No. 22-1149

In the Supreme Court of Texas

ROGER BORGELT, MARK PULLIAM, JAY WILEY, AND THE STATE OF TEXAS,
Petitioners,

v.

AUSTIN FIREFIGHTERS ASSOCIATION, IAFF LOCAL 975; CITY OF AUSTIN; AND MARC A. OTT, IN HIS OFFICIAL CAPACITY AS THE CITY MANAGER OF THE CITY OF AUSTIN,
Respondents.

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

BRIEF FOR PETITIONER THE STATE OF TEXAS

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Statement of the Case

Nature of the Case: Taxpayers Mark Pulliam, Jay Wiley, and, later, Roger Borgelt (collectively, "Taxpayers") sued the City of Austin, its City Manager (collectively, "the City"), and the Austin Firefighters Association (the "Union") to enjoin and declare that a provision of the collective-bargaining agreement (the "Agreement") between the City and the Union (collectively, "Defendants") violates the "Gift Clauses" of the Texas Constitution, Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a). CR.1412-1534 (live petition). The State intervened as a plaintiff. CR.1757-1882 (live plea in intervention). The parties filed cross-motions for summary judgment. CR.2416-2826; 2.SCR.251-696. And the Union moved for sanctions against Pulliam and Wiley under the Texas Citizens Participation Act (TCPA). CR.2243-55.

Trial Court: 419th District Court, Travis County
The Honorable Catherine A. Mauzy

Disposition in the Trial Court: Cross-motions for summary judgment were heard by the Honorable Amy Clark Meachum, who granted in part and denied in part Defendants' motion for summary judgment, CR.3813-15, and denied the State and Taxpayers' (collectively, "Plaintiffs'") motion in full, CR.3811-12. In addition, Judge Meachum granted the Union's motion for TCPA sanctions against Pulliam and Wiley. CR.3805-06. After a bench trial concerning the City's implementation of the

	Agreement, the Honorable Jessica Mangrum rendered a final judgment for Defendants, denying all declaratory and injunctive relief that Plaintiffs had requested. CR.4163-64.
Parties in the Court of Appeals:	Plaintiffs were appellants. Defendants were appellees.
Disposition in the Court of Appeals:	The court of appeals affirmed. *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786 (Tex. App.—Austin Nov. 22, 2022, pet. filed) (mem. op.) (Triana, J., with Baker and Kelly, JJ.).

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a). This case presents issues of first impression and statewide importance regarding an arrangement in which the City paid firefighters using City funds for time spent working for the firefighters' Union. The court of appeals' opinion, which conflated public employees with the unions that serve them, threatens to render nugatory this Court's requirements for constitutionally acceptable public gifts to private entities. It also sets a precedent for allowing public grants to public-sector unions.

Issues Presented

In its Agreement with the firefighters' Union, the City agreed to create a shared bank of paid leave ("association leave") that Union members could use to perform "[Union] business." But the Texas Constitution's Gift Clauses, Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a), prohibit gratuitous grants of public money or things of value—*i.e.*, grants for which the City receives no sufficient consideration—to any association. And even if the grant is not gratuitous, it will violate the Gift Clauses if it does not serve a strictly governmental purpose.

The issues presented are:

1. Whether the test under which the court of appeals analyzed association leave is faithful to the plain language of the Texas Constitution's Gift Clauses.
2. Whether the association-leave provision violates the Gift Clauses because it is gratuitous; because its predominant purpose serves the City's firefighters' Union instead of the public; because the City does not exercise effective public controls over the Union's use of association leave; or because the City receives no valid reciprocal benefit.
3. Whether the lower courts erred in granting the Union's TCPA motion to dismiss against Pulliam and Wiley (briefed by Taxpayers).
4. Whether the lower courts erred in awarding sanctions against Pulliam and Wiley (briefed by Taxpayers).

To the Honorable Supreme Court of Texas:

The Texas Constitution's Gift Clauses prevent depletion of the public treasury for private purposes. Under the original meaning of those Clauses, all public aid to private interests was forbidden regardless of the aid's intended use. Over time, Texas courts permitted private parties to use public funds for public purposes but held that the Clauses still prohibit private parties from using public resources for any *private* purposes. As this Court puts it, the Gift Clauses "positive[ly] and absolute[ly]" prohibit using public funds for anything other than a "strictly governmental" purpose. *Bexar County v. Linden*, 220 S.W. 761, 762 (Tex. 1920). This reading honors the Gift Clauses' text and original meaning.

But some courts have strayed from the proper understanding of the Gift Clauses to read the strict public-purpose requirement extraordinarily broadly. Case in point: the court of appeals held that an arrangement under which the City of Austin pays its firefighters to perform work for the Union was consistent with the Gift Clauses. But "[Union] business" is not strictly governmental business. Union members regularly use association leave for galas, fishing trips, parties, and the like—activities that benefit the Union and its preferred causes. So, when the court of appeals upheld association leave as constitutional, it allowed the City to give public resources to private parties for nongovernmental purposes.

This case presents an ideal vehicle for the Court to reemphasize that the Gift Clauses mean what they say. This Court can ensure that lower courts do not expand the Gift Clauses' narrow public-purpose requirement too broadly by rethinking or fine-tuning its analytical framework for those Clauses.

But under any analysis, association leave is unconstitutional. It amounts to a gratuitous payment to the Union—indeed, it cannot constitute compensation to all firefighters because counting it as such renders it unconstitutional. For this reason, any benefit the City receives in return for association leave is likely unlawful.

And unlike the types of public payments that can sustain constitutional challenges under the Gift Clauses, use of association leave for Union business constitutes using public money for *private* endeavors—the exact type of arrangement those Clauses forbid. In addition to using the leave for galas, fishing trips, and parties, Union members can also use association leave to further the Union's political ends.

In the Gift Clause context, controls must be specifically tailored to ensure that the grant accomplishes its intended strictly governmental purpose. The City does not have such controls in place. Any supposed oversight of the Union president is illusory, as no one knows what he is doing on a daily basis. Controls over other Union members' use of association leave is similarly toothless.

The Court should grant review to uphold the Gift Clauses' meaning. It should also correct the court of appeals' analytical errors. For example, the court of appeals apparently assumed that because the association-leave provision is located in the Agreement, which it concluded served a public purpose, association leave necessarily serves a public purpose, too. It also held that because the City receives a benefit from the Agreement, it also receives a benefit from association leave. But this reasoning would allow contracts to hide improper private purposes from review. This vitiates the Gift Clauses, and the Court should not countenance such an arrangement.

Defendants' one-note response to the petitions for review in this case insists (at, *e.g.*, 15-16, 20) that because the trial court made findings of fact, that somehow insulates this case from review. It does not. Here, Plaintiffs challenge the lower courts' erroneous interpretation of *the law*—which, if appropriately applied, would have produced a different result irrespective of whether Plaintiffs challenged the trial court's factual findings.

The lower courts' holdings undermine the Gift Clauses by upholding an unconstitutional gift of public money for private interests. This Court should therefore reverse the court of appeals' judgment and render judgment for Plaintiffs.

Statement of Facts

The court of appeals correctly stated the nature of the case. *See supra* pp. x-xi.

I. Legal Background

A. Development of the Gift Clauses

"In the early days of the nation[,] private capital for large scale investments was scarce, and, as a result, private enterprise had difficulty obtaining capital for any large undertaking. It became common," therefore, "for state governments to aid business enterprise by grants of land or loans of money and credit." Tex. Const. art. III, § 50 interp. commentary (West 2007). But States' debts grew as they subsidized private projects, and "[t]he unsustainable nature of these public investments in private ventures was laid bare" by economic panics and recessions. Matthew D. Mitchell et al., *Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State*

Constitutions 19-20 (Mercatus Ctr. at George Mason Univ., Working Paper, 2020); *accord* Tex. Const. art. III, § 50 interp. commentary.

States came up with a wide variety of strategies to "clean up their own messes," one of which was "adopt[ing] constitutional limitations on public aid to private entities." Mitchell, *supra*, at 20, 22; *accord* Tex. Const. art. III, § 50 interp. commentary; George D. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 232 (1977). Thus, Texas's first statehood constitution, the Constitution of 1845, "prohibited appropriations for private or individual purposes or for internal improvements without the concurrence of two-thirds of both houses of the legislature." Braden, *supra*, at 725. The current version of that provision is located in article XVI, section 6(a) of the 1876 Constitution. *Id.*; *see* Tex. Const. art. XVI, § 6(a). That constitution added sections 50 and 51, as well. Tex. Const. art. III, §§ 50, 51. Such aid-limitation provisions did not initially apply to localities and political subdivisions, but localities began to partake of private investment and *their* debt began to skyrocket, so States extended their constitutions' aid-limitation provisions to cover them, as well. Mitchell, *supra*, at 23, 24-25. Texas, for example, gained article III, section 52(a), also in 1876. Tex. Const. art. III, § 52(a).

"The case for [these aid-limitation] provisions was both moral and practical." Mitchell, *supra*, at 23. Morally, "[t]here is no justice in the principle that the property or the money of the people should be taken to make profits for" private interests. *Id.* (quoting 1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850* 651-52 (W.B. Burford Print Co. 1850)). Practically, publicly supported private enterprise was "a system of oppression

inflicted by the representatives of the people . . . . It is well known how these schemes are got along in the Legislature. [Private interests] are always well represented there, and the people have no knowledge of what is going on until they are entrapped by [the private interests]." *Id.*

B. The Gift Clauses' text

The four Gift Clauses of the Texas Constitution together prohibit giving public money or "thing[s] of value" to an individual, association, or corporation. *See* Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a). The first three Clauses appear in the legislative article; each, therefore, imposes a prohibition on the Legislature. *Id.* art. III, §§ 50, 51, 52(a). Article III, section 50 prohibits the Legislature from "giving or lending" the State's credit "in aid of, or to any person, association, or corporation," including with the purpose of paying another individual's or entity's liabilities. *Id.* art. III, § 50. This provision "is an involved and somewhat imprecise way of saying that the [S]tate may not aid anybody by lending him money;" providing "land, goods, or services on credit;" or "guaranteeing payment to a third party who aids anybody by lending him money or providing him land, goods, or services on credit." Braden, *supra*, at 225. The "basic reason" for this section "was to prevent the government from aiding private parties in their grandiose schemes to build railroads and other internal improvements." *Id.* at 226; *see supra* Statement Part I.A. Section 50 "complement[s]" section 51, Braden, *supra*, at 225, which states that the Legislature has "no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever," Tex. Const. art. III, § 51. This section "[f]irst and

principally," Braden, *supra*, at 232, "prohibits grants of money," *id.* at 225; *see* Tex. Const. art. III, § 51.

Section 52(a) focuses on municipalities, forbidding the Legislature from "authoriz[ing] any county, city, town, or other political corporation or subdivision of the State" to "grant public money or thing of value in aid of[] or to any individual, association, or corporation whatsoever." Tex. Const. art. III, § 52(a). This Clause "started out as a flat prohibition on grants and loans by local governments, . . . serving as a complement to" and "local' version of" sections 50 and 51, though "[s]ection 51 covers both 'grants' and 'loans' as such," whether the government involved is a state or a local unit. Braden, *supra*, at 257, 259.

The fourth Gift Clause has its home in the "General Provisions" article, article XVI, Tex. Const. art. XVI, § 6(a), and first appeared in the 1845 Constitution, *see supra* Statement Part I.A. It simply states, "No appropriation for private or individual purposes shall be made, unless authorized by this Constitution." Tex. Const. art. XVI, § 6(a). It thus prohibits any part of the government, legislative or otherwise, from making an "appropriation for private or individual purposes." *Id.*

C. The public-purpose doctrine

Over the half century following States' initial ratification of aid-limitation provisions, "[w]ith the municipal fiscal crisis fresh in mind and with the framers' intentions abundantly clear," early state courts "understood that the framers of" provisions like the Gift Clauses "intended them to limit public aid to private interests regardless of the aid's purpose." Mitchell, *supra*, at 27. This was true of Texas's Gift Clauses: The 1875 constitutional convention "not only used [aid-limitation]

language" but did so "over and over again." Braden, *supra*, at 232 (citing, among other things, Tex. Const. art. III, §§ 50, 51, 52; *id.* art. XVI, § 6(a). But over time, courts weakened that strict adherence to aid-limitation provisions, "in large measure" through a judicially created public-purpose doctrine. Mitchell, *supra*, at 28, 31. Under that doctrine, which dates to the Pennsylvania Supreme Court's decision *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853), the government is not necessarily forbidden from using tax dollars "to fund projects that are in the public interest," but "projects that benefit private interests are forbidden," Mitchell, *supra*, at 31-32.

"On its face," this doctrine "would seem to complement state constitutional anti-aid provisions" because it "prohibits the expenditure of public resources in service of private interests." *Id.* at 32. But in practice, it has thwarted state constitutional provisions like Texas's Gift Clauses. *Id.* This effect is due to (1) courts' "extraordinary tendency to construe 'public purpose' in as broad a light as possible" and (2) courts' growing view that the doctrine served as an exception to aid-limiting provisions, rather than a complement to them—an interpretation "at odds with the doctrine's initial articulation as a *restraint* on government expenditures, requiring all public projects to serve purely public purposes. It is also at odds with the plain language" of provisions "forbid[ding] government aid to private firms or individuals regardless of the aid's purpose." *Id.* at 32-33.

With the grafting of the court-made public-purpose doctrine onto the Gift Clauses, this Court articulated a test to determine whether a grant is constitutional in *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation*

Commission. 74 S.W.3d 377, 383-84 (Tex. 2002). Under this framework, a grant cannot be gratuitous. *Id.* at 383. Moreover, it will only satisfy the Gift Clauses if it "is for a public purpose." Braden, *supra*, at 232; *Tex. Mun. League*, 74 S.W.3d at 383-84. In turn, a grant is "for a public purpose" only if several conditions are met: (1) a public purpose predominates, (2) the relevant governmental entity exercises adequate controls, and (3) the government receives a return public benefit. *Tex. Mun. League*, 74 S.W.3d at 84. But allowing a public purpose merely to "predominate," *see id.*, has "considerably" broadened the public-purpose doctrine's scope. Braden, *supra*, at 726; *see also id.* at 232-34. Whereas courts at the time of the Gift Clauses' ratification understood that only grants with exclusively public purposes would satisfy the Clauses, *see* Mitchell, *supra*, at 32, the *Texas Municipal League* test as applied today ostensibly permits public grants to serve some private purposes, *see* 74 S.W.3d at 384.

"[W]hile society and technology do change and advance," however, the "principles that spurred [aid-limitation] provisions are immutable and ever applicable." Mitchell, *supra*, at 45. Texas's Gift Clauses aim to prevent depletion of the public treasury for private purposes and prevent allocation of public resources to special interests that may be corrupt. *See, e.g.*, *id.* at 36 (citing *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (explaining that the purpose of aid-limitation provisions is "to prevent governmental bodies from depleting the public treasury by giving advantages to special interests")). As this Court explained almost a century ago, "each of [the Clauses] is intended to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of

such funds to any individual, corporation, or purpose whatsoever." *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. [Comm'n Op.] 1928); *accord State v. City of Austin*, 331 S.W.2d 737, 742 (Tex. 1960). "The giving away of public money, its application to other than *strictly governmental* purposes, is what the" Gift Clauses are "intended to guard against." *Linden*, 220 S.W. at 762 (emphasis added). This prohibition against giving away public money to any purpose that is not strictly governmental remains "a positive and absolute one." *Id.*

II. Factual Background

The Union is an "independent organization that represents the City's firefighters in matters, including grievances, labor disputes[,] . . . conditions of employment," and collective bargaining. 7.RR.13, 450. It is the "sole and exclusive bargaining agent for all Fire Fighters." 7.RR.13; *see* Tex. Loc. Gov't Code § 174.101. But not all Austin firefighters are Union members. 2.SCR.505. The City and Union periodically negotiate collective-bargaining agreements setting out "terms and conditions of employment and other benefits for all covered employees." 7.RR.450. This case centers on one provision of the current Agreement—Article 10, or the association-leave provision. *See* 7.RR.24-25. That provision requires the City to create a pool of 5,600 hours of paid leave, or "association leave," for City firefighters who are Union members to use "to conduct [Union] business." 7.RR.24-25. Association leave must be used for activities supporting the Union's role "as an employee organization," 2.SCR.615, including those that exclusively support the Union's mission, 2.SCR.509. The leave "is funded through the City's General Fund, which is funded primarily through property tax and sales tax." 7.RR.451.

The Agreement establishes two categories of association leave: (1) leave for Union members other than the Union president, who can be deputized as "[a]uthorized [a]ssociation [r]epresentatives" ("authorized representatives"), and (2) leave for the Union president. 7.RR.24; *see also* 7.RR.10 (defining "[a]uthorized [a]ssociation [r]epresentative").

A. Authorized representatives

Authorized representatives may use association leave for "[Union] business activities" that "directly support the mission of the [Union]." 4.RR.69-70; *accord* 7.RR.24. The Agreement expressly defines "[Union] business" as "time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training . . . , and attending [U]nion conferences and meetings." 7.RR.24. Union members seeking to use association leave as authorized representatives must submit a request to do so in advance, indicating what they will use the leave for. 7.RR.24, 452. Requests to use association leave are submitted first to the Union president, then, if the president approves, to the City—specifically, to a firefighter the Fire Chief has designated. 7.RR.452. This is the only control the City exercises to ensure that association leave is used for its stated purposes, 4.RR.106-07, and the City approves 99% of all requests that the Union presents to it, 4.RR.88-89; 2.SCR.517; *see* 2.SCR.546-68 (records of requests to use association leave). Of the remaining 1%, "most of th[ose] denials" were for requests to use association leave for activities falling into a category denoted "other association business." 2.SCR.456.

Authorized representatives seeking to use association leave designate the leave's intended use by category. 7.RR.452. Those categories are "addressing cadet class, bargaining, dispute resolution proceedings, grievance committee, union conference meeting, and other association business." 7.RR.452. Each category corresponds to the Agreement's express definition of "[Union] business," except for one category: "other association business." *Compare* 7.RR.24 (defining "[Union] business" for authorized representatives), *with* 7.RR.452. Authorized representatives spend 75% of their association leave on the "other association business" category: From the fourth quarter of 2017 through the end of 2019, authorized representatives used 5,603.25 out of 7,456.75 hours of association leave for "other association business." *See* 7.RR.453. Authorized representatives use approximately 22% of the leave to address cadet classes and to attend union conferences and meetings. *See* 7.RR.453.

No requirement governs what Union members may use association leave for. 2.SCR.524. And nothing requires authorized representatives to perform specific activities for the Austin Fire Department (AFD) or the City while on association leave. 2.SCR.323, 472, 488, 523-24. Thus, Union members use the "other association business" catchall to cover a wide range of activities: a "gala" or "ball," 4.RR.91-92; attending retirement parties, 2.SCR.548, and funerals, 2.SCR547; "fishing fundraisers throughout the year," 4.RR.94-95; political action committee (PAC) board meetings, 4.RR.92-94; and other private charity events that support the Union, including one consisting of a "boxing match," 4.RR.96. The Union attends many of these events to support or raise money for the Union or its preferred causes. *See* 4.RR.91-92, 94-96; 2.SCR.547-48. While the City can purportedly object to the

charitable activities in which Union members participate using their association leave, the record contains no evidence that it has ever done so. *See* 4.RR.95.

Once the City rubber-stamps a Union member's request to use association leave, the City's oversight ends. Authorized representatives do not report to anyone about their use of association leave. *See* 2.SCR.456. And "the City admits the [Agreement] does not require the [Union] to provide an accounting for the members on [their] use of [association leave]." 2.SCR.540. Nor are City personnel "available to supervise" the activities comprising "other association business." *See, e.g.*, 4.RR.91. Only *Union* executives supervise such events. *See* 2.SCR.456, 524. Of course, the Union's president and executive board monitor authorized representatives' use of association leave. 7.RR.453. But the City does not require the Union to provide an audit on how Union members use that leave. 2.SR.540. An AFD internal order states that "Fire HQ Administrative staff will maintain a record of all [association leave] request[s] and [association-leave] time used," 2.SCR.543, and indeed, the City does keep records of requests to use association leave, 2.SCR.546-68. But Defendants' response to the petitions for review cited no evidence showing that the City does anything with this information or disciplines any authorized representatives for their use of association leave.

B. The Union president

The Union president "may use [association leave] for any lawful [Union] activities consistent with the [Union's] purposes." 7.RR.451. The Agreement allots the president up to 2,080 association-leave hours per year, approximately 37% of the total leave pool. 7.RR.25. He is assigned to a forty-hour work week, so he works full-time

for the Union. 7.RR.25; *see* CR.4212 (finding that the current Union president uses association leave on a full-time basis). And if he works more than forty hours in the week, he also spends those extra hours solely on Union business. *See* CR.4212.

The Union president can use association leave however and whenever he wants, with zero oversight. No one directs his activities on a daily basis, nor is he required to report to AFD headquarters. 4.RR.58; 7.RR.451; 2.SCR.506, 507. He "nominally reports directly to the Chief of Staff" at AFD, but the Chief of Staff does not "actively supervise" him or know what he is doing on a daily basis. 4.RR.62; 7.RR.451. He does not need permission from anyone in AFD to do Union work. 2.SCR.506. He may be assigned certain tasks, but no record evidence indicates that anyone has ever assigned him any. 2.SCR.507. No one places prohibitions on the activities he can perform, 2.SCR.448, 507, and no one even tracks what he uses association leave for, 4.RR.106-07; *see* 7.RR.452; 2.SCR.513-14. He is required to submit time sheets, but as those time sheets do not "record any information that shows the activities that he's actually performing during that period of time," 4.RR.58-59; *accord* 4.RR.74; 2.SCR.450, how he uses association leave is anyone's guess.

As with the authorized representatives, Defendants' response to the petitions for review pointed to no evidence showing that the Union president has ever been disciplined specifically for his use of association leave. On one occasion, the current Union president "was subject to a disciplinary investigation brought by the City for alleged violation of the City's social media policy" because he "post[ed] slanderous posts about a senior Fire Department official." 7.RR.451. But this incident was "not related to [association leave]" or to the Union president's use of the leave.

3.SCR.257. He did, though, use association leave to participate in his disciplinary proceedings, 4.RR.98-102; 2.SCR.522-23, as did other firefighters, *see, e.g.*, 2.SCR.243.

Nothing prevents the Union president from using association leave for political activities. City policy expressly prohibits the use of City resources for political activities. *E.g.*, 7.RR.500 ("All employees of the City shall refrain from using their influence publicly in any way regarding any candidate for elective City office or regarding any election where an issue or proposal involves only City employees."). And supervisors "may not at any time participate or contribute money, labor, time, or other valuable thing to any person campaigning for a position on the City Council of the City of Austin." 7.RR.500. But the current Union president uses association leave to conduct political activities or "advocat[e] for or against policy proposals that are before the Austin City Council." 4.RR.68-69. He spends about 25-30% of his work time on lobbying activities, 2.SCR.470, including producing documents providing the Union's endorsement or opposition for candidates for elected office, 2.SCR.471. He and other Union members determine which political candidates to support or oppose during PAC meetings that they attend using association leave. 4.RR.139-40; 2.SCR.471. *But see* 7.RR.24 (defining "[Union] business" for which Union members may use association leave such that it does not include political activities or attending PAC meetings).

True, the current Union president has testified that he does not "believe" that he is on association leave when performing political activities. *E.g.*, 5.RR.104, 174; *see also* 5.RR.101, 150-52; 3.SCR.338-39. But he is always operating in his capacity as

Union president, *see* CR.4212, so no barrier separates association-leave hours from other hours. And no external constraint prevents him from using association-leave hours for political activities. *See* 3.SCR.339 (asking the current Union president how he "determine[d]" he was working association-leave hours instead of non-association-leave hours when he does not calculate how much time he spends on non-association-leave time). Indeed, the only constraints on his use of association leave for political activities are "self-imposed." 5.RR.152.

III. Procedural History

In 2016, Mark Pulliam and Jay Wiley sued Defendants seeking injunctive relief and a declaratory judgment that the association-leave provision violated the Texas Constitution's Gift Clauses. CR. 9-115; *see* Tex. Const. art. III, §§ 50, 51, 52(a); Tex. Const. art. XVI, § 6(a). The State intervened, asserting the same claims as Pulliam and Wiley. CR.119-222. Plaintiffs do not challenge the rest of the Agreement, which is severable from the association-leave provision in any event. 7.RR.90.

On the Union's motion, CR.226-414, the trial court dismissed Pulliam and Wiley's claims against the Union under the TCPA, CR.1392; *see also* CR.1407-11. In November 2017, Pulliam and Wiley filed an amended petition and application for injunctive and declaratory relief because the City and Union had entered into a new collective-bargaining agreement, the 2017-2022 Agreement, which contained an association-leave provision identical to the provision in the previous agreement. CR.1412-1534; *see also Borgelt*, 2022 WL 17096786, at *1 & n.2 (noting "some intervening appellate proceedings that are not relevant to the claims at issue in this appeal"). The State nonsuited all its claims against the Union, CR.1535-37, and filed

an amended plea in intervention against the City only, CR.1757-1882. The Union moved under the TCPA for an award of costs, attorneys' fees, other expenses, and sanctions against Pulliam and Wiley, CR.2243-55, a motion the trial court later granted, CR.3805-06.

On cross-motions for summary judgment, the trial court granted summary judgment in part for Defendants "as to any claims related to the collective bargaining agreement itself and the terms therein." CR.3813-15. It denied the rest of Defendants' motion in part, leaving an issue of fact for trial, *see* CR.3813-15, and denied Plaintiffs' motion in full, CR.3811-12.

Pulliam nonsuited his claims against the City. CR.3820-21. Taxpayer Roger Borgelt joined the lawsuit by filing, with Wiley, a second amended original petition and application for injunctive relief. CR.3822-3945. Wiley then nonsuited his claims against the City. CR.3946-49.

After a bench trial, the trial court issued final judgment in favor of Defendants on claims regarding the City's implementation of the Agreement. CR.4163-64; *see* CR.4208-16 (findings of fact and conclusions of law). A panel of the Third Court of Appeals unanimously affirmed on all points. *Borgelt*, 2022 WL 17096786, at *1. Plaintiffs each petitioned this Court for review.

The record indicates that association leave is presently in effect. Although the 2017-2022 Agreement was due to expire at the end of September 2022, it can remain in effect for six months "if the parties are engaged in negotiations for a successor Agreement." 7.RR.92. At the time of this writing, the City's website names the 2017-2022 Agreement as the effective Agreement governing the relationship

between the Defendants. *Fire Collective Bargaining Agreements*, austintexas.gov, https://www.austintexas.gov/page/fire-collective-bargaining-agreement (last visited Sept. 2, 2023); *see also Labor Relations Office*, austintexas.gov, https://www.austintexas.gov/department/labor-relations-office (last visited Sept. 2, 2023) (listing no upcoming collective-bargaining negotiations between the City and the Union). Defendants have given no indication that a successor agreement will eliminate association leave.

Summary of the Argument

I. The court of appeals' analysis was out of step with the text of the Gift Clauses, which prohibits giving public resources to private purposes. The Clauses' framers and Texas courts at the time of ratification understood the Clauses to prohibit giving public resources to private entities for *any* purpose, public or private. The best way to honor that original meaning is to require, as this Court does, the granted public resources to serve a strictly governmental purpose. But the court of appeals departed from that guidance; it followed this Court's test under *Texas Municipal League* and wrongly assumed that association leave was constitutional if *any* public purpose was present.

This reading is at odds with the Gift Clauses' text and ignores two critical and linked facts. *First*, the Union exists as a political entity separate and apart from its capacity as a representative of firefighters in the collective-bargaining context. *Second*, the Union therefore has an incentive, not to mention the ability, to bargain for provisions in a collective-bargaining agreement that principally benefit itself rather than the firefighters. This creates a manifest risk of conflicts of interest for the

Union. Ignoring these realities led to errors in the lower court's analysis. This Court should ensure the Constitution is followed as written.

II. A. The Third Court's *Texas Municipal League* analysis collapses under its own weight. Association leave is gratuitous, *first*, because it cannot constitute compensation to firefighters. Reading it as such would read the association-leave provision in such a way that renders it unconstitutional. Counting association leave as compensation to firefighters that do not belong to the Union, as the court of appeals did, would violate those nonmembers' First Amendment rights because payment to a public-sector union "deducted from a nonmember's wages" without the nonmember's affirmative consent violates the nonmember's freedom of speech. *Janus v. Am. Fed.'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018). *Second*, association leave's benefit flows principally to the Union *qua* Union, not the firefighters. *Third*, the use of association leave for "other association business" confirms that the City did not give consideration for the leave, as that use of association leave was not bargained for.

B. Nor does public purpose predominate over non-public purposes like enriching the Union. To be sure, a firefighter is a public employee, but association leave does not serve a sufficient public purpose. This Court has required that public funds or things of value serve only "strictly governmental purposes." *Linden*, 220 S.W. at 762. Association leave does not. Its predominant purpose is to conduct Union business, which is not strictly governmental. The record bears this out, as Union members use the leave to attend galas, parties, and fishing trips—activities that support the Union, its members, or its preferred causes. That the Union in some capacity

serves firefighters does not anoint everything that the Union does with public purpose. And even association leave had a public purpose, that purpose does not predominate.

C. The City also lacks meaningful controls to ensure that the Union uses association leave for only a strictly governmental purpose. The Agreement effectively exempts the Union president from all City control, as nothing limits how he may use association leave. The City likewise does not exercise adequate control over authorized representatives. Neither the Agreement's definition of "[Union] business" nor other supposed "controls" prevent the use of association leave for activities that fall outside of that definition. The purported controls that the court of appeals touted and that the Defendants put forward are toothless because they are neither sufficiently obligatory nor specifically tailored to ensure association leave accomplishes a public purpose.

D. Finally, association leave fails to provide the necessary reciprocal benefit for the City. The alleged benefit that the City receives is likely unlawful because association leave would violate the First Amendment if it truly counts as compensation to all firefighters. Moreover, the Court should grant review of this case to correct the court of appeals' assumption that the association-leave provision must benefit the City merely because the overall Agreement may be beneficial. The Court should reject this view, as it would allow collective-bargaining agreements to mask unlawful benefits to private interests.

Standard of Review

This Court reviews both a summary judgment and a trial court's conclusions of law de novo. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The Court "defer[s] to unchallenged findings of fact that are supported by some evidence." *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014). But even with unchallenged findings, this Court regularly corrects legal errors. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696-97 (Tex. 1986) (stating that unchallenged factual findings are not binding if the Court disregards all evidence contrary to the findings and no remaining evidence supports the judgment). A trial court "has no discretion" in "determining what the law is and applying the law to the facts." *Tenaska*, 437 S.W.3d at 523. So, here, this Court "review[s] de novo" whether the facts the trial court found have the legal effect Defendants say they do. *Id.* If the Court "holds [that] there is legally insufficient evidence to support a judgment after a trial on the merits, the proper disposition is to reverse and render judgment." *See, e.g.*, *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 929 (Tex. 2009) (per curiam).

Argument

I. The Court of Appeals Failed to Give Effect to the Gift Clauses' Text.

In its interpretation of the Gift Clauses' strict public-purpose requirement, the court of appeals strayed from the Clauses' text and original meaning. *See, e.g.*, Mitchell, *supra*, at 32-33; *supra* Statement Part I.C. At minimum, the Clauses require a strict understanding of "public purpose": They will countenance nothing less than a "strictly governmental" purpose, *Linden*, 220 S.W. at 762, not merely a

predominant public purpose, *Tex. Mun. League*, 74 S.W.3d at 384, for public grants. The court of appeals did not heed the "strictly governmental" requirement. Insofar as *Texas Municipal League* might have led the court of appeals to this conclusion, this Court's intervention is needed: If *Texas Municipal League*'s predominant-public-purpose requirement does not track with the Gift Clauses' text or original meaning, that requirement must change.

A. The Gift Clauses' text allows grants of public resources only for a "strictly governmental" purpose.

Together, the Gift Clauses prohibit giving public money or "thing[s] of value" to an individual, association, or corporation. *See* Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a). The 1875 constitutional convention was so serious about this prohibition that it used aid-limiting language "over and over again." Braden, *supra*, at 232. The Clauses prohibit the State from granting or even lending money at all. Tex. Const. art. III, §§ 50, 51. Nor can the State authorize a municipality to grant public money or things of value to anyone or anything. *Id.* art. III, § 52(a). And the Clauses forbid any "appropriation for private or individual purposes. *Id.* art. XVI, § 6(a). Early state courts understood that the Texas Constitution's framers intended to "limit public aid to private interests regardless of the aid's purpose"—that is, even if a public purpose was present. Mitchell, *supra*, at 27; *see also* Braden, *supra*, at 232 (explaining that Texas courts strictly enforced the Gift Clauses "in some areas").

But with the grafting of the public-purpose doctrine onto the Gift Clauses, courts' understanding of the Clauses' meaning shifted. *See* Statement Part I.C. Now,

Texas courts interpret the Gift Clauses as ostensibly allowing public grants to private entities so long as a "the grant is for a public purpose." Braden, *supra*, at 232. In Texas, the public-purpose doctrine has been articulated such that it requires not only that the grant serve a strictly governmental purpose, *Linden*, 220 S.W. at 362, but also that the government retain sufficient controls over the grant and receive a benefit from the grant, *Tex. Mun. League*, 74 S.W.3d at 384. Over time, however, the requirement of a strictly governmental purpose shifted to allow the grant to serve private purposes so long as a public purpose merely predominates. *Id.* Despite any facial appeal of this gloss, it is at odds with provisions disallowing public aid for any private purpose. *See supra* Statement Part I.C.

The best way to reconcile the Gift Clauses' text and original meaning with the modern public-purpose doctrine is to hew closely to this Court's requirement of a "strictly governmental" purpose for public grants. *Linden*, 220 S.W. at 762; *see Davis v. City of Lubbock*, 326 S.W.2d 699, 705-06, 709 (Tex. 1959) (stating that the Court reads the phrase "public use" strictly and that "public purpose" is read equally strictly); *accord Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972) (citing *Davis* and reiterating that "public use" and "public purpose" have the same meaning); *see Tex. Mun. League*, 74 S.W.3d at 383 (citing *Davis* in the Gift Clause context). As the Court has explained, a public purpose means something "more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided." *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958); *see Davis*, 326 S.W.2d at 709. This Court has elsewhere stated that the public must have "some definite right or use in the business or

undertaking to which the property is devoted." *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11, 14 (Tex. 1905). A public purpose reflects a "direct" or "intimate relationship between the public" and the end sought. *Davis*, 326 S.W.2d at 707 (quoting *Foeller v. Hous. Auth. of Portland*, 256 P.2d 752, 766 (Or. 1953)).

Insisting on a strictly governmental purpose acknowledges the development of the public-purpose doctrine while honoring the Gift Clauses' original meaning by disallowing use of public resources for any private purpose. *See supra* Statement Part I.C. And, when coupled with *Texas Municipal League*'s controls and clear-public-benefit requirements, 74 S.W.3d at 384, a rule requiring a strictly governmental purpose allows the Gift Clauses do what they were designed to do: "prevent the application of public funds to private purposes," *Byrd*, 6 S.W.2d at 740. One thing, though, is clear: Only this Court can determine the extent to which any public funds may be used for a private purpose consistent with the Clauses' text and original meaning. *See supra* Statement Part I.B-C.

B. The court of appeals improperly widened the narrow scope of public grants that the Gift Clauses permit.

Over twenty years ago, this Court articulated a multistep test to determine whether a "grant [of] public money or thing of value" to an "individual, corporation, or association" violates the Gift Clauses. *Tex. Mun. League*, 74 S.W.3d at 383-84. But if the *Texas Municipal League* test does not track with the Gift Clauses, the Court should alter that test. A test designed to implement words of the state constitution should comport with the text of that constitution. *See Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402, 408 (Tex. 2022). "The focus should be on" the words of the

constitution, "not on extraneous concepts" that, "when applied, may or may not yield the same result as a straightforward application" of the constitutional text. *Id.* If *Texas Municipal League* "parts ways with" that text, the Court should eschew or modify that test. *Id.*

It is questionable whether the *Texas Municipal League* test adequately gives effect to the Gift Clauses' text and original meaning. *See In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021) (orig. proceeding) ("[This Court's] goal when interpreting the Texas Constitution is to give effect to the plain meaning of the text as it was understood by those who ratified it."). The test ostensibly allows a public grant to serve a merely predominant public purpose, *Tex. Mun. League*, 74 S.W.3d at 384, which is broader than a strictly governmental purpose. That gloss is troubling when compared with constitutional provisions that do not allow a public grant to be used for *any* private purpose. *See supra* Statement Part I.C; *cf. Abbott*, 628 S.W.3d at 293.

The court of appeals clearly failed to hew to the Gift Clauses' text by reading "public purpose" so broadly. *Cf.* Mitchell, *supra*, at 32 (describing courts' "extraordinary tendency to construe 'public purpose' in as broad a light as possible"). Courts interpreting the Texas Constitution must "give constitutional provisions the effect their makers and adopters intended" and "strive to avoid a construction that renders any provision meaningless or inoperative." *Doody v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 344 (Tex. 2001). But the court of appeals apparently assumed that the presence of any arguable public purpose, no matter how inconsistent when compared to any private benefits, would render association leave constitutional. *See Borgelt*, 2022 WL 17096786, at *8. This analysis ignores two vital and linked realities.

First, the Union exists as a political entity separate and apart from its capacity as a representative of the firefighters in the limited context of collective bargaining. *See, e.g.*, *United States v. White*, 322 U.S. 694, 701 (1944) ("Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members."); *id.* at 703 ("Both common law rules and legislative enactments have granted many substantive rights to labor unions as separate functioning institutions."); *Am. Fed'n of Labor v. Mann*, 188 S.W.2d 276, 282 (Tex. App.—Austin 1945, no writ) (explaining that regulation "of unions as such is severable from and does not constitute a regulation of the individuals composing" a union. "As 'separate functioning institutions' they have been granted many substantive rights applicable to them as such, separate and distinct from the individuals composing the membership, and also imposing upon them as unions regulations and responsibilities" that do not apply to individuals.). A labor union "cannot be said to embody or represent the purely private or personal interests of its constituents." *White*, 322 U.S. at 701; *see id.* at 701-02 ("The union engages in a multitude of business and other official concerted activities, none of which can be said to be the private undertakings of the members.").

Rather, the Union is an entity unto itself with private interests of its own, political and otherwise. *Cf., e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (discussing a union's First Amendment rights and stating that a State "is under no obligation to aid the unions in their political activities"); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 767 (1961) (referencing the "intensive involvement of the railroad unions in political activities"). Thus, during collective bargaining with the City,

the Union can negotiate not only benefits to its members, but also benefits to itself—to the Union as an entity. This threatens the working of the Gift Clauses: Uncurbed, a public-sector union and a municipality could bargain to give public dollars to the Union under the guise of providing a benefit to firefighters. *See Byrd*, 6 S.W.2d at 740 (stating that the Gift Clauses are "intended to prevent the application of public funds to private purposes"). This relationship reflects a *second* reality absent from the court of appeals' reasoning: the risk for conflicts of interest due to the Union's unchecked ability to negotiate on both its own behalf and that of its members. *See, e.g.*, Restatement (Third) of Agency § 8.02 (Am. L. Inst. 2006) ("An agent" like the Union "has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."); *id.* § 8.02 cmt. b (discussing rationales for this rule); *id.* § 8.01; *see also* Tex. Loc. Gov't Code § 174.101; *cf. Conflict of interest*, Black's Law Dictionary (11th ed. 2019) ("[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties").

The court of appeals did not test whether association leave serves private purposes with the stringency the Texas Constitution requires because it did not insist that association leave serve a strictly governmental purpose. *Borgelt*, 2022 WL 17096786, at *8-9; *see Linden*, 220 S.W. at 762. This approach did not give full effect to the Gift Clauses' text and original meaning, under which "projects that benefit private interests are [strictly] forbidden." Mitchell, *supra*, at 32. The Court should therefore reverse the court of appeals.

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

Even assuming *Texas Municipal League* applies, the association-leave arrangement does not pass muster under the Gift Clauses. Under that case, "payments to individuals, associations, or corporations" *first* cannot be "gratuitous." 74 S.W.3d at 383 (emphasis omitted). *Second*, the Court asks whether the payment "(1) serves a legitimate public purpose[] and (2) affords a clear public benefit received in return." *Id.*

"A three-part test determines" if a grant of public money "accomplishes a public purpose." *Id.* at 384. First, the gift's "predominant purpose" must "accomplish a public purpose, not . . . benefit private parties." *Id.* Second, "public control over the funds" must be "retain[ed]" to "ensure that the public purpose is accomplished." *Id.* And third, the "political subdivision" must "receive[] a return benefit." *Id.* This third prong of the public-purpose test overlaps with the requirement that the payment "afford[] a clear public benefit received in return." *Id.* at 383. Thus, under *Texas Municipal League*, Defendants must satisfy four distinct requirements: (1) Association leave cannot be gratuitous; (2) association leave must accomplish a predominantly public purpose; (3) the City must retain adequate public controls over association leave's use; and (4) the City must receive a "clear public benefit" in return. *Id.* at 383-84.

And Defendants must satisfy *all* four of those requirements. If Defendants do not prevail on any one of these four prongs, association leave is unconstitutional

under the Gift Clauses. *See id.* Here, they fail at least the first three, and whether they can prevail on the fourth is dubious at best.

A. Association leave constitutes a gratuitous payment to the Union.

Under *Texas Municipal League*, "[a] political subdivision's paying public money is not 'gratuitous' if [that] subdivision receives return consideration." *Id.* at 383. The court of appeals held that association leave was not a gratuitous payment because it "was part of [firefighters'] agreed compensation" under the Agreement. *Borgelt*, 2022 WL 17096786, at *5. But allowing a public grant so long as it is located in a contract for which the governmental entity nominally gave some consideration somewhere, *see Borgelt*, 2022 WL 17096786, at *5, permits unlawful gifts to private entities to fly under the constitutional radar. The Court should grant review to ensure that this does not happen.

The court of appeals incorrectly concluded that association leave amounted to compensation for both the firefighters and the Union. *Id.* at *5-7. But the leave cannot qualify as compensation. Counting it as such would construe the Agreement in a way that would violate the rights protected by the First Amendment to the federal Constitution. Because the Court does not read contracts in a way that would render them illegal, *e.g.*, *Lewis v. Davis*, 199 S.W.2d 146, 149 (Tex. 1947), association leave cannot qualify as compensation to the firefighters—which means that association leave is gratuitous as to them. Moreover, association leave's benefit flows principally to the Union, not to the firefighters, which makes association leave different in kind from other types of leave that this Court has permitted. Finally, no consideration

backs up the Union's use of association leave for "other association business," so using the leave for that purpose renders a gratuitous payment to the Union.

1. Treating association leave as if it is backed by consideration would violate the First Amendment by entitling the Union to part of nonmember firefighters' compensation.

Counting association leave as compensation to all firefighters, as the court of appeals did, *Borgelt*, 2022 WL 17096786, at *5-6 (failing to distinguish between Union-member firefighters and nonmember firefighters), would violate the First Amendment and therefore cannot form a basis on which to deem association leave non-gratuitous. Accepting the court of appeals' reasoning would mean that nonmember firefighters' compensation is partly comprised of a type of leave that benefits a union they may not support. This would violate the nonmember firefighters' free-speech rights. *Janus*, 138 S. Ct. at 2486. This Court should decline to read the association-leave provision in a way that would render it unconstitutional.

The First Amendment to the U.S. Constitution "forbids abridgment of the freedom of speech," *id.* at 2463; U.S. Const. amend. I, which "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), as well as "[t]he right to eschew association for expressive purposes," *Janus*, 138 S. Ct. at 2463 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). Compelling "free and independent individuals" to "mouth support for views they find objectionable violates that cardinal constitutional command" and "is always demeaning" because it "coerce[s]" them "into betraying their convictions." *Id.* at 2463-64. "Compelling a person to *subsidize* the speech of other private speakers

raises similar First Amendment concerns," so the United States Supreme Court has "recognized that a 'significant impingement on First Amendment rights' occurs when public employees are required to provide support for a union that 'takes any positions during collective bargaining that have powerful political and civic consequences." *Id.* at 2464 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310-11 (2012)).

If association leave is deemed part of nonmembers' compensation—even though they cannot use it, *see infra* Section II.A.2—then the Union has taken part of that compensation in violation of the nonmembers' right not to engage in compelled speech, *see Janus*, 138 S. Ct. at 2486. In *Janus*, non-unionized public employees were required to pay an "agency fee," which charged those nonmembers "not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities," including lobbying, "[s]ocial and recreational activities," advertising, "[m]embership meetings and conventions," litigation, and "other unspecified '[s]ervices' that 'may ultimately inure to the benefit of the members of the local bargaining unit.'" *Id.* at 2460-61. This agency fee was "automatically deducted" from a nonmember employee's wages, without his or her consent. *Id.* at 2486.

The U.S. Supreme Court held that this arrangement violated the First Amendment. *Id.* No "payment to the union may be deducted from a nonmember's wages" without that employee's affirmative consent to pay. *Id.* After all, affirmative consent to pay waives First Amendment rights, "and such a waiver cannot be presumed." *Id.*; *accord Knox*, 567 U.S. at 312 ("Courts 'do not presume acquiescence in the loss of fundamental rights.'" (quoting *Coll. Savings Bank v. Fla. Prepaid Postsecondary Ed.*

Expense Bd., 527 U.S. 666, 682 (1999))). Thus, exacting a contribution to a public-sector union from a nonmember without the nonmember's affirmative consent is unconstitutional. *Janus*, 138 S. Ct. at 2486.

Under the court of appeals' reasoning, association leave violates the freedom of speech of those firefighters who are not members of the Union. The court of appeals concluded that association leave is compensation to, presumably, all Austin firefighters. *Borgelt*, 2022 WL 17096786, at *5-6. But not all firefighters are Union members. 2.SCR.505. If association leave counts as part of the nonmember firefighters' compensation, that compensation supports a union of which they are not members and that they may not support. *See Janus*, 138 S. Ct. at 2463-64, 2486. Thus, through the association-leave provision, the Union exacts part of the nonmembers' "compensation" to support itself, ostensibly violating their rights against compelled speech. *See id.* at 2463-64. The Union may even have betrayed its obligation as exclusive bargaining agent to "provid[e] fair representation [even] for nonmembers" by negotiating a collective-bargaining agreement that gives nonmembers compensation that they cannot use and that impinges on their rights, *id.* at 2460, 2467; *see* Tex. Loc. Gov't Code § 174.101; *infra* Part II.A.2.

Association leave therefore cannot constitute compensation to all firefighters. When the Court may read a contract in two ways, one that results in a violation of law and one that does not, the Court must choose the reading that "does not result in violation of law." *Lewis*, 199 S.W.2d at 149; *cf. also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247-51 (2012) (discussing the statutory-interpretation analogue to this principle, the constitutional-doubt

canon). The Court should avoid rendering the Agreement illegal and hold that association leave is not compensation to firefighters. *See* 7.RR.90 (the Agreement's severability provision).

2. Association leave is not compensation for firefighters because it flows primarily to the benefit of the Union *qua* Union, not the firefighters.

Association leave also violates the Gift Clauses because it allows the City to pay City employees to do work for the Union. 7.RR.24-25. It thus cannot be deemed compensation for firefighters because it is used for Union business and to accomplish Union purposes. 7.RR.24. For example, the Agreement defines "[Union] business" to include addressing cadet classes and attending Union conferences and meetings, 7.RR.24, activities on which the authorized representatives spend about 22% of their allotted association-leave hours, *see* 7.RR.453. These activities certainly benefit the Union—for example, the purpose of addressing firefighter cadets during training is presumably to recruit the cadets to become members. It is, of course, true that "a city may . . . engage its servants and employees upon any terms of payment acceptable to both parties." *Byrd*, 6 S.W.2d at 740. But when public-sector unions negotiate on behalf of their public-employee members, courts should use special care in examining the resulting agreements to ensure that they do not contain unconstitutional grants to the unions disguised as compensation to members. *See supra* Part I.B.

Here, such caution is warranted, as the firefighters, on whose behalf the Union negotiates, do not receive the principal benefit of association-leave hours. *See* 7.RR.24. Association leave differs in kind from the types of compensation at issue in

Byrd and its progeny, which all involved pensions or types of compensation from which the benefit flows directly or chiefly to the employees. *Byrd*, 6 S.W.2d at 738-39; *e.g.*, *Austin Fire & Police Dep'ts v. City of Austin*, 228 S.W.2d 845, 845 (Tex. 1950) (providing pensions, longevity pay, sick leave); *Friedman v. Am. Sur. Co. of N.Y.*, 151 S.W.2d 570, 575-76 (Tex. 1941) (involving "insurance or compensation for the employees of a certain class of employers during involuntary unemployment" when that insurance or compensation was drawn from a separate fund that "never becomes a State fund"). The court of appeals' reliance on *Byrd* was therefore misplaced. *See Borgelt*, 2022 WL 17096786, at *5-6. Compensation such as pensions and sick leave allow public employees to take off work for their own purposes. *See, e.g.*, *Byrd*, 6 S.W.2d at 738-39; *Austin Fire & Police Dep'ts*, 228 S.W.2d at 845; *Friedman*, 151 S.W.2d at 575-76. Indeed, the Agreement in this case contains such provisions. 7.RR.21, 28, 37.

Association leave is different because it does not allow a firefighter to take time off for himself or his own individual purposes (when he is sick, for example). Instead, the association-leave provision requires a firefighter using association leave to do work for the Union. 7.RR.24-25. Using it requires firefighters not to take off work, but to do additional—and paid—work for a private entity other than their employer. 7.RR.24. Because of the difference in kind between association leave and the class of compensation including pension, sick leave, and the like, the court of appeals improperly relied on *Byrd* to determine that association leave constitutes compensation of the same order. *See Borgelt*, 2022 WL 17096786, at *5-6.

Only this Court can conclusively decide whether a contract provision negotiated by a public-sector union, which necessarily operates in two capacities, *see supra* Part I.B, is a "gratuity" for Gift Clause purposes. Given the inherent potential conflicts of interests in such negotiations, that legal question alone merits the Court's consideration.

Association leave is better classed as compensation to the Union, not to firefighters, because firefighters who do not belong to the Union cannot use it. The City agreed to the current association-leave provision "in exchange for" a change in the way the City treated sick leave. *Borgelt*, 2022 WL 17096786, at *7. Instead of treating it as "productive leave" that "count[s] towards employees' hours worked for purposes of calculating overtime," the City now treats firefighters' sick leave as "non-productive leave" that does "not count toward employees' hours worked." *Id.* Nonmember firefighters thus lost the benefit of having their sick leave count toward hours worked for the purposes of calculating overtime, *see id.*, but got nothing in return, as only Union members may use association leave, *see* CR.4212 (explaining that only a "member of the bargaining unit may request to use [association leave] as an [authorized representative]").

Nonmember firefighters therefore cannot avail themselves of association leave—even though, according to the court of appeals, it is part of their compensation under the Agreement. *See Borgelt*, 2022 WL 17096786, at *5-6. If a subset of firefighters cannot avail themselves of the leave and lack an alternative type of compensation, it is difficult to see how association leave qualifies as compensation to those firefighters. Moreover, if both Union members and nonmembers have the

same "compensation," but nonmembers cannot avail themselves of it, the City might have a problem with compensating similarly situated employees differently solely because one firefighter belongs to the Union and another does not.

3. The Union's use of association leave for "other association business" confirms that the City has given no consideration for it.

Under *Texas Municipal League*, association leave is undoubtedly a gratuitous payment to the Union if the City does not receive consideration for it. 74 S.W.3d at 383. Many of the association-leave hours cannot qualify as consideration to the Union (as opposed to the firefighters)—at least, not as the Union currently uses them. The court of appeals instead concluded that association leave could qualify as consideration to the Union because the City receives "concessions" from the Union on certain matters, the Agreement binds the Union "to several specific obligations related to a number of administrative requirements," the Union plays a role in maintaining harmonious labor relations, and the City received favorable treatment of sick leave (as "nonproductive" instead of "productive") in exchange for association leave. *Borgelt*, 2022 WL 17096786, at *6-7; *see supra* Part II.A.2.

But in so concluding, the court of appeals ignored that the Union allows its members to use association leave for uses to which the City and Union did not agree and which therefore were not bargained for. The Agreement expressly defines "[Union] business" for which Union members may use association leave to mean *only* collective-bargaining negotiations, adjusting grievances, attending dispute-resolution proceedings, addressing cadet classes during training, and attending Union conferences and meetings. 7.RR.24; *see* 7.RR.24 (stating that both the Union president and

authorized representatives may use association leave for "[Union] business"). This express definition necessarily excludes all other categories. *See, e.g.*, Scalia & Garner, *supra*, at 107-11 (explaining the canon *expressio unius est exclusio alterius*).

But the Union has created another, extra-contractual category: "other association business." *Compare* 7.RR.24, *with* 7.RR.452. About 75% of all the activities for which authorized representatives use association leave falls into this category, *see* 7.RR.453, which includes participating in such activities as galas, fishing trips, and retirement parties for the Union's or its favored causes' benefit, *see* 4.RR.91-96. But the Agreement does not include this catchall category, 7.RR.24, so the parties did not bargain for it, *see, e.g.*, *Lewis v. Chatelain*, 245 S.W.3d 641, 644 (Tex. App.—Beaumont 2008, pet. denied) ("We determine the parties' intent from the language of the contract."); *see also Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011) ("In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself."), and the City has received no consideration for it, *see, e.g.*, Restatement (Second) of Contracts §§ 17(1) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."), 71(1) ("To constitute consideration, a performance or a return promise must be bargained for.") (Am. L. Inst. 1981). The use of association leave for "other association business" is therefore gratuitous, and that use of the leave cannot constitute compensation to either the firefighters or the Union. The Court should reverse the court of appeals' contrary conclusion.

B. Association leave does not satisfy the public-purpose test.

Even if association leave is not gratuitous, Defendants must still show that it satisfies the public-purpose test. *Tex. Mun. League*, 74 S.W.3d at 384-85. They cannot because association leave does not serve a *predominantly* public purpose and the City does not retain constitutionally adequate controls over the use of association leave to ensure that the leave is used for a sufficiently public purpose. *Id.* at 384. Moreover, any benefit that the City receives in return for association leave must be lawful, *see id.*, but given the constitutional problems discussed above, any benefit the City receives is, at best, legally questionable, and the City does not truly "benefit" from the arrangement in the relevant constitutional sense.

1. Association leave violates the Gift Clauses because a public purpose does not predominate.

The lower courts' apparent assumption that the presence of any arguable public purpose makes association leave constitutional is flawed for two reasons. *First*, this Court has stated that the Gift Clauses do not countenance giving away public funds for anything other than a "strictly governmental" purpose. *Linden*, 220 S.W. at 762*; see supra* Part I. Association leave does not serve such a purpose. *Second*, that strictly governmental purpose must *predominate* over all other purposes. *Tex. Mun. League*, 74 S.W.3d at 384. The lower courts engaged in no analysis to determine whether it did. But the way that Union members use association leave demonstrates that it does not.

The lower courts also erred in by conflating the association-leave provision with the Agreement as a whole. *E.g.*, *Borgelt*, 2022 WL 17096786, at *8; CR.4214 ("The

[Agreement], including the [association-leave provision] and the City's implementation of [association leave] under the [Agreement], accomplishes a predominantly public purpose and is not predominantly a benefit to private parties."). But Plaintiffs do not contest the constitutionality of *the Agreement*—they contend only that the association-leave provision is unconstitutional. Thus, assuming that the Court looks to the entire Agreement to determine whether association leave is gratuitous, *see Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 86-87 (Tex. App.—Amarillo 1994, writ denied), it should look only to the association-leave provision to determine whether that provision serves a public purpose. And the association-leave provision is severable from the rest of the Agreement in any event. 7.RR.90; *see In re Poly-Am., L.P.*, 262 S.W.3d 337, 360 (Tex. 2008) (orig. proceeding); *Borgelt*, 2022 WL 17096786, at *5 (noting that Plaintiffs asserted that only the association-leave provision is unlawful and acknowledging that an illegal contract provision may be severed).

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

As explained above, the Gift Clauses place a "positive and absolute" prohibition on applying public funds "to other than *strictly governmental* purposes." *Linden*, 220 S.W. at 762 (emphasis added); *see supra* Part I. Association leave does not meet this exacting standard. Its predominant purpose is to conduct Union business. 7.RR.24. But Union business is not "strictly governmental." The association-leave provision defines it to include such activities as addressing cadet classes at cadet training—presumably to recruit new firefighters to the Union—and attending Union conferences and meetings. 7.RR.24. Expanding the Union's membership and attending

conferences and meetings to further the Union's purposes—some of which are undoubtedly private purposes benefitting the Union as an entity, not the firefighters, *see supra* Part I.B—is not strictly governmental, nor does it have a "direct" or "intimate" relationship to the public good, *see Davis*, 326 S.W.2d at 707.

And the record makes abundantly clear that Union members do not use association leave for strictly governmental purposes. *See Linden*, 220 S.W. at 762. Over 75% of association leave is used for "other association business," *see* 7.RR.453, which includes attending galas, parties, and fishing trips to benefit the Union or its preferred causes. 4.RR.91-96. Attending such events on the public dime is not a "strictly governmental" purpose. These activities are a far cry from strictly governmental uses of public funds in this Court's past cases, such as using public funds to finance a primary election, *Bullock*, 480 S.W.2d at 370, and highway construction, *City of Austin*, 331 S.W.2d at 745. And while charitable activities, which comprise much of the "other association business" category, *see* 2.SCR.546-68, might include, among other things, "governmental or municipal purposes," *Boyd v. Frost Nat'l Bank*, 196 S.W.2d 497, 502 (Tex. 1946), this Court has never held that charitable activities per se are strictly governmental. With good reason: holding so would eviscerate accountability for how public entities use public dollars in the Gift Clause context. If a charitable activity per se served a "strictly governmental" purpose—or even just *some* public purpose—a municipality need only call its preferred use of public funds for private purposes a "charitable activity" to get around the Gift Clauses.

Undoubtedly, fighting fires serves a public purpose, but that does not anoint everything a firefighters' *union* does with the imprimatur of public purpose. Displaying

courts' "extraordinary tendency to construe 'public purpose' in as broad a light as possible," Mitchell, *supra*, at 32, the court of appeals concluded that because the Union's purpose overlaps with AFD's to an extent, CR.4209, association leave served a public purpose, *Borgelt*, 2022 WL 17096786, at *8. But a compensation system that violates the First Amendment does not serve a public purpose. *See supra* Part II.A.1. And even assuming that the Union's and AFD's purposes overlap, that cannot satisfy the Gift Clauses because it does not answer the question whether that public purpose *predominates* over purposes that are not strictly governmental. *See Tex. Mun. League*, 74 S.W.3d at 384; *Linden*, 220 S.W. at 762.

b. Any governmental purpose does not predominate.

The lower courts paid lip service to whether a public purpose *predominates*, merely listing some public purposes that the Agreement or the Union may serve. *Borgelt*, 2022 WL 17096786, at *8; CR.4208-11. But this list-type "analysis" says nothing about how those public purposes weigh against, for example, any private purposes the Union may have, *see supra* Part I.B, and defeats the purpose of a requirement that the public purpose predominate over private ones, *see Tex. Mun. League*, 74 S.W.3d at 384.

The trial court's findings of fact do not demonstrate that a strictly governmental purpose predominates in association leave. *See id.*; *Linden*, 220 S.W. at 762. That court found that the Agreement's purpose "is to achieve and maintain harmonious labor relations between the parties, to establish benefits, rates of pay, hours of work, and other terms and conditions of employment for all members of the bargaining unit[,] and to provide for the equitable and orderly adjustment of grievances that may

arise during the term of the [A]greement." CR.4208. It also found that firefighters serve a public purpose and that the Agreement "benefits the public in general." CR.4209. It recited that collective bargaining and establishing "contractual arbitration and enforcement procedures promote[] the health, safety, and welfare of the public by ensuring 'high morale of fire fighters . . . and the efficient operation of the departments'" in which they serve. CR.4210 (quoting Tex. Loc. Gov't Code § 174.002(e)). It also found that "[a]chieving and maintaining harmonious relations between public safety employees and local government," "[a]greeing to a method of equitable and orderly adjustment of firefighter grievances," and physically fit firefighters all constitute public purposes. CR.4210-11.

None of these findings shows that association leave serves a *predominance* of strictly governmental purpose. *See Tex. Mun. League*, 74 S.W.3d at 384; *Linden*, 220 S.W. at 762. To begin with, none of these findings are strictly about association leave. They are about firefighters, the Agreement, and various things for which the Agreement provides, namely collective bargaining, the grievance process, and general "harmonious [labor] relations." CR.4208-11. But Plaintiffs contest the constitutionality only of association leave (which is severable from the rest of the Agreement, 7.RR.90), so only *association leave's* strictly governmental purpose (or not) is relevant.

But even if these findings were about association leave in particular, they conspicuously do not include a finding that the public purposes the trial court found *predominate* over any others. *See Tex. Mun. League*, 74 S.W.3d at 384; CR.4208-12. The trial court never made any findings as to any private purposes that this case

might involve. *See* CR.4208-16. But without weighing public purposes against private ones, the trial court cannot conclude that a public purpose predominates. *See Tex. Mun. League*, 74 S.W.3d at 384; *Linden*, 220 S.W. at 762; *see also* CR.4214 (concluding, with no analysis, that association leave does not violate the Gift Clauses and "accomplishes a predominantly public purpose and is not predominantly a benefit to private parties"). The trial court's factfinding therefore does not lead to the conclusion that a strictly governmental purpose predominates over any private purposes. Nor have Defendants pointed to any evidence that would support that result. *See* Resp. to Pet. for Review at 20. This Court should therefore reverse the lower courts' erroneous conclusion. *See City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005) ("[I]f reasonable minds cannot differ from the conclusion that the evidence lacks probative force it will be held to be the legal equivalent of no evidence.").

2. The City does not maintain controls to ensure that the Union uses association leave for only a strictly governmental purpose.

A public entity must exercise control over the way a grant of "public money or thing of value," Tex. Const. art. III, § 52(a), is used, "to ensure that the public purpose is accomplished and to protect the public's investment," *Tex. Mun. League*, 74 S.W.3d at 384. To honor the Gift Clauses, *see, e.g.*, *Byrd*, 6 S.W.2d at 740, controls should be "specifically tailored" to ensure that the expenditures are directed to accomplish the "strictly governmental" purpose to which the public dedicates them. Tex. Att'y Gen. Op. No. MW-89, at *2 (1979); *Linden*, 220 S.W. at 762.

It is the governmental entity's responsibility to implement these controls. *See* Tex. Att'y Gen. Op. No. MW-89, at *2. After all, if the *grantee* is responsible for

controlling how it uses the public's investment, the *grantee* will not face accountability. This Court thus requires more than merely discretionary oversight. When the Legislature grants public funds or public benefits, it may place controls on the use of the funds or benefits in a statute. S*ee* Tex. Const. art. III, §§ 50, 51, 52(a); *Davis*, 326 S.W.2d at 702, 704, 706-07. In *Davis*, the Texas Urban Renewal Law authorized cities to acquire land within areas designated as slums by either purchasing or condemning the land. 326 S.W.2d at 702; *see, e.g.*, *Tex. Mun. League*, 74 S.W.3d at 383-84 (citing *Davis*); *Bullock*, 480 S.W.2d at 370 (same). The City could then sell or lease the land to private individuals or companies, but "[only] under terms and conditions designed to prevent the recurrence of slums." *Davis*, 326 S.W.2d at 702. These "covenants, restrictions[,] and zoning ordinances" would ensure that the City's "redevelopment plan" would "be carried out," *id.* at 707, so the land still had a public use, *id.* at 704, 706-07; *see id.* at 709.

But when a public entity grants public funds or benefits via a contract, "adequate contractual" controls are required to govern the way the recipient uses the benefits so that the use is not left up to the recipient's "discretion." Tex. Att'y Gen. Op. No. MW-89, at *1-2. The need for "adequate" controls is particularly strong in the context of public-sector unions. For example, in 1975, Fort Worth ISD "adopted a policy that allow[ed]" teachers' unions "to use school personnel during working hours to pursue the business of the organization." Tex. Att'y Gen. Op. No. MW-89, at *1. The policy granted teachers' unions "released time with full pay" to "be used at the discretion of the professional organization for pursuing the business of the organization by its officers or members." *Id.* But that discretionary policy would have

improperly granted a "substantial benefit to a private professional organization which has no obligation to apply it to accomplish a public purpose," as the district did "not specifically tailor[] the . . . expenditures to the accomplishment of school-related purposes." *Id.* at *2. The district had not "placed adequate controls on the use of released time to [e]nsure that a public purpose will be served." *Id.* at *2.

As the Union receives association leave from the City via a contract, adequate controls—"specifically tailored" to accomplish a strictly governmental purpose, *id.*; *Tex. Mun. League*, 74 S.W.3d at 384; *Linden*, 220 S.W. at 762—could be located in the Agreement. *But see infra* Part II.B.2.b (describing why any limitations in the Agreement do not adequately control here). Here, the City has not ensured that association leave serves such purposes by tailoring any controls over the Union president or the other members who use association leave.

a. The City does not maintain adequate controls over the Union president.

The most obvious shortcoming concerns the Union president. The Agreement effectively exempts him from all City control, as nothing limits how he may use association leave. *See* 4.RR.57-58, 62; 7.RR.24; 2.SCR.448, 506, 507. He does not need permission to do Union work, and no one prohibits him from performing any particular activities. 2.SCR.448, 506, 507. The City has no idea how he uses his time, as he "is not required" to report "his daily activities or what [Union] work he is doing." *Borgelt*, 2022 WL 17096786, at *9. He "is allowed to work full-time on [Union] business but is not required to report to AFD headquarters or any other [AFD] office

on a daily basis." *Id.* He reports to the Chief of Staff, but the Chief of Staff does not "actively supervise" him or even know what he is doing day to day. 4.RR.62; 7.RR.451. The Agreement requires no accounting or audit of how he uses his time. 2.SCR.540. He is required to submit time sheets, but those time sheets do not "record any information that shows the activities that he's actually performing." 4.RR.58-59; *accord* 4.RR.74; 2.SCR.450, 513-14.

The record does not bear out the court of appeals' conclusion that the Agreement, including the association-leave provision, and the City's implementation of association leave retain sufficient public control to ensure that the leave accomplishes a public purpose. *Borgelt*, 2022 WL 17096786, at *12. Specifically, the court of appeals reasoned that, although "the City cannot choose who the [Union] President is, the City controls his employment as an AFD employee, including retaining its ability to terminate his City employment, which would terminate his access to paid leave of any kind." *Id.* at *10. But this misses the point because no matter who the Union president is, he or she will have access to the allotted 2,080 hours of association leave to fund the president's full-time Union job. 7.RR.25. And unless the City actually implements controls on how the Union president uses his or her forty-hour work week—all of which consists of association-leave hours, 7.RR.25—whoever the Union president is will be able to use association leave at his or her "discretion," Tex. Att'y Gen. Op. No. MW-89, at *2. Nor does it matter that the Union president "remains a City employee who returns to his previous City position whenever his term as [Union] President ends," *Borgelt*, 2022 WL 17096786, at *10, because this does not impact how he uses association leave while he is Union president.

Defendants have argued, Resp. to Pet. for Review at 10-12, that the City places sufficient controls on the Union president's use of association leave because he must follow the City's personnel policies and AFD's Code of Conduct, must comply with credentialing requirements, is subject to discipline, and "attends meetings with AFD management and [sometimes] meets with the Fire Chief." CR.4211-12; *accord Borgelt*, 2022 WL 17096786, at *10. These "controls" are neither sufficiently obligatory nor specifically tailored to accomplish a public purpose for two reasons.

First, these measures impose no binding obligation on the Union. In *Davis*, adequate controls on use of property were enshrined in statute or in deeds conveying property. 326 S.W.2d at 704-07. In the Fort Worth ISD case, the released-time program would have been unconstitutional because it lacked "adequate *contractual* or other controls." Tex. Att'y Gen. Op. No. MW-89, at *1 (emphasis added). Defendants cite no external requirement obliging the Union president to meet regularly—or at all—with AFD management. This renders that practice merely ad hoc and not controlling for Gift Clause purposes. *See Davis*, 326 S.W.2d at 704-07; Tex. Att'y Gen. Op. No. MW-89, at *2; 5.RR.152 (describing the only constraints on the Union president's use of association leave for political activities as "self-imposed"). Voluntary compliance, without a binding obligation, cannot be said to *control* against misuse of funding.

Second, the measures Defendants have cited are not specifically tailored to cabin the use of association leave. Indeed, the measures Defendants cite regarding the Union president are generally applicable policies that presumably apply to all firefighters or City employees. CR.4211-12; *accord Borgelt*, 2022 WL 17096786, at *10; *see*

Resp. to Pet. for Review at 10-12. That the Union president must comply with certain credentialing and personnel requirements presumably applicable to all firefighters says nothing about how he uses association leave. *See* Tex. Att'y Gen. Op. No. MW-89, at *2 (requiring specific tailoring for controls to be constitutionally adequate); CR.4212; *see also* Austin, Tex., Code of Ordinances §§ 2-7-62, 2-7-73, 2-7-74. And while Defendants have asserted that the current Union president "can be—and has been—subjected to [AFD] discipline," Resp. to Pet. for Review at 12, that discipline has nothing to do with his use of association leave. Discipline he received for posting libelous and slanderous materials against a senior AFD member on social media, 7.RR.451; 3.SCR.258, was specifically for his violation of the City's Code of Conduct, not for his use of association leave in particular. 3.SCR.258.

Nor can Defendants isolate which uses of the president's time were improper. Saying that the Union president received discipline for time he was on association leave proves nothing because his entire forty-hour work week consists of association leave. 7.RR.25. The president states that he performs other work, such as political work, as Union president "while not on [association leave]." CR.4212. But neither he nor Defendants have pointed to any way of knowing which hours count as association-leave hours and which do not. *Cf.* 3.SCR.339. Disciplining the Union president for violations of the City's Code of Conduct is not sufficiently specifically tailored to discipline the president for his use of association leave because it does not target the *purpose* for which he used the leave. *See* Tex. Att'y Gen. Op. No. MW-89, at *2.

b. The City does not maintain adequate control over Union members.

Likewise, the City does not exercise effective control over authorized representatives, the other Union members who can use association leave. The Agreement's express definition of what "[Union] business" means is an illusory limit. As discussed above, Union members frequently use association leave for activities that are not strictly governmental. 4.RR.91-96; *see supra* Part II.B.1. Neither these nor private charitable activities fit within the association-leave provision's express definition of "[Union] business." 7.RR.24. And that definition has evidently not prevented authorized representatives from using 75% of the association-leave hours for activities falling outside the definition.

The record demonstrates that the City does not have controls in place to confine association leave to a strictly governmental purpose. An AFD representative reviews requests to use association leave, 4.RR.106-07; 7.RR.452, but this means little when the City approves 99% of all requests, even for activities that are nongovernmental, 4.RR.88-89, 91-92, 94-95; 7.RR.453; 2.SCR.517; *see* 2.SCR.546-68; *see also Linden*, 220 S.W. at 762. The City never objects to activities in which the Union chooses to participate. *See* 4.RR.95. Authorized representatives do not report to anyone about how they are using association leave. *See* 2.SCR.456, nor are City personnel "available to supervise" the activities comprising "other association business," *see, e.g.*, 4.RR.91. Indeed, the Union is effectively on the honor system with its use of association leave. *See* 2.SCR.456, 524. The City does not monitor authorized representatives' use of association leave—only the Union does. 7.RR.453. But allowing the

recipient of the public funds to decide unilaterally how it will use those funds flouts the Gift Clauses. *See, e.g.*, *Byrd*, 6 S.W.2d at 740.

The Agreement requires no accounting or audit of how authorized representatives use their leave time. 2.SCR.540. An AFD internal order does state that "Fire HQ Administrative staff will maintain a record of all" association-leave requests and association-leave time used. 2.SCR.543; *accord Borgelt*, 2022 WL 17096786, at *10, *11. But Defendants have pointed to no evidence suggesting that the City has ever disciplined or reprimanded any authorized representatives for using association leave for purposes that are not strictly governmental. *See generally* Resp. to Pet. for Review. The City does not control the use of association leave by gathering information that it never uses.

The lower courts noted that the City "maintains all inherent rights to manage AFD and its work force," CR.4208; *Borgelt*, 2022 WL 17096786, at *11, but this ignores the City's inability to manage how Union members use association leave and that the City does not control who can use it, 2.SCR.542. And the City's "right to discipline or discharge employees" and the firefighters' obligation to "comply with applicable personnel policies and AFD's Code of Conduct" while on association leave do not constitute controls for the same reasons they did not control the Union president, *Borgelt*, 2022 WL 17096786, at *11; *see supra* Section II.B.2.a. Following the City's Code of Conduct and complying with applicable personnel policies are not specifically tailored to accomplish Union business, let alone to a strictly governmental public purpose.

3. The City receives no "clear public benefit" because the return benefit ostensibly received is unlawful.

A grant to a private entity will not pass muster under the Gift Clauses unless the "political subdivision" dispensing the grant "receives a return benefit." *Tex. Mun. League*, 74 S.W.3d at 384. This overlaps with the requirement that the City receive a "clear public benefit," which is only nominally distinct from the three-pronged public-purpose test. *Id.*; *see Borgelt*, 2022 WL 17096786, at *13. Within that test, because the Gift Clauses "positive[ly] and absolute[ly]" prohibit applying public money to anything "other than strictly governmental purposes," *Linden*, 220 S.W. at 762, any "public benefit" that the City receives from association leave should also be "strictly governmental."

Assuming that the City receives a return benefit for giving the Union association leave, *Borgelt*, 2022 WL 17096786, at *6-7, that benefit is suspect because, under the court of appeals' reasoning, association leave is likely unconstitutional, *see supra* Part II.A.1. The City should not be permitted to reap a benefit from a violation of nonmember firefighters' First Amendment rights, which might include nonmember firefighters' freedom of association. One point of association leave seems to be to incentivize nonmembers or new firefighters to join the Union. *See, e.g.*, 7.RR.24 (allowing Union members to use association leave to address classes of cadet firefighters during cadet training). But if incentivizing nonmembers to join the Union violates those firefighters' freedom of association, the City should not be able to avail itself of that benefit. *Cf. Ams. for Prosperity Found. v. Bona*, 141 S. Ct. 2373, 2388 (2021) ("Exacting scrutiny is triggered by 'state action which *may* have the effect of curtailing the

freedom to associate.'" (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958))). And as discussed above, firefighters who do not belong to the Union cannot use association leave, even though the court of appeals deemed it compensation to them. *See supra* Part II.A.2. The City should not be able to benefit from such an arrangement.

The Court should grant review of this case to correct the erroneous ruling that the City has received a public benefit. The court of appeals used Texas's policy that firefighters "should have the right to organize for collective bargaining," Tex. Loc. Gov't Code § 174.002(b), to reason that because the overall Agreement may benefit the City, the association-leave provision must, too, *see, e.g.*, *Borgelt*, 2022 WL 17096786, at *7. But if *any* provision in a collective-bargaining agreement serves a public purpose or conveys a public benefit simply by virtue of its presence in the agreement—irrespective of whether that provision actually benefits the public—such agreements could hide unlawful benefits for private interests. Such workarounds vitiate the Gift Clauses. *See, e.g.*, *Byrd*, 6 S.W.2d at 740; Mitchell, *supra*, at 23 (explaining aid-limitation provisions' moral and practical purposes). This Court should reject that result.

Prayer

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

Respectfully submitted.

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Ari Cuenin

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