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SUPREME COURT OF TEXAS
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No. 22-1149

IN THE SUPREME COURT OF TEXAS

ROGER BORGELT; MARK PULLIAM; JAY WILEY,
Petitioners,

TEXAS,
Intervenor-Petitioner,

v.

CITY OF AUSTIN; SPENCER CRONK,
IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND
AUSTIN FIREFIGHTERS ASSOCIATION LOCAL 975
Respondents.

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

PETITIONERS' OPENING BRIEF ON THE MERITS

Robert Henneke
Texas Bar No. 24046058
Chance Weldon
Texas Bar No. 24076767
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Phone: (512) 472-2700
Fax: (512) 472-2728
rhenneke@texaspolicy.com
cweldon@texaspolicy.com

Jonathan Riches
Pro Hac Vice Application Pending
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
Phone: (602) 256-4000
Fax: (602) 256-7045
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs/Taxpayer Petitioners

IDENTITY OF PARTIES AND COUNSEL

Petitioners:	Appellate and Trial Counsel:
Roger Borgelt, Mark Pulliam, Mark Wiley	Robert Henneke Chance Weldon Munera Al-Fuhaid TEXAS PUBLIC POLICY FOUNDATION 901 Congress Avenue Austin, Texas 78701 Jonathan Riches Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE 500 E. Coronado Rd. Phoenix, Arizona 85004
Intervenor-Petitioner:	Appellate and Trial Counsel:
State of Texas	William T. Thompson Deputy Attorney General for Special Litigation OFFICE OF THE ATTORNEY GENERAL P.O. Box 12548 (MC 059) Austin, Texas 78711-2548
Respondents:	Appellate and Trial Counsel:
City of Austin, Spencer Cronk, City Manager of Austin	Paul Matula Assistant City Attorney CITY OF AUSTIN LAW DEPT. P.O. Box 1546 Austin, Texas 78767-1546

Respondents:	Appellate and Trial Counsel:
Austin Firefighters Association Local 975	Diana J. Nobile John W. Stewart McGillivary Steele Elkin LLP 1101 Vermont Ave., NW, Ste. 1000 Washington, D.C. 2005 Matt Bachop Deats, Durst & Owen, P.L.L.C. 707 W. 34th St. Austin, Texas 78705

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STATEMENT OF THE CASE

***Nature of the Case*:** This case involves a challenge under the Texas Constitution's Gift Clause, Tex. Const. art. III, § 52(a); *see also id.* art. III, §§ 50, 51; art. XVI, § 6(a), to a City of Austin ("City") program that allocates one-full time employee, and the equivalent of two other full-time employees, to work for Appellee Austin Firefighters' Association ("AFA") to advance the AFA's mission, while receiving City-funded salaries. Taxpayer Petitioners are City taxpayers and the State of Texas, seeking declaratory and injunctive relief against Appellees City and the AFA.

***Trial Court*:** 201st District Court of Travis County (Hon. Amy Clark Meachum)

419th District Court of Travis County (Hon. Jessica Mangrum)

419th District Court of Travis County (Hon. Orlinda Naranjo)

Disposition in the Trial Court: The trial court granted a Texas Citizens' Participation Act ("TCPA") motion filed by the AFA against Taxpayer Petitioners on February 7, 2017. CR.1392. The trial court later granted in part and denied in part the City's and the AFA's Joint Cross-Motion for Summary Judgment, leaving a fact issue for trial. CR.3813–3815. On March 8–9, 2021, this case was heard as a bench trial on the remaining issues, and the trial court entered judgment in favor of Appellees City and the AFA. CR.4163–64

Parties in the Court of Appeals: Taxpayers Roger Borgelt, Mark Pulliam, and Jay Wiley, as Taxpayer Petitioners and the State of Texas as Intervenor Petitioner. City of Austin, Spencer Cronk (formerly Marc Ott) in his official capacity as the City Manager of the City of Austin, and the Austin Firefighters' Association, IAFF Local 975 as Appellees.

Disposition in the Court of Appeals: The Third Court of Appeals affirmed the trial court's final judgment. *Borgelt v. Austin Firefighters Ass'n*, No. 03-21-00227-CV, 2022 WL 17096786, at *1 (Tex. App.—Austin,

Nov. 22, 2022) (Triana, J., joined by Baker, J. and Kelly, J.). No motions for rehearing *en banc* were filed.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code § 22.001(a) because this case involves "question[s] of law that [are] important to the jurisprudence of the state." Specifically, the lower court issued an erroneous decision on a crucial question regarding the scope and application of the Texas Constitution's Gift Clause.[1] That decision is contrary to this Court's longstanding Gift Clause jurisprudence because it misapplies each element of the test this Court has established for ensuring that public resources are not allocated to private, special interests. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383–84 (Tex. 2002).

This Court has not examined the contours of the Gift Clause in depth for over 20 years, and lower courts need guidance as to how it applies to cases involving government aid to private entities generally, and the subsidization of union activities with taxpayer resources specifically.

[1] "Gift Clause" refers collectively to the prohibition on public financial subsidies imposed by Tex. Const. art. III, § 52(a); art. III, §§ 50, 51; art. XVI, § 6(a). Such prohibitions, sometimes called "anti-aid" clauses, appear in most state constitutions. *See* Mitchell, et al., *Outlawing Favoritism: The Economics, History and Law of Anti-Aid Provisions in State Constitutions* (Mercatus Center, 2020), https://www.mercatus.org/media/71786/download.

ISSUES PRESENTED

1. Does the Gift Clause prohibit the City of Austin ("City") from paying the salary and benefits of City employees to work, not for the general public, but for the Austin Firefighters' Association ("AFA" or "Union")—a politically active private organization—when the City does not control those employees' activities, and they work to advance the interests of the AFA, not the City?

2. Did the lower court err in granting the AFA's Texas Citizens' Participation Act ("TCPA") motion, thus allowing officials to weaponize the TCPA against citizens challenging the constitutionality of government action in good faith—and concluding that Taxpayers failed to establish a prima facie Gift Clause violation when the trial court simultaneously found sufficient evidence for the case to go to trial?

STATEMENT OF FACTS

This case challenges the legality of "Association Business Leave" ("ABL") also known as "release time," whereby the City of Austin ("City") employs one full-time City employee, and pays the equivalent of two other full-time employees, *not* to perform the government jobs they were hired to do, but instead to work under the exclusive direction and control of the Austin Firefighters Association, Local 975 ("AFA" or "Union"), a private labor organization.

While on release time, these "released" employees engage in union activities under the Union's direction—activities that "directly support the [AFA's] mission," including political, recruiting, and other activities that advance the AFA's institutional interests, as opposed to discharging public responsibilities. Although the City pays for this with taxpayer money, it exercises virtually no control or oversight over the use of release time, but instead lets the AFA direct and control the use of these *public* funds.

The AFA is a private labor union that represents *some* Austin firefighters; it is also a political organization that, among other things, supports and opposes candidates for election and engages in lobbying activities. 2.SCR.471 at 127:12–128:6. Yet the City pays "released" employees through a Collective Bargaining Agreement ("CBA") signed with the AFA, which allows City employees to receive

their public salaries while "conduct[ing] [AFA] business" instead of working for the City. 7.RR.24–25 (Joint Ex. 1, CBA, art. X).

The CBA establishes two categories of ABL: (1) leave for the AFA President, and (2) leave for other union members. *Id.* §§ 1.A–B. The President (currently, Bob Nicks) "may use ABL for any lawful Association business activities consistent with *the Association's* purposes." *Id.* § 1.B.1. (emphasis added); *see also* 7.RR.451 ¶ 19. The President is allotted up to 2,080 hours per year, which means he has a full-time, no-show job that allows him to receive a salary from the City while devoting his entire work week to Union, not City, business. 7.RR.25 (Joint Ex. 1, art. X, § 2.C); *see also* 7.RR.451 ¶¶ 18, 20.

Mr. Nicks takes full advantage of this provision. He devotes "all of his time" to working on behalf of the Union, not the City. 4.RR.57:17–20. No one at the City directs his activities, nor does the City place any prohibitions on his activities. 7.RR.451 ¶¶ 24–25. He is not required to report to Fire Department Headquarters, or any other City office, on a regular basis. *Id.* ¶ 25; 2.SCR.506 at 20:23–25; 2.SCR.449 at 40:3–7; 4.RR.59. Instead, he reports to AFA's offices. *Id.* While there, or anywhere else, he is not required to provide an accounting of any kind to the City about his daily activities, or how he uses ABL. *Id.*; 2.SCR.507 at 21:20–22, 2.SCR.513–14 at 48:21–49:2; 4.RR.59; *see also* 4.RR.74; 2.SCR.540, RFA 12. Nobody in the City directly supervises Mr. Nicks, 7.RR.451 ¶ 29–30.

The City also has no say in who becomes the AFA President (or any other Authorized Association Representative), and cannot remove Nicks from his job. 2:SCR.451 at 48:10–14.

While using ABL, Nicks engages in political and lobbying activities, 4.RR.67:23–68:6, and recruiting for the Union, 7.RR.453 ¶¶ 48–50, 4.RR.75:12–77:18. He also attends private Union conferences and meetings. 4.RR.79:23–81:16. The City also pays him for the time he spends opposing the City in contract negotiations and grievance proceedings. 4.RR.76:2–79:22. He even used ABL to represent *himself* when he was subject to a disciplinary investigation by the Fire Department. 7.RR.451 ¶ 31; 4:RR:102:7–16.

In other words, Nicks uses all his time in all his working days to advance the Union's interests and the Union's work with effectively *no* City oversight.

Other Union members also use thousands of hours of ABL as "other authorized representative[s]." CR.4212 ¶ 41. These Union members "can use ABL for activities that directly support the mission of the AFA," rather than the Department's mission. 4.RR.69:11–70:1. The President, not the City, "direct[s] the activities" of these "released" employees. 4.RR.84:18–24; *see* 7.RR.453 ¶ 51. These activities include attending private charitable events (e.g., "a gala," a boxing match called "Battle of the Badges," "fishing fundraisers") and meetings of the union's "political action committee." 4.RR.90:6–96:18.

Even after the fact, the City does not know how a large portion of ABL time is spent. In the City's reporting system, most ABL hours used by "other Authorized Association representatives" are simply categorized as "association business" without further detail. 7.RR.453 ¶¶ 48–50. That accounts for over 75% of ABL used by other Union members. Another 20% of ABL is used for Union recruitment and union meetings. That means nearly 96.4% of *all* ABL time was used for Union recruitment, to attend Union meetings, and engage in the undefined and unaccounted-for category of "other Association business." 7.RR.113–15, 448.

While using ABL for these private Union activities, "released" employees "receive their ordinary City salaries, benefits, and pensions." 7.RR.451 ¶ 21. ABL costs the city roughly $200,000 to $250,000 per year, roughly $1.25 million over the course of the CBA. *See* 4.RR.158:1–10. Those costs are ultimately borne by taxpayers, like Plaintiff Borgelt. *See* 7.RR.449–50 ¶¶ 5–7.

SUMMARY OF ARGUMENT

The Texas Constitution's Gift Clause prohibits the government from giving public funds to private parties that are not controlled by the state, or subsidizing private undertakings that primarily advance private, rather than public, interests. In other words, sections 50, 51, and 52(a) of Article III, and section 6(a) of Article XVI of the Texas Constitution "prohibit[] the expenditure of public funds for private gain." *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.—Austin 1996,

writ denied), or "the application of public funds to private purposes." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995), *as modified* (Feb. 16, 1995) (citation omitted).

The release time practice under review violates both the letter and purpose of the Gift Clause and fails every element of the test this Court has set out to ensure that public resources are not allocated to private, special interests. Those tests are as follows:

An expenditure violates the Constitution if it is granted "gratuitously" to a private entity, meaning that the government does not receive sufficient consideration in exchange for the payment, ***or*** the payment does not "serve a legitimate public purpose; and… afford[] a clear public benefit[2] … in return." *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383–84 (Tex. 2002).

A three-part test determines if an expenditure accomplishes a public purpose. Specifically, the government must: "(1) ensure that [the expenditure's] *predominant* purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is

[2] The "clear public benefit" factor overlaps somewhat with the "predominately public purpose" test because if the public expenditure does not advance a predominantly public purpose, then it also does not afford a clear public benefit.

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

These are *conjunctive* requirements. *Id.* A government expenditure is unconstitutional if it fails *any* of these tests.

The Third Court misapplied each of the three factors in its decision. First, the Third Court was wrong to say release time serves a public purpose—it does not, because it *predominantly* benefits the AFA, a private party, including use of release time for the AFA's political and lobbying activities. Second, it erred in finding that release time was not gratuitous—it is, because the CBA does not obligate the AFA to provide *any* direct benefits in exchange for the $1.25 million ABL expenditures. Finally, the Third Court erred in concluding that the City retains adequate control over "released" employees—in fact, they are not directed or controlled by, or accountable to, the City in *any* meaningful way.

As a consequence of these errors, the decision below upholds exactly the type of subsidy that the Clause was written to prohibit, and eviscerates vital taxpayer protections in the Texas Constitution.

Even worse, the AFA is a political entity. It exists to advance its specific political interests. Of course, it has that right—but for the government to give taxpayer money to a political organization to advance its own political purposes is a gross misallocation of public funds.

If allowed to stand, the lower court's decision will provide carte blanche for cities throughout Texas to subsidize private activities with taxpayer resources, including the political activities of powerful special interest groups like the Union. The framers of the Texas Constitution enacted the Gift Clause to forbid such misallocations of public money for private, special interests. This Court should grant review and reverse the decision below because it is contrary to longstanding Gift Clause jurisprudence, which requires (1) a predominantly *public purpose*, (2) *adequate consideration*, and (3) *public control* over public expenditures. Those requirements are modest and flexible—but they ensure that taxpayer resources are allocated to, and used for, truly *public* purposes and that the public receives fair exchange for its money.

This Court should also grant review and reverse the decision below because it violates both the letter and purpose of the TCPA, which is intended to guarantee citizens' exercise of their constitutional rights, including their right to challenge the legality of government action, as Taxpayer Petitioners did here. The decision below transforms this shield protecting the citizen into a sword in the government's hands.

ARGUMENT

I. The ABL provisions violate the Gift Clause.

A. Release time does not serve a public purpose because it predominantly benefits the Union, not the City or taxpayers.

Under the Texas Constitution, a public expenditure is only lawful when its "*predominant* purpose is to accomplish a public purpose, not to benefit private parties." *Tex. Mun. League*, 74 S.W.3d at 384 (emphasis added). Whatever incidental benefits ABL may serve, the record in this case is plain that the *predominant* beneficiary of release time is the AFA, a private labor organization, not the City, and not the taxpaying public.

To find that ABL predominantly benefits the Union, the Court need look no further than the CBA's plain language. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.,* 574 S.W.3d 882, 888 (Tex. 2019) (A contract's plain language controls … [and] we presume parties intend what the words of their contract say." (citations & internal marks omitted)). It says: "The Association President may use ABL for any lawful *Association business* activities consistent with *the Association's* purposes." 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added). In other words, it doesn't just *permit* the AFA to use release time for Union business, it *mandates* such use.

Both Respondents also *agree* that ABL is used for AFA business and activities, not those of the City. AFA President Nicks testified: "Association

Business Leave is leave that can be used to do *Association* business." 2.SCR.446 at 26:6–7 (emphasis added). According to the City, "association business leave" in the CBA means "[a]ctivities by the AFA in connection with Article 10 are those that support their role as an employee organization." 2.SCR.615, Resp. No. 18.

If both parties agree that ABL means leave "used to do Association business," 2.SCR.446 at 26:6–7, to "support their role as an employee organization," 2.SCR.615, Resp. No. 18, and that under the CBA, ABL *must* be used for "the Association's purposes," 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added), ABL's predominant purpose cannot be public; it exists instead to benefit the Union—a private, special interest.

The record here substantiates this. The uses of ABL that the City *knows* about (and the City does not know how most ABL time is used, because ABL is controlled exclusively by the AFA, and is not reported to the City) *all* advance the AFA's private interests. Those uses are: the Union's political and lobbying activities, recruitment activities, Union conferences and meetings, and disciplinary and grievances proceedings in which the AFA and the City are, in the words of the City Assistant Fire Chief, "diametrically opposed." 2.SCR.511 at 37:8.

Perhaps the most striking example of how use of ABL does not, and in fact legally *cannot*, serve a public purpose is when ABL is used for political activities—and it is used extensively for these. AFA is a political organization,

which advocates for the election and defeat of candidates, and provides financial support to candidates. 2.SCR.471 at 127:12–128:6. Nicks and other AFA members determine which candidates to support or oppose during Political Action Committee meetings that are attended using ABL. *Id.*; 4.RR.139:21–140:24. Nicks also arranges for the placement of political candidate yard signs while on ABL. 2.SCR.471 at 126:24–127:5. And he produces written materials that provide AFA endorsement for or against political candidates "during [the] workweek." *Id.* at 125:18–126:1.

Nicks estimates that approximately 25–30 percent of his time is spent on political activities and lobbying. *Id.* 470 at 122:21–123:5. And several other Authorized Association Representatives use ABL for political meetings. *See* 2.SCR.550, 551, 554, 559, 565.

In short, the Union uses ABL to engage in political activities at taxpayer expense, even though City policy *expressly* prohibits the use of City resources for political activities. Under the City's Personnel Policy, "All employees of the City shall refrain from using their influence publicly *in any way* regarding any candidate for elective City office." 7.RR.500 § H(3). That policy goes on to prohibit supervisors from "participat[ing] or contribut[ing] money, labor, time, or

other valuable thing[s] to any person campaigning for a position on the City Council of the City of Austin." *Id.* § H(2).[3]

Yet, Nicks and other Union members use ABL to support and oppose candidates and to work on their campaigns. 2.SCR.471 at 126:24–127:5, 125:18–126:1. Of course, if City policy prohibits use of official position, resources, and time for certain political activities, it is difficult to see how use of ABL for those activities could possibly advance a *public* purpose.

The lower court said that the missions of the AFA and the City may sometimes "overlap[]," and therefore use of ABL by the Union serves a public purpose. Op. at 18–19. But that is not the law. The law requires a *predominant* public purpose, *Tex. Mun. League*, 74 S.W.3d at 384, not an incidental one. And in any event, the record shows that the ABL is often used in ways that place the AFA in an *adverse* or *adversarial* relationship to the City.

For example, ABL is used to finance AFA contract negotiations *against* the City. 7.RR.113–115, 448. During these negotiations, the AFA has its own negotiator, pursuing the AFA's interests and the best possible deal that AFA can

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

negotiate for itself and its members. That negotiator is literally on the opposite side of the bargaining table from the City's own negotiator. 2.SCR.322 at 26:4–11. Yet the AFA's negotiator is paid for with City taxpayer money under the release time provisions.

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

Similarly, during the disciplinary process, the AFA represents its members *against* disciplinary charges brought *by* the City, where the City is acting on behalf of its interests and the AFA is acting on behalf of its members against whom discipline was brought. 2.SCR.575, Resp. 14. In fact, on at least one occasion, Nicks *himself* was subject to a disciplinary action brought by the City for allegedly violating the City's social media policy. 7.RR.451 ¶ 31. During the investigation and adjudication of *Nicks' own alleged misconduct*, Nicks used ABL. 2.SCR.523 at 85:7–25.

All of this shows that ABL is actually spent for purposes that are *adverse* to the City's interests.

What's more, although the vast majority of ABL activities *that we know of* advance the AFA's interests instead of the City's, the record shows that the City does not even know how the vast majority of ABL time is actually spent. Reports show that under the CBA, 6,542.25 hours out of 8,714.50 hours[4] of ABL were used by "other Authorized Association representatives" on an undefined, unaccounted-for category of time identified only as "other Association business." 7.RR.113–15, 448. *Id.* 453 ¶¶ 48–50. In other words, of the time reported to the City for ABL used by "other Authorized Association Representatives," less than 25 percent was even identified by use! *Id.*

The fact that AFA controls and directs the activities of "other Authorized representatives" while on release time, this means AFA decides *in its sole discretion* how 75% of all ABL is used, and *also* provides no accounting for *how* it is used. Indeed, many of these uses of ABL appear to advance no public interest whatsoever. For example, some uses of ABL for "other association business" included participating in nonprofit activities such as the "Firefighter Combat Challenge," "Battle of the Badges Boxing Charity Event," and the "Austin Firefighters Relief and Outreach Fishing Fundraiser." 2.SCR.546–68.

[4] The records produced were from the fourth quarter of 2017 through calendar year 2020.

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

Yet instead of identifying the specific public purposes served by ABL, the lower court gestured in the direction of general policy propositions, such as declaring that "collective bargaining … is in the public interest" under state law, Op. at 18, or that ABL purportedly "support[s] the Fire Department's mission" of "maintaining good labor relations." *Id.* at 20. That is insufficient as a matter of law.

The constitutionality of the City's decision to give taxpayer money to the AFA has nothing to do with the merits of collective bargaining in the abstract, or the maintenance of labor relations generally. If *that* is enough to satisfy the Gift Clause, then *every* expenditure will *always* pass muster. If the City simply gave AFA a $1.25 million donation, that would arguably "improve labor relations." But the test is not whether an expenditure is *somehow* related to some public benefit.

Or, as Justices Owen and Hecht put it, this Court's Gift Clause jurisprudence "does not stand for the proposition that public funds can be funneled to an individual or a private corporation so long as the public interest is somehow furthered." *Tex. Mun. League*, 74 S.W.3d at 392 (dissenting opinion). Rather, the question is whether the "*predominant* purpose" of the expenditure is public. *Id.* at 384 (emphasis added). None of the uses of ABL—whether for Union meetings, the Union's recruitment and political, activities, bargaining or filing grievances against the City, defending against disciplinary actions brought by the City, or participating in fishing fundraisers or charity boxing events—can be said to advance a *predominantly* public purpose … unless, of course, absolutely *every* expenditure is constitutional.

Again, it is, of course, perfectly acceptable for AFA to advocate for its members' private interests, and for Union officers to use their time advancing AFA's interests. Indeed, they have a legal and ethical obligation to do so. But it is unconstitutional for the government to fund such activities with a gift of public money. The Gift Clause simply does not permit public expenditures to be used to run a private organization. *Tex. Mun. League*, 74 S.W.3d at 384; *see also Young v. City of Houston*, 756 S.W.2d 813, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Even if there were some *incidental* public benefits to the Union's release time activities, the *predominant* beneficiary is AFA, a private entity.

B. Even if release time did serve a predominantly public purpose, it still violates the Gift Clause because the Union is not obligated to provide any direct benefits in exchange for it.

Under this Court's precedent, the challenged expenditures not only must serve a public purpose, but also must be supported by "sufficient" consideration. *Tex. Mun. League*, 74 S.W.3d at 383–84. That means the government must (1) get back a "clear public benefit … in return" for the expenditure, *Meno*, 917 S.W.2d at 740, and (2) such consideration must be contractually obligatory—that is, the recipient of public money must "*obligate[] itself contractually* to perform a function beneficial to the public." *Key v. Comm'rs Ct. of Marion Cnty.*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no pet.) (emphasis added); *see also Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.—Tyler 2010, no pet.) ("Lack of consideration occurs when the contract, at its inception, does not impose *obligations* on both parties."). In other words, the return on the public's investment cannot be speculative or indirect, but instead, must be "clear." *Meno*, 917 S.W.2d at 740.

Here, the Union has not obligated itself to do *anything* with release time in exchange for the money it gets, and the speculative, indirect benefits identified by the lower court do not count as valuable consideration under the Gift Clause.

1. The Union has no contractual obligation to provide *any* services in return for ABL.

In order for there to be valid consideration under the Gift Clause, there must be a contractual obligation on the part of the private party receiving public funds. *Key*, 727 S.W.2d at 669 (emphasis added). Other state high courts have also adopted this standard in Gift Clause cases. *See also Turken v. Gordon*, 224 P.3d 158, 165 ¶ 31 (Ariz. 2010) (only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration under the Gift Clause). That is because absent obligation, there is nothing to ensure that the public's business will, in fact, be done. *Key*, 727 S.W.2d at 669. Thus, receiving something without a contractual obligation to provide something in return, is by definition a gift—a gratuity—due to insufficient consideration.

This Gift Clause principle is also directly in line with general principles of contract law. "[A] contract must be based upon a valid consideration, and that a contract in which there is no consideration moving from one party, or no obligation upon him, lacks mutuality, is unilateral, and unenforceable. *Tex. Farm Bureau Cotton Ass'n v. Stovall*, 253 S.W. 1101, 1105 (1923); *see also TLC Hospitality, LLC v. Pillar Income Asset Mgmt., Inc.*, 570 S.W.3d 749, 760 (Tex. App.—Tyler 2018, pet. denied) ("To be enforceable, a contract must be based on consideration, also known as mutuality of *obligation*." (emphasis added)).

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

In other words, the CBA itself, rather than imposing obligations on the AFA to perform activities *for* the City, expressly *frees* AFA from having to do so. The entire purpose of release time is to allow the AFA President and other AFA representatives to perform services for a private entity, not to obligate the Union to preform services for the City.

If the CBA's language were not enough, the record also proves that nothing in the CBA obligates or requires Nicks or other Authorized Association Representatives using ABL to perform specific activities for the City. Every single witness for the City and Nicks testified that *nothing* in the CBA, or anywhere else,

obligates or requires them to do so. 2.SCR.523–24 at 88:23–89:3, 91:3–6, 92:1–15; 488 at 20:14–17; 321–23 at 24:11–26:24, 30:21–31:6; 472 at 129:1–4.

The Assistant Director of the Fire Department responsible for finance and human resources stated it plainly. Asked if "there [is] anything in Article 10 that requires the AFA President to perform specific activities for the City," she answered, "No." *Id.* 488 at 20:14–17. Nicks agreed. He was asked, "Is there anything that requires you to perform specific activities, for the City, while using ABL?" He answered, "Specific activities? No." *Id.* 472 at 129:1–4.

Compare this to the *Key* case. There, a citizen challenged the transfer of a "Christmas Candlelight Tour" from the Marion County Historical Commission, a public entity, to the Historic Jefferson Foundation, a private nonprofit organization, as a subsidy in violation of the Gift Clauses. The Commission argued that the transfer was not an unconstitutional gift because the nonprofit shared "the same stated goals as the commission." 727 S.W.2d at 669. This is almost identical to what the lower court found in this case; the court said there was adequate consideration here because the missions of the AFA and the City may sometimes "overlap[]." Op. at 18–19. But the *Key* court rejected that argument, holding instead that "contractual obligation" was necessary to establish consideration. Or, as the court wrote, "[h]ad the Historic Jefferson Foundation *obligated* itself

contractually to perform a function beneficial to the public, this obligation might be deemed consideration." *Id.* (emphasis added).

Thus, even assuming the City and AFA share the same goals (which, as explained above, they do not), that shared interest is not consideration in the absence of contractual *obligation* on AFA's part. And none exists here.

Even if the CBA were interpreted as reciting some kind of obligation on AFA's part to do something in exchange for release time funding—which it cannot be—that consideration would be illusory. A promise is illusory "if it does not bind the promisor, such as when the promisor retains the option to discontinue performance," *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010), and contracts may be voided when based on an illusory promise. Retaining the option to discontinue performance is *exactly* the state of affairs with respect to Nicks. When asked, "[I]f someone at the City was not satisfied with your job performance, could they ask you to step aside or remove you from your position as the AFA President?" he responded "No." 2:SCR.451 at 48:10–14. So, even assuming AFA is supposed to perform functions for the City while using ABL, that promise is illusory, because it's entirely voluntary on AFA's part—not obligatory. "When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation, and therefore, no contract." *In re 24R, Inc.*, 324 S.W.3d at 567.

Absent contractual obligation and an express promise to perform some commitment in exchange for release time, there is simply no valid consideration. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991). Here, ABA is not obligated to do anything in exchange for the money it gets for release time. In the absence of such obligation, the funding is gratuitous—i.e., a gift. *Key*, 727 S.W.2d at 669; *Tex. Mun. League*, 74 S.W.3d at 383–84.

2. The lower court's reliance on speculative, indirect benefits purportedly served by release time do not count as consideration under the Gift Clause.

In addition to contractual obligation, this Court has also found that a transfer of public funds to a private entity must obtain a "clear public benefit … in return." *Meno*, 917 S.W.2d at 740. "Clear" means "unambiguous, sure, or free from doubt." *Deaver v. Desai*, 483 S.W.3d 668, 675 (Tex. App.—Houston 2015, no pet.). In other words, for a public expenditure to satisfy the consideration requirement of the Gift Clause, the public return for that expenditure must be certain and unambiguous—not speculative and indirect, such as the benefits purportedly provided in exchange for the release time payments.

While this Court has not defined what "clear" means in the context of Gift Clause consideration analysis, other state high courts have. In *Schires v. Carlat*, 480 P.3d 639 (Ariz. 2021), the Arizona Supreme Court struck down a $1.9 million subsidy from a city to a private university, explaining that adequacy of

consideration under that state's gift clause requires an exchange of clear, "objective" values. *Id.* at at 376 ¶ 14. The university said that there was consideration because its operations would help improve the economy in a general sense. *See id.* at 377 ¶ 15. But the court said such "anticipated indirect benefits" do not count as part of this analysis. *Id.* ¶ 16. The reason is that such indirect general improvements are too vague to be compared to the government expenditure, and the consideration analysis must "focus[] … on the objective fair market value[s]" that the government gives and gets. *Id.* at 376 ¶ 14 (emphasis added; citation omitted).

In other words, when government pays money to a private entity, it must get something *clear* in return—something "unambiguous, sure, or free from doubt," *Deaver*, 483 S.W.3d at 675, because otherwise it could give away taxpayer money in exchange for vaguely-described, general, indirect, hoped-for abstractions. It might donate $1 million to a restaurant—a clear gift—but claim that it was giving the money in exchange for a "nicer neighborhood" or an "improved community." If such vague, indirect benefits counted as consideration, the Gift Clause would be rendered ineffectual.

In this case, release time costs Austin taxpayers over $1.25 million throughout the course of the CBA. 4.RR.158:1–5. In exchange for that payment, the City receives *no* "clear" benefit—no objective or direct value. Even the City's

chief witness on finances and human resources for the Fire Department testified that she could not "think of any financial benefit that comes in as a direct consequence [of ABL]." 2.SCR.488 at 18:8–16. And the City has never conducted any studies or prepared any reports to ascertain the benefits, if any, of ABL. *Id.* at 19:10–13.

Instead, we are left with the lower court's speculation that in exchange for a massive subsidy, the Union is using release time in ways that "facilitate[e] harmonious labor relations." Op. at 28. But "facilitating harmonious labor relations" is precisely the sort of speculative and indirect "benefit"—the kind of general, abstract improvement—that does not count as consideration under the Gift Clause. *See Meno*, 917 S.W.2d at 740 (To be constitutional, a transfer of public funds to a private entity must include some "clear public benefit received in return.").

What's more, there is no evidence in the record to show that the ABL actually "facilitates harmonious labor relations." Op. at 28. As set out in Petitioner's Reply to the Petition for Review at 6–8, it is more probable that the opposite is true. When the release time provision was first negotiated, the AFA President, on full-time release, accused the City of "bad-faith bargaining" when

negotiations nearly broke down.[5] And in attempting to ratify a new CBA, the City and the Union negotiators, including the AFA President, are *currently at an impasse,* and have been for nearly a year.[6] Even more remarkably, the AFA President used release time to represent himself when he was subject to a disciplinary investigation for making improper comments about City management. 7.RR.451 ¶ 31; 4:RR:102:7–16.

In short, if release time is supposed to "facilitate[e] harmonious labor relations," Op. at 28, it doesn't appear to be doing so.

This would also be a different case if the Union committed itself to performing specific functions in furtherance of labor relations or labor peace. But that is not happening. Instead, as explained above, no Union members using release time are *obligated* to perform *any* function for, or provide *any* service to, the City under the terms of the CBA or any other policy. *Cf. Bryant v. Cady*, 445 S.W.3d 815, 820 (Tex. App.—Texarkana 2014, no pet.) ("Lack of consideration occurs when the contract, at its inception, does not impose obligations on both parties."). In the absence of an obligation on AFA's part, all that remains are

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[5] Hernandez, *Contract Talks Getting Hot at AFD,* Austin Chron. (July 21, 2017), https://www.austinchronicle.com/news/2017-07-21/contract-talks-getting-hot-at-afd/.

[6] Clifton, *Firefighters Say City Lawyers Unreasonably Stopped Arbitration,* Austin Monitor (Apr. 5, 2023), https://www.austinmonitor.com/stories/2023/04/firefighters-say-city-lawyers-unreasonably-stopped-arbitration/.

speculative, abstract values such as "harmonious labor relations" which are not *clear* benefits—and are not consideration under the Gift Clause.

Absent contractual obligation and a promise to perform specific services that have a clear benefit to the City, there is simply no legal consideration received for the release time expenditures. And that means the public money the City spends for release time is a gift to AFA. For that reason alone, the ABL provisions violate the Gift Clause.

C. Even if release time served a public purpose *and* the City received consideration in exchange for it, it still violates the Gift Clause because the City exercises insufficient control over the practice to ensure a public purpose is achieved.

Of the three conjunctive requirements necessary for the City's expenditures on ABL to avoid a Gift Clauses violation, the failure to establish adequate control is the most obvious. This Court held in *Texas Municipal League* that when a public entity spends public resources, it must maintain "public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." 74 S.W.3d at 384; *accord, Key*, 727 S.W.2d at 669 ("[T]he unifying theme of the [Gift Clause] cases [is] that some form of continuing public control is necessary to insure that the State agency receives its consideration.").

The reason for this public control requirement is that without it, the government could pay a private entity, ostensibly to perform some service—but then the recipient could fail to perform, resulting in a gratuitous expenditure, i.e., a gift.

See, e.g., Alter v. City of Cincinnati, 46 N.E. 69, 70–71 (Ohio 1897); *Harrington v. Atteberry*, 153 P. 1041, 1045–46 (N.M. 1915). Public contracts must, therefore, include sufficient public controls to ensure that the expenditure fulfills a predominantly public purpose.

In this case, the City does not control the use of ABL in any meaningful way, either in the language of the CBA or in practice. AFA is authorized under the CBA to use ABL, and does in fact use ABL, when and how it pleases.

The element of public control can be resolved on the plain language of the CBA. That agreement not only allows, but *mandates*, that Nicks devote *all* his time to "[AFA] business activities," 7.RR.24; 7.RR.451 ¶ 17, which the City does not direct, oversee, or even receive notice of, in any meaningful way. Other Authorized Association Representatives are also permitted to use ABL for "[AFA] business activities that directly support the mission of the … [AFA]," which means ABL can be used for activities that "*exclusively* support the mission of the AFA," 7.RR.24; *Id.* at 452 ¶ 39; 2:SCR.509 at 31:25–32:2 (emphasis added), and that released employees are under the control of the AFA while using ABL.

The court below held that the CBA "sets forth the parameters of what constitutes Association business activities for which Association Leave may be used." Op. at 21. But that is belied by the plain language of the CBA. It says Nicks may use all of his time for "[AFA] business activities," and that other Union

members may use ABL for "[AFA] business activities that directly support the mission of the … Association." 7.RR.24.[7] The Union President testified that ABL means "leave that can be used to do *Association* business," 2.SCR.446 at 26:6–7, and the City says ABL means activities "that support [the AFA's] role as an employee organization." 2.SCR.615, Resp No. 18. Since the AFA gets to determine what its business is as an employee organization, the CBA does not set forth *any* meaningful parameters on the use of ABL.

Even if it did, however, the City must still "retain some degree of *control* over the *performance of* [the CBA]" to ensure that a public purpose is accomplished. *Key*, 727 S.W.2d at 669 (emphasis added). Here, the record is conclusive that the City does not retain *any* control over the performance of employees using ABL.

This is most obviously true with respect to the Union President, Nicks, who is released *full-time* from any regular firefighting duties to work for the Union—while his salary is paid by taxpayers. Nobody at the City directs his activities while on ABL, 7.RR.451 ¶ 24–25; 2.SCR.507 at 21:1–3; 4.RR.58:19–25; he does not need permission from anyone in the City regarding his use of ABL, 2.SCR.506

[7] The CBA's language must govern this case because, "absent a compelling reason, courts must respect and enforce the terms of a contract that the parties have freely and voluntarily made." *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2019).

at 20:19–22; 4.RR.106:21–107:4; the City places no prohibitions on his activities while suing ABL. 2.SCR.506–07 at 20:6–12, 21:12–16; 2.SCR.448 at 33:9–12, 34:20–22. He is not required to report to the Fire Department Headquarters, or any other City office, on a regular basis. 7.RR.451 ¶ 25; 2.SCR.506 at 20:23–25; 2.SCR.449 at 40:3–7; 4.RR.58:19–22. Instead, he reports to AFA offices. 2.SCR.449 at 40:13–15. While there (or anywhere else) he is not required to punch a time clock or record his arrival or departure time. 2.SCR.450 at 42:9–21. In fact, he provides *no accounting of any kind* to the City about his daily activities or how he spends release time. *Id.*; 2.SCR.507 at 21:20–22, 2.SCR.513–14 at 48:21–49:2; 4.RR.59:2–8; *see also* 4.RR.74:3–11; 2.SCR.540, RFA 12 ("[The] City admits the CBA does not require the AFA to provide an accounting for the members on [sic.] use of ABL.").

Additionally, although *every other* firefighter has a direct supervisor to whom he or she reports, no one in the City directly supervises the Union President's work. 7.RR.451 ¶¶ 27, 29–30; 2.SCR.504–05 at 12:25–13:2; 2.SCR.526 at 100:15–20. This reporting structure is unlike any other within the Austin Fire Department. It means that Nicks is, in the words of Assistant Fire Chief Woolverton, "clearly outside the … regular chain of command." 2.SCR.527 at 101:6–7. Although other City employees must undergo some form of evaluation of their work performance, no evaluation is conducted for Nicks. 7.RR.451 ¶ 26;

2.SCR.318 at 9:12–25; 2.SCR.450 at 44:1–16. The City also has no say in who becomes the AFA President, or any other Authorized Association Representative, and the City cannot remove Nicks from his job. 2.SCR.506 at 18:8–10; 2.SCR.451 at 47:17–19.

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

Here, none of those factors apply to Nicks. The City cannot "hire" him as AFA President, or remove him as AFA President; it does not supervise him or his activities or set his work schedule. Yet, he is paid a City salary.

The reality is that he is actually an employee *of the AFA*, and his time is spent advancing *its* private mission, not that of the taxpaying public. *Cf. Ariz. Ctr.*

for Law in Pub. Interest v. Hassell, 837 P.2d 158, 169–70 (Ariz. App. 1991) (In Gift Clause cases, courts must focus on "the reality of the transaction" instead of "surface indicia."). Yet his paycheck comes from the taxpayer.

The same lack of public control over public funds exists with respect to other Union members who use ABL. Nicks and the AFA Executive Board decide who becomes an Authorized Association Representative, and do so with no input from the City. 2.SCR.452 at 50:4–6, 51:24–52:2. Requests to use ABL are approved in the first instance by Nicks, and thereafter, the City approves 99 percent of all requests that were initially approved by the AFA. 7.RR.452–53 ¶¶ 45–46; 2.SCR.546–68; 2.SCR.517 at 61:16–22. The *vast* majority of ABL used by other Authorized Association Representatives—75 percent[8]—is spent on "other [AFA] business"—an undefined, unaccounted-for category of time, where the AFA gets to determine *how* this time is spent. 7.RR.113–15, 448. The other uses of ABL by other Union members are for union recruitment activities and to attend union conferences and meetings, which together with the undefined and unaccounted-for category of "other Association business" account for **96.4%** of all ABL use. 7.RR.113–15, 448. *Id.* 453 ¶¶ 48–50.

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

While the City does *not* monitor and control the use of ABL, the Union does. The record shows that the use of ABL by "other Authorized Association Representatives" is "monitored by Nicks and members of the AFA's Executive Board," 7.RR.453 ¶ 51, not by City management or other City personnel. Nicks and other AFA officers, not the City, "direct [their] activities." 2.SCR.456 at 68:1–9.

In sum, there are simply *no indicia of public control* over how ABL is actually used, either in the CBA's terms or in practice.

If the City wanted to enter into an agreement with the AFA to perform public services, it could, of course, do so. But that agreement would have to contain sufficient conditions and controls to ensure a *public* objective was actually met. *See Tex. Mun. League*, 74 S.W.3d at 384. Nothing like that exists here.

Over 40 years ago, the Texas Attorney General concluded that another release time policy, far less generous than the one under review here, violated the Gift Clause because, *inter alia*, the agreement between a school district and a labor union lacked sufficient control. Tex. Att'y Gen. Op. MW-89, 1979 WL 31300 at *1 (Nov. 27, 1979). That opinion is remarkably similar to this case, except the release time abuses are much worse here.

In that case, the Fort Worth Independent School District permitted nine days of release time for every 100 union members to "be used at the discretion of the

professional organization for pursuing the business of the organization by its officers or members." *Id*. The Attorney General found that the teachers' union used 301 days of release time at a cost of nearly $23,000 in teacher salaries in one year, which resulted in "the transfer of a valuable benefit to the professional association." *Id.* In this case, the City provides the AFA with 5,600 hours of release time per year—paying one full-time employee and the equivalent of two other full time employees release time benefits that amount to $200,000–$250,000 per year, or $1.25 million over the course of the CBA. *See* 4.RR.158:1–10.

The Attorney General in the Fort Worth opinion ultimately concluded that release time was unconstitutional because "the school district has neither articulated a public purpose to be served by the release[] time program nor placed adequate controls on the use of released time to insure that a public purpose will be served." 1979 WL 31300 at *2. Here, the language of the CBA and the record of the facts on the ground show that ABL can likewise "be used at the discretion of the [AFA] for pursuing the business of the [AFA] by its officers or members." *Id.* at *1. The Attorney General emphasized "the unconditional nature of the grant of services" to the Union in the Fort Worth case. *Id.* at *2. Here, the grant of ABL to the AFA is likewise unconditional, because it can be used how, when, and for whatever purposes the AFA decides.

Thus, just as release time expenditures were not "specifically tailored … to the accomplishment of school-related purposes," in the Fort Worth case, *id.*, ABL in this case is not sufficiently tailored or controlled by the City to achieve public purposes.

There is no question who controls release time here: AFA does. Its President and other Union members direct their own activities, with no input from, or limits by, the City—and with no accounting of their activities *to* the City. Release time employees cannot be hired or fired by the City, are not evaluated by the City, and are not supervised by the City. Consequently, release time as it exists in the CBA and as used by the AFA includes no "form of continuing public control" such as "is necessary to insure that the State agency receives its consideration." *Key*, 727 S.W.2d at 669. For that reason, it is a gift of public funds in violation of the Gift Clause.

II. The trial court's TCPA order should be set aside because it was improperly granted, and because the TCPA is not intended to be used as a tool to deter citizens challenging the legality of government action in good faith, as taxpayers do here.

The TCPA ruling from the court below is inherently contradictory, misapplied the TCPA to the facts in this case, and violates both the letter and purpose of the TCPA. If allowed to stand, it would invert the purpose of a statute that is intended to protect the exercise of constitutional rights, and would instead

chill public-interest litigation brought by citizens seeking in good faith to vindicate their constitutional rights.

The TCPA exists "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002. It is intended to "protect[] citizens who [associate,] petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). The statute is thus "designed to protect *both* a defendant's rights of speech, petition, and association *and* a claimant's right to pursue valid legal claims for injuries the defendant caused." *Montelongo v. Abrea*, 622 S.W.3d 290, 295–96 (Tex. 2021).

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

Second, if, and only if, the movant can prove that the case infringes on its constitutional rights, the burden shifts to the nonmoving party to establish a prima facie case for each essential element of the claim in question. *Youngkin*, 546 S.W.3d at 679; *see* Tex. Civ. Prac. & Rem. Code § 27.005(c). This case does not infringe on the AFA's constitutional rights, and the court below erred in finding that Plaintiffs failed to establish a prima facie case.

A. The lower court erred in affirming the trial court's TCPA order.

1. The AFA cannot meet its burden of establishing that this public interest, taxpayer action impairs its rights of speech or association.

The AFA cannot meet its burden of establishing by a preponderance of evidence that this case relates to its exercise of its right to association. In fact, its admissions in the court below show that this public interest constitutional action has not, and *cannot*, infringe any constitutional or statutory rights of AFA.

The "[e]xercise of the right of association" is defined in the TCPA as a communication between individuals who "join together to collectively express, promote, pursue, or defend common interests." Tex. Civ. Prac. & Rem. Code § 27.001(2). But this case challenges the constitutionality of the government subsidizing AFA; it does not challenge AFA's right to join together to pursue common interests, etc.

In the trial court, AFA contended that this case is based on its right of association, because release time is used for "communications between AFA members about AFA business." CR.232. Such a reading of the TCPA would completely insulate AFA—and by extension the City—from *any* meritorious challenge to the legality of its activities, no matter how meritorious. That cannot be correct. *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (a statute should not be interpreted if the reading "leads to absurd or nonsensical results.").

Even if Taxpayers receive the relief they seek—i.e., a cessation of taxpayer-financed release time—AFA's constitutional right to communicate and associate will be unaffected.. Indeed, AFA existed as an organization before the implementation of the release time provisions at issue, which shows that it was free to associate and communicate—and did actively associate and communicate—before taxpayers funded ABL. And the AFA will still be free to associate even if taxpayers cease to finance its private activities while using ABL. *See Texas Dep't of Human Res. v. Tex. State Emps. Union*, 696 S.W.2d 164, 171 (Tex. App.—Austin 1985, no pet.).

To the extent the AFA contends that it has a *right* to public financing of its private activities, that argument is squarely foreclosed by Supreme Court precedent. An entity's First Amendment rights are not infringed if the government

chooses not to subsidize its activities. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the [First Amendment] right." *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 549 (1983); *see also Texas Dep't of Human Res.*, 696 S.W.2d at 171 ("It is one thing to say that the State may not affirmatively act to interfere with one's freedom of association … it is quite another thing entirely to say that the State must subsidize one's exercise of his 'liberty.'").

Indeed, the U.S. Supreme Court has expressly rejected the argument that withholding government subsidies from a labor union violates the union's free speech rights. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007). And the Court has directly held that forcing citizens to subsidize the associational activities of some particular group itself offends the First Amendment. *See Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2295–2296 (2012) ("First Amendment values [would be] at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors." (citation omitted)).

Plaintiffs in this case are Austin taxpayers who seek to prevent the unlawful expenditure of taxpayer funds that they are obligated to replenish. **They do not challenge any of AFA's activities at all.** Rather, they challenge government's decision to fund those activities with taxpayer money. The question is not whether

AFA can speak or associate—Taxpayers have never contended that it cannot. The question is whether the Texas Constitution allows the City to *subsidize* AFA's private undertakings with taxpayer money, and to cede control over government employees during scheduled work hours. If AFA wants to pursue its private interests, it can and should do so. But it may not demand that Taxpayers finance those interests.

In short, this case simply does not implicate the AFA's speech or association rights under the TCPA or otherwise.

2. Taxpayers established a prima facie Gift Clause violation at the TCPA stage of this litigation.

Even if this case did involve AFA's constitutional rights, the TCPA ruling would only be correct if Taxpayers failed to establish a prima facie Gift Clause case. To emphasize, the TCPA does *not* require Taxpayers to ultimately prevail on the merits; it only requires Taxpayers to make out a prima facie case—that is, "the minimum quantity of evidence necessary to support a rational inference that the allegation[s] … [are] true." *Rodriguez v. Printone Color Corp*., 982 S.W.2d 69, 72 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). They are *not* required to prove that they would be entitled to judgment on the merits. *Miller v. Watkins,* No. 02-20-00165-CV, 2021 WL 924843, at *9–10 (Tex. App.—Ft. Worth Mar. 11, 2021).

The trial court, however, confused those two standards. It said Taxpayers failed to make out a prima facie case because "the Agreement and the Association

Leave Provision[s] were supported by valid consideration, served a public purpose, and afforded a clear benefit in return." Op. at 35. That is a non sequitur because a prima facie case is not the same thing as a win on the merits. Establishing a prima facie case only requires a plaintiff to proffer "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (citation omitted). And the Taxpayers here easily pass that test.

At the TCPA hearing, Taxpayers introduced substantial evidence and testimony supporting their Gift Clause claim, far more than "the minimum quantum … necessary." *Id.* This included, of course, the CBA itself—and to find a Gift Clause violation, a court need go no further than the plain language of the CBA, which by itself proves that ABL predominantly benefits the Union (because it can be used "for any lawful *Association business* activities consistent with *the Association's* purposes." 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added)). Similarly, the CBA itself fails to provide any control over the use of ABL by Union members; it mandates that Nicks use all of his time for "[AFA] business activities," and that other Union members use ABL for "[AFA] business activities that directly support the mission of the … Association." *Id.*

These features of the CBA (along with others described above) show that the CBA's plain language—which was presented as evidence to the trial court at the

TCPA hearing—was *by itself* enough to establish a prima facie case for a Gift Clause violation. That language shows a violation of *each* Gift Clause test.

Yet the trial court ignored the plain language of the CBA in granting the TCPA motion, and the court of appeals did the same when it affirmed.

In addition to the CBA's language, however, Taxpayers provided substantial additional evidence at the TCPA hearing which also established a prima facie case for a Gift Clause violation. They showed that the Union was using ABL to predominantly advance the Union's interest, not those of the City or taxpaying public. They showed that the Union president used *all* of his time for "association business," and that other Union members used the vast majority of their time for the private, unaccountable category of "other association business." In total this represented 85 percent of all ABL being used exclusively for private Union purposes. 2.CR.25. They also showed that ABL was used for boxing events, fundraisers, and "Helping out at Union Hall with some issues," *id.*, again, predominantly Union activities. They submitted the Union President's testimony that AFA engages in political and lobbying activities, and that the only limitation while using ABL was that he couldn't deliver a "monetary contribution to a political candidate while on ABL." 3.RR.38:23–39:3. They offered his testimony that, of all his ABL time, he spends "maybe 30 percent" on lobbying activities. *Id.* at 46:12–21.

Thus they offered far more than the bare minimum of evidence necessary to make out a prima facie case that AFA, not the City, predominantly benefits from ABL.

They also offered overwhelming evidence that the City exercises no meaningful control over the Union's use of ABL. During the TCPA hearing, the Union President testified that he: (1) did not report to the Fire Department offices on a daily basis *id.* at 40:13–15, and instead reported to AFA offices, *id.* at 40:21–23; (2) that he is not required to provide any details about how he spends his time while on ABL, *id.* at 41:6–8; (3) that his purported supervisor in the Fire Department "doesn't direct my day-to-day activities," *id.* at 50:8–14; and (4) that he has never been asked to perform a "special project" for the Fire Department as authorized under the CBA. *Id.* at 49:23–50:7. They also provided evidence that the Union, not the City, approved requests for other Union members to use ABL, and out of 335 requests, only four were denied by the City. *Id.* 90:2–17.

All of this evidence and more, was presented to the trial court at the TCPA stage. It is obviously far beyond "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *In re Lipsky*, 460 S.W.3d at 590 (citation omitted). Yet, the trial court disregarded it. By affirming that ruling, the court of appeals committed plain error. This Court can and should find that on the record that existed at the time of the TCPA hearing, Taxpayers

plainly exceeded "the minimum quantum of evidence" requirement and thus established a prima facie Gift Clause case—rendering the TCPA ruling improper.

3. The trial court's findings were logically contradictory—and therefore reversible error—because it found that Taxpayers failed to present a prima facie case, but also found that Taxpayers pleaded and produced sufficient evidence to go to trial.

The trial court's findings were also logically contradictory in a way that makes the TCPA ruling invalid. It said that Taxpayers failed to present a prima facie case—but then simultaneously said they had pleaded and produced evidence sufficient to deny Defendants' motion for summary judgment, and it ordered *trial on the merits* of Taxpayers' constitutional claims.

It is a matter of blackletter law that if a party produces sufficient evidence to go to trial, that party has presented a prima facie case. As this Court held in *Coward v. Gateway Nat'l Bank of Beaumont*, 525 S.W.2d 857, 859 (Tex. 1975), the term prima facie evidence "mean[s] that the proponent has produced sufficient evidence to go to the trier of fact on the issue." There is no question that Taxpayers did this, because despite multiple attempts by the Defendants to obtain dismissal of this matter—first by two pleas to the jurisdiction and then by a motion for summary judgment—the trial court **determined that this case should be tried on the merits**. That means it found there was a triable issue of fact, and as a matter of law, that means Taxpayers established a prima facie case. *Gold v. Exxon*

Corp., 960 S.W.2d 378, 381 n.2 (Tex. App.—Houston [14th Dist.] 1998, no pet.) ("the failure to establish a prima facie case generally means that there are no material facts at issue.").

In fact, the TCPA *requires* dismissal if a plaintiff fails to make a prima facie case. *Morrison v. Profanchik*, 578 S.W.3d 676, 680 (Tex. App.—Austin 2019) ("the trial court must dismiss" in such a situation). Yet the trial court did not dismiss. It did the opposite: it found there *were* sufficient grounds for trial on the merits. A logical self-contradiction of this kind is reversible legal error.

First, in the trial court, the Defendants filed two separate Pleas to the Jurisdiction after the TCPA hearing. Both of which were *denied* by the trial court. On December 8, 2016, two weeks after the AFA filed its TCPA motion to dismiss, the City filed a Plea to the Jurisdiction, contending that even if all allegations in the petition were taken as true, Taxpayers failed to state a claim for relief. 2.SCR.3–12. After the AFA's TCPA motion to dismiss was granted, the City filed *another* Plea to the Jurisdiction, contending that collateral estoppel barred Taxpayers' amended petition because the TCPA order purportedly had resolved all of Taxpayers' claims. CR.1907–1921. The trial court also denied that Plea to the Jurisdiction. CR.1969. The denial of these two separate Pleas to the Jurisdiction shows that Taxpayers *did* establish a prima facie case. As this Court has held, failure to demonstrate a prima facie case "means the court has no jurisdiction and

the claim should be dismissed." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012). Yet Taxpayers' claims *were not* dismissed by the trial court. If Taxpayers had, in fact, failed to establish a prima facie case under the TCPA, those Pleas should have been granted. The trial court's denial of them demonstrates that Taxpayers pleaded and provided sufficient evidence to overcome AFA's TCPA motion.

Second, the City and AFA filed a joint motion for summary judgment, contending that no material facts were in dispute, and that judgment should be entered in their favor as a matter of law. CR.2416–2434. That motion was also partially denied by the trial court, which specifically held that there *was* a triable issue of fact related to "implementation of [the 2017-2022 CBA] by the City of Austin." CR.3814. Summary judgment can only be granted if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp v. Catrett*, 477 U.S. 317, 322–23 (1986). Once again, Taxpayers *did* make a prima facie showing *as a matter of law*, because the trial court denied Defendants' motion for summary judgment.

Finally, this case actually went to trial *on the merits*. When a party has "produced sufficient evidence to go to the trier of fact," the party necessarily *has* established a prima facie case. *Coward*, 525 S.W.2d at 859; *Gold,* 960 S.W.2d at

381. *Coward* and *Gold* are dispositive on this issue. Because the trial court found that Taxpayers produced enough evidence to go to trial, Taxpayers necessarily met the "minimal showing [necessary] in order to establish a *prima facie* case." *Gold*, 960 S.W.2d at 382. The trial court's initial grant of AFA's TCPA motion to dismiss is therefore both logically contradictory and legally unsupported, given its *multiple* other orders finding a triable issue of fact.

Because the trial court held—repeatedly—that Taxpayers pleaded and produced sufficient evidence to go to trial, Taxpayers established a prima facie case, as a matter of law, and AFA's TCPA motion therefore must be set aside. If nothing else, the trial court's extraordinary inconsistency shows that it acted arbitrarily. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 911 (Tex. 2017) ("A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." (citation omitted)).

This Court should reverse the court of appeals' opinion for affirming the trial court's arbitrary, unreasonable, and inherently contradictory orders in this case.

4. The court below erred in sustaining a sanction award in an amount that is punitive and far greater than the record indicates is warranted.

Sanctions imposed pursuant to the TCPA must be tied to the Act's purpose of deterrence, and not in an amount that is more than the evidentiary record

demonstrates is necessary to deter a party from filing future lawsuits designed to chill the exercise of First Amendment rights. The *sole* purpose of a sanctions award under the TCPA is "to deter the party who brought the legal action from bringing similar actions[]." Tex. Civ. Prac. & Rem. Code § 27.009(a). Yet the district court awarded sanctions in an amount that is punitive.

The proper test is the two-factor test this Court established in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991): "First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party." Additionally any sanctions imposed "should be no more severe than necessary to satisfy [the TCPA's] legitimate purposes." *Id*. In making that judgment, a court must "consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.*

The sanction here dramatically fails both prongs of this test. There is no evidence that Taxpayers Mark Pulliam or Jay Wiley have ever filed a frivolous lawsuit, or that they have any intention to file a meritless legal action in the future. Indeed, given that neither remain taxpayers in the City of Austin, it is unlikely they *could* file such an action.

Given that they have no history of filing meritless cases, and the lack of reason to believe they might do so in the future, the considerable sanctions entered by the district court is unfitting. Even if sanctions were warranted here, nominal sanctions would be sufficient deterrent.

Worse, leaving the extraordinary award entered here in place would transform the TCPA from a shield for constitutional rights into a weapon for discouraging litigants from zealously advocating in defense of their constitutional rights. The TCPA's legitimate goal was to limit frivolous lawsuits that are intended to censor people. It was not intended to become a tool of censorship itself. As one California court observed in a similar situation, to transform an anti-SLAPP law like this into a weapon against meritorious constitutional litigation "would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power … . It would also ironically impose an undue burden upon the very right of petition for those seeking [judicial] review in a manner squarely contrary to the underlying legislative intent behind [the anti-SLAPP laws]." *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Emps.' Ret. Ass'n*, 22 Cal. Rptr.3d 724, 735 (App. 2004). This Court should reverse the sanction award.

B. The AFA should be estopped from seeking relief under the TCPA because it voluntarily intervened *back into* a case from which it successfully sought to be dismissed as a party.

By intervening back into a case from which it sought to be dismissed as a party, AFA waived the relief it later sought under the TCPA. Under the TCPA, the court shall dismiss the *"moving party"* to a suit if *that party* can show that the suit "is based on or is in response to" the defendant's exercise of the right to free speech, the right to petition, or the right of association. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b) (emphasis added). The plain language of the TCPA thus permits only *one* remedy: dismissal of the "moving party," not dismissal of an entire suit with multiple parties.

That, of course, makes sense, as the purpose of the law is to allow certain defendants whose rights have been implicated to exit a case quickly and cost-effectively. Dismissal under the TCPA is thus defendant-specific, not claim-specific. It is intended to protect a defendant from a baseless lawsuit.

But here, AFA was dismissed as a defendant, at its request—only to turn around and *intervene back into the case*. CR.2236–2242. They were not the innocent victims of a baseless lawsuit, but the eager defenders of an unconstitutional statute.

After the trial court entered its TCPA Order dismissing AFA as a party with respect to Taxpayers' claims, Intervenor Texas and Taxpayers continued to litigate

their constitutional claims against the City. Apparently unwilling to take "yes" for an answer, AFA turned around and on its own motion sought the court's leave to become a party to the case again. *Id.*

But AFA cannot have it both ways, and neither can the court below. Either the case implicated AFA's constitutional rights, in which case they were properly dismissed as a party under the TCPA, or the case never implicated their rights to begin with, and the TCPA motion should never have been granted. AFA's voluntary "re-intervention" proves it to have been the latter.[9]

"The doctrine of judicial estoppel 'precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding.'" *Pleasant Glade Assembly of God v. Schubert,* 264 S.W.3d 1, 6 (Tex. 2008) (citation omitted). The doctrine is "applied when a party uses intentional self contradiction as a means of obtaining an unfair advantage in a legal proceeding." *Thompson v. Cont'l Airlines*, 18 S.W.3d 701, 703 (Tex. App.—San Antonio 2000, no pet.).

AFA should also be estopped from engaging in such self-serving self-contradiction. By voluntarily intervening back into a case from which it sought to

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

be dismissed, it took a logically inconsistent position with its position that it should be dismissed as a party. This Court should estop AFA from receiving the benefit of dismissal under the TCPA, and then obtaining an "unfair advantage" by claiming that it should in fact remain a party to this case. *Pleasant Glade Assembly of God*, 264 S.W.3d at 6.[10] The Court should prevent the AFA from having its cake and eating it too.

Most importantly, in *State ex rel. Best v. Harper*, 562 S.W.3d 1, 19 (Tex. 2018), this Court found that "the state should not be suing to prevent its own citizens from participating in government," and allowed an individual to bring a TCPA counter-claim against a government entity. The rationale was that government entities and officials should not weaponize the TCPA to punish citizens from participating in government. The same rationale applies here. This is a taxpayer action brought against the City by citizens who participated in government by challenging the legality of its actions. Prior to this Court deciding the question of whether employees acting in their official capacities could bring a

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

TCPA claim, in 2019, the Texas Legislature amended the TCPA to specifically *prohibit* "a government entity, agency, or an official or employee acting in an official capacity" from bringing a TCPA motion. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). This Court should also grant review to clarify that based on the principle established in *Harper*, the pre-2019 TCPA cannot be invoked against private citizens challenging the legality of government action in good faith.

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

Finally, the TCPA order and the order granting attorney fees and sanctions against Taxpayers violates Taxpayers' First and Fourteenth Amendment rights. In *NAACP v. Button*, 371 U.S. 415, 428–29 (1963), the U.S. Supreme Court held that the activities of a public-interest law firm and its litigation "are modes of expression and association protected by the First and Fourteenth Amendments." The Court wrote: "association for litigation may be the most effective form of political association." *Id.* at 431.

When the First Amendment rights of public-interest litigation are implicated by a sanctions order, the Court instructed that the sanctions order must be narrowly tailored to a compelling government interest, *id.* at 439—a standard that nearly always is fatal, and certainly is in this case.

Given that the purpose of the TCPA itself "is to encourage and safeguard the constitutional rights of persons to…participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury," Tex. Civ. Prac. & Rem. Code § 27.002, it would be irrational to penalize Taxpayers for doing just that. This public interest lawsuit is itself a constitutionally protected action by citizens seeking a determination of the legitimacy of government action in good faith. "Courts exist to hear such cases; [and] we should encourage resolution of constitutional arguments in court rather than on the streets." *Wistuber v. Paradise Valley Unified Sch. Dist*., 687 P.2d 354, 358 (Ariz. 1984) (finding that an award of attorney fees against taxpayer plaintiffs challenging publicly funded release time is inappropriate because such an award "would be contrary to public policy" and "would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials.").

The fact that a TCPA motion, as well as attorney fees and sanctions, were granted in a public interest case where aggrieved citizen taxpayers are challenging the constitutionality of government activity, turns the TCPA on its head, and in the process violates Taxpayers' constitutional rights. If the trial court can punish citizens for exercising their right to bring constitutional claims before a judge, those rights are illusory. Because the TCPA order cannot survive strict scrutiny,

and as a matter of equity and public policy, the TCPA order and the order for attorney fees and sanctions against Taxpayer plaintiffs must be set aside.

Prayer

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

/s/ *Robert Henneke*
Robert Henneke
Texas Bar No. 24046058
Chance Weldon
Texas Bar No. 24076767
rhenneke@texaspolicy.com
cweldon@texaspolicy.com

/s/ *Jonathan Riches*
Jonathan Riches
Pro Hac Vice Application Pending
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs/Taxpayer Petitioners

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/s/ *Robert Henneke*
ROBERT HENNEKE

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I hereby certify that the above and foregoing document has been served via electronic service to all counsel of record listed below on this 6th day of September, 2023.

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF
Paul Matula
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Paul.matula@austintexas.gov
Attorneys for Defendant City of Austin

William T. Thompson, Esq.
OFFICE OF THE ATTORNEY GENERAL
PO Box 12548, Mail Code 009.
Austin, Texas 78711-2548
will.thompson@oag.texas.gov
Attorneys for Intervenor-Plaintiff
State of Texas

B. Craig Deats, Esq.
Matt Bachop, Esq.
DEATS, DURST & OWEN, PLLC
707 W. 34th St.
Austin, Texas 78705
cdeats@ddollaw.com
mbachop@ddollaw.com
Attorneys for Defendant
Austin Firefighters Assoc., Local 975

Diana J. Nobile, Esq.
John W. Stewart, Esq.
McGILLIVARY STEELE ELKIN LLP
1101 Vermont Ave., N.W., Ste. 1000
Washington, DC 20005
djn@mselaborlaw.com
jws@mselaborlaw.com
Attorneys for Defendant
Austin Firefighters Assoc., Local 975

/s/ *Robert Henneke*
ROBERT HENNEKE

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rhenneke@texaspolicy.com
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Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Ari Cuenin		ari.cuenin@oag.texas.gov	9/6/2023 6:09:25 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	9/6/2023 6:09:25 PM	SENT
Sara Baumgardner		sara.baumgardner@oag.texas.gov	9/6/2023 6:09:25 PM	SENT
Will Thompson		will.thompson@oag.texas.gov	9/6/2023 6:09:25 PM	SENT

Associated Case Party: Roger Borgelt

Name	BarNumber	Email	TimestampSubmitted	Status
Chance DWeldon		cweldon@texaspolicy.com	9/6/2023 6:09:25 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	9/6/2023 6:09:25 PM	SENT

Associated Case Party: Mark Pulliam

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Matula	13234354	paul.matula@austintexas.gov	9/6/2023 6:09:25 PM	SENT
Deidre Carter-Briscoe		deidre.carter-briscoe@austintexas.gov	9/6/2023 6:09:25 PM	SENT
Kelly Resech		kelly.resech@austintexas.gov	9/6/2023 6:09:25 PM	SENT
Jonathan Riches		jriches@goldwaterinstitute.org	9/6/2023 6:09:25 PM	SENT
John W.Stewart		jws@mselaborlaw.com	9/6/2023 6:09:25 PM	SENT
Diana J.Nobile		djn@mselaborlaw.com	9/6/2023 6:09:25 PM	SENT
B. CraigDeats		cdeats@ddollaw.com	9/6/2023 6:09:25 PM	SENT
Matt Bachop		mbachop@ddollaw.com	9/6/2023 6:09:25 PM	SENT
Yvonne Simental		ysimental@texaspolicy.com	9/6/2023 6:09:25 PM	SENT

Associated Case Party: Jay Wiley

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Associated Case Party: Jay Wiley

Name	BarNumber	Email	TimestampSubmitted	Status
Tony McDonald		tony@tonymcdonald.com	9/6/2023 6:09:25 PM	SENT

Associated Case Party: National Right to Work Legal Defense Foundation, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
David Watkins		dwatkins@jenkinswatkins.com	9/6/2023 6:09:25 PM	SENT
William Messenger		wlm@nrtw.org	9/6/2023 6:09:25 PM	SENT
David Watkins		dwatkins@jenkinswatkins.com	9/6/2023 6:09:25 PM	SENT
William L.Messenger		wlm@nrtw.org	9/6/2023 6:09:25 PM	SENT

Associated Case Party: Austin Firefighters Association

Name	BarNumber	Email	TimestampSubmitted	Status
John WStewart		jws@mselaborlaw.com	9/6/2023 6:09:25 PM	SENT
B. CraigDeats		cdeats@ddollaw.com	9/6/2023 6:09:25 PM	SENT
B. CraigDeats		cdeats@ddollaw.com	9/6/2023 6:09:25 PM	SENT

Associated Case Party: City of Austin

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Matula		paul.matula@austintexas.gov	9/6/2023 6:09:25 PM	SENT

Associated Case Party: Cato Institute

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Associated Case Party: Cato Institute

Nicholas DeBenedetto		ndebenedetto@cato.org	9/6/2023 6:09:25 PM	SENT
Isaiah McKinney		imckinney@cato.org	9/6/2023 6:09:25 PM	SENT

Associated Case Party: Freedom Foundation

Name	BarNumber	Email	TimestampSubmitted	Status
Shella Alcabes		salcabes@freedomfoundation.com	9/6/2023 6:09:25 PM	SENT