its new CBA now subject to a legal challenge and its name included among the defendants, the AFA reluctantly returned to litigating the meritless gift clause challenge to its contract and filed a Plea in Intervention on July 25, 2018. CR.2225-31 (Plea in Intervention of AFA).

The parties concluded discovery and filed cross-motions for summary judgment. SCR.251-696 (Pl. & Tex. Mot.); 3.SCR.3-468 (Defs. Mot. & Opp.); CR.3281-3343 (Pl. & Tex. Reply); CR.3344-70 (Defs. Reply). On July 18, 2019, the trial court granted summary judgment in favor of the City and the AFA "as to any claims related to the collective bargaining agreement itself and the terms therein,"

(Tex. Plea to Juris. (Dec. 16, 2016)). Accordingly, Texas argued that it had grounds for an interlocutory appeal of the implicit denial of its plea to the jurisdiction. *See State v. City of Austin*, 2017 Tex. App. LEXIS 9510, at *2. This Court determined, after clarification from Judge Naranjo, that "the February 7 order does not operate as an implicit denial of the State's plea to the jurisdiction" and dismissed Intervenor Texas's interlocutory appeal for lack of jurisdiction. *Id.*

but denied the motion "with regard to the implementation of such contract by the City of Austin," granted AFA's request for fees and sanctions under the TCPA, and struck AFA from the case, allowing only Plaintiffs and the City to proceed to trial on the narrow implementation issue. *See* CR.3803-19.

Following a two-day bench trial on March 8 and 9, 2021, the trial court issued a final judgment in Appellees' favor on all claims on March 24, 2021. CR.4163-66. At Appellants' request, the Court issued Findings of Fact and Conclusions of Law on April 19, 2021 and Amended Findings of Fact and Conclusions of Law on May 11, 2021. CR.4178-87 (FOF & COL); CR.4208-19 (Am. FOF & COL).

STATEMENT OF FACTS

The trial and summary judgment records amply support the trial court's principal findings of fact, which are summarized as follows.

a. The Texas Legislature Has Established Public Policy That Clearly Supports the CBA

In 1947, Texas adopted the Firefighters and Police Officers' Civil Service Act, codified at Chapter 143 of the Local Government Code, creating the basic framework for civil service for fire fighters in Texas cities. *See* Act of June 2, 1947, 50th Leg., R.S., ch. 325. It created baseline rules regarding hiring and promotion, competitive examinations, a procedure for disciplinary actions, and compensation and leaves of absences. *See generally* TEX. LOCAL GOV'T CODE § 143.001 *et seq.*

In 1973, the Texas legislature adopted the Fire and Police Employee Relations Act, codified at Chapter 174 of the Local Government Code, authorizing collective bargaining with police and fire fighters (while prohibiting strikes and lockouts). *See* Act of May 11, 1973, 63rd Leg., R.S., Ch. 81. This Act establishes that "[t]he policy of this state is that firefighters and police officers, like employees in the private sector, should have the right to organize for collective bargaining, as collective bargaining is a fair and practical method for determining compensation and other conditions of employment." TEX. LOCAL GOV'T CODE § 174.002(b). Additionally, the Act establishes that "expeditious, effective, and binding" contractual arbitration and enforcement procedures serve the public interest by ensuring "high morale of fire fighters . . . and the efficient operation of the departments." *Id*. § 174.002(b), (e).

b. The AFD and AFA Have Overlapping Public Service Missions

The Austin Fire Department's purpose is to "protect and enhance the safety and well-being of those in the community" and to "creat[e] safer communities through prevention, preparedness, and effective emergency response." 3.SCR.60-62 (AFD Purpose, Mission, Vision, Goals); 3.SCR.229 (Woolverton). Its goals include to "maintain a safe, healthy, well-trained, and highly-performing workforce" and to "attract and retain a qualified and diverse workforce." 3.SCR.60-62; 3.SCR.268-269 (Woolverton); *see also* CR.4127 (Am. Joint Stipulated Facts) at ¶15 ("The Austin

Fire Department's purpose is to protect and enhance the safety and wellbeing of those in the community; its vision is to create safer communities through prevention, preparedness, and effective emergency response; its goals include maintaining a safe, healthy, well-trained, and highly-performing workforce and attracting and retaining a qualified and diverse workforce.").

The AFA is the exclusive bargaining representative of Austin's fire fighters with the overlapping mission to "uphold and further professional standards for firefighters," to "promote firefighter and public safety through advocacy, education, policy and sometimes legislation," to "work towards more harmonious management labor relations through discussion on important issues," and to promote shared charitable interests. 3.SCR.362 (Nicks); 3.SCR.303 (Nicks) ("[W]e represent the bargaining unit for the City, under Chapter 174"); 4.RR.229:5-13 (Nicks) (describing the AFA as "an Association of firefighters that meet and try to establish our common interests, and we try to promote safety for the citizens and for the firefighters"); 4.RR.233:16-234:7 (Nicks) (same). Battalion Chief Bob Nicks serves as the AFA's President and recently has been their lead contract negotiator. 3.SCR.466-68 (Nicks Aff.); 3.SCR.301-02, 308 (Nicks); 4.RR.256:21-24, 224:12-23 (Nicks) (same).

Given the foregoing, the trial court correctly found that the AFA's mission includes "furthering professional standards for firefighters, promoting fire fighter and public safety, and working towards more harmonious labor relations." CR.4209 (Am. FOF & COL) at ¶8. Moreover, the trial court correctly found that the AFA has "pledged in the CBA to support the service and mission of the AFD, [and] to constructively support the goals and objectives of the AFD . . . ." CR.4209 (Am. FOF & COL) at ¶7; 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 1.

Thus, the trial court correctly found that "[t]he missions of the AFD and AFA overlap and are not mutually exclusive." CR.4209 (Am. FOF & COL) at ¶9; *see also* 4.RR.233:16-234:7 (Nicks) ("[T]here's a lot of overlap between what the Association does and what the Fire Department and the City do"); 5.RR.72:24-73:14 (Nicks) (same); 5.RR.133:1-134:9 (Nicks) (AFA's efforts analyzing emergency services in five underserved neighborhoods promoted public safety: "It's good for the firefighters. It's good for the Department. It's good for the community.").[3]

[3] Appellant Roger Borgelt has admitted as much. 5.RR.51:16-52:7 (Borgelt) (AFA's and the AFD's missions "can be consistent" like "when the Association is promoting, for instance, equipment that will help better fight fires, something like that, then that would be consistent").

c. ABL is No "Gift": The CBA and Its Bargained-For Terms Were Not Gratuitously Granted

The trial court found explicitly that "[t]he City does not give any public funds to the AFA." CR.4209 (Am. FOF & COL) at ¶11; *see* 4.RR.189:16-19 (Paulsen). Rather, the trial court found, "ABL is a type of paid leave available to the City of Austin *firefighters*." CR.4210 (Am. FOF & COL) at ¶19 (emphasis added); *see* 5.RR.37:8-13 (Borgelt) (admitting that the supposed "gift" of paid leave is to "the firefighters who are using the ABL," not the AFA). The trial court also found that the "implementation of ABL under the CBA is not a 'gift' to any individual or entity." CR.4215 (Am. FOF & COL) at ¶14.

The most recent CBA was ratified, after arms-length negotiations between the City's and the AFA's negotiation teams, on September 28, 2017, effective October 1, 2017, and is binding on the City, the City's fire fighters, and their employee association, the AFA. CR.4127 (Am. Joint Stipulated Facts) at ¶¶9-13; 7.RR.5-109 (Joint Ex. 1) (CBA); 3.SCR.55-56 (Resolution No. 20170928-018); 3.SCR.466-68 (Nicks Aff.); 3.SCR.373 (Nicks); 3.SCR.290-91 (Paulsen); 3.SCR.210-11 (Flores); 5.RR.134:19-135:1 (CBA terms "part of a long negotiation process").

The thirty-two article CBA represents a complex, irreducible whole, with bargained-for consideration exchanged between all parties. 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA); 3.SCR.231, 259-61 (Woolverton); 3.SCR.283 (Paulsen) ("It's a

– a package"); 287-88 (articles of the CBA "taken in a totality before it's finished"); 4.RR.134:21-135:11 (Woolverton) ("not just Article 10 in that contract. There's, I believe, 30 some odd articles within that contract, and it goes from salaries, hourly wages to [ABL] . . . each one is a give and take."); 4.RR.171:22-172:4 (Paulsen) (ABL "part of the package, the larger package of the negotiations").

As part of the bargain it struck in exchange for Article 10 and the other terms of the CBA, the City gained substantial concessions from the AFA, including changes to Texas Local Government Code Chapter 143 implementation, such as changes regarding initial hiring, promotions, disciplinary investigations, disciplinary appeals, allowing for differences in base wages based upon seniority, longevity pay, required certifications, required education, specialized assignments, the designation of personnel in certain positions with certain leave and pay levels, drug testing, and the ability to merge the Austin Fire Department with Travis County Emergency Services Districts. 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 12, Art. 16; 3.SCR.210 (Flores) ("This agreement allows the City of Austin to address different items that are outside of Chapter 143 of the local code"), 214-15; 3.SCR.283-84 (Paulsen); 3.SCR.259-61 (Woolverton) (benefits to City include terms of hiring, promotions, drug testing, appointing Division Chiefs, "assessment centers," deviations from strict Civil Service testing and others); 4.RR.167:16-25 (Paulsen) ("[T]here's a state

civil service law that governs how firefighters do certain things like hiring and promotions, and there were elements of those key areas that we wanted to negotiated changes to the state law about that, and this agreement allows us to deviate from that state, you know, law – the 143 law"); 4.RR.169:1-169:20 (Paulsen) (CBA negotiations included topics subject to Chapter 143 including "promotions, work conditions, firing, ranks, those sorts of things"); 4.RR.170:11-171:2 (Paulsen) (same), 4.RR.178:17-24 (Paulsen) (same).

Additionally, terms governing wages, wage increases, and benefits are negotiated and set as part of the CBA. 7.RR.5-109 (Joint Ex. 1) (CBA); Ex. 4: Paulsen Tr. at 31:16-32:22; 36:10-13; 4.RR.134:21-135:11 (Woolverton) (CBA negotiations include "work hours, wages, working conditions"); 4.RR.170:2-170:10 (Paulsen) (negotiations included the "base pay and various certification pay, other forms of benefits for the years that are coming," including "paid leave").

Article 10 of the current CBA provides for "Association Business Leave" ("ABL"), a shared leave bank for use by all Austin fire fighters, in service of the Department's and the AFA's overlapping missions, subject to certain contractual controls. 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10; 3.SCR.466-68 (Nicks Aff.); 3.SCR.232 (Woolverton) ("to be used for purposes that benefit the Department, the

Association, or both"), 244-45 (noting use of ABL by fire fighters who were not AFA members).

The current language of Article 10 first appeared as a result of the 2009 contract negotiations, after arms-length bargaining sessions between the City and the AFA's representatives. 3.SCR.466-68 (Nicks Aff.). There was an explicit "give and take" in the bargaining process, in which the City agreed to the current ABL provision for a change in the treatment of the way sick leave was counted towards employees' overtime hours. *See* 3.SCR.367-68 (Nicks). The sick leave policy change afforded the City "5 to $600,000" per year in savings. *Id*.

d. The CBA, including ABL, Serves a Predominantly Public Purpose and the Affords a Clear Public Benefit in Return

As the trial court found, "[t]he CBA benefits the public in general," CR.4209 (Am. FOF & COL) at ¶10, and the CBA's purpose is "to achieve and maintain harmonious 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." CR.4208 (Am. FOF & COL) at ¶1; *see* Tex. Local Gov't Code § 174.002; 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 1; 5.RR.23:16-20 (Borgelt) (agreeing "maintaining harmonious relations between employees and management benefits both").

The trial court also found that "[g]ood 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." CR.4209 (Am. FOF & COL) at ¶6; 4.RR.166:18-24 (Paulsen) ("There is a benefit to the City to have these organized negotiations. Once an agreement is completed, there are clear descriptions of certain processes, procedures that we go forward with"); 4.RR.167:16-25 (Paulsen) ("The Association represents all firefighters so . . . we don't have firefighters one by one by one negotiating certain benefits or certain procedures."); 4.RR.168:1-168:9 (Paulsen) ("very inefficient to try to negotiate something with individuals"); 4.RR.169:21-170:1 (Paulsen) (negotiating disciplinary procedures important to the City because "[i]n order to have consistency with every disciplinary hearing, it's important to have it written down so everyone knows what the rules are, the procedures are").

Even viewed more narrowly, ABL itself provides a clear public benefit to the City as well. 4.RR.179:8-179:12 (Paulsen) ("Q. Do you believe there is any direct or indirect benefit to the City of Austin in agreeing to the specific term of the CBA regarding Association business leave? A. Yes."); 4.RR.179:13-181:7 (Paulsen) (benefits of ABL include allowing participation in "oversight committees," like the weekly "cadet hiring oversight committee," in which the committee "will make

recommendations to the Fire Chief about, for example, should we have, you know, hours of college education as a requirement or not have them; should we have a certain portion of the process included or not included," and the Chief "looks at these committees as a valued contribution in that they're representing lots of different perspectives"); 5.RR.142:17-24 (Nicks) (meetings with AFA President on ABL provides Fire Chief the "perspective of the rank and file," and allows him "to make a more informed decision a lot of times on very important issues").

The public benefits from fire fighters using ABL to participate in collective bargaining, meet with other fire fighters to discuss issues related to the CBA and Department policy, participate in labor-management meetings, meet to discuss or represent fire fighters in disciplinary and grievance proceedings, participate in informal dispute resolution proceedings, and conduct other lawful activities that support the Department's and the AFA's overlapping missions. 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(A-(B)(2), Art. 2(4); 3.SCR.304, 305-06, 325-27, 329-31, 340-41 (Nicks); 3.SCR.232-234, 238-43, 270 (Woolverton); 3.SCR.212-13, 214-15 (Flores); 3.SCR283-85 (Paulsen); *see also* 5.RR.120:11-17 (Nicks) ("station visits" is a "good portion" of what "other" category is used for); 4.RR.255:21-256:6 (Nicks) (CBA negotiation and preparation is "significant" and "probably one of my number one, you know, time items"); 4.RR.202:16-203:23 (Flores) (Chief Nicks' ABL

activities include "engaging in negotiations with the City of Austin, representing employees in grievances, perhaps attending conferences or attending orientation with approval of course"); 4.RR.179:13-179:20 (Paulsen) (City benefits from ABL used by fire fighters to attend "a labor management initiative where we come together once a month and talk about issues"); 4.RR.181:8-182:14 (Paulsen) (AFA's participation in labor-management meetings benefits the City because "[o]ftentimes something will come up that's a rumor, something that's just not really true, and it's a quick way for us to have a conversation and provide accurate information and get that back out to the membership. So it's a way to resolve simple things before they get out of proportion," and losing this resource could "affect the efficiency of the Department's operations."); 4.RR.133:3-15 (Woolverton) ("if we work things out through a grievance process or dispute resolutions process, that's the way we prefer to do it").

e. ABL Used by AFA President Bob Nicks

The ABL used by AFA President Bob Nicks is primarily devoted to contract negotiations, AFD committee meetings, meetings with AFD management, meeting with AFA membership, attending trainings or conferences to better understand the issues facing AFA membership and the Department as a whole, and the day-to-day administrative work that supports these activities. *See* 7.RR.452 (Joint Ex. 9) (Am.

Joint Stip. Facts) at ¶¶36-38; 3.SCR.466-68 (Nicks Aff.); 3.SCR.364-65 (Nicks); 3.SCR.307-08 (Nicks) ("lead negotiator" on the most recent CBA), 314-15 (had recently met with Chief Dodds for several hours to discuss overtime practices); *see also* 4.RR.255:21-256:6 (Nicks) (CBA negotiation and preparation).

Chief Nicks regularly meets with AFD management while on ABL, to collaborate on improving AFD operations and public safety. 3.SCR.313 (Nicks) ("There are a lot of common, mutual projects we work on together, where we're coordinating our time and ideas, and resources to accomplish."), 315 (describing nearly six hours of personnel and management meetings in one day), 316-17 (describing meetings resulting in 3-4 million dollars savings to the City), 331-32 (attended conferences to understand the issues faced by "females in the fire service, and the culture, and how we can make it more inclusive"); 4.RR.129:1-12 (Woolverton) (agreeing that, when on ABL, Chief Nicks was "responsive to communications from the Fire Chief or Assistant Fire Chiefs and others," that he "regularly attended meetings with management of the Austin Fire Department," and that "there would have been an issue had he refused to meet with them"); 5.RR.140:6-140:6 (Nicks) ("regularly having meetings" with Department management and when "anybody in the command" calls, "I pick up immediately, and I deal with every issue they need, provide any perspective of work they need").

Chief Nicks' use of ABL aids Department management and improves operations by allowing efficient, open communication with the City's fire fighters. 5.RR.145:24-146:24 (Nicks) ("a lot of value" to the City from "do[ing] a lot of work for them in terms of finding out what is acceptable and unacceptable that helps or hurts morale. . . . . A lot of times not only do we find that it's a safety issue we can bring forward they may not have been otherwise aware of, but we also find operational issues that need to be addressed," and ultimately, "we bring a lot of great information forward to [the Chief] so he can base the decisions he makes are [sic] partly off of what we're bringing forward."); 5.RR.146:25-147:3 (Nicks) (agreeing his work on ABL "can improve the operations of the Department"); 5.RR.154:21-155:10 (Nicks) (agreeing a "significant amount of [his] time is spent communicating messages from the Fire Department management to the AFA membership," explaining he spends "a lot of time talking to individuals or groups. I get a lot of phone calls, you know. I spend a lot of time on the phone every day talking to people that maybe couldn't get their issue worked out with the VP but need to talk to me directly").

Chief Nicks' work on ABL in support of collective bargaining affords the City a substantial benefit in efficiency of negotiations. *See* 4.RR.252:5-21 (Nicks) (explaining the CBA ratification process: "There's an educational period that the

bargaining team gets together. We try to come up with pros and cons. We try to basically put it in a format -- you know, we put the whole contract out there," "[w]e usually have a survey that we put out before we bargain so we usually release that survey to members can see if we achieved to what they hoped us to achieve. Then we – a formal motion to ratify the contract is made and a formal online vote is made after the educational period is over"); 4.RR.168:1-168:9 (Paulsen) ("[I]t would be very inefficient to try to negotiate something with individuals").

Chief Nicks also spends time on ABL in direct support of critical public service missions, such as coordinating efforts to transport Austin residents—who had been trapped without power or water by a snow emergency—to safety. 5.RR.137:20-138:25 (Nicks) (describing work performed while on ABL during a snow emergency the week of February 15, 2021, trying to rescue people in their homes, giving out his phone number publicly, and coordinating efforts of AFA members with four-wheel drive trucks, who "probably saved close to a hundred people that were freezing in their homes the next two days"); 5.RR.139:1-139:17 (Nicks) (ABL used opening a "warming shelter at our Union hall, a 40-bed shelter, and then we started realizing water is an issue, so we started water delivery services," efforts which continued for a "couple-week period").

Chief Nicks, as AFA president, is allotted 40 hours of ABL each week but testified that he spends significantly more time working each week. *See* 3.SCR.140 (Nicks); 5.RR.135:8-20 (Nicks). Chief Nicks testified he does *not* use his 40 hours of allotted ABL time for lobbying or political activities.[4]

While on ABL, Chief Nicks remains subject to the Department's code of conduct and personnel policies, and he must physically report when directed to do so by supervisors for an emergency or a special project. 7.RR.452 (Joint Ex. 9) (Am. Joint Stipulated Facts) at ¶34 ("Bob Nicks is required to follow the City's Code of Conduct."), ¶35 ("Bob Nicks must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisors, as outlined in the CBA.").[5]

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[4] Appellants have repeatedly asserted that Chief Nicks engages in political activities while on ABL and misleadingly assert that "25-30 percent" of his time is spent on such political activities. Br. at 2, 17. However, as President Nicks testified repeatedly, at deposition and at trial, he ***does not*** spend all of his time on ABL; his political activities are conducted as part of his excess or "volunteer" hours, beyond the 40 hours of ABL he is allotted each week. *See, e.g.*, 3.SCR.338-39 (Nicks); 5.RR.103:23-104:11 (Nicks) ("**Like I've testified over and over, my work week is well over 40 hours, and I believe that I am not on ABL when I'm doing political activities**, ..."); 5.RR.101:11-17 (Nicks) (ABL not used for political purposes)); 5.RR.150:3-151:11 (Nicks) (same); 5.RR.152:5-20 (Nicks) (same); 5.RR.174:16-174:22 (Nicks) (same).

[5] *See also* 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(2)(C); 3.SCR.372, 386-88 (Nicks); 3.SCR.312, 314, 334-35 (Nicks); 3.SCR.281-82 (Paulsen);3.SCR.235-37 (Woolverton) (Nicks has "regularly scheduled" interactions with Dodds, including recurring monthly meetings and others "as-needed").

Chief Nicks is held to the same personnel standards as other AFD employees. 4.RR.126:18-127:1 (Woolverton) (Nicks "held to the same standard as anyone" at the Department regarding performance evaluations); 4.RR.126:7-17 (Woolverton) ("held to the same standard" regarding professional development and continuing education requirements); 4.RR.243:6-244:7 (Nicks) ("I can't violate Code of Conduct. As an employee of City of Austin, I can't violate policies," and "if there was a circumstance where [AFA Bylaws are] in conflict I certainly would have to abide by the Code of Conduct in the City of Austin. I would have to abide by state and federal law, local laws and ordinances, and I would have to abide by the policies of the Austin Fire Department. I do not believe they're in conflict. I can't think of an instance where they are").

Given the foregoing, the trial court correctly found that Chief Nicks "regularly attends meetings with AFD management and meets with the Fire Chief when requested to do so," that Chief Nicks is subject to AFD personnel policies, the code of conduct, and professional standards while on ABL, and that, if there were ever a conflict between Chief Nicks' duties as AFA president and AFD policies, "Nicks would have to comply with AFD's personnel policies and Code of Conduct." CR.4211 (Am. FOF & COL) at ¶¶30-34.

f. ABL Use by Other AFA Members

Pursuant to the CBA, other AFA members may use ABL to account for time spent bargaining collectively, adjusting grievances, attending union conferences and meetings, and any other AFA "business activities that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of this Article." 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(B)(2). The CBA prohibits the use of ABL by those members for "legislative and/or political activities related to any election of public officials or City Charter amendments." *Id*.

ABL use by these members is separated into categories by the City, based on the activities set out in Article 10 of the CBA, plus an extra category: "Other Association Business." 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(B)(2); 3.SCR.318-19 (Nicks); 4.RR.81:21-25 (Woolverton).

ABL designated as "time spent in Collective Bargaining negotiations" refers to "negotiating or otherwise participating on behalf of the AFA, during those negotiations," which benefits the City's interest in efficient and expedient contract negotiations.[6] ABL designated as "adjusting grievances" and "attending dispute

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[6] 3.SCR.325 (Nicks); 3.SCR.212-13 (Flores) ("We want to ensure that the members have enough time that they can utilize for contract bargaining."), 214-15, 218-19.

resolution proceedings" involves reviewing, processing, attempting to informally resolve, and then representing the grievant in employee grievances, which promotes the fair and efficient resolution of employee grievances, saving the City time and money, and ensures that the CBA's terms are interpreted fairly and correctly.[7] ABL designated as "cadet classes during cadet training" serves as a recruiting tool but is also used to orient and educate incoming employees to the terms of the CBA and the grievance procedures.[8] ABL designated "attending union conferences and meetings" includes time spent attending internal AFA meetings where members are educated about the CBA and give feedback about their priorities, attending professional development conferences, or participating in joint committee meetings with management, which serves the public purpose of promoting harmonious and efficient administration of the CBA and Department policy.[9]

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[7] 3.SCR.325-29 (Nicks); 3.SCR.270 (Woolverton) ("grievances help to identify [interpretation] issues, and — and remedy them at the lowest level possible"), 271 ("it has clearly benefited both the AFA and the City"); *see also* 4.RR.133:3-15 (Woolverton) (benefit to City "if we work things out through a grievance").

[8] 3.SCR.340-41 (Nicks) (AFA explains "what the Civil Service law is. They understand that they're working under that, whether they're a member or not. They understand what the contract is, and — and how it operates, and how you can — you know, we go through the grievance process").

[9] 3.SCR.304-05, 329-31 (Nicks); 3.SCR.283-84 (Paulsen) (ABL use "contributes significantly to the decision-making process in the Department"), 285 ("[A]ttendance of those members on ABL at those oversight committees" benefits the City because "[t]heir perspective

ABL designated "other association business," is "mostly outreach to the members, going out and — and visiting with them," which serves the important public purpose of collecting and bringing forward workplace concerns, including safety and operations issues, for efficient consideration by the Department.[10] Other uses of ABL in this category also serve additional public purposes of (1) promoting a fit, skilled, and high-performing workforce; (2) fostering good will towards the Department in the community; and (3) addressing cancer and other health issues faced by fire fighters in Austin and elsewhere.[11]

A fire fighter who proposes using ABL must request permission at least three days in advance; this request is reviewed by the AFA and then it is either approved or disapproved by the Fire Chief's designee based on compliance with the terms of the CBA and operational needs. *See* 7.RR.111-12 (Joint Ex. 3) (General Order

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adds to the process. Sometimes they see things slightly different than the chain of command or the other representatives, who sit on those committees."); 4.RR.179:13-181:7 (Paulsen) (same).

[10] 3.SCR.318-19 (Nicks) ("mostly that's going to be the VP's going to station visits. . . . a good deal of our time is going out and — and educating our members, and then soliciting feedback from our members on — on what they would like us to advocate for."); 5.RR.120:11-17 (Nicks) ("good portion" of what "other" category is used for); 5.RR.145:24-146:24 (Nicks) (describing how AFA brings safety and operational issues to Chief's attention).

[11] 3.SCR.250-52, 253-54, 255-56, 266-69 (Woolverton); 3.SCR.320-21, 322-24 (Nicks); 5.RR.125:7-20 (Nicks) (describing ABL use for coordinating and working public events sponsored by the AFA).

E111.2); 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(C)–(D). In practice, a fire fighter will fill out an electronic form through a system called Formsite which includes fields for the firefighter's name, proposed date and amount of ABL usage, as well as a *"*Purpose of Request" field in which the fire fighter *must* enter detailed description of the proposed use, which is scrutinized by the AFD. 3.SCR.248-49 (Woolverton); 4.RR.116:10-117:15 (Woolverton). If the "Purpose of Request" field indicates that the purpose of the ABL would not meet the Department's standards, it is submitted to multiple levels of review and screened out. *See, e.g.*, 4.RR.121:16-122:14 (Woolverton) (if the "Purpose of Request" field indicated that the requested ABL activity may be political, "it's something that we would really screen," and "it would, as I said earlier, tickle the conscious [sic] enough that I would want to get the Chief of Staff's input, probably the Fire Chief's input, and probably City legal"). Further, "[i]f a firefighter is on suspension pending an investigation, they obviously wouldn't be approved to use ABL to go to a cadet oversight committee or things like that." 4.RR.124:21-125:8 (Woolverton).

It is relatively rare for the City to deny a request to use ABL because the City's fire fighters are familiar with permitted uses, and thus are able to limit ABL requests to only those permitted uses, even before they are routed to the Fire Chief's designee for approval. 3.SCR.262-63, 264 (Woolverton). Nevertheless, the City *can deny* and

has denied ABL requests before, such as when its use would have primarily served a political end or would otherwise be inconsistent with ABL's purposes under the CBA. 3.SCR.265 (Woolverton); 3.SCR.342 (Nicks) (ABL requests for Battle of the Badges event were denied); 5.RR.155:25-156:7 (Nicks) ("[O]nce it goes to the approval process, I don't recall a time when anybody has ever said [ABL]'s been used inappropriately, no."); 5.RR.160:12-161:11 (Nicks) (describing denial of ABL for budgetary reasons "where the operational needs of the Department kind of trumped the – you know, the approval of ABL"); 4.RR.113:13-114:14 (Woolverton) (describing denial of ABL requests to attend rally opposing a District Attorney because such an event would be "clearly political" and so told the members "no").

SUMMARY OF ARGUMENT

Appellants' lawsuit—just like the lawsuits Appellants' counsel has had rejected by the Arizona and New Jersey[12] high courts—sought to invalidate a provision of a binding, arms-length collective bargaining agreement ("CBA") on the nonsensical grounds that the bargained-for provision was an unconstitutional "gift" of public funds.

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[12] *See Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016); *Rozenblit v. Lyles*, 243 A.3d 1249, 1267 (N.J. 2021).

In fact, it is undisputed that the Austin Firefighters Association ("AFA") receives *no* public funds from the City of Austin ("City"), gratuitous or otherwise. The contract provision in question provides a bank of "Association Business Leave" ("ABL") to the City's fire fighters, and it, along with the rest of the CBA, was the subject of extensive, arm's-length negotiations between the City and its fire fighters. The CBA, including the ABL bank provided pursuant to Article 10, is supported by valid consideration on all sides, serves myriad important public purposes, and affords clear public benefit in return. These facts have never been in meaningful dispute at any time during the years-long course of this litigation, and the trial court's rulings should be affirmed on all issues.

STANDARD OF REVIEW

In an appeal from a bench trial, as here, the court's findings of fact "have the same force and dignity as a jury's verdict upon questions." *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex. 1991); *Ludwig v. Encore Med., L.P.,* 191 S.W.3d 285, 294 (Tex. App.--Austin 2006, pet. denied).

When reviewing a trial court's findings of fact for legal sufficiency, "the reviewing court considers the evidence in the light most favorable to the judgment, crediting favorable evidence if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not." *271 Truck Repair &*

Parts, Inc. v. First Air Express, Inc., No. 03-07-00498-CV, 2008 Tex. App. LEXIS 4273, at *8 (Tex. App.—Austin June 11, 2008, no pet.) (mem. Op.) (citing *City of Keller v. Wilson,* 168 S.W.3d 802, 807 (Tex. 2005)). When reviewing findings for factual sufficiency, "the reviewing court considers all evidence and 'should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.'" *Id.* (quoting *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986)). The trial court "is the 'sole judge of the credibility of the witnesses and the weight to be given their testimony'" and is free to "believe one witness, disbelieve others, and resolve inconsistencies in any witness's testimony." *Id*. (quoting *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 696 (Tex. 1986)). The trial court's conclusions of law are reviewed de novo. *BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex. 2002).

Summary judgment is also reviewed de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When a defendant moves for summary judgment on a plaintiff's claims, summary judgment is appropriate where a defendant has disproven "at least one element of each claim as a matter of law." *Long v. Sw. Funding, L.P.*, No. 03-15-00020-CV, 2017 Tex. App. LEXIS 1291, at *4 (Tex. App.—Austin Feb. 16, 2017, no pet.) (mem. op.). "Where, as here, a trial court's order granting summary judgment does not specify the ground or grounds

relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories presented to the trial court and preserved for appellate review are meritorious." *Id*.

A dismissal pursuant to the Texas Citizens Participation Act ("TCPA"), codified in Chapter 27 of the Texas Civil Practice and Remedies Code, is reviewed de novo. *See Long Canyon Phase II & III Homeowners Ass'n v. Cashion*, 517 S.W.3d 212, 222 (Tex. App.—Austin 2017, no pet.). However, the amount awarded in mandatory sanctions under the TCPA is reviewed for abuse of discretion. *See Serafine v. Blunt*, No. 03-16-00131-CV, 2017 Tex. App. LEXIS 4606, at *23 (Tex. App.—Austin May 19, 2017, pet. denied) (mem. op.).

ARGUMENT & AUTHORITIES

Association Business Leave is provided as part of an arms-length agreement, in exchange for valid consideration. Furthermore, the record overwhelmingly demonstrates that the CBA, as well as the ABL provision contained within it, serve a public purpose and afford a clear benefit in return. Therefore, as correctly determined by the trial court, the CBA's ABL provision is constitutional, and the trial court's rulings should be affirmed.

I. The Judgment Should Be Affirmed

a. The "Gift Clause" Prohibits *Gratuitous* Grants of Public Funds, Not Contracts

Appellants' ill-conceived challenge to a *contract* provision providing *current City employees* with paid leave does not implicate the Texas Constitution's "Gift Clause."[13] In fact, it is undisputed that the City has paid ***no public funds*** to the AFA whatsoever, 4.RR.189:16-19 (Paulsen), rendering the Gift Clause inapplicable.

The Texas Supreme Court, in *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377 (Tex. 2002), stated the Gift Clause analysis—and its focus on *gratuitous* payments—as follows:

> We have held that section 52(a)'s prohibiting the Legislature from 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.
>
> Moreover, we have 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 received in return. A three-part

[13] In their briefing, Appellants use the terms "Gift Clause" and "Gift Clauses," interchangeably, to refer to Article III, Sections 50, 51, 52(a), and Article XVI, Section 6(a) of the Texas Constitution. Because these provisions are generally analyzed under a single standard, Appellees have used the term "Gift Clause" to refer to these related sections of the Texas Constitution.

> test determines if a statute accomplishes a public purpose consistent with section 52(a). Specifically, the Legislature must: (1) ensure that the statute'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.

Tex. Mun. League, 74 S.W.3d at 383-84.

Appellants declare, without authority, that "[t]hese are *conjunctive* requirements. A government expenditure will violate the Gift Clauses if it fails *any* of these tests." Br. at 8. Yet, decades of precedent reinforce the Gift Clause's purpose of prohibiting the ***gratuitous*** grant of public funds, not to provide activists a chance to second-guess the public purpose of every governmental expenditure. *See*, *e.g.*, *City of Corpus Christi v. PUC of Tex*., 51 S.W.3d 231, 240 (Tex. 2001) (purpose to prevent "gratuitous" grants); *State v. Austin*, 160 Tex. 348, 355 (Tex. 1960) (same); *Byrd v. Dallas*, 6 S.W.2d 738, 740 (Tex. 1928) (same).

Indeed, the Third Court of Appeals has rejected a gift clause challenge on the basis of consideration alone at least once before, in *Walker v. City of Georgetown*, 86 S.W.3d 249 (Tex. App.—Austin 2002, pet. denied). There, the court considered a gift clause challenge to a lease of public land to a private company so it could operate a batting cage for profit. *See Walker*, 86 S.W.3d at 249-56. The court explained that "[t]he City maintains that article III, section 52 applies only to

gratuitous donations to private entities, and that because it leased the land for $400.00 a month, it has not made a gratuitous donation. We agree with the City." *Id.* at 260. Noting that the "purpose of [the Gift Clause] is to prevent the gratuitous transfer of public funds to any individual," the court ruled that "the lease entered into here was supported by valuable consideration. As such, it was not a gratuitous donation of public funds or a thing of value." *Id*. Rather than embark on an unnecessary—and inappropriate—analysis of whether a batting cage would serve a public purpose and afford a clear public benefit in return, the court relied solely on the presence of consideration, which rendered the lease non-gratuitous and, therefore, constitutional. *Id*.

This has long been the explicit opinion of the Texas Attorney General as well. *See* Tex. Att'y Gen. Op. No. GA-0664, 2008 Tex. AG LEXIS 79 (Sep. 12, 2008) ("Article III, section 52(a) prohibits only gratuitous grants of public money by a political subdivision," and paraphrasing *Tex. Mun. League* as "emphasizing that 'to grant public money' [in article III, section 52(a)] means that the Legislature cannot require *gratuitous* payments'").[14]

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[14] Appellants rely on a non-binding, 1979 Attorney General opinion which they erroneously describe as concerning "a release time arrangement in one public-school district contract." Br. at 9 (citing Tex. Att'y Gen. Op. MW-89, 1979 WL 31300 at *1 (1979)). In fact, because public school teachers ***do not possess the right to collectively bargain in Texas***, there was no "contract" at issue

Nevertheless, the Court need not resolve this legal issue to rule in Appellees' favor, because the record establishes not only that the CBA was supported by consideration, but also that the CBA—and ABL itself—predominantly serve a public purpose and afford clear public benefits in return.

b. The Arms-Length CBA, Including ABL, Is Supported by Valid Consideration and Is Not Gratuitous

The trial court correctly ruled that Appellants failed to establish that an arm's-length CBA between the City and its fire fighters was a gratuitous grant of public funds. *See Tex. Mun. League*, 74 S.W.3d at 383; *Walker*, 86 S.W.3d at 260 (disposing gift clause challenge on presence of valuable consideration alone). Appellants now seek to escape the trial court's well-grounded conclusions by undoing basic precepts of contract law: arbitrarily ignoring the majority of the CBA and insisting that each party must share a mutuality of obligation on each individual term. Appellants' attempts to reimagine contract law should be rejected; the record clearly establishes that ABL was not gratuitously granted.

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there at all. Moreover, without a contract to negotiate, to administer, and on which to educate its membership, the school's labor organization lacked several important public purposes served by ABL. *See Cheatham v. DiCiccio*, 379 P.3d 211, 218 (Ariz. 2016); *Rozenblit v. Lyles*, No. HUD-C-2-17, 2017 N.J. Super. Unpub. LEXIS 3202, *17-18 (N.J. Super. Ct. Ch. Div. Oct. 31, 2017), *aff'd*, 243 A.3d 1249, 1259 (N.J. 2021). The 1979 opinion is entirely inapposite.

i. The Contract Must Be Considered as a Whole

Appellants isolate a single provision of a 105-page, 32-article CBA and pretend the balance of the contract simply does not exist. As blackletter law and the Texas Supreme Court instruct, however, the Court must "examine the entire agreement when interpreting a contract and give effect to all the contract's provisions so that none are rendered meaningless." *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002). "[I]ndividual 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)). Thus, it is inappropriate to assess the consideration recited in each individual sub-part or sub-paragraph of a contract; the correct analysis is of the consideration underlying the contract as a whole. *See 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.").

Put another way, "mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole." *Howell*, 890 S.W.2d at 86-87; *see also 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 writ) ("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))).

Indeed, Appellants' arguments on this point have been rejected by the high court of every jurisdiction to which their attorneys have peddled their "gift" clause claims. *See Rozenblit v. Lyles*, 243 A.3d 1249, 1259 (N.J. 2021) ("The release time arrangement is part of an agreement arrived at through collective negotiations in which the Association made concessions in return for provisions that it sought. It is one of many provisions of the CNA bargained for through the collective negotiations process."); *Cheatham v. DiCiccio*, 379 P.3d 211, 219 (Ariz. 2016) (citations omitted) (rejecting a virtually identical gift clause challenge and reasoning "we cannot consider particular provisions in isolation").

As the Arizona Supreme Court explained, "[f]or example, if such an agreement provided for paid vacation or personal leave time for public employees, the adequacy of the consideration received by the employer would not be evaluated

by asking if the employees must use their time in a way that benefits the employer." *Cheatham*, 379 P.3d at 219. Rather, courts must assess the entire transaction, including the work the public employees "generally agree to provide under the agreement." *Id*. When considering the CBA in this fashion, as this Court must, it is beyond any doubt that the CBA is supported by adequate consideration.

ii. The CBA and ABL are Supported by Valid Consideration

The Texas Constitution "requires only sufficient -- not equal -- return consideration to render a political subdivision's paying public funds constitutional." *Tex. Mun. League*, 74 S.W.3d at 384. "As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy. Parties are bound by the terms of their agreement as written, and this court cannot rewrite the agreement to change its terms." *Morales v. Hidalgo Cnty. Irrigation Dist. No. 6*, No. 13-14-00205-CV, 2015 Tex. App. LEXIS 9919, *7 (Tex. App.—Corpus Christi Sept. 24, 2015, pet. denied) (quotation marks and citations omitted) (finding a payment amounting to 5 years of wages for less than 2 years of work to be sufficient consideration).

Texas courts have consistently held performance of employment duties to be sufficient consideration for benefits and other compensation. *See id.* (upholding disproportionately large severance package); *City of Corpus Christi v. Herschbach*,

536 S.W.2d 653, 657 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.), *superseded by statute on unrelated grounds as recognized in City of Houston v. Soriano*, No. 14-05-00161-CV, 2006 Tex. App. LEXIS 7666, *14 n.5 (Tex. App.—Houston [14th Dist.] Aug. 29, 2006, pet. denied); *City of Galveston v. Landrum*, 533 S.W.2d 394 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); *Devon v. City of San Antonio*, 443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, writ ref'd); *City of Orange v. Chance*, 325 S.W.2d 838, 841 (Tex. Civ. App.—Beaumont 1959, no writ).

Most instructive, in *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W.2d 738 (Tex. 1928), the Texas Supreme Court rejected a Gift Clause challenge to a public employee pension fund. The Court explained that if the pension fund was "a part of the compensation of [public employees] for services rendered to the city, or if it be for a public purpose, then ***clearly*** it is a valid exercise of the legislative power. ***There is no reason why a city may not engage its servants and employees upon any terms of payment acceptable to both parties.***" *Id*. at 740 (emphasis added). Thus, there is no need to weigh the sufficiency of the consideration—it is enough that the City agreed to engage its fire fighters on the terms of the CBA.

In fact, the City receives quite substantial consideration in return for the terms of the fire fighters' CBA. Most obviously, the City receives fire protection services,

and it receives those services from employees subject to the negotiated terms and conditions of employment that make those fire protection services more effective. Just as the vacation and sick leave provided in that same CBA are not granted for "nothing in return," ABL is granted in exchange for indisputably valuable consideration—efficiently run fire protection services.

Additionally, the City receives consideration in the form of concessions by the AFA and its members under Texas Local Government Code Chapter 143, including City-favoring changes regarding hiring, promotions, disciplinary investigations, disciplinary appeals, allowing for differences in base wages based upon seniority, longevity pay, required certifications, required education, specialized assignments, the designation of personnel in certain positions with certain leave and pay levels, drug testing, and the ability to merge the Austin Fire Department with Travis County Emergency Services Districts. 7.RR.5-109 (CBA) at Arts. 12, 16; 3.SCR.210, 214-15 (Flores); 3.SCR.283-84, 286-87, 291 (Paulsen); 3.SCR.259-261 (Woolverton).

Without any record support, Appellants claim that "the AFA has not obligated itself to perform any duties, or give anything in return, for the ABL hours it receives." Br. at 22. Of course, under Texas law "mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for

the contract as a whole." *Howell*, 890 S.W.2d at 86-87. And in fact, the unambiguous terms of the CBA directly bind the AFA to multiple, specific obligations. For example, Article 7 requires the AFA to provide notice of dues withholding, furnish a list of AFA members to the City, and reimburse the City $.10 for every dues deduction made. 7.RR.5-109 (CBA) at Art. 7. In Article 8, the AFA agrees not to have *ex parte* communications with members of the Civil Service Commission. 7.RR.5-109 (CBA) at Art. 8. In Article 11, the AFA agrees not to use "personal attacks or inflammatory statements" regarding the Department and promises to "permit the Fire Chief space for a column in the 'Smoke Signal' (or other successor publication) in which to address rumors." 7.RR.5-109 (CBA) at Art. 11. In Article 17, the AFA agrees to "provide a class before the academy begins to the academy staff and team leaders on contract compliance as it relates to training standards." 7.RR.5-109 (CBA) at Art. 17, Part B, Sec. 6(A). Further, Article 20 requires the AFA to process, attempt to informally resolve, and submit written grievances on behalf of the bargaining unit members who submit a "valid" grievance. 7.RR.5-109 (CBA) at Art. 20.

Moreover, there was a "give and take" in the bargaining process in 2009, in which the City exchanged the current ABL bank for a change in the treatment of sick leave from "productive leave" that counted towards employees' hours worked for

purposes of calculating overtime to "nonproductive leave" that did *not* count towards employees' hours worked. *See* 3.RR.21-22 (Jan. 17, 2017 Hr'g Tr.) (Nicks). In exchange for providing its employees ABL, the City received "5 to $600,000" per year in estimated overtime savings. *Id*. Thus, even taking the impermissibly narrow view urged by Appellants, the ABL provision *itself* was bargained in exchange for adequate consideration.

In sum, because the CBA is an exchange of valid, bargained-for consideration, it is constitutional. Even when evaluated in isolation, ABL was explicitly bargained in exchange for valuable consideration. Therefore, because ABL is not gratuitously granted, it complies with the Gift Clause, and the trial court's judgment should be affirmed.

c. The CBA, Including ABL, Serves a Legitimate Public Purpose and Affords a Clear Public Benefit in Return

Even if the presence of valid consideration were not enough to resolve Appellants' lawsuit, Appellants still failed to establish a constitutional violation. Under the *Texas Municipal League* test, grants of public funds are still constitutional where the statute or ordinance authorizing the payments: "(1) serves a legitimate public purpose; and (2) affords a clear public benefit received 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).

The weight of evidence demonstrates that the trial court's conclusions were correct: the CBA negotiated between the City of Austin and its fire fighters serves a predominantly public purpose and affords a clear public benefit in return, as does the ABL provision itself, and the City has retained sufficient control over the Department—and even over the administration of ABL itself—to protect its investment.

i. Determining Public Purpose is a Function of the Legislature

Despite Appellants' fervent personal opinions on what should be considered a legitimate public purpose, "[d]etermining a public purpose is primarily a function of the legislature, and it should be upheld unless it is manifestly arbitrary and incorrect." *Young v. Houston*, 756 S.W.2d 813, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (citing *Bland v. City of Taylor*, 37 S.W.2d 291, 293 (Tex. Civ. App.—Austin 1931), *aff'd sub nom. Davis v. City of Taylor*, 67 S.W.2d 1033 (Tex. 1934)).

The Texas State Legislature, in the Fire and Police Employee Relations Act of 1993, has declared by law that:

> The policy of this state is that fire fighters and police officers, like employees in the private sector, should have the right to organize for collective bargaining, as collective bargaining is a fair and practical method for determining compensation and other conditions of employment. Denying fire fighters and police officers the right to organize and bargain collectively would lead to strife and unrest, consequently injuring the health, safety and welfare of the public.

TEX. LOCAL GOV'T CODE § 174.002(b). Moreover, the Austin City Council, by negotiating and publicly ratifying the CBA has determined that the CBA and its terms serve a public purpose. Thus, the Austin City Council and the Texas Legislature are in agreement: the health, safety and welfare of the public is served by a fully negotiated CBA—which includes the ABL provision—that carefully balances the interests of employees and their government employers while promoting an effective, well-trained and well-managed fire department.

This Court's opinion in *Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Util. Dist. & Dist. Dirs. Robinson*, No. 03-16-00214-CV, 2017 Tex. App. LEXIS 4285 (Tex. App.—Austin May 11, 2017, pet. denied), is also instructive here. There, the Court of Appeals found it "conclusively established that the Agreements were for public purposes," based solely on the "expressly stated . . . guiding principles" stated in the parties' contract:

> The Parties agree that the following guiding principles are integral to this Agreement and important to the success of the service area operations: 1) that cost savings and efficiencies of operation, along with economies of scale, will result from combining the water utility systems of [the District] and the City, 2) that establishing and maintaining uniform service policies between the City and [the District] are a key to ensuring efficient operations, 3) avoidance of disputes between the City and [the District] over customers, service areas, and service policies is in the customer's interest, and 4) cooperative efforts to secure new water supplies and to build and operate regional facilities will help reduce water service costs to all of our customers.

Chisholm Trail, 2017 Tex. App. LEXIS 4285, at *16.

Here, the trial court took note of the same sort of mutual covenant of cooperation: "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." CR.4209 (Am. FOF & COL) at ¶7; 7.RR.5-109 (CBA) at Art. 1 (same). As with the agreements in *Chisholm Trail*, the CBA's own terms conclusively establish public purpose.

ii. The CBA, and ABL, Serve a Predominantly Public Purpose and Afford a Clear Public Benefit in Return

Taking the appropriate panoptic view, the CBA's predominant purpose is to secure safe and efficient fire safety and emergency services for the citizens of Austin, an unquestionable public purpose. TEX. LOCAL GOV'T CODE § 174.002; 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA) at Art. 1(2). It does so by maintaining a harmonious

labor-management relationship, fostering good morale among the City's fire fighters, setting fair and attractive wages, benefits, and other conditions of employment agreeable to both employer and employee, and allowing for fair and orderly adjustment of grievances under the CBA. *See* 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA) at Art. 8 ("Civil Service Commission"), Art. 9 ("Wages & Benefits"), Art. 12 ("Leave Provisions"), Art. 14 ("Hours of Work"), Art. 15 ("Overtime"), Art. 17 ("Hiring & Cadet Training"), Art. 20 ("Contract Grievance Procedure"), Art. 22 ("Health Related Benefits"), Art. 24 ("Drug Testing"); *see also* 3.SCR.210 (Flores); 3.SCR.229, 231 (Woolverton); 3.SCR.283-84 (Paulsen).

Even considered alone, the ABL provision of the CBA still serves a predominantly public purpose and affords a clear return benefit. The primary use of ABL is to allow AFA members to participate in collective bargaining, labor-management meetings, membership meetings, disciplinary and grievance proceedings, or other activities that support the mission of the Department. *See supra*, pp. 12-25. Aside from their own private preferences, Appellants have failed to establish any basis to overturn the legislative judgment that the CBA and ABL serve a predominantly public purpose.

Appellants argue that the so-called "private" purposes of the AFA are inherently incongruent with the City's "public" purposes. In fact, the trial court

found, with ample record support, that the "[t]he missions of the AFD and AFA overlap and are not mutually exclusive." CR.4209 (Am. FOF & COL) at ¶9. Indeed, there is no basis to conclude that the AFA's "interests" serve anything other than public purposes, given the AFA's uncontroverted public safety mission and its pledge "to support the service and mission of the Austin Fire Department, [and] to constructively support the goals and objectives of the Austin Fire Department" in the parties' CBA. 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA) at Art. I(2). The AFA's objectives, therefore, plainly overlap with the City of Austin's Fire Department own objectives and cannot be presumed adverse.

Indeed, the objectives of a labor association and an employer frequently align in favor of the public good, as courts recognize. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (U.S. 1960) (recognizing the importance of a properly functioning grievance arbitration system "in achieving industrial peace"); *accord* TEX. LOCAL GOV'T CODE § 174.002. In rejecting an argument identical to the one raised by Appellants here, the Arizona Supreme Court explained that "a public purpose may be served by [the labor organization's] representational activities to the extent they promote improved labor relations and employment conditions for public safety officers." *Cheatham*, 379 P.3d at 218. Here, as in *Cheatham*, ABL overwhelmingly serves a public purpose and provides

substantial benefit to the City in the form of harmonious labor relations and improved employment conditions for Austin's fire fighters.

Although Appellants once again attempt to suggest that Chief Nicks "uses ABL time for political and lobbying activities," Br. at 2 (citing 4.RR.67:23-28:6), Chief Nicks repeatedly testified that he did *not* use ABL for any political or lobbying activities. *See, e.g.*, 5.RR.103:23-104:11 (Nicks) ("Like I've testified over and over, my work week is well over 40 hours, and I believe that I am not on ABL when I'm doing political activities . . . ."). [15] The trial court was entitled to credit Chief Nicks' testimony on this point, and Appellants cannot simply pretend Chief Nicks' extensive testimony on this subject does not exist.

Notwithstanding the Appellants unsubstantiated claims about what "political" activities are conducted by AFD members while on ABL, the record contains overwhelming evidence of the *non*-political activities Chief Nicks performs while on ABL. As detailed above, Chief Nicks regularly meets with AFD management to discuss AFD operations and public safety issues; he provides "a lot of value" to the City by bringing forward safety and operational issues concerning the City's fire fighters; and he spends a "significant amount of [his] time . . . communicating

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[15] *See also* 5.RR.150:3-151:11, 152:5-20, 174:16-174:22.

messages from the Fire Department management to the AFA membership." 5.RR.145:24-146:24; 5.RR.146:25-147:3; 5.RR.154:21-155:10; 4.RR.252:5-21.

Likewise, the primary uses of ABL by the AFA's members—to participate in collective bargaining, meet with other fire fighters to discuss issues related to the CBA and Department policy, participate in labor-management meetings, meet to discuss or represent fire fighters in disciplinary and grievance proceedings, participate in informal dispute resolution proceedings, and conduct other lawful activities that support the Department's and the AFA's overlapping missions—collectively and individually serve a predominantly public purpose. *See supra*, pp. 12-25; *see also* 4.RR.179:13-181:7 (Paulsen) (benefits of member use of ABL includes participating in "oversight committees" like the weekly "cadet hiring oversight committee," in which the committee "will make recommendations to the Fire Chief about, for example, should we have, you know, hours of college education as a requirement or not have them; should we have a certain portion of the process included or not included. The Fire Chief still has the management right to do a thumbs up or thumbs down, but he looks at these committees as a valued contribution in that they're representing lots of different perspectives."); 4.RR.179:13-179:20 (Paulsen) (City considers it beneficial that ABL allows fire fighters to attend "a labor

management initiative where we come together once a month and talk about issues.").

Appellants failed to show that the CBA—or even ABL itself—serves anything other than a predominantly public purpose, affording the City a clear benefit in return.

iii. The City Retains Sufficient Control

The trial court correctly ruled that the City possesses adequate control under the CBA to protect its investment. Despite Appellants' characterization, the compensation and benefits afforded under the CBA were not given away without getting anything in return—and indeed, they were not given *to the AFA* at all, but rather *to the City's employees*, in return for their valued public service. The binding contract itself constitutes sufficient public control. *See Chisholm Trail*, 2017 Tex. App. LEXIS 4285, at *16-17 (considering a challenged contract, "even if the District were required to retain some degree of control, the Agreements expressly grant the District control going forward"). *Cf. Key v. Commissioners Court of Marion Cnty*, 727 S.W.2d 667 (Tex. App.—Texarkana 1987, no writ) (rights and obligations under contract probative on the issue of control). Here, the binding CBA grants the City sufficient control to protect its investment in the AFD's fire and rescue services

and—even viewed more narrowly—sufficient control to protect its investment in ABL.

Under the CBA, the City retained the right to "change those benefits, privileges, and working conditions which it determines, in accordance with this subsection, to interfere with the operations of the Department." 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 27(2). The City also retained a full complement of management rights, including:

> [D]irection of the work force, including but not but not limited to, the right to hire; the right to discipline or discharge in accordance with Chapter 143 and this Agreement; the right to decide job qualifications for hiring; the right to layoff or abolish positions; the right to make rules and regulations governing conduct and safety; the right to determine schedules of work together with the right to determine methods, processes, and manner of performing work; the right to evaluate, supervise, and manage performance of employees; the right to determine the size of the work force, and the assignment of work to Fire Fighters within the Department, including the right to transfer Fire Fighters; the right to determine policy affecting the selection of new Fire Fighters; the right to establish the services and programs provided by the Department, including the nature and level of such services and programs, as well as the type and quantity of resources allocated; the right to establish work performance measurements and standards; and the right to implement programs to increase the cost effectiveness of departmental operations.

7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 4. Thus, the City retains more than adequate controls over its workforce. *See Chisholm*, 2017 Tex. App. LEXIS 4285, at *16-17.

Even considering ABL alone, the City still retains more than adequate control: it possesses the contractual right to specify through departmental policy the "[a]dministrative procedures and details regarding the implementation" of the ABL provision contained at Article 10 of the CBA. *See* 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(2)(D). Further, the City reviews ***all*** ABL requests and retains the right to deny requests for operational needs or noncompliance with the CBA. 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(C)–(D); 5.RR.127:6-15 (Nicks); 4.RR.115:23-116:9 (Woolverton) ("Q. . . . is it possible for a firefighter to use [ABL] without the Fire Department's approval? A. No.").

Moreover—although it is the *right* to control that is material—the City does in fact *exercise* its right to deny ABL requests whenever necessary. *See, e.g.*, 4.RR.113:13-114:14 (Woolverton) (describing a denial of ABL request for purposes the AFD determined would have been political); 5.RR.160:12-161:11 (Nicks) (denial for budgetary reasons). This right of control over ABL use is more than sufficient to show that the legitimate public purposes behind the provision of ABL—that is, to provide for stable, efficient, and effective fire safety and emergency services in Austin—are being protected.

Appellants theorize that the City must precisely monitor every aspect of ABL use in order to exercise sufficient control. But the City is not required to monitor the

minute-by-minute activities of employees on leave—indeed, tracking ABL activities by the minute is no more constitutionally required than mandating surprise home visits of employees who call in sick, just to confirm they are in bed with a hot water bottle. It is telling that Appellants were unable or unwilling to identify what *would* be sufficient public control over ABL to avoid a constitutional problem. *See* 5.RR.58:14-59:18 (Borgelt) (declining to answer which controls he would find sufficient and concluding "if I had been negotiating the contract, there wouldn't have been ABL in it").

Troublingly, Appellants claim that "[e]ven after the fact, the City does not know how a large portion of ABL time is spent," without any citation to the record. Br. at 3; *see also* Br. at 18 (claiming, without any citation to the record, that "the record shows that the City does not even know how the vast majority of ABL time is actually spent"). These assertions—which are in fact demonstrably false—appear to stem from the Appellants' misleading, but oft-repeated claim that "most ABL hours . . . are simply categorized as 'other Association business' without further detail." Br. at 3 (citing 7.RR.453 ¶¶48-50); *see also* Br. at 12 (referring to it as an "unaccounted-for category of time") (citing 7.113-15, 448); Br. at 18-19 (same); Br. at 19 (Appellants claiming that "of the time reported to the City for ABL used by 'other Authorized Association Representatives,' less than 25 percent was

specifically identified by use!"). In support of these contentions, Appellants rely exclusively on three stipulated facts reciting yearly ABL summary figures for 2017, 2018, and 2019, *see* 7.RR.453 ¶¶48-50, and four one-page summaries of ABL hours used in 2017 through 2020, *see* 7.113-15, 448.

However, even if the quarterly summaries do not contain the granular detail Appellants would prefer, the record unequivocally establishes that the City *does* possess "further detail" about how ABL in the "Other Association Business Leave" is used. For each and every ABL request, the City requires that its fire fighters complete a "Purpose of Request" field and, if ever they fail to do so, the request is "kicked back asking for the submitter to put in the required information." 4.RR.116:10-117:15 (Woolverton). Moreover, if the "Purpose of Request" field indicated that the requested ABL activity may be political, "it's something that we would really screen," and "it would, as I said earlier, tickle the conscious [sic] enough that I would want to get the Chief of Staff's input, probably the Fire Chief's input, and probably City legal." 4.RR.121:16-122:14 (Woolverton). And despite Appellants' misleading claim that most ABL usage is not "categorized" or "identified" by use, the City maintains the "Purpose of Request" field for each ABL request, thereby identifying every hour of "Other Association Business" by its specific, individual use. 4.RR.116:10-117:15 (Woolverton) (authenticating Joint

Exhibit 7, an electronic file containing historical "Purpose of Request" information for ABL requests).

Likewise, even if the CBA does not explicitly require an itemized "accounting" of all activities performed on ABL—though the retention of the "Purpose of Request" information effectively serves as one—it does not follow that the City is actually *unaware* of activities that are performed by its fire fighters while on ABL. For example, members of AFD management attend union meetings and witness first-hand what goes on there. *See, e.g.*, 4.RR.152:25-153:17 (Woolverton) (describing his presence at a recent union meeting). Regular joint meetings, like the weekly cadet hiring oversight committee meetings and the monthly labor-management initiative meetings, are attended by AFD management *and* AFA who members on ABL. 4.RR.179:8-179:12 (Paulsen). Similarly, AFD chiefs attend union conferences along with AFA members and may witness firsthand what that attendance involves. *See, e.g.*, 4.RR.153:18-154:9 (Woolverton) (describing his time spent as the AFD's "Wellness Chief" attending a week-long conference "all about firefighter health and wellness").

Regarding the right to control Chief Nicks' ABL use, the Appellants misleadingly assert that "the City places no prohibitions on [Chief Nicks'] activities." Br. at 9 (citing 2.SCR.506-07 at 20:6-12, 21:12-16 (Nicks Dep. Tr.);

2.SCR.448 at 33:9-12, 34:20-22 (Nicks Dep. Tr.)). But when the Appellants' opaque citations are inspected, the testimony reveals that Chief Nicks actually identified *several* prohibitions on his conduct, including prohibitions on soliciting in uniform, delivering checks, and also testifying that, "[o]f course I am subject to the Code of Conduct. Regardless of whether I'm – I'm working as Battalion Chief or Union President, I'm still a City of – employee. I'm still employed by the City of Austin, and I am subject to those sort of personnel policies, too." 2.SCR.447-48 (Nicks). Indeed, prior to trial, Appellants stipulated that "Bob Nicks is required to follow the City's Code of Conduct" and that he "must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisors, as outlined in the CBA." 7.RR.452 (Am. Joint Stip. of Facts) ¶¶32-35.

Appellants also assert that Chief Nicks "provides no accounting of any kind to the City about his daily activities or how he spends [ABL]." Br. at 10. But whether Nicks provides a formal "accounting" of his ABL activities or not, the record demonstrates that Chief Nicks "regularly attend[ed] meetings with management of the Austin Fire Department," and was "responsive to communications from the Fire Chief or Assistant Chiefs and others," whenever they were made. 4.RR.129:1-12 (Woolverton) (emphasis added); *see also* 5.RR.140:6-140:6 (Nicks) (confirming he is "regularly having meetings with the Fire Chief and the Assistant Chiefs and other

members of the Fire Department management" and explaining that when "anybody in the command" calls him, "I pick up immediately, and I deal with every issue they need, provide any perspective of work they need"). In fact, "there would have been an issue had [Chief Nicks] refused to meet with them." 4.RR.129:1-12 (Woolverton). Thus, the City is aware of those activities of Chief Nicks that his AFD managers are also directly involved in. The record demonstrates that Chief Nicks is regularly in communication with AFD management and responds to their calls when he is contacted.

Appellants also misleadingly assert that "[a]lthough other City employees must undergo some form of evaluation of their work performance, no evaluation is conducted for Nicks." Br. at 11. In fact, the "other City employees" to which the Appellants misleadingly refer include only non-Fire Department personnel; for Fire Department employees, there are currently no formal performance evaluations conducted by AFD management. *See* 5.RR.113:6-8 (Nicks) ("Q. Does the Fire Chief give you performance reviews? A. No, but nobody gets performance reviews in the Department right now because we don't have a process for doing that."); 5.RR.113.18-20 (Nicks) ("An official, like, sit down with a piece of paper review, they don't exist in our department, so the answer is no."); 4.RR.126:18-127:1 (Woolverton) (agreeing that Chief Nicks has a "performance review process that is

the same as any other employee of the – any other sworn employee of the Fire Department" and testifying that "he would have been held to the same standard as anyone whether we did [performance evaluations] or didn't do it"). Therefore, the record reflects that with regard to the formal performance evaluations, Chief Nicks *is not* exempted from any process that all other AFD members must participate in.

Appellants also claim that the "City has no say in who becomes the AFA President, . . . and the City cannot remove Nicks from his job," Br. 11 (emphasis added), apparently in an attempt to suggest to the Court that Chief Nicks cannot be terminated by the City. In fact, the Appellants' unexplained citations to the record only establish that the City cannot unilaterally remove Chief Nicks from his role *with the AFA*, and do not relate whatsoever to the City's ability to manage and discipline Chief Nicks, up to an including terminating his employment, which prerogatives of the City remain fully intact. As Chief Nicks remains subject to all AFD personnel policies, the City is perfectly capable of terminating Chief Nicks from his employment and thus terminating his access to ABL—or indeed paid leave of any kind.

In fact, Chief Nicks can be—and has been—subjected to Department discipline for time on ABL. 3.SCR.466-68 (Nicks Aff.); 3.SCR.316-17 (Nicks);

3.SCR.257-58 (Woolverton); 4.RR.127:22-128:4 (Woolverton) (Nicks disciplined for Code of Conduct violation as applicable to all employees).

Thus, the continuing use of ABL is subject to the tracking and discretion of the City in ways easily sufficient to protect the City's investment in paid leave to qualifying AFD members. Accordingly, the record evidence overwhelmingly supports the trial court's conclusion that the Appellants failed to demonstrate any violation of the Texas Constitution, and the judgment below should be affirmed.

II. The TCPA Order Should Be Affirmed[16]

Appellants raise several imaginative, but fundamentally flawed, grounds for overturning the trial court's TCPA dismissal and sanctions award. As explained below, the TCPA was properly invoked by the AFA, Appellants Pulliam and Wiley failed to carry their burden to marshal evidence of a prima facie case against the AFA, and their claims were properly dismissed with prejudice on February 7, 2017. Further, AFA's reluctant return to litigation in 2018, after the Appellants amended their Petition seeking to invalidate *another* CBA (effective 2017-2022) is no basis to overturn the 2016 dismissal of Appellants' attempts to invalidate the AFA's

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[16] Appellees City of Austin and its City Manager did not move for dismissal of Appellants' claims pursuant to the TCPA and thus take no position on the following section and the arguments made therein by the AFA.

previous CBA (effective 2015-2017). Finally, the trial court's carefully considered fees and sanctions award does not infringe on any constitutional rights and should be affirmed in full.[17]

a. TCPA Legal Standard[18]

Analyzing a TCPA motion to dismiss is a two-step, burden-shifting inquiry.[19] First, the movant must show, by a preponderance of the evidence, that "the action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association." *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 845 (Tex. App.—Dallas 2015, pet. filed); TEX. CIV. PRAC. & REM. CODE § 27.005(b). Relevant here, the TCPA defines the "[e]xercise of the right of association" as "a communication between individuals who join

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[17] Appellants have not briefed any challenge to the reasonableness of Appellees' mandatory fees pursuant to the TCPA and therefore any such challenge should be considered waived pursuant to TEX. R. APP. P. 38.1. Nevertheless, the record demonstrates that the fees and costs awarded were fair and reasonable. *See* CR.2243-2255 (Fees Mot.); CR.2256-2265 (Aff. of B. Craig Deats); CR.2347-2380 (summary and contemporaneously kept record of fees and costs expended).

[18] References to the TCPA are to the version applicable here, in effect prior to the 2019 amendments. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 131 n.3 (Tex. 2019).

[19] In the event the plaintiffs are able to carry their responsive burden in the second step, the burden shifts back to the defendants to establish an affirmative defense, if any. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d). No third step is necessary here.

together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(2).

Second, upon such a showing, the burden shifts to the plaintiffs; the court "shall dismiss" the complaint unless "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." *Id*. at § 27.005(b), (c). Plaintiffs must "provide enough detail to show the factual basis for its claim." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015). "[M]ere notice pleading—that is, general allegations that merely recited the elements of a cause of action—will not suffice." *Id*. at 590.

b. AFA Carried Its Initial Burden Under the TCPA

Contrary to the Appellants' briefing, the AFA was not obligated to demonstrate that the plaintiffs' lawsuit actually "impaired" the AFA's constitutional rights or that the Appellants' abuse of the court system arose to an actionable constitutional violation. Rather, the TCPA required only that the AFA demonstrate that the Appellants' claims "relate" to the statutorily-defined acts of association, *see* TEX. CIV. PRAC. & REM. CODE § 27.001(2). The AFA readily did so here.

Texas courts have squarely rejected attempts to read constitutional law into the plain language of the TCPA. *See, e.g.*, *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018). Rather, the Texas Supreme Court has made it

"clear that [courts are] to adhere to a plain-meaning, dictionary-definition analysis of the text within the TCPA's definitions of protected expression, not the broader resort to constitutional context that some [courts] have urged previously." *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism'd).

Thus, applying the plain text of the TCPA, the AFA needed only demonstrate that Appellants' claims related to "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(2). The Appellants challenge to ABL was based on allegations that it was used for "time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training . . . , and attending union conferences and meetings." CR.231-233 (TCPA Mot. at 6-8); CR.13 (Pet. at ¶27). This fact alone shifts the burden to Appellants. *See Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 Tex. App. LEXIS 1098, at *17 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (TCPA implicated by emails between members of public employee association).

c. Appellants Failed to Carry Their Burden Under the TCPA to Demonstrate a Prima Facie Case by Clear and Specific Evidence

With the burden passed to the second stage of the TCPA analysis, the Appellants were required to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c). On appeal, Appellants do not cite to a single page of the record in support of this burden, *see* Br. at 28-33, nor do Appellants offer a single citation to the TCPA hearing record. Instead, Appellants rely exclusively on the idea that their failure to establish a prima facie case on February 7, 2017, is "logically incompatible" with the trial court's subsequent rulings—rulings that occurred years later, based on different standards of review, different record evidence, and even different CBAs.

Under the TCPA, a nonmovant's burden to present a "prima facie case 'refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.'" *Long Canyon Phase II & III Homeowners Ass'n v. Cashion*, 517 S.W.3d 212, 222 (Tex. App.—Austin 2017, no pet.) (citations omitted). "Conclusory statements and bare, baseless opinions are not probative and accordingly do not establish a prima facie case." *Id*. The fact that a plea to the jurisdiction—which Appellants opposed as "procedurally defective"—was denied does not establish that the trial court found a prima facie case present. Likewise, the fact that a prima facie

burden could be carried years later at summary judgment bears no logical inconsistency with the Appellants' failure to put on a prima facie case in response to the TCPA motion. That summary judgment ruling was based on a new set of pleadings, challenging a new CBA, after multiple depositions, and after full written discovery including documents created and events that occurred after the February 7, 2017 ruling. The trial court's subsequent rulings in no way establish that Appellants Wiley and Pulliam carried their burden under the TCPA in 2017.

In fact, the hearing transcript reveals that the trial court's TCPA dismissal was legally sound. The undisputed evidence established that the CBA—and the ABL provision itself—were supported by valid consideration, served a public purpose, and afforded a clear public benefit in return. Not only did the CBA reflect bargained-for consideration on both sides, but that the ABL provision itself had involved a specific "give and take" at the bargaining table, in which the City obtained a valuable change to the way "productive leave" and sick leave were treated by the AFD. 3.RR.21-22. The record also demonstrated that the activities performed on ABL served predominantly public purposes. *See, e.g.*, 3.RR.17 (ABL used to "get ideas what's going on in the work place that might lead to discussions that enhance safety"); 3.RR.17-18 (AFA members would "meet to try to come up with solutions that meet management's interest of trying to put bodies in seats, but meet our interest

to make sure fatigue and safety issues are addressed"). The record established that the City had authority to review and reject ABL requests and that, even on ABL, Chief Nicks and other members were subject to City policies and orders. 3.RR.57; CR.19-115, 2015-2017 CBA, at Art. 10, §§ 1(C), (D) at §§ 2(A), (D); *see also* 3.RR.26, 40-42 (describing application of code of conduct and other controls on ABL use).

The burden lay with Appellants Wiley and Pulliam, not the AFA, and Appellants' reliance on unverified and conclusory allegations without marshalling evidence in support of each prima facie element was insufficient to carry that burden in 2017, and it is insufficient now. The court should affirm the trial court's TCPA ruling.

d. AFA's Intervention to Defend Against Appellants' Amended Petition Seeking to Invalidate the 2017-2022 CBA Does Not Conflict with the Dismissal of Appellants' Challenge to the 2015-2017 CBA

Appellants next argue that the only remedy afforded by the TCPA is relief from being "named" in a lawsuit and an "exit" from the case as the plaintiffs proceed to obtain a judgment in absentia against their defenseless target. As Appellants argue, because the AFA obtained a dismissal with prejudice of the challenge to the 2015-2017 CBA, the AFA should now be precluded from defending against a

subsequent challenge to the 2017-2022 CBA, merely because it bears the same case number.

In fact, the TCPA provides expedited dismissal of "legal actions" and "lawsuits," not parties. *See, e.g.*, *Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021) (TCPA promotes expedited dismissal of "legal action" meaning not only "lawsuits, petitions, pleadings, and filings, but also causes of action, cross-claims, and counterclaims"); *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (dismissal of "***a legal action***" (emphasis added)); *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016) ("expedited dismissal of a legal action"); *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) ("identify[ing] and summarily dispos[ing] of ***lawsuits***" (emphasis added)); *Cavin v. Abbott*, 545 S.W.3d 47, 55 & n.16 (Tex. App.—Austin 2017, no pet.) ("identify[ing] and summarily dispos[ing] of ***lawsuits***" and making "***legal proceedings***," not parties, "subject to threshold testing of potential merit, and compelling rapid dismissal" (emphasis added)).

Further, Appellants ignore the fact that the Amended Petition against which the AFA felt compelled to defend sought *new* injunctive relief: it sought to enjoin and invalidate a separate CBA. *See* CR.1415 (Am. Pet.) (attaching the CBA ratified September 28, 2017, and in effect through September 30, 2022); *id*. at 1420 (seeking, among other things, to "[p]reliminarily and permanently enjoin Article 10 of the

Agreement between AFA and Austin from having any further or continuing effect"). The AFA's efforts to defend against Appellants' attempts to invalidate the AFA's new CBA demonstrates no inconsistency or flaw in the 2017 TCPA ruling, and the Court should reject Appellants' argument on this point as well.

e. Appellants Have Failed to Establish the TCPA Sanctions Award Constituted an Abuse of Discretion by the Trial Court

Under the TCPA, sanctions in an amount sufficient to deter future meritless lawsuits against public policy are statutorily required. TEX. CIV. PRAC. & REM. CODE § 27.009(a).

Appellants Pulliam and Wiley each admitted that they had not even *read* the CBA prior to filing suit. *See* CR.3371-84 (Notice and Nobile Decl.); CR.3419-20 (Pulliam); CR.3436 (Wiley). At deposition, Appellant Wiley admitted he *still* had never read it or looked into how it was negotiated. CR.3436 (Wiley). Given Appellants' failure to do even the most basic of research before alleging that terms of those CBAs were granted for "nothing in return," Appellants showed the trial court they were willing to file politically expedient suits regardless of their merits.

Meanwhile, Appellants both admitted to having ulterior motives for filing suit against the AFA. Appellant Pulliam testified that he "practiced labor and employment laws for many years and ha[s] written about public employee bargaining. I'm not a big fan of public employee bargaining." CR.3422 (Pulliam).

He further admitted that "as a matter of public policy I do not believe that public employee bargaining is beneficial to taxpayers or to, to democracy for that matter." CR.3423 (Pulliam). Tellingly, Appellant Pulliam admitted to writing a blog about "lawfare," the practice of "pursuing a political goal through the legal system, either criminally or civilly, by, you know, indirectly accomplishing a particular end." CR.3424.

Appellant Wiley admitted to using the lawsuit as publicity to support his political platform as a "fiscal conservative" seeking "union reform" and "right-to-work laws" in Texas. CR.3435, 3446-52. Fewer than ten days after the suit was filed, Appellant Wiley sent an email blast about the suit to his political listserv of about 9,000 to 10,000 individuals, including the press, who had expressed "interest in the campaign" or "who politically may have been interested in supporting my campaign." CR.3440-45, 3448 (Wiley); CR.3458-60 (Sept. 13, 2016 Email from J. Wiley). The email contained a graphic of a "little thief running away with a bag of money," which he selected himself. CR.3443 (Wiley). Appellant Wiley also admitted to including information about his stance on "public spending" and the lawsuit on his campaign website when he first announced his candidacy. CR.3446-47 (Wiley).

Although he stated publicly that his purpose in bringing the suit was to ensure that "our tax dollars will no longer be used for private union activities," Appellant Wiley recognizes that the City of Austin has been forced to expend taxpayer funds to defend that suit, which he continued to press for over two years after dismissal on the merits of his claim. CR.3443-44 (Wiley). The publicity campaign worked: Wiley's political listserv grew at least 20% since filing the lawsuit. CR.3444-45 (Wiley). Appellant Wiley admitted publicizing his lawsuit because he "thought it would help [him] in [his] campaign." CR.3448 (Wiley). Likewise, the purpose of his campaign webpage, which featured the lawsuit prominently, was "to promote [his] political campaign." CR.3450 (Wiley).

Given the foregoing, the trial court was justified in concluding that there was a substantial risk that Appellants Wiley or Pulliam would file similar abusive, politically-motivated lawsuits against public employee associations in Texas. Indeed, even after Plaintiffs' claims against the AFA have been dismissed on the merits, subjecting Plaintiffs to statutorily-mandated fees and sanctions, Plaintiff Pulliam admits that "it's possible" that he would file a similar lawsuit in San Antonio if he became a taxpayer there. CR.3425-27 (Pulliam). In addition, Appellant Borgelt admitted at trial that he joined the lawsuit because he was asked to do so by

Appellant Pulliam, who withdrew from the case but nevertheless wanted Borgelt to "help[] him pursue the case." 5.RR.45:5-12 (Borgelt).

Accordingly, the trial court had sufficient grounds to conclude substantial monetary sanctions were necessary to deter similar abusive litigation going forward.

f. Appellants' Meritless Lawsuit Against Public Policy Warrants No Special Protections from Consequences

Appellants, having failed in their attempt to undermine fire fighters' constitutionally protected rights to association, now argue that it is *their* right to associate that has been "implicated" by the sanctions order. But having had their day in court—in fact having had multiple days in court over the course of years—Appellants' claims have been adjudicated meritless several times over. While the First Amendment may insulate public-interest attorneys from blanket rules against barratry that would impair public-interest litigants' access to attorneys, that is far from the circumstance here.

In *NAACP v. Button*, 371 U.S. 415 (1963), the Supreme Court was careful to distinguish its holding from the "different matter" of "oppressive, malicious, or avaricious use of the legal process for purely private gain." *Id*. at 443. The Court noted the judicial hostility towards stirring up litigation "where it promotes the use of legal machinery to oppress," and that "[f]or a member of the bar to participate,

directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public." *Id*. at 441.

Misuse of the judicial process for purposes of oppression is precisely the kind of conduct the TCPA is designed to prevent. "The TCPA's express purpose is to balance the protections for persons exercising their constitutional rights of expression and association with protections for persons filing meritorious lawsuits for demonstrable injury." *Mem'l Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 Tex. App. LEXIS 7474, at *41-43 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied). The balance struck by the TCPA differs from the blanket prohibition on "barratry" at issue in *NAACP v. Button* in several important respects.

As one Texas Appellate Court reasoned when rejecting a challenge to the TCPA under the Texas Constitution, "the fee-award provision is not imposed on a party before being permitted to institute litigation. Nor is it imposed on parties who meet the burden placed on them, under the TCPA, . . . to avoid dismissal." *Id*. Rather, "it is a fee imposed after resolution of a motion to dismiss that shifts litigation costs from the prevailing party (who met its burden to show by a preponderance of the evidence that the legal action is based on, related to, or is in response to that party's exercise of protected rights) to the party that failed to meet its burden." *Id*. The TCPA has several "provisions in place that limit the impact of this fee-shifting provision,"

including court discretion to set the amount of fees and sanctions awarded and providing a "countermeasure that permits fee-shifting in the event a trial court finds that a motion to dismiss was frivolous or filed solely to delay." *Id*. Balancing the TCPA's purpose against litigants' protected rights to open court, as well as the right to sue for reputational torts protected by Article I, section 8 of the Texas Constitution, the court nevertheless upheld the TCPA. *Id*. at 43 n.9.

The reasonable attorneys' fees and sanctions imposed against Appellants Wiley and Pulliam for their oppressive use of the court system do not offend the constitutional right to associate with counsel, nor do they impair access to the courts, and this Court should reject Appellants' constitutional challenge to the TCPA.

CONCLUSION & PRAYER

The trial court's TCPA ruling and subsequent summary judgment rulings and trial verdict in favor of Appellees should be affirmed.

DATE: January 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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