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Velva L. Price
District Clerk
Travis County
D-1-GN-16-004307
Terri Juarez

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

MARK PULLIAM; AND JAY WILEY,	§	
	§	
***Plaintiffs*,**	§	
	§	
AND	§	
	§	
TEXAS,	§	
	§	
***Intervenor-Plaintiff*,**	§	**IN THE DISTRICT COURT**
v.	§	
	§	
CITY OF AUSTIN, TEXAS; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN;	§	**OF TRAVIS COUNTY, TEXAS**
	§	
	§	
	§	**419th JUDICIAL DISTRICT**
***Defendant*,**	§	
	§	
AND	§	
	§	
AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975,	§	
	§	
***Intervenor-Defendant*.**	§	

DEFENDANTS' AND INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF THEIR JOINT CROSS-MOTION FOR SUMMARY JUDGMENT

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TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Intervenor-Defendant Austin Firefighters Association, International Association of Fire Fighters, AFL-CIO, Local 975, ("AFA"), and Defendants City of Austin and Marc A. Ott, ("City") (collectively, "Defendants"), by and through counsel, file this Reply in Support of Their Joint Cross-Motion for Summary Judgment. Defendants respectfully request that this Court grant judgment in Defendants' favor against Plaintiffs Mark Pulliam and Jay Wiley and Intervenor-Plaintiff Texas (collectively, "Plaintiffs"), as to all claims.[1]

I. Introduction

Despite the lengthy procedural history of this case, the issue now before the Court is simple: whether the arms-length Collective Bargaining Agreement ("CBA") between the City of Austin and its fire fighters constitutes a gratuitous grant of public funds to a private party. Quite obviously, ***and as this Court has already ruled on the merits in this case***, it does not.

Plaintiffs' attempts to muddy the analysis by insisting on arbitrary limitations on the scope of this Court's review and by relying on deviations from basic tenets of contract law should be disregarded. As every court to consider a challenge to a bargained-for release time provision of a valid CBA has done previously, this Court should reject Plaintiffs' politically-motivated attack on public employee collective bargaining rights. Tellingly, Plaintiffs do not even present an argument under the panoptic standard required by Texas law and adopted by the previous two courts to dismiss the Goldwater Institute's challenges. *See In re Palm Harbor*

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[1] The City's request for judgment in its favor is subject to its pleas to the jurisdiction challenging Plaintiffs' standing to sue.

Homes, Inc., 195 S.W.3d 672, 676 (Tex. 2006) (analysis of consideration includes the entire agreement); *Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016); *Rozenblit v. Lyles*, No. HUD-C-2-17, 2017 N.J. Super. Unpub. LEXIS 3202 (N.J. Super. Ct. Ch. Div. Oct. 31, 2017). Under the appropriate standard of review, there is no question that Plaintiffs' lawsuit is meritless. This Court should join the Honorable Orlinda Naranjo in ordering that meritless suit dismissed.

II. Argument

A. Principles of *Res Judicata* and Collateral Estoppel Bar Relitigation of the Merits of Plaintiffs' Claims

Plaintiffs' claims have already been tested at an evidentiary hearing and dismissed on the merits under the Texas Citizens Participation Act, ("TCPA"). Plaintiffs now attempt to escape this Court's prior ruling on the merits by claiming that (1) the order dismissing Plaintiffs' claim did not apply to Texas, (2) the ruling was not a final judgment, and (3) the hearing was not "full and fair litigation" of their claims. Pl. Opp. at 3-4. None of these arguments withstand scrutiny.

First, Texas's procedural exception from the TCPA ruling does nothing to protect it from the preclusive effect of that ruling. Issue preclusion and collateral estoppel bar relitigation of the same issue not only by the same party, but also by those in privity with such party. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). Further, "[t]here is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res judicata and the determination of who are privies requires careful examination into the circumstances of each case as it arises." *Id*. Texas already had its day in court on the anti-SLAPP motion: it participated in the anti-SLAPP hearing and even filed its own opposition to the motion. The suggestion that Texas would not be bound by the anti-SLAPP decision that it

argued on the merits because the order was not directed specifically against Texas due to a procedural exception strains credulity.

Second, a ruling is sufficiently "final" for purposes of *res judicata* and collateral estoppel if it is "sufficiently firm to be accorded conclusive effect," regardless of whether the order given preclusive effect may be immediately appealed. Restatement (Second) of Judgments § 13 (1982); *see also id.* at § 13, cmt g; *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (Friendly, J.) ("Whether a judgment, not 'final' in the sense of 28 U.S.C. § 1291, ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."). Here, this Court has issued a final ruling dismissing Plaintiffs' claims on the merits. Further, with two years elapsed since that ruling and Judge Naranjo now retired, the Travis County Local Rules preclude reconsideration of that dismissal on the merits. 419th (Tex.) Dist. Ct. Loc. R. 1.4 (a motion "challenging a prior ruling, except one by default, must be presented to the judge who made the ruling, including a visiting judge"). This Court's prior dismissal of Plaintiffs' claims on the merits is final.[2]

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[2] In a stunningly incorrect recitation of the text of the TCPA, which formed the basis for Judge Naranjo's ruling, Plaintiffs state that "the TCPA permits only *one* remedy: dismissal of the 'moving party.' Tex. Civ. Prac. & Rem. Code § 27.005(b).'" Pl. Opp. at 9. Of

Third, Plaintiffs' contention that a TCPA hearing is not sufficiently "full and fair" to be given preclusive effect is contrary to the well-accepted application of *res judicata* to TCPA dismissals on the merits. *Holcomb v. Waller Cty.*, 546 S.W.3d 833, 841 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *see also Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 500 S.W.3d 26, 40 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) ("A dismissal with prejudice under the TCPA constitutes a final determination on the merits for res judicata purposes.").

Individual Plaintiffs and Texas are barred from relitigating Plaintiffs' meritless claims by principles of *res judicata* and collateral estoppel. Moreover, even if this were not the case, those claims remain meritless as a matter of law.

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course, what section 27.005(b) *actually* provides is that "a court shall dismiss *a legal action* against the moving party" unless the plaintiff can demonstrate that legal action meritorious. Tex. Civ. Prac. & Rem. Code § 27.005(b) (emphasis added). Indeed, a dismissal pursuant to the TCPA is more than a procedural ruling severing a party from the case; "an order of dismissal under the TCPA is made with prejudice and is a judgment on the merits." *Holcomb v. Waller Cty.*, 546 S.W.3d 833, 841 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *see also Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 500 S.W.3d 26, 40 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). Plaintiffs' attempt to misstate the law should be cast aside.

B. Plaintiffs Have Failed to Carry Their Burden to Show the CBA Lacks Sufficient Consideration

i. Consideration Renders the CBA Constitutional

As the Texas Supreme Court stated unequivocally in considering a challenge to provisions of a joint-insurance fund, "consideration renders the provisions constitutional because the payments are nongratuitous." *See Tex. Mun. League v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). This explicit statement of the law by the Supreme Court controls the analysis.

Moreover, Section 50b-4(a) of Article III of the Texas Constitution does nothing to remedy the unworkability of Plaintiffs' proposed "conjunctive" standard. Despite Plaintiffs' mistaken reliance on this provision to explain away the issues raised in Defendants' brief, *see* Pl. Opp. at 16 n.5, that section only permits the legislature to "finance educational ***loans***." Tex. Const. art. III, Sec. 50b-4(a) (emphasis added). It has no bearing on educational ***grants***, which by definition are issued without consideration. Thus, under Plaintiffs' proposed standard, and Section 50b-4(a) notwithstanding, Texas's many educational grant programs would be rendered instantly unconstitutional. *See, e.g.*, Tex. Educ. Code, Chapter 56, Subchapters C, G, I, M, P.

This Court should apply the Texas Supreme Court's clear statement of the rule made in *Texas Municipal League*: "consideration renders the provisions constitutional." *Tex. Mun. League*, 74 S.W.3d at 383. It need not do more.[3]

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[3] Rather than focus on the facts of this case, Plaintiffs present wild hypotheticals. Plaintiffs suggest that if any consideration alone is sufficient, then a City could give a developer $100 million to build a Ritz-Carlton and that would not violate the gift clause. *See* Pl. Op. at 14.

ii. Plaintiffs Disregard Basic Principles of Contract Law

Plaintiffs ignore basic tenets of contract law in their attempts to argue that Article 10 of the CBA lacks sufficient consideration. This Court must assess whether there is sufficient consideration according to the well-settled contract law of Texas.

First, as the Texas Supreme Court has long held, "individual paragraphs of a contract are not separate and divisible contracts." *Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 86-87 (Tex.

First, as Plaintiffs point out in their brief, grants of public money for "development and diversification of the economy of the state," like this hypothetical project, are excepted from the gift clause inquiry altogether by the Texas Constitution. Pl. Opp. at 16 n.5 (citing Tex. Const., art. III, § 52-a). The State knows this well, given that the State of Texas is one of the largest providers of such economic development grants through the Texas Enterprise Fund, and frequently does give grants in the tens of millions of dollars. *See* https://gov.texas.gov/uploads/files/business/TEF_Awards_Listing.pdf. Additionally, the Legislature explicitly authorized economic development grants by localities, just as it did collective bargaining with fire fighters, in the Local Government Code. *See* Loc. Gov. Code § 380.001, *et seq.*, and § 174.002. Further, ignoring the purposefully trumped-up number suggested by Plaintiffs for shock value, to the extent that the Plaintiffs are suggesting that the consideration at issue under their hypothetical is lopsided, Texas Municipal League holds that consideration must be "adequate" to be constitutional. *Tex. Mun. League*, 74 S.W.3d at 384–85. Given the CBA at issue here, there can be no question the consideration exchanged by the parties is adequate. *See* Def. Mot. at 20-26.

App.—Amarillo 1994, writ denied) (citing *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 344 (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 pet.) ("A basic principle of contract law is that one consideration will support multiple promises by the other contracting party." (citing Restatement (Second) of Contracts, § 80(1) (1981)).[4]

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[4] *See also, e.g.*, *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 224 (Tex. App.—Fort Worth 2009, pet. denied) ("But mutuality in each clause of a contract is not required when consideration is given for the contract as a whole."); *City of Emerald v. Peel*, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no pet.) ("There is no requirement that a separate identifiable consideration be segregated and attributable to the arbitration provision; it was part of the entire bundle of rights the Peels acquired, along with the house.");

Plaintiffs' attempt to escape this basic pillar of contract law is transparently circular. Plaintiffs contend that they challenge the legality of Article 10 alone, not the entire contract. Pl. Opp. at 17. Severing a provision from a contract for analysis, Plaintiffs continue, is acceptable where "only an ancillary provision is illegal." *Id.* at 17 (quoting *Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 218 (Tex. App.—Dallas 2015, no pet.)). Finally, closing the circle, Plaintiffs conclude that Article 10 may therefore be severed from the contract and examined for consideration in isolation because, *when severed and viewed in isolation*, it lacks consideration. *Id*. at 17-18. In other words, Plaintiffs contend that it is severable because it is illegal and that it is illegal because it is severable. Aside from being circular in its reasoning,[5]

Serv. Corp. Int'l v. Ruiz, No. 13-16-00699-CV, 2018 Tex. App. LEXIS 712, at *13 (Tex. App.—Corpus Christi Jan. 25, 2018, pet. denied) ("[T]he arbitration clauses in question are not stand-alone agreements; they are part of larger, underlying contracts . . . ."); *In re Prime Ins. Co.*, No. 13-14-00490-CV, 2014 Tex. App. LEXIS 11502, at *33 (Tex. App.—Corpus Christi Oct. 16, 2014, no pet.) ("[T]he contract as a whole does not lack for consideration . . . ."); *Tex. All Risk Gen. Agency, Inc. v. Apex Lloyds Ins. Co.*, No. 10-10-00017-CV, 2010 Tex. App. LEXIS 9035, at *11 (Tex. App.—Waco Nov. 10, 2010, no pet.).

[5] Article 10 is not like the homestead waiver provision in *Vince Poscente* which was illegal on its face—the illegality of which was undisputed. *See Vince Poscente*, 460 S.W.3d at 217–18.

this argument ignores the basic principles of contract law described above and would leave any provision of any contract that does not recite specific consideration open to attack.[6]

Second, Plaintiffs argue that Article 10 of the CBA lacks consideration because "the AFA is not obligated to provide anything in return for release time." Pl. Opp. 19. Aside from being wrong as a factual matter, *see* Def. Mot. at 23-24 (reciting multiple, specific obligations placed on AFA under the CBA), Plaintiffs once again misconstrue basic principles of contract law. When assessing consideration in a multi-party contract such as a CBA:

> Even if [the labor association] is viewed as the primary beneficiary of the release time provisions, in gauging whether the City has received consideration for those provisions it is necessary to consider what the [employees covered by the MOU] have agreed to do – to work under the wages hours, and conditions specified in the MOU — in exchange for the compensation package (which includes the

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[6] Plaintiffs also argue that because the contract contains a severability clause, Article 10 may be viewed in isolation. But whether a contract can continue with one provision excised is not the same question as whether that provision may be viewed in isolation for purposes of analyzing consideration, and there is no support for the Plaintiffs' position that severability allows the Court to zoom in and focus on a single provision in isolation.

Moreover, even assuming that severability of a contract clause should necessarily limit the consideration analysis to that clause alone — ***a proposition without any authority whatsoever*** — the presence of a severability clause, alone, does not render every clause severable; the analysis requires a showing that the parties "would have entered into the agreement absent the unenforceable provisions." *See In re Poly-America, L.P.*, 262 S.W.3d 337, 360 (Tex. 2008). Here, it is not at all clear that the parties to the CBA would have entered into the same agreement if Article 10 had not been included.

> release time provisions). This reflects the general contractual principle that **one party's performance . . . may be supported by 'consideration' in the form of performance or a return promise by either the promissee . . . *or another person***.

Cheatham, 379 P.3d at 219 (emphasis added) (citing Restatement (Second) of Contracts § 714(4), cmt e (1981); *Turken v. Gordon*, 224 P.3d 158 (Ariz. 2010)).[7]

That "general contractual principle" is not unique to Arizona. *See* Restatement (Second) of Contracts § 714(4), cmt e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous."). Indeed, "[i]t is well-settled in Texas that consideration may be given either by the promisee or by some other person to either the promissor or some other person." *Hovas v. O'Brien*, 654 S.W.2d 801, 802-03 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); *see*

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[7] It is important to note that the Arizona Supreme Court specifically cited its prior holding in *Turken v. Gordon*, 224 P.3d 158 (Ariz. 2010) in arriving at this conclusion, that the CBA as a whole — including the performance of the employees themselves — should be weighed as consideration under the Gift Clause analysis. In *Turken*, the Arizona Supreme Court held only that "anticipated indirect benefits . . . when not bargained for as part of the contracting party's promised performance" could not be weighed as consideration. *Turken*, 224 P.3d at 165-166. The Arizona Supreme Court most certainly did *not* hold — as Plaintiffs have misleadingly suggested — that the bargained-for performance of duties under a CBA "cannot be valued as consideration" if they provide "speculative and indirect benefits" to the City. Pl. Opp. at 21. Bargained-for performance of duties under the CBA, whether the performance of those duties benefits the City or its employees or another party, may be weighed as consideration.

also Loomis v. Skillerns-Loomis Plaza, Inc., 593 S.W.2d 409, 411 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (for purposes of evaluating consideration, "[i]t is immaterial from or to whom consideration moves, even if the promisor receives no personal benefit."). Thus, applying basic principles of contract law, the Court must look beyond the artificially narrow view urged by Plaintiffs, analyzing consideration in the CBA as a whole, from all parties.

Trying desperately to avoid yet another basic principle of contract law, Plaintiffs cite to inapplicable First Amendment doctrine and plainly irrelevant sections of the Texas Labor Code. Pl. Opp. at 18-19. As an initial matter, Plaintiffs lack the standing necessary to challenge any violation of the doctrine set out in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). *See Janus*, 138 S. Ct. at 2462 (reciting the holding of the 7th Circuit in *Janus v. AFSCME, Council 31*, 851 F.3d 746 (7th Cir. 2017), dismissing non-employee claim for lack of standing). Plaintiffs and Texas have not identified a single fire fighter who objects to ABL, and Plaintiffs and Texas are not fire fighters asserting any First Amendment claims through this lawsuit. More substantively, the ruling in *Janus* concerns "money taken" directly from public employees' paychecks and paid directly to an employee union. *Id*. at 2464, 2486. There is no dispute that employees of the City of Austin do not have money taken from their salaries – it is the City that funds the ABL pool, not employee salaries. The connection that Plaintiffs wish to make here is simply too attenuated to implicate First Amendment speech, and furthermore, it is a connection that no court has made. *See* Def. Mot. Ex. 4: Paulsen Tr. at 33:15-34:3 (specific consideration exchanged for the current form of Article 10 "could be, with regard to wages and benefits, but it could be a lot of other articles within the bargaining agreement, because they're taken in a totality before it's finished"). Further, Article 10 of the CBA provides for a pool of ABL used by AFA members and non-members alike; in other words, there is simply no evidence that any

employee's share of the ABL pool is being used contrary to any employees First Amendment rights. Def. Mot. Ex. 3: Woolverton Tr. 40:18-41:14. Plaintiff's plainly erroneous eleventh-hour attempt to convert its suit into a challenge under *Janus*, without the proper standing, should not be indulged.

Similarly, the Texas Labor Code prohibits only "the retention of part of an employee's compensation to pay dues or assessments on the employee's part." Tex. Lab. Code § 101.004. Quite plainly, the CBA neither retains part of any employee's compensation nor pays dues or assessments on the employee's part without written consent. Neither *Janus* nor this facially inapplicable law disturb the basic tenet of contract law that consideration in a multi-party contract may move in any direction.

Likewise, Plaintiffs' attempt to separate Article 10 of the CBA from the AFA's obligations under the CBA as a whole because the AFA is "already obligated to perform" the duties owed pursuant to the larger CBA fails as well. Pl. Opp. at 21. Article 10 is not a "supplemental contract or modification" of the CBA. *Id*. The CBA stands together as a single agreement, Article 10 included. *See, e.g.*, *In re Palm Harbor Homes, Inc.*, 195 S.W.3d at 676.

Considering the CBA as a whole — as this Court must under clear and well-settled principles of contract law — there is no dispute that the CBA is supported by sufficient consideration. As part of the CBA including Article 10, the City of Austin procures the preferred terms of employment for its fire fighters, it receives bargained-for concessions on hiring, promotions, disciplinary investigations, disciplinary appeals, and numerous other management rights and conditions of employment that it would not be entitled to without the CBA. *See* Def. Mot. at 22. The City — and indeed its employees — obtain the bargained-for obligation of the AFA to numerous specific duties under the CBA. *See* Def. Mot. at 23-24. Significantly, the AFA

obligates itself to a grievance procedure that would not exist but for its agreement to the CBA. Def. Mot. at 24. There is no reasonable dispute that the CBA, including Article 10, is supported by sufficient consideration.

C. Plaintiffs Have Failed to Carry Their Burden to Show the CBA Lacks a Legitimate Public Purpose and Does Not Afford a Clear Public Benefit in Return

i. The Undisputed Record Demonstrates Overwhelming Public Purpose and Clear Public Benefit in Return

The record contains overwhelming and uncontroverted evidence that the CBA, including Article 10, serves a legitimate public purpose and afford a clear public benefit in return.

Not only do the terms of the CBA provide the City of Austin with efficient fire protection and emergency services, *see* Def. Mot. at 27-28, the specific bargain struck yields a number of important public benefits for the City, as the undisputed record demonstrates:

- "This agreement allows the City of Austin to address different items that are outside of Chapter 143 of the local code. It addresses things like hiring, and promotions, disciplines, and how we will monitor pay for the fire fighters. It includes thirty-two articles that we have negotiated with the Association." Def. Mot. Ex. 2: Flores Tr. at 10:12-11:17.

- "The hiring article allows us to hire, utilizing other mechanisms outside of Chapter 143. The same thing for promotions. It also allows us to pay some – different amounts to different fire fighters, based on their rank or tenure. It allows us to address disciplinary issues. Everything on here is a benefit that we gained. That also includes ABL." Def. Mot. Ex. 2: Flores Tr. at 21:3-21:18.

- "[T]he purpose of – of the – the contract is to negotiate various topics that – that benefit both the fire fighters and the City of Austin," continuing that such benefits include "[h]iring is – is one. Promotions is another" and "[a]s stated earlier, there's thirty-two different articles within there, and – and it – that includes the things that I just talked about but also things like drug testing." Def. Mot. Ex. 3: Woolverton Tr. at 15:10-22.

- "[T]here are many [benefits]. The – the ABL hours are a part of all of the articles in the Collective Bargaining Agreement. It's a – a package, as we call it. That for that, it may have been bargained to get something with regard to promotions, or hiring, or – or drug screening. So there are a lot of intangible benefits that come from the inclusion of this article." Def. Mot. Ex. 4: Paulsen Tr. at 18:19-19:9.[8]

Thus, viewing the reality of the transaction by taking the "panoptic" view rather than indulging Plaintiffs' impermissibly narrow view, there is no dispute that the CBA primarily serves a public purpose and offers a clear benefit in return. *See Cheatham*, 379 P.3d at 219 ((citing *Int'l Union of Operating Eng'rs, Local 139, ALF-CIO v. J.H. Findorff & Son, Inc.*, 393 F.3d 742, 746 (7th Cir. 2004); *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 312 (1989)); *Rozenblit v. Lyles*, No. HUD-C-2-17, 2017 N.J. Super. Unpub. LEXIS 3202, *17 n.5 (N.J. Super. Ct. Ch. Div. Oct. 31, 2017). The CBA sets the City's preferred terms of employment for its fire fighters and does so in a manner agreeable to those fire fighters as well. Thus, the CBA ensures that the high morale of the City of Austin's emergency services employees is maintained, as the Texas legislature has explicitly found to be in the public interest, *see* Tex. Local Gov't Code § 174.002(e), and the health, safety, and welfare of the public are served by efficient and uninterrupted emergency services.

ii. The Plaintiffs Have Misunderstood the Standard of Review, which Places the Burden of Proof Squarely on Plaintiffs

Plaintiffs apparently wish this Court to apply the strict scrutiny standard of review to the parties' CBA. *See, e.g.*, Pl. Opp. at 25 ("labor peace . . . can be achieved in ways that are less

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[8] Plaintiffs and Texas appear to have totally ignored the fact that the CBA gives the City and its fire fighters the freedom to contract around the basic requirements under Chapter 143, and their response does not address this benefit at all.

offensive to the Gift Clause"); ("Defendants claim that ABL is necessary because it is used for collective bargaining"). But the question before this Court is not whether ABL is "necessary" or if its ends could be accomplished through less restrictive means. *See Cheatham*, 379 P.3d at 219 (rejecting an identical argument by Plaintiffs' attorneys in this matter). There is no authority to suggest that the public purposes served by the CBA (and ABL) must be compelling or outweigh First Amendment interests. Rather, it is *Plaintiffs'* burden to establish that the CBA does *not* serve a legitimate public purpose and provide a clear public benefit in return — a burden they have utterly failed to carry. *See Tex. Mun. League*, 74 S.W.3d at 381.

Moreover, the holding *Janus* did not eliminate labor peace as a public purpose, as Plaintiffs contend. It merely stood for the proposition that, under the "exacting scrutiny" standard, labor peace could be accomplished through less restrictive means than withholding dues from paychecks without consent. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2466 (2018). No such exacting scrutiny standard applies here; labor peace, pursuant to the explicit finding of the Texas legislature, remains a legitimate public purpose. Tex. Local Gov't Code § 174.002(b), (e). Once again, Plaintiffs eleventh-hour attempt to shoehorn its case into a challenge under the First Amendment pursuant to *Janus*, without the necessary standing, must be rejected.[9]

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[9] Likewise, Plaintiffs' attempt to bend the ruling in *Janus,* that representing employees in grievances is "speaking on behalf of the employees," to somehow preclude that speech on behalf of employees from serving a public purpose simply does not follow. Pl. Opp. at 26. The specific question under First Amendment jurisprudence of whether speech is "pursuant

Under the correct standard of review, the burden is squarely on the Plaintiffs. *Tex. Mun. League*, 74 S.W.3d at 381 ("The burden is on the party attacking the statute to show that it is unconstitutional.").

iii. Plaintiffs' Assumption that the AFA Can Serve Exclusively "Private" Purposes Is Belied by the Uncontroverted Record

Plaintiffs' case rests entirely on the assumption that the AFA's activities cannot serve a public purpose because the AFA is engaged in its own "*private* business." Pl. Opp. at 1; *see also* Pl. Opp. at 28 (criticizing ABL, absurdly, as an attempt to "enhance the profits of the stronger"). The uncontroverted record, however, demonstrates that the AFA — which does not operate for profit — serves myriad public purposes which benefit the City of Austin and its fire fighters.

Even crediting Plaintiffs' contentions that the benefits of ABL inure primarily to the AFA, the AFA's purpose *is itself primarily a public purpose*. As the undisputed record has established, the purposes of the AFA are 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. Def. Mot. Ex. 6: Nicks Hr'g Tr. at 16:3-13; Def. Mot. Ex. 5: Nicks Tr. at 12:18-12:20 ("We represent the bargaining unit for the City, under Chapter 174"). Maligned as "private" interests by Plaintiffs, these goals each clearly further legitimate public purposes.

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to an employee's official duties" or private speech has no bearing on whether that speech may serve a public purpose.

Indeed, this is borne out by the specific, public-purpose-serving uses of ABL that saturate the record:

- ABL is used for labor-management meetings, at the request of management, resulting in millions of dollars of savings and improved morale. Def. Mot. Ex. 5: Nicks Tr. at 47:10-48:16.

- ABL is used for contract negotiations, which results in substantial efficiency for the City which would otherwise have to negotiate myriad individual employment contracts. Def. Mot. Ex. 8: Nicks Aff.; Ex. 6: Nicks Hr'g Tr. at 18:3-19:16; Ex. 5: Nicks Tr. at 24:25-25:7; Ex. 2: Flores Tr. at 15:20-16:2, 21:19-22:12.

- In addition to the contract negotiation itself, ABL categorized as "other association business" and "attending union conferences and meetings" supports efficient contract negotiations and department decision-making by permitting the AFA to coordinate input, concerns, and complaints from the City's employees. Def. Mot. Ex. 5: Nicks Tr. at 13:5-12; 19:18-7; 61:15-62:7; 105:17-107:1; Ex. 4: Paulsen Tr. at 18:19:9.

- ABL is used to attend conferences and trainings which address workplace issues or industry practices. Def. Mot. Ex. 5: Nicks Tr. 107:4-108:2.

- ABL is used to resolve issues that might arise to grievances informally, "at the lowest level" avoiding "lawsuit[s] that could cost the City considerably more than a few hours of ABL." Def. Mot. Ex. 3: Woolverton Tr. at 98:6-25, 116:5-116:25; Ex. 5: Nicks Tr. at 103:19-105:4.

- ABL is used to promote fair and correct interpretation of the CBA. Ex. 3: Woolverton Tr. at 116:5-116:25 ("[M]anagement is comprised of human beings, and human beings make – make mistakes. And our interpretation of the rules and contracts that are put before – before us are – are not always a hundred percent."); 117:1-5 (contract grievances have "clearly benefited both the AFA and the City").

- ABL is used to orient and educate incoming employees—both AFA members and non-members alike — on the terms of the CBA and the procedures available to them. Def. Mot. Ex. 5: Nicks Tr. at 155:21-156:24.

- To a lesser extent, ABL is used to attend fire-fighting-skills competitions and charity events which serve the public interest by (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. Def. Mot. Ex. 3: Woolverton Tr. at 70:10-72:23; 74:21-75:4; 80:4-81:12; 112:21-113:2; 114:5-115:6; 115:13-23; Ex. 5: Nicks Tr. at 86:16-87:22; 92:2-93:1; 93:2-94:19.

There is simply no record evidence that ABL's primary use is anything other than these public-purpose serving activities. Even crediting Plaintiffs' argument that 25-30 percent of President Nicks' ABL time is spent promoting political issues — which is absolutely false — this still fails to establish that ABL is *primarily* used for private purposes. Indeed, 25-30 percent of the 2,080 hours of ABL allotted to the AFA president is ***just 11 percent*** of the 5,600 total hours of ABL allotted under Article 10. But even this figure fails to reflect the reality of the ABL used by President Nicks. As President Nicks testified repeatedly, he spends his full allotment of ABL hours each week on activities other than lobbying or political activities. Def. Mot. Ex. 5: Nicks Tr. 150:18-151:17; 155:16-20.

Plaintiffs have failed to present any evidence that could dislodge the undisputed weight of the record: ABL use itself primarily serves public purposes.

iv. Contractual and Other Controls Satisfy the Control Requirement

Where contractual controls exist, as here, there is no requirement under the gift clause that public entities possess or exact additional control, despite Plaintiffs' misstatement of the law. As the Third Court of Appeals recently stated, in a case involving a contract with sufficient consideration, "even if the District was required to retain some degree of control" — in other words, *it is not so required* — "the Agreements expressly grant the District control going forward." *Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Util. Dist. & Dist. Dirs. Robinson*, No. 03-16-00214-CV, 2017 Tex. App. LEXIS 4285, at *17 (Tex. App.—Austin May 11, 2017).

Indeed, Plaintiffs' attempts to persuade this Court to the contrary rely on a misreading of the holding in *Key v. Commissioners Court of Marion Cty.*, 727 S.W.2d 667, 669 (Tex. App.—

Texarkana 1987, no writ). As Plaintiffs misrepresent the holding of *Key*: "a recipient of public expenditures must '*obligate[] itself contractually* to perform a function beneficial to the public.'" Pl. Opp. at 27 (quoting *Key,* 727 S.W.2d at 669). In fact, that portion of the *Key* opinion, when not misrepresented, supports just the opposite conclusion:

> Had the Historic Jefferson Foundation obligated itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration, and where sufficient consideration exists, Article III, § 52(a) of the Texas Constitution would not be applicable to the transaction.

Key, 727 S.W.2d at 669. In other words, the presence of specific contractual obligations, which constitute consideration, *ends the gift clause inquiry*. Nowhere in *Key* does the court state that the presence of a contract is necessary to satisfy the control requirement of the gift clause.

Plaintiffs misstate another portion of the *Key* opinion, claiming that "the court unequivocally rejected the idea that a contract alone constitutes sufficient control under the Gift Clause. Instead, it ruled that 'the political subdivision must retain some degree of control over the performance of the contract.'" Pl. Opp. at 29. In fact, the court in *Key* was analyzing the transfer of the rights to publish the "Christmas Candlelight Tour" to a third party without any consideration or contract to which the public entity was a party whatsoever. *Key*, 727 S.W.2d at 668. The quote taken out of context by Plaintiffs from the *Key* opinion is in fact from a secondary source discussing situations in which the "consideration" is the "accomplishment of the public purpose" and the government has *not* retained public control through a binding contract. *Id.* at 669; *see also Chisholm*, 2017 Tex. App. LEXIS 4285, at *17 (Tex. App.—Austin May 11, 2017) (distinguishing the holding in *Key* along similar lines). Thus, retaining the formal

control afforded by the CBA — through grievance procedures and through action for breach of contract — the City has satisfied the gift clause's formal control requirement.[10]

Even if this were not enough, Plaintiffs have once again failed to take the appropriately panoptic view of the transaction. The overall public purpose sought by the City of Austin in agreeing to the CBA is broader than the use of ABL itself for public purposes: its purpose is securing efficient emergency response services on terms agreeable to the City and its employees. To this end, the City retains perfect control, through the disciplinary process, the code of conduct, and the myriad other methods in which it can directly control the activities of its emergency services employees.

Moreover, inappropriately narrowing the inquiry to control over employees while using ABL, as Plaintiffs would prefer, does not disturb this conclusion. The City retains the ability to enact policies controlling the use and request process for ABL, reject requests for ABL it finds inappropriate, discipline and terminate employees including President Nicks for misconduct while on ABL, recall President Nicks from ABL at any time and without limitation, and assert its numerous protected management rights over its employees. *See* Def. Mot. at 38-43. Plaintiffs have utterly failed to carry their burden to demonstrate these controls inadequate, either in the abstract or in practice.

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[10] Notably, *Key* also does not find that the transfer of rights was an unconstitutional gift; it merely holds that there is a fact question as to whether the rights transferred even implicated Gift Clause provisions. *Key*, 272 S.W.2d at 669.

III. Conclusion

Plaintiffs' attack on the City of Austin's collective bargaining arrangement has gone far enough. The dismissal on the merits of Plaintiffs' strategic lawsuit against public policy is now two years old, yet Plaintiffs persist in their meritless suit. As this Court has already concluded, and which the Plaintiffs' briefing has done nothing to disturb, there is no material dispute that the CBA withstands gift clause scrutiny. Plaintiffs have failed to satisfy their burden that the CBA, including its constituent parts, lacks consideration, fails to serve a legitimate public purpose, or fails to afford a clear public benefit. Defendants are entitled to summary judgment.

Date: February 22, 2019

Respectfully Submitted,

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