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

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

PLAINTIFFS TAXPAYERS' AND INTERVENOR TEXAS'S JOINT RESPONSE TO DEFENDANTS' AND INTERVENOR-DEFENDANT'S JOINT CROSS-MOTION FOR SUMMARY JUDGMENT
AND
REPLY TO DEFENDANTS' AND INTERVENOR-DEFENDANT'S OPPOSITION TO PLAINTIFFS' TAXPAYERS AND INTERVENOR TEXAS'S JOINT MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Texas Constitution's Gift Clause places prudent limitations on the government's ability to give public resources to private entities for their own use. This is no less true when public resources are directed to organizations purportedly involved in *quasi-public* purposes, but actually engaged in their own *private* business.

In their Motion, the City of Austin ("City") and Austin Firefighters Association ("AFA") (collectively, "Defendants") offer an interpretation of the Gift Clause that is contrary to its plain language and case law. Defendants' interpretation also ignores the purpose of the Gift Clause and would, if accepted, eviscerate that provision's central protections.

According to the Defendants, the Gift Clause is satisfied if there is sufficient consideration for a public expenditure, regardless of the purpose of that expenditure. Defendants assert that if a public body spends taxpayer funds in a way that benefits *only* a private party, there is no Gift Clause violation so long as there is "valid consideration" for that expenditure. *Id.* at 16. As such, Defendants argue for a *sequential* approach to the Gift Clause analysis, contending that if there is valid consideration under step one, then there is no need to reach step two, which tests whether the expenditure serves a *public* purpose. *Id.* at 16, 18. That approach, however, would render the Gift Clause incapable of prohibiting expenditures that benefit *private* purposes—an essential role the Clause was meant to play.

The Gift Clause prohibits government subsidies to private entities. That is its whole point. As the Texas Supreme Court observed, this provision was included in the Texas Constitution "to prevent 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) (emphasis added). That objective can *only* be fulfilled if public expenditures are directed towards public rather than private purposes.

That is why the Texas Supreme Court and lower Texas courts apply a *conjunctive* rather than *sequential* Gift Clause test. They require *both* consideration *and* a public purpose for *all* public expenditures.

Texas is not alone in requiring that public expenditures serve a public purpose. In fact, 47 states include an anti-subsidy provision in their state constitutions. And courts in *every single one* of those states—in addition to Texas—test whether a public expenditure is made for public purposes as opposed to private purposes. Thus, Defendants' argument is wrong. In order to ensure that the government does not give away pubic money to private enterprises and activities, Texas courts, like every other court in the country that has examined a state constitution's Gift Clause, test for *both* public purpose *and* adequate consideration.

The Defendants' contention that ABL is simply compensation to all firefighters for services rendered also fails. ABL cannot lawfully be compensation to all firefighters because that would violate both the Texas Labor Code and the First Amendment. Texas law prohibits "the retention of part of an employee's compensation to pay dues or assessments on the employee's part to a labor union." Tex. Lab. Code § 101.004. And the First Amendment requires that no portion of a public employee's compensation can be directed to a public labor union "unless the employee affirmatively consents to pay." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018). Not all Austin firefighters are members of the AFA, Plaintiffs' Motion for Summary Judgment ("PMSJ") Exhibit 9 at 16:9-11, and Austin firefighters who are not AFA members have not given affirmative consent to having a portion of their pay directed toward AFA activities. PMSJ Ex. 7 at 37:10-24. Therefore, ABL cannot lawfully be "compensation to all firefighters" because that construction would violate the U.S. Constitution and Texas labor law.

What's more, ABL is not a benefit that runs to *individual* firefighters for services rendered, such as sick leave or vacation leave. It is specifically earmarked and set aside for use by *the AFA*. As such, it is a gift to the Association, not a form of compensation to individual firefighters.

Following these basic legal principles, the Defendants' remaining arguments as to why the release time provisions satisfy the Gift Clause's *conjunctive* requirements fail. First, the indirect and speculative contractual obligations that AFA contends count as valuable consideration are not related to the use of ABL. They also primarily benefit the AFA and, in any event, do not come close to approaching the actual cost of release time to the City. Second, the benefits that Defendants claim flow to the City in reality predominantly benefit the AFA, not the public. Finally, the release time employees' performance of duties, over which the City exercises virtually no control, does not ensure that a public purpose will be accomplished through the use of ABL. As a result, the Gift Clause's control requirement is violated.

For the release time expenditures in this case, the AFA has provided inadequate consideration, over which the City lacks control, and for which the primary beneficiary is a private labor union, rather than the community at large. That violates the Gift Clause.

ARGUMENT

I. This Suit is Not Barred by Collateral Estoppel or Res Judicata.

In their Joint Cross-Motion for Summary Judgement, the City and AFA assert that Taxpayers' and Texas's suit is barred on the basis of collateral estoppel and res judicata under the theory that the Court's interlocutory order on February 7, 2017, granting AFA's TCPA Motion to Dismiss—*only as to the Taxpayers' claims against AFA*—was a final determination on the merits of this case. Defs.' Mot. at 13. But neither collateral estoppel, nor res judicata apply to this suit, because: 1) the Court's TCPA Order did not apply to Texas, 2) the Order was not a final judgment,

and 3) the Order did not constitute a full and fair litigation on the merits of the constitutional claim at issue.

Collateral estoppel, or issue preclusion, precludes re-litigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit. *Thomas v. Thomas*, 902 S.W.2d 621, 625 (Tex. App.—Austin 1995, writ denied). Importantly, for collateral estoppel to apply, there must be a decision on "an issue of ultimate fact [that] has once been determined by a valid and *final judgment*," *State v. Getman*, 255 S.W.3d 381, 384 (Tex. App.—Austin 2008, no pet.) (emphasis added), and the issue decided in the first action must be "identical to an issue in the second action." *BP Auto. LP v. RML Waxahachie Dodge, LLC*, 517 S.W.3d 186, 200 (Tex. App.—Texarkana 2017, no pet.). Thus, "[a] party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).

By contrast, res judicata, or claim preclusion, bars re-litigation of a claim or cause of action that has been finally adjudicated, in addition to "related matters that … should have been litigated in the prior suit." *Barr v. Resolution Trust Corp. ex. rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). To establish res judicata, a party must show: (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on claims that were raised or could have been raised in the first action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

Defendants cannot establish that either collateral estoppel or res judicata bar Plaintiffs' claims. The trial court's order on AFA's TCPA motion *only dismissed the AFA as a party.* It did

not apply to Texas, and cannot collaterally estop Texas, or Taxpayers' case against the City. There is also no final judgment based on full and fair litigation of the entire case.

A. Procedural background of the TCPA Motion and Order.

On January 17, 2017, the trial court heard oral argument on AFA's[1] Motion to Dismiss and on Texas's Plea to the Jurisdiction. Order, Feb. 7, 2017; Order at 2, Sept. 12, 2017. On February 7, 2017, the court issued an order granting AFA's TCPA Motion, dismissing only Taxpayer Plaintiffs' claims against AFA. *Id.*

Taxpayers and Texas both appealed the order to the Third Court of Appeals. Pls.' Notice of Appeal at 1; Texas's Notice of Appeal at 1–2. Eventually, in the Taxpayers' appeal, Taxpayers and AFA filed an agreed motion to abate the appeal, "until an appealable order has been entered by the trial court." Agreement to Abate Appeal, attached as Exhibit 1 at 2. The court of appeals, however, declined to grant a stay and instead dismissed Taxpayers' appeal without prejudice until "the trial court renders a final, appealable judgment." Apr. 14, 2017 Order, attached as Exhibit 2 at 3.

In Texas's appeal, the Third Court abated the appeal and remanded the case to the trial court for clarification of the TCPA Order, indicating that it was unclear from the order whether the trial court intended to deny Texas's plea to the jurisdiction and dismiss Texas's claims against AFA under the TCPA. Sept. 12, 2017 Order, attached as Exhibit 3 at 1. On September 19, 2017, the trial court issued an "Order and Certification," clarifying that the February 7, 2017 TCPA Order *did not* apply to Texas. Thus, on October 11, 2017, the Third Court dismissed Texas' appeal for want of jurisdiction without prejudice under Tex. Civ. Prac. & Rem. Code § 51.04(a)(8), on

[1] At that time, AFA was a named defendant in Taxpayers' Original Petition and Texas's Plea in Intervention.

the basis that the trial court had not ruled on AFA's motion to dismiss Texas's claims. Oct. 11, 2017 Mem. Op., attached as Exhibit 4 at 2.

B. The TCPA Order did not apply to Texas, and thus Texas is not collaterally estopped from suing the City.

Texas is not collaterally estopped from bringing Gift Clause claims against the City for the new CBA because, as the Third Court held on appeal, this Court's TCPA order did not apply to Texas. *See State v. City of Austin*, No. 03-17-00131-CV, 2017 WL 4582603, at *1 (Tex. App.—Austin Oct. 11, 2017, no pet.) ("the trial court did not rule on AFA's motion to dismiss with respect to the State's claims"). Absent a ruling by this Court, AFA's motion to dismiss Texas's plea in intervention was denied by operation of law. *See* Tex. Civ. Prac. & Rem. Code §§ 27.005 (stating court must rule on TCPA motion to dismiss within 30 days); 27.008 (stating court's failure to rule within 30 days means the motion to dismiss is denied by operation of law). Thus, the TCPA Order does not bar Texas's claims, and if that order has any preclusive effect, it acts to *protect* Texas's ability to sue over the CBA. *See Quinney Elec., Inc. v. Kondos Entm't, Inc.*, 988 S.W.2d 212, 213–14 (Tex. 1999) (holding collateral estoppel applies to prevent a party from re-litigating an issue that it previously litigated and *lost*, not one on which the party prevailed). The Court should reject Defendants' collateral estoppel argument as to Texas.

C. Collateral estoppel and res judicata do not apply to this suit because there is no final judgment.

The Court should also reject Defendants' claims that collateral estoppel and res judicata apply to this case. The law is plain that collateral estoppel does not apply when there is no final judgment. *Getman*, 255 S.W.3d at 384. But the order Defendants claim collaterally estops this action is *not* a final judgment. Sept. 19, 2017 Order & Certification; Ex. 4 at 2.

Defendants claim that the Court's TCPA Order involving the AFA collaterally estops Taxpayers and Texas from pursuing this litigation against the City. However, the TCPA Order did not dispose of this case. Ex. 4 at 2. It only dismissed AFA as a party, and only with respect to Taxpayers. Sept. 19, 2017 Order & Certification. Furthermore, dismissal of a private party is the *only* remedy available under the TCPA. Tex. Civ. Prac. & Rem. Code § 27.005(b). That Order simply did not, and does not, apply to the City as a defendant.

Moreover, as indicated above, the court of appeals already determined that the TCPA Order is not a final order. Ex. 2 at 3; Ex. 3 at 2. What Defendants overlook is that the Third Court's decisions are law of the case. *See Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). As the Third Court indicated, "[a]ccording to the movants, no final judgment has been signed by the trial court … Because we do not have jurisdiction to consider the merits of the trial court's interlocutory decision to grant the AFA's motion to dismiss pursuant to the TCPA, we dismiss Pulliam and Wiley's appeal without prejudice to refiling once the trial court renders a final, appealable order." Ex. 2 at 3. The trial court has not issued a final appealable order. This conclusion of the Court of Appeals is dispositive. Thus, there is no collateral estoppel of Taxpayers' or Texas's claims based on the TCPA Order.

D. Collateral estoppel does not apply because the issues relevant to *this* Taxpayer action challenging the unlawful expenditure of taxpayer funds *by the City* was not fully and fairly litigated in a preliminary TCPA motion that applied only to the AFA, a private party.

Collateral estoppel also does not bar the Plaintiffs' suit because the facts relevant to this action were not "fully and fairly litigated" in the AFA's TCPA motion, and because that motion only applied to Taxpayers and the AFA, not Taxpayers, Texas, or the City.

In order for collateral estoppel to apply, "the facts sought to be litigated in the second action [must have been] fully and fairly litigated in the first action." *Sysco Food Svcs.*, 890 S.W.2d at

801. "To determine whether the facts were fully and fairly litigated in the first suit, we consider '(1) whether the parties were fully heard, (2) that the court supported its decision with a reasoned opinion, and (3) that the decision was subject to appeal or was in fact reviewed on appeal.'" *BP Auto.*, 517 S.W.3d at 200 (citations omitted). These requirements are conjunctive.

Also, an issue is only "conclusive in a subsequent action *between the same parties*." *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985) (emphasis added). This action satisfies *none* of the requirements for a full and fair litigation, let alone *all* of them.

First, Taxpayers and Texas were not fully heard on the merits of their Gift Clause claim because the TCPA, by its own terms, requires truncated proceedings, without the benefit of full discovery. Tex. Civ. Prac. & Rem. Code § 27.003. Indeed, the entire purpose of the TCPA is to avoid a full adjudication on the merits.

Second, the Court did not issue a decision supported by a reasoned opinion. In fact, the Court's order granting the TCPA motion is in substance one sentence. Feb. 7, 2017 Order. It was, in fact, so unclear that the Third Court had to direct the Court to clarify the order. Ex. 3 at 4–5.

Third, the TCPA Order was not subject to appeal, as has already been established by the law of the case, as described above. Ex. 4 at 2.

Fourth, the TCPA Order fails every requirement for a full and fair hearing for purposes of collateral estoppel because it does not apply between the same parties—Taxpayers and the City. The City expressly admitted this when it said in a prior motion that, "[P]laintiffs Pulliam and Wiley's claims against the City of Austin *were not directly resolved* by the TCPA motion to dismiss." Nov. 30, 2017 Defs.' Mot. to Stay at 4 (emphasis added). That concession is fatal on the issue of collateral estoppel.

Fifth, this case is not a subsequent action. When the CBA in existence at the time this lawsuit was filed was replaced in September 2017 by the current CBA, Plaintiffs amended their pleadings to reflect the current facts. However, it remains the same case. Amendment of pleadings does not create new litigation.

The TCPA allows only for the dismissal of *private parties,* and does not, by its plain terms, apply to government actions. The City cannot shoehorn that statute's sole remedy into this action challenging *unlawful government expenditures*. The express purpose of the TCPA is to protect *citizens* from retaliatory lawsuits, *see Kirkstall Road Enters., Inc. v. Jones*, 523 S.W.3d 251, 252 (Tex. App.—Dallas 2017, no pet.), not to shield the government from legitimate public interest lawsuits designed to enforce constitutional protections for taxpayer rights. In other words, government agencies or political subdivisions cannot raise TCPA motions.

"When construing and applying the TCPA, [courts] are to look first to the Act's plain language, and if unambiguous, interpret the statute according to its plain meaning." *Cavin v. Abbot*, 545 S.W.3d 47, 62 (Tex. App.—Austin 2017, no pet.) (internal quotations & citation omitted). The plain language of the TCPA permits only *one* remedy: dismissal of the "moving party." Tex. Civ. Prac. & Rem. Code § 27.005(b). In this case, the City is not, and cannot be, the moving party because the statute does not permit political subdivisions to seek its protections. Indeed, the City admits, as it must, that it did not and could not bring a TCPA motion even if it wanted to. As the City concedes, "The City of Austin could not join in the TCPA motion to dismiss because of its status as a political subdivision." Defs.' Mot. to Stay at 4 n.1.[2]

[2] Texas courts have never allowed the government to invoke the TCPA against citizens. Of states with anti-SLAPP laws like the TCPA, only California has allowed this. *See Bradbury v. Super. Ct.,* 57 Cal. Rptr. 2d 207 (Cal. App. 1996). As the Washington Supreme Court has observed, the California courts' reasoning is "not … persuasive." *Henne v. City of Yakima*, 341 P.3d 284, 290 ¶ 24 (Wash. 2015). Indeed, the California approach has been condemned for "chilling citizens from

Here, the City has joined with the AFA in trying to expand a remedy that is only available to private parties to encompass government activity. The TCPA does not permit this. And the Defendants' novel attempts to stretch that law's meaning beyond its plain and obvious purpose should not be indulged.

II. The Constitution's Gift Clause test is *conjunctive* not *sequential*, and public expenditures require both a public purpose and sufficient consideration.

The Texas Constitution requires that public expenditures be directed toward *"predominant[ly]"* public purposes, that the government retain control over the expenditures to ensure the public purpose is accomplished, and that all expenditures are supported by adequate consideration. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383–84 (Tex. 2002) (emphasis added). In their Motion, Defendants reduce this three factor test to a one step inquiry, contending that "if there is valid consideration, there is no gift clause violation." Defs.' Mot. at 16. But that interpretation does not comport with the plain purpose of the Gift Clause or the case law interpreting it. And, if that theory were accepted, it would render the Gift Clause inert, nonsensical, and counterproductive.

In ascertaining whether an unlawful subsidy has occurred, Texas courts have never looked at consideration alone. Neither has any other court examining similar gift clause provisions that exist in the state constitutions of nearly every state in the country. In fact, in the case on which Defendants rely for the proposition that consideration alone is enough to satisfy the Gift Clause, *Texas Municipal League*, the Texas Supreme Court expressly treats the Gift Clause inquiry as *conjunctive*. There, the Court upheld payments to a municipal injury fund from a risk pool against

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exercising their petition rights to address wrongs suffered at the hands of government." Steven J. André, *California Code of Civil Procedure Section 425.16—an Epitaph to the Right to Petition Government for Redress of Grievances*, 31 Whittier L. Rev. 155, 169 (2009).

a Gift Clause challenge. The Court examined the arrangement and concluded that the "statutory obligation to pay lifetime benefits from the Fund to any Risk Pool member" was sufficient consideration. 74 S.W.3d at 384-85. The Court then *went on to examine* whether the payments "accomplish a legitimate public purpose" by testing them for a "predominant[ly] public purpose" and "control" over the benefits. *Id.* at 385.

If the Defendants' interpretation of the Gift Clause test—that "if there is valid consideration, there is no gift clause violation"—were the correct one, there would be no reason for the *Texas Municipal League* Court to test the expenditures for a public purpose *after* it already concluded that sufficient consideration existed. By doing so, the Court would be engaging in a redundancy and ignoring the very test in the very case that *it set out*.

The Defendants try to explain away this defect in their analysis by claiming that "courts frequently undertake both [public purpose and consideration] steps of the analysis as part of a belt-and-suspenders approach." Defs.' Mot. at 18. But that cannot be right. As a court of last resort, the Texas Supreme Court would have no need to wear both a belt and suspenders, and doing so would make cases like *Texas Municipal League* into advisory opinions. The correct analysis is that the Texas Supreme Court, and lower courts, set out the *multi-factor* Gift Clause analysis because the analysis, is, in fact, a two-step test.

Also, if the Defendants' interpretation of the Gift Clause were correct, then public purpose would never be an *independent* Gift Clause test, and we would expect that no Texas court would invalidate a public expenditure for lack of public purpose. But that is not what the courts have done. Instead, Texas courts have invalidated expenditures that lacked a public purpose *either* because the expenditure primarily benefited a private party *or* the government lacked control over it. *See, e.g., Key v. Comm'rs Ct. of Marion Cnty.*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana,

1987) ("[T]he unifying theme of the cited cases shows that some form of continuing public control is necessary to insure that the State agency receives its consideration."); *Road Dist. No. 4, Shelby Cnty. v. Allred*, 68 S.W.2d 164, 169 (Tex. Comm'n App. 1934) (Because the grant of public money was made under such conditions where none of it can be used in performing government functions, the loans violate the Gift Clause); *Brazoria Cnty. v. Perry*, 537 S.W.2d 89, 90 (Tex. App.—Houston [1st Dist.] 1976, no writ) (the expenditure was made "for the direct accomplishment of a legitimate public purpose.").

Defendants even argue that the Attorney General of Texas previously shared their interpretation of the Gift Clause (that is, their consideration-only test). Defs.' Mot. at 16-17. But Defendants omit that in the very same Attorney General Opinion, the Attorney General adopts the three part test for Gift Clause claims explained above. *See* Tex. Att'y Gen. Op. No. GA-0664 (2008) (explaining "[t]he Supreme Court of Texas has established a three-part test to determine when a statute authorizing a payment of public money accomplishes a public purpose" and then reciting the test). In accordance with that opinion, Texas and the Taxpayers are arguing *in this case* that the Gift Clause requires analysis of both public purpose and consideration. This aligns with other Attorney General Opinions to test the constitutionality of release time for public employees expressly found that the Gift Clause "prohibit[s] the grant of public funds or benefits to any association unless the transfer *serves a public purpose and adequate contractual or other controls* ensure its realization." Tex. Att'y Gen. Op. MW-89 (1979) (emphasis added). In that opinion, the Attorney General found that a release time policy that was far less offensive than the one under review here violated the Gift Clause.[3] *Id.*

[3] Despite its obvious relevance and application, the Defendants contend that this Attorney General Opinion is "inapposite" because it involved a policy, not a contract. Defs.' Mot. at 17, note 4. But the focus of the Gift Clause is on public *expenditures,* whatever the form. *See Tex. Mun. League*,

Texas courts are not alone in requiring that public expenditures serve a public purpose. In fact, every single state constitution that includes some form of an anti-subsidy provision—47 of them in total—require that a public expenditure serve a public purpose.[4] For example, as the Arizona Supreme Court observed, it is a core Gift Clause principle that "[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual." *Kromko v. Ariz. Bd. of Regents*, 718 P.2d 478, 480 (Ariz. 1986) (citation omitted). Or, as the Florida Supreme Court found, Gift Clause is intended to "protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefitted." *Bannon v. Port of Palm Beach Dist.*, 246 So.2d 737, 741 (Fla. 1971). A primary question under Washington's Gift Clause is whether the expenditure carries out a fundamental governmental purpose. *See City of Tacoma v. Taxpayers of City of Tacoma*, 743 P.2d 793, 801 (Wash. 1987). Likewise, in New Jersey, all public

74 S.W.3d 377 at 383 ("We have held that section 52(a)[ ] prohibit[s] the Legislature from authorizing a political subdivision '*to grant public money*.'") (emphasis added). An expenditure can violate the Gift Clause whether it is made pursuant to a policy, a contract, or, as is the case here, both.

[4] *See* Ala. Const. §§ 93, 94, 98. Ala. Const. Amend. Nos. 150, 192 (and similar); Alaska Const. art. 9, § 6; Ariz. Const. art. 9, § 7; Ark. Const. art. 12, § 5; art. 16, § 1; Cal. Const. art. 16, §§ 6, 17; Colo. Const., art. 11, §§ 1, 2; Conn. Const. art. 1, § 1; Del. Const. art 8, §§ 4, 8; Fla. Const. art. 7, § 10; Ga. Const. art. 3, § 6, ¶ 6; Haw. Const. art. 7, § 4; Idaho Const. art. 8, §§ 2, 4, art. 12, § 4; Ill. Const. art. 8, § 1; Ind. Const. art. 10, § 6, art. 11, § 12; Iowa Const. art. 7, § 1; Ky. Const. §§ 177, 179; La. Const. art. 7, § 14; Md. Const. art. 3, §§ 34, 54, 59; Mass. Const. art. 62, §§ 1-4; Mich. Const. art. 7, § 26, art. 9, §§ 18, 19; Minn. Const. art. 11, § 2; Miss. Const. art. 4, § 66, art. 7, § 183, art. 14, § 258; Mo. Const. art. 3, § 39, art. 6, §§ 23, 25; Neb. Const. art. 13, § 3; Nev. Const. art. 8, §§ 9, 10; N.H. Const. pt. 1, art. 10, pt. 2, art. 5; N.H. Const. pt. 1, art. 36; N.J. Const. art. 8, § 2, ¶ 1, art. 8, § 3, ¶¶ 2-3; N.M. Const. art. 9, § 14; N.Y. Const. art. 7, § 8, art. 8, § 1; N.C. Const. art. 5, §§ 3-4; N.D. Const. art. 10, § 18; Ohio Const. art. 8, §§ 4, 6; Okla. Const. art. 10, §§ 15, 17; Or. Const. art. XI, §§ 7, 9, art. XI-O, §§ 1, 4; Pa. Const. art. 8, § 8, art. 9, § 9; R.I. Const. art. 6, §§ 11, 16; S.C. Const. art. 10, §§ 11, 16; S.D. Const. art. 13, § 1; Tenn. Const. art. 2, §§ 29, 31; Tex. Const. art. 3, §§ 50-52, art. 11, § 3; Utah Const. art. 6, § 29; Vt. Const. chpt. I, art. 7; Va. Const. art. 10, § 10; Wash. Const. art. 8, §§ 5, 7, art. 12, § 9, art. 29, § 1; W. Va. Const. art. 10, § 6; Wis. Const. art. 8, §§ 3, 7, art. 4, § 26; Wyo. Const. art. 16, § 6.

expenditures must serve to "benefit to the community as a whole," and "at the same time is directly related to the function of government." *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 579 A.2d 288, 298 (N.J. 1990) (citation omitted). Or, as the Alabama Supreme Court explained, the test to determine what is a public purpose "should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit." *In re Opinion of the Justices*, 384 So.2d 1051, 1053 (Ala. 1980) (citation omitted). The list goes on and on.

This, of course, is what the Texas Gift Clause is all about: "The clear purpose of this constitutional provision is to prevent the gratuitous application of funds to private use." *Brazoria Cnty.*, 537 S.W.2d at 90; *see also Edgewood*, 917 S.W.2d at 740 (The Gift Clause is intended "to prevent the application of public funds to private purposes." (citation omitted)).

The Defendants' interpretation (that "consideration alone" is sufficient to avoid a Gift Clause violation) would render the Gift Clause inert, and even counter-productive or non-sensical. Under the Defendants' reasoning, the City could give a private real estate developer $100 million in cash, and if the developer built a $100 million Ritz Carlton, then under the Defendants' analysis, that expenditure would not violate the Gift Clause, because there is still "valid consideration," even though there is no public purpose. That would render the Gift Clause meaningless.

The test for whether an expenditure is "gratuitous" is crucial in Gift Clause analysis (*see* PMSJ at 20-29). But it is only one-part of that analysis.

The Defendants simply misunderstand what a "gratuitous" expenditure is. Gratuitous means "[d]one or performed without *obligation* to do so; given without consideration in circumstances that do not otherwise *impose a duty*." GRATUITOUS, Black's Law Dictionary (10th ed. 2014). The contractual obligation test is, of course, the test that Texas Courts have set

out to measure consideration. A "gratuitous contract," moreover, is "[a] contract made for the benefit of a promisee who does not give consideration *to the promisor*." CONTRACT, Black's Law Dictionary (10th ed. 2014) (emphasis added). In other words, it is a contract that benefits only the promisee. Or, in the context of the Gift Clause, a contract that benefits the private party rather than the public.

The Defendants next try an unconvincing "slippery slope" argument, contending that a Gift Clause analysis that examines both public purpose and consideration "would open the floodgates to a devastatingly disruptive wave of politicized litigation." Defs.' Mot. at 19. First, it is absurd to suggest that private taxpayers everywhere are clamoring to file expensive and time-consuming lawsuits to challenge "trash pickup." *Id.* Second, this argument fails as a matter of experience. Forty-seven states have Gift Clauses that require a public purpose for public expenditures. And most have had them since the turn of the 19th Century. *See* note 4. Yet we have seen nothing of the "floodgates" of "disruptive … litigation" that Defendants forecast.

On the contrary, the amount of Gift Clause claims across both Texas and the country have been surprisingly small. In Texas, where both public purpose and consideration are required, there have been a total of four published appellate decisions involving Gift Clause claims in the last 10 years. *See Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Utility Dist.*, No. 03-16-00214-CV, 2017 WL 2062258 (Tex. App.—Austin 2017, rev. denied); *Ex parte Springsteen*, 506 S.W.3d 789, 791 (Tex. App.—Austin 2016, rev. denied); *Farran v. Canutillo Indep. Sch. Dist.*, 420 S.W.3d 65 (Tex. App.—El Paso 2012); *U.S. v. Walker*, No. 1:11-CR-67, 2011 WL 6181468 (E.D.Tex. 2011). Arizona also has a conjunctive public purpose plus consideration test. So does New Jersey. Yet neither state has experienced anything even closely approaching a "floodgate"

of litigation. In its entire 100 year history, Arizona has only 86 published Gift Clause cases. New Jersey has 79, and only five in the last 10 years.

The Defendants finally argue that Taxpayers' analysis of the Gift Clause, and the Texas courts' requirement that public expenditures be supported by both valid consideration and a public purpose would "instantly invalidate every public assistance grant, every college tuition program, every small business grant program, and indeed every public interest program in Texas." Defs.' Mot. at 18-19. This is absurd. First, the Texas Constitution expressly exempts from the Gift Clause public assistance grants, student loans, and loans and grants for economic development programs, including those for small business.[5]

Of course, the fact that the *Texas Constitution* excludes these things from the prohibitions imposed by the Gift Clause, shows that the framers were well aware of the scope of the Gift Clause's prohibition on subsidies. Otherwise there would have been no need to exclude them. And that fact strengthens Plaintiffs' argument that in the absence of such an exemption, release

[5] *See* Tex. Const. art. III, Sec. 51-a(a) ("The Legislature shall have the power, by General Laws, to provide, subject to limitations herein contained, and such other limitations, restrictions and regulations as may by the Legislature be deemed expedient, for assistance grants to needy dependent children and the caretakers of such children, needy persons who are totally and permanently disabled because of a mental or physical handicap, needy aged persons and needy blind persons."); *id.* at 50b-4(a) ("The legislature by general law may authorize the Texas Higher Education Coordinating Board or its successor or successors to issue and sell general obligation bonds of the State of Texas in an amount authorized by constitutional amendment or by a debt proposition under Section 49 of this article to finance educational loans to students who have been admitted to attend an institution of higher education within the State of Texas, public or private, which is recognized or accredited under terms and conditions prescribed by the Legislature."); *id.* at Sec. 52-a ("Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state.").

time violates the Gift Clause. In any event, Defendants' sky-is-falling argument is a distraction, because none of the programs Defendants refer to are at issue here. What *is* at issue is a situation in which the government is funding, by a direct subsidy, a private organization that does not serve a public purpose and that expenditure is not supported by adequate consideration.

III. The release time provisions must be independently tested for legality, and the purported benefits that the AFA contends constitute valuable consideration for the release time expenditures are speculative, indirect, and constitutionally inadequate.

A. ABL cannot lawfully be compensation to all Austin firefighters because that reading would violate state labor law and the First Amendment, nor is ABL compensation for employment duties because it is given to the AFA, not provided to *individual* firefighters for services rendered.

The Defendants continue to contend that the purported consideration provided by the AFA to the City for the release time provisions cannot be tested for legal sufficiency on their own, but rather that the CBA is an "irreducible whole" that must be "taken in a totality." Defs.' Mot. at 5. Defendants go on to claim that "performance of employment duties" are "sufficient consideration for benefits and other compensation." *Id.* at 20.

This is incorrect as a practical matter. Taxpayers' challenge is not to the entire CBA, but to a discrete and unlawful portion of it. Taxpayers assert that the ABL provisions of Article 10, and the ABL provisions alone, violate the Gift Clause. As such, *those* provisions ought to be enjoined, and the remaining lawful portions kept intact. *See Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 218 (Tex. App.—Dallas 2015) ("[I]f the subject matter of a contract is legal, and only an ancillary provision is illegal, the illegal provision may be severed and the remainder of the contract enforced.") Indeed, the parties themselves acknowledge in the CBA that the contract may not be read as an "irreducible whole," as any unlawful provisions in it may be

severed from the remaining contract under the express terms of the severability clause in the CBA. PMSJ Ex. 4 at COA0642.

The ABL provisions that benefit the AFA alone cannot legally be compensation to all employees because such a reading would violate both Texas Labor Law and the First Amendment. Such a reading also ignores the reality of the transaction under review.

Perhaps recognizing that, viewed as written, it is impossible to find sufficient consideration for the City's $1.2 million ABL expenditures, the Defendants contend that ABL is just part of *overall* compensation for the "performance of employment duties" by all Austin firefighters. Defs.' Mot. at 20. But both the Texas Labor Code and the First Amendment forbid any portion of a public employee's compensation being directed to a public labor union "unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486. "A contract that permits or requires the retention of part of an employee's compensation to pay dues or assessments on the employee's part to a labor union *is void*…" Tex. Lab. Code § 101.004 (emphasis added).

The uncontroverted evidence establishes that firefighters who are not members of the AFA cannot opt out of funding ABL. The City's Assistant Director of the Fire Department made this plain. When asked, "Could non-AFA members opt out of funding ABL?" Ronnelle Paulsen answered, "No." In follow-up, Ms. Paulsen was asked, "Non AFA members would not have a choice but to have part of their compensation directed for use as ABL?" She answered, "Yes. That's my understanding." PMSJ Ex. 7 at 37:10-24. As such, ABL cannot be part of total compensation. Non-members have no ability to opt out of expenditures that are indisputably directed toward the activities of the AFA, a public labor union. Therefore, if release time is viewed as compensation *as a whole*, then the CBA must be void as a matter of First Amendment and state law.

But in reality, ABL does *not* pay for the "performance of employment duties." Defs.' Mot. at 20. As we know, the AFA President, Mr. Nicks, does not perform duties *for the City* when on release time; he performs duties *for the AFA*. The CBA allows him to use ABL "for any lawful *Association business activities* consistent with the *Association's* purposes." PMSJ Ex. 4 at COA0576 (emphasis added). The City does not monitor, supervise, direct, or control his activities in any way. *See* PMSJ at 11-13. And it also does not benefit from his release time activities.

The Defendants' reliance on the *Byrd v. City of Dallas* case from 1928 is also mistaken. *Byrd* upheld pension payments for public employees as "part of the compensation … for services rendered to the city." 6 S.W.2d 738, 740 (Tex. Comm'n App. 1928). But release time cannot lawfully be "part of compensation," as explained above. It is also not as a practical matter "part of compensation" for *individual* services rendered to the City, because it is not paid to the employee. For the same reason, it is not an employment benefit such as pension pay, sick leave, or vacation.

Unlike employee compensation packages that include fringe benefits, there are no "conditions of employment" attached to the release time provisions here. On the contrary, as the record establishes, the AFA is not obligated to provide *anything* in return for release time.

Benefits like military leave, pensions, or other fringe benefits run directly to the *employee* for services rendered *by* the employee. Release time in this CBA, by contrast, runs directly to *the AFA* with *no* accountability, control, or consideration. It would be one thing if all City firefighters received a certain amount of leave and then voluntarily donated it to the AFA for use as release time. (In fact, many municipalities follow this practice.) But that is not what is happening here. Here, release time goes directly to the AFA for the AFA to use for its *own* business and purposes in any manner it deems fit.

This is also why the Defendants' contention that the ABL leave bank is "provided for use by *all* bargaining unit members" fails as a legal matter. Defs.' Mot. at 22 n.5. First, the contention that ABL is a bank of hours available to all firefighters is just not true with respect to Mr. Nicks. Under the terms of the CBA, 2,080 hours of that "bank" are directed to his exclusive use that *no other AFA member, or anyone else, can use*. PMSJ Ex. 4 at COA0577. This argument also fails with respect to the use of ABL for "other authorized association representatives." Defs.' Mot. at 23 n.6. Despite the Defendants' arguments to the contrary, it is difficult to imagine how non-AFA members can qualify as "association representatives" under the plain language of the contract. Even if they did, however, as explained above, such an arrangement would *still* violate Tex. Lab. Code § 101.004 and the First Amendment, because non-members have *not* been given an opportunity to opt out of dedicating a portion of their compensation to the AFA in the form of ABL.

B. The remaining items identified by the Defendants as valuable consideration under the terms of the CBA are not related to the use of ABL, primarily benefit the AFA, and in any event, do not come close to approaching the cost of release time.

The AFA claims that there are five contractual obligations that "directly bind the AFA" under the terms of the CBA, and thus constitute valuable consideration for purposes of a Gift Clause analysis. They are: (1) the AFA must perform tasks related to dues withholding, including furnishing a list of its members to the City (Article 7); (2) the AFA may not engage in *ex parte* communications with members of the Civil Service Commission (Article 8); (3) the AFA may not use "personal attacks or inflammatory statements" regarding the Fire Department or its policies (Article 11); (4) the AFA will provide a class to academy personnel on contract compliance (Article 17); and (5) the AFA agrees to process written grievances on behalf of unit members (Article 20). Defs.' Mot. at 23-24. None of these activities qualify as valuable consideration.

First, it is telling that, with the exception of grievances, ABL is not used *for any of these activities*. And, as the record establishes, an infinitesimally small part of ABL is used to process grievances. Under the existing CBA, only two hours out of a total of 3,712.5 hours of ABL was used by Authorized Association Representatives for grievance proceedings. PMSJ Ex. 14 at COA0022-25. Indeed, each of these activities is in an entirely different section of the contract than the provisions governing ABL.

Second, as a matter of law, none of these items counts as consideration because the AFA is already obligated, under the terms of the CBA, to perform these activities. In finding a lack of consideration under a Gift Clause challenge in *Pasadena Police Officers Association v. City of Pasadena*, the court of appeals held that "[w]here a party agrees to do what he is already bound to do by an original contract, there is not sufficient consideration to support a supplemental contract or modification." 497 S.W.2d 388, 392–93 (Tex. App.—Houston [1st Dist.] 1973), writ refused NRE. In other words, to the extent these items have value at all, they don't count as lawful consideration because the AFA is *already* obligated to perform them.

Third, the benefit of each of these "obligations" runs to the AFA, not the City. Providing a membership list of AFA members to the City so that the AFA can enjoy the unique and valuable benefit of having the City automatically process private union dues deductions obviously inures to the benefit of the AFA. Likewise, presentation to academy courses serves as a valuable recruitment tool for the AFA. And filing grievances *against the City* not only fails to serve a public purpose, but is directly inimical to the interests of the City. *See* PMSJ at 6-7. Finally, to the extent they are benefits at all, agreeing to not engage in communications with an administrative body or to attack the Fire Department management and its policies are the sort of speculative and indirect benefits that cannot be valued as consideration. *See Turken v. Gordon*, 224 P.3d 158, 166 ¶ 33

(Ariz. 2010) ("[A]nalysis of adequacy of consideration for Gift Clause purposes focuses instead on the objective fair market value of what the private party has promised to provide in return for the public entity's payment.") To be constitutional, a transfer of public funds to a private entity must include some "clear public benefit received in return." *Meno*, 917 S.W.2d at 740. That does not exist here.

To the extent any of these paltry "benefits" count as valid consideration at all, they cannot be said to amount to a $1.2 million dollar benefit to the City. *See Turken*, 224 P.3d at 164 ¶ 22 ("When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.")

IV. The release time provisions do not serve a public purpose because they *primarily* benefit AFA and are only *tangentially* related to a function of government.

The public purpose test of the Texas Constitution requires that public expenditures that benefit a private party not serve just *some* public purpose, but *predominantly* serve a public purpose. As the Texas Supreme Court has made clear, a public expenditure will achieve a public purpose only if the expenditure's "*predominant* purpose is to accomplish a public purpose, not to benefit private parties." *Tex. Mun. League*, 74 S.W.3d at 384 (emphasis added). In this case, the opposite is true: the *primary* beneficiary of release time is AFA, not the public. That is made plain by: (1) the language in the CBA[6]; (2) the City's own admissions that Association Business Leave pertains to the AFA's role as "an employee organization," and not as an instrument of the City[7]; and (3) the fact that most release time activities are adverse to the City, and those that aren't plainly

[6] "The Association President may use ABL for any lawful *Association* business activities consistent with the *Association's purposes*." PMSJ Ex. 4 at COA0576

[7] "Activities by the AFA in connection with Article 10 are those that support their role as an employee organization." PMSJ Ex. 18 at 8, Resp. No. 18.

benefit the AFA, not the City—including partisan political activities and lobbying activities. *See* PMSJ at 15-20.

Despite these undisputed facts, the AFA contends that ABL *primarily* serves a public purpose because: (1) the CBA as a whole purportedly promotes labor peace and ABL specifically allows for the AFA to (2) participate in collective bargaining, (3) labor-management and membership meetings, (4) disciplinary and grievance proceedings, and (5) "other activities that support the mission of the Department." Defs.' Mot. at 30–31. Each of these purposes are speculative, unsupported by the record, and would be activities the AFA would engage in even *without* being subsidized by taxpayer-funded release time.

As a threshold matter, the Defendants try to conflate the use of ABL specifically with the right of the AFA to organization and collectively bargain generally. That is, they conflate the AFA's constitutional right to organize and their statutory ability to collectively bargain with *public financing* of these activities. Those things are different. AFA, of course, has a right to represent its members. It has a legal and ethical obligation to do so. This case does not challenge collective bargaining. It challenges taxpayer financed *non-bargaining* activity, including political activities.[8]

[8] By Mr. Nicks's own admission he spends approximately 25-30 percent of this time on political activities and lobbying. PMSJ Ex. 6 at 122:21-123:5. Defendants attempt to downplay this enormous dedication of taxpayer resources to the political activities of a private organization by contending that Nicks works "more than forty hours a week" and his political activities are "volunteer" hours. Defs.' Mot. at 8 & n.2. Yet, this contention is contradicted by Mr. Nick's own testimony, where he agreed that he "could handle Union business and [his] duties as the AFA President with one weekly shift, and spend the rest of [his] time doing traditional fire fighter duties." PMSJ Ex. 6 at 120:16-121:4. By doing so, Nicks opined, " I think we can save the citizens a little bit of money." *Id.* at 121:15-16. In any event, Nicks is on full-time release. *Id.* at 30:7–16. In other words, all of his hours are paid by taxpayers. And he directly testified that many political activities are performed during working hours, including determining which candidates to support or oppose, paying a contracting company to place political candidate yard signs, and producing written materials that provide AFA endorsement for or against political candidates "during the workweek." *Id.* at 127:12–128:6; 126:24–127:5; 125:18–126:1. Mr. Nicks cannot just

And, as the Supreme Court has held, a public labor union has no First Amendment right to fund its activities with money given to it as a subsidy by the state. *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 184 (2007) (noting that legal restrictions on the union's use of subsidies were "simply a condition on the union's exercise of this extraordinary power [*i.e.*, the subsidy] … . The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive.").

The Defendants contend that ABL serves a predominantly public purpose because it purportedly "promotes labor peace." Defs.' Mot. at 29. First, there is insufficient evidence in the record to conclude that the presence of taxpayer-funded union employees actually does *enhance* "labor peace." Indeed, the opposite may be true. We know from the record that less than three years after the AFA president was granted full-time release in 2010, the City and the AFA arrived at an impasse over contract negotiations for a period of two years. PMSJ Ex. 6 at 38:13–23. (During this time, Mr. Nicks was "back at the station" and the AFA continued to operate without the use of ABL. *Id.*) Thus, if the object of release time is "labor peace," at least in some instances, it does not seem to be working.

The Supreme Court in *Janus* also did not find the union's justification of "labor peace" convincing in striking down agency fees. There the Court concluded that "[e]xclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked." 138 S. Ct. at 2456. The Court went on to observe that, "To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees

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decide which hours are "work" hours and which are dedicated to politics, and any "volunteer" hours would trigger overtime and other policies of the Department. *Id.* at 30:7–31:17..

[without agency fees]". *Id.* at 2456-57. Likewise, with release time. Labor peace can obviously be achieved without taxpayers financing union activities. "Whatever may have been the case 41 years ago … it is thus now undeniable that 'labor peace' can readily be achieved through less restrictive means than the assessment of agency fees." *Id.* at 2457. The same is true here: labor peace, to the extent that it is actually addressed by ABL, can be achieved in ways that are less offensive to the Gift Clause than ABL's direct transfer of taxpayer funds to AFA.

The remaining items identified by the Defendants as serving predominantly public purposes can be easily dispelled.

The Defendants claim that ABL is necessary because it is used for collective bargaining. First, as a factual matter, this does not appear to be true in any meaningful sense. Under the existing CBA, exactly three hours out of a total of 3,712.5 hours (*0.08%*) of ABL was used by authorized association representatives for purposes of collective bargaining. PMSJ Ex. 14 at COA0022-24. That is such an inconsequential amount of ABL that it cannot possibly be judged to serve a predominately public purpose, or count as sufficient consideration.

Second, the AFA already has both a legal and a contractual obligation to collectively bargain with the City. *See* Act of May 11, 1973, 63rd Leg., R.S., Ch. 81; Tex. Local Gov't Code § 174.105(a)-(b); PMSJ Ex. 4 at COA0561. That means the City realizes no benefit, and receives no consideration, for ABL, other than something the AFA is *already obligated to do*—which would, of course, be *illusory* consideration. *Burt v. Deorsam*, 227 S.W. 354, 357 (Tex. App.—Austin 1920) ("[A] promise to do a thing which the promisor is already under legal obligation to do does not constitute a valuable consideration."); *Pasadena Police Officers Ass'n*, 497 S.W.2d at 392–93 ("Where a party agrees to do what he is already bound to do by an original contract, there is not sufficient consideration to support a supplemental contract or modification.").

The argument that ABL serves a predominantly public purpose because it is used for disciplinary and grievance proceedings is also flawed. Once again, the record plainly establishes that existing ABL *is not in fact* used for these purposes. Under the existing CBA, only *two* hours out of a total of 3,712.5 hours (*0.05%*) of ABL was used by Authorized Association Representatives for "Dispute Resolution Proceedings" and "Grievance Committee." PMSJ Ex. 14 at COA0022-25. Such a tiny portion of ABL use can hardly be characterized as serving a predominantly public purpose.

Additionally, use of ABL by the AFA to file grievances *against* the City and to defend AFA members in disciplinary proceedings *brought by the City* is by definition *adverse* to the City's interests, because it is literally on the opposite side of a dispute with the AFA. *See* PMSJ at 17. The City's witness Chief Aaron Woolverton testified that the interests of the AFA and the City during the grievance process are "diametrically opposed." PMSJ Ex. 9 at 37:3–10. And asked if the AFA could represent its membership in grievance proceedings without the use of ABL, Chief Woolverton answered, "Certainly." *Id.* at 99:3-5.

In *Janus*, the U.S. Supreme Court confronted the question of whether union speech in collective bargaining and grievance proceedings was "pursuant to [an employee's] official duties." 138 S. Ct. at 2474. It ruled that when the union is communicating in collective bargaining and grievance matters, the union is not speaking on behalf of its employer, but rather "is speaking on behalf of the employees." *Id.* at 2457. Such communications thus by definition advance the interests of the AFA and its members, not the City or taxpayers.

Next, the Defendants' arguments that ABL serves a public purpose because it is purportedly used for labor-management meetings and *internal* AFA meetings is unavailing because such benefits are speculative and indirect rather than direct and genuine, as the Gift Clause

requires. And in any event, the primary beneficiary of these meetings is still the AFA. Whether and how much communications would occur between City representatives and employees in the absence of taxpayer-funded union representatives is unclear from the record. Also, as outlined above, as the exclusive collective bargaining representative, the AFA is already obligated to communicate with the City. Even aside from those factors, however, internal AFA meetings, including Political Action Committee meetings where partisan endorsements are discussed and determined, *predominantly* benefit the AFA, not the City. PMSJ Ex. 6 at 127:12–128:6.

Finally, the Defendants' amorphous claim that ABL serves a predominantly public purpose when used for "other association business" (Defs. Mot. at 36-37) demonstrates both a lack of control and a lack of consideration that are, once again, fatal to ABL as a Gift Clause matter. Because the AFA, not the City, effectively determines when, who, and what is done when members are performing "other association business," there is an obvious lack of public control. Which is precisely why, under *Key*, a recipient of public expenditures must *"obligate[] itself contractually* to perform a function beneficial to the public." 727 S.W.2d at 669 (emphasis added). Absent actual, contractual obligation on the part of the private party, there is nothing to ensure that the public's business is being done with the public money that the private party receives.

The purported benefits of release time that the Defendants identify amount to speculative aspirations. The question, moreover, is not whether such services are occurring, but *whom* they are benefiting. Under the terms of the CBA, as well as the direct admissions by the City, and the evidence that many release time hours are spent in activities that are *adverse* to the City, it is plain that the *primary* beneficiary of release time is AFA itself, not the public. To the extent that other benefits have been achieved by release time, they are not bargained-for and they are incidental to the benefits received by AFA—which means they are insufficient under the Gift Clause.

V. The release time provisions fail the Gift Clause's control requirement because release time is used as the AFA pleases, without any direction from and insufficient accountability to the City.

Government control over public expenditures is necessary because the government cannot ensure a public purpose is accomplished, or consideration is received, for an outlay of resources unless it exercises sufficient *control* over that expenditure. 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." *Tex. Mun. League Intergovernmental Risk Pool*, 74 S.W.3d at 384.

Adequate control is also necessary to prevent special interest abuse of taxpayer resources. "When the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger." *Roe v. Kervick*, 199 A.2d 834, 842 (N.J. 1964) (citation omitted). The risk that special advantages will be given to private interests at public expense, particularly special interests that exert political power and engage extensively in the political process, is diminished if the government exercises sufficient and continuing control over public expenditures.

The AFA contends that "[a] binding contract itself constitutes sufficient public control." Defs.' Mot. at 38. But that is not the law. *Key* is dispositive on this point. There, the court of appeals examined "cases involv[ing] contractual agreements for services or property entered into by a governmental arm with private business." 727 S.W.2d at 669. *Key* held that the transfer of control over a holiday light tour from a public historical commission to a historical nonprofit violated the Gift Clause because there was "no retention of formal control" in any contractual agreement—even though the nonprofit shared the same mission as the historical commission. *Id.*

The court unequivocally rejected the idea that a contract *alone* constitutes sufficient control under the Gift Clause. Instead, it ruled that "the political subdivision must retain some degree of control over the *performance of the contract*." *Id* (emphasis added). That is not to say that every activity between a public entity and a private party must be controlled, but there must be *some* form of continued *public* control over the expenditure of taxpayer resources to ensure that the public receives its consideration and that special interests do not exploit taxpayers.

But no such control exists with regard to ABL. The Defendants cite a host of "management rights" to support their contention that sufficient control exists over the use of ABL, such as the purported right to hire, fire, discipline, and decide job qualifications for firefighters. Defs.' Mot. at 39. But, as the record establishes, none of these things apply to Mr. Nicks's use of ABL. Instead, the City has *no* say in who is appointed as AFA president, cannot remove him, does not direct his activities, and does not monitor or otherwise supervise his performance. *See* PMSJ at 12-13. The same is true of other authorized association representatives using ABL, who are selected by the AFA, and whose activities are controlled and monitored by the AFA, not the City. *Id.* at 13-14. To the extent these "management rights" exist at all with respect to the use of ABL, the City has not exercised them; it has abdicated them, and in so doing, forfeited control over ABL.[9]

The City is thus left with three elements of what it characterizes as "control" over ABL as outlined in Article 10: (1) the City has "administrative procedures and details regarding the implementation" of the ABL contract provisions; (2) the City may review ABL requests for CBA compliance; and (3) the City has, in fact, denied ABL requests. Defs.' Mot. at 40.

[9] Of course, the City *should* not dictate who a union's president is, or what he may do. But it must dictate how public funds are spent. That dilemma is caused solely by the unlawful subsidy to the union in the form of release time.

As a threshold matter, *none* of these purported controls apply to Mr. Nicks's use of ABL *at all*. The Austin Fire Department Policy and Procedure the City references only applies to use of ABL by "other authorized association representatives," not Mr. Nick's use of ABL. PMSJ Ex. 11 & Ex. 4 at COA0576. Moreover, Mr. Nicks does not need permission or prior approval from anyone in the Fire Department before he may use ABL. PMSJ Ex. 9 at 24:5-7 (Question: "Does Mr. Nicks need any prior—prior approval before he can use ABL?" Chief Woolverton Answer: "No."). And the use of ABL has *never* been disapproved for Mr. Nicks. *Id.* at 25:23-26:1 (Question: "Do you know if the use of ABL has ever been disapproved for Mr. Nicks?" Chief Woolverton Answer: "I am not aware of any instance where it's ever been disapproved for – for Chief Nicks.").

Notwithstanding the undisputed facts that *none* of the purported measures of City control over use of ABL apply *at all* to Mr. Nicks, the Defendants claim that Mr. Nicks's activities are nonetheless controlled by the City because he: (1) "still fills out a timesheet to account for his weekly ABL hours," (2) he "remains subject to the fire department's code of conduct and personnel policies," and (3) "he must physically report to the Fire Department when directed to do so by supervisors for an emergency or a special project." Defs.' Mot. at 41. The evidence, once again, contradicts the City's claims that these are meaningful, indeed *any*, measures of control.

First, by Mr. Nicks's own account his timesheets are a pro forma accounting measure only, and do not accurately portray what he actually does on any given workday. PMSJ Ex. 9 at 21:20-22 (Question: "Is Mr. Nicks required to provide an accounting as to how he spends his time, each day, to the Department?" Chief Woolverton Answer: "No."). PMSJ Ex. 7 at 17:1–3 (Question: "Does [Nicks] provide any other reports, in terms of how he uses ABL, apart from the timesheet?" Assistant Director Paulsen Answer: "No."). According to Mr. Nicks himself, "the

way I describe [my time] on my time sheet isn't an accurate portrayal of exactly what I'm working on a particular—any particular day." PMSJ Ex. 6 at 150:20-22.

Second, of course Mr. Nicks "remains subject to" the Fire Department's code of conduct and personnel policies. He is a full-time, paid employee of the Fire Department. Yet his relationship to the City as the President of AFA resembles no employer-employee relationship anywhere, including the definition of employer-employee in Texas, because the City cannot hire him, remove him from his position, assign him duties, or monitor his performance, as a technical City employee. That is not changed by the fact that he remains subject to the code of conduct in some abstract sense—although it is telling that with respect to at least the City's political activities policies, Mr. Nicks appears to be immune from them, or is at least again given preferential treatment. PMSJ at 18.

Third, the Defendants claim that the City exercises control over Mr. Nick's use of ABL because he must report to the Fire Department when directed for an emergency or special project. But, in his nearly ten years as AFA President, Mr. Nicks has *never* been recalled for an emergency and has *never* been assigned a special project by the Fire Chief. PMSJ Ex. 9 at 24:11-13 (Question: "To your knowledge, has Mr. Nicks ever been required to return to duty for an emergency situation?" Chief Woolverton Answer, "No."); *Id.* at 25:6-8 (Question: "To your knowledge, has Mr. Nicks ever been assigned a special project by the Fire Chief?" Chief Woolverton Answer: "No.") Indeed, he was not even required to return to duty when the City experienced its most devastating water crisis in years following the flooding of October 2018. *Id.* at 24:22-24. As the evidence plainly establishes, *none* of the measures of control offered by the Defendants apply to Mr. Nicks or establish any reasonable basis to conclude that the City controls his use of ABL in the manner required to satisfy the Gift Clause.

The same is also true with respect to "other Authorized Association Representatives." As we have seen, the City's administrative procedures for the review and approval of ABL has led to a situation in which *the AFA* effectively decides who is granted ABL and what activities are performed and monitored while AFA members are on ABL. The plain language of the "administrative procedures" itself grants the AFA carte blanche approval authority for ABL requests, so that such requests are "automatically approved" if submitted to the Fire Department with three days advance notice. *See* PMSJ Ex. 11 at COA0874 ("Requests for authorized ABL from the Association received by noon, three or more business days in advance of the requested time off *are automatically approved*, subject only to the operational needs of the Department.") (emphasis added).

The review and approval of ABL in practice also bears out that *it is the AFA, not the City, who controls ABL*. Under the current and previous CBA, the City reported 956 requests to use ABL by other Authorized Association Representatives from the AFA. PMSJ Ex. 12. Of these, all but 12—or approximately 99 percent—that were initially approved by the AFA were subsequently approved by the City. *Id.*; PMSJ Ex. 9 at 61:16–22. This makes plain that it is the AFA, not the City, that is controlling ABL.

To emphasize, the City need not control every small detail of ABL or how it is used. But the City *must*, under the Gift Clause, put in place *some* measures to oversee and manage the expenditure of public funds, to ensure that *public* business is *actually* being done, and that the public is receiving adequate value for its significant release time expenditures. But that is not happening here.

CONCLUSION

The AFA contends that "this [C]ourt cannot rewrite the agreement or change its terms." Defs.' Mot. at 20. Nobody is asking for that. But this Court *can* enjoin those portions of it that no not comply with the Texas Constitution. The evidence establishes that the City does not exercise meaningful control over the AFA's use of ABL, is not the predominant beneficiary of the AFA's ABL activities, and does not receive adequate consideration for a significant and continuing government expenditure. Although it need only fail one of these tests, Article 10 of the CBA fails all three. That Article and the ABL expenditures that result from it should be enjoined.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served via email to all counsel of record listed below on this 8th day February, 2019.

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Exhibit 1

ACCEPTED
03-17-00131-CV
15970700
THIRD COURT OF APPEALS
AUSTIN, TEXAS
3/21/2017 10:15:45 AM
JEFFREY D. KYLE
CLERK

No. 03-17-00131-CV

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

MARK PULLIAM AND JAY WILEY,
Plaintiffs/Appellants,

v.

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

AGREEMENT TO ABATE APPEAL

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Pursuant to Rules 6.6 and 42.1(a)(2)(C) (although there has been no settlement agreement to effectuate in the trial court), the parties agree to the abatement of any further appellate proceedings until an appealable order has been entered by the trial court or directed by this Court.

Undersigned counsel certify that they have conferred with all parties regarding this matter. Texas takes no position on the Motion to Abate, and will continue to pursue its own appeal in this matter.

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Attorneys for City of Austin, et al.

By: /s/ Michael Siegel
Michael Siegel

Dated: March 21, 2017

CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that he has conferred with all parties regarding this matter. Texas takes no position on the Motion to Abate, and will continue to pursue its own appeal in this matter.

/s/ Robert Henneke
ROBERT HENNEKE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served via electronic service to all counsel of record listed below on this 21st day of March, 2017.

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Exhibit 2

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00131-CV

Mark Pulliam, Jay Wiley, and The State of Texas, Appellants

v.

City of Austin, Texas; Elaine Hart, in her official capacity as City Manager of the City of Austin;[1] and Austin Firefighters Association, Local 975, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT
NO. D-1-GN-16-004307, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

O R D E R

PER CURIAM

Appellants Mark Pulliam and Jay Wiley filed a notice of appeal from an order signed by the trial court on February 7, 2017, granting a motion to dismiss filed by appellee Austin Firefighters Association, Local 975 (AFA) pursuant to the Texas Citizens Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code §§ 27.003, .005. Appellant the State of Texas separately filed a notice of appeal from the same order, challenging the February 7 order to the extent it also operates as a denial of the State's plea to the jurisdiction. Appellee AFA and appellants Pulliam and Wiley have now filed an agreed motion to abate, asking that we abate Pulliam and Wiley's appeal until a

[1] This suit was originally brought against Marc A. Ott, the former City Manager for the City of Austin. We automatically substitute the name of the interim successor to this office, Elaine Hart. *See* Tex. R. App. P. 7.2.

final, appealable order is signed by the trial court. We decline to do so and instead dismiss Pulliam and Wiley's appeal without prejudice to refiling.

Generally, appellate courts have jurisdiction only over appeals from final judgments and orders. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). A judgment is final for purposes of appeal if it disposes of all pending parties and claims. *Id*. This Court has jurisdiction to review interlocutory orders only when explicitly authorized by statute. *See* Tex. Civ. Prac. & Rem. Code §§ 51.012, .014. Because they present a narrow exception to the general rule that interlocutory orders are not immediately appealable, statutes permitting interlocutory appeals are strictly applied. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).

The Texas Civil Practice and Remedies Code provides for an interlocutory appeal of a denial of a plea to the jurisdiction, such as the appeal brought by the State of Texas in this case. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) (providing for interlocutory appeal of order granting or denying plea to jurisdiction by governmental unit). Chapter 27 of the Code also provides for an interlocutory appeal of an order that "denies a motion to dismiss filed under Section 27.003 [of the TCPA]." *Id*. § 51.014(a)(12). In addition, under section 27.008(b) of the Code, appellate courts must expedite an appeal or other writ from a trial court order on a motion to dismiss under the TCPA or from a trial court's failure to rule on that motion within the time allowed under the TCPA,"whether interlocutory or not." *Id*. § 27.008(b). No statute, however, expressly provides for an interlocutory appeal of an order granting a motion to dismiss under the TCPA. *See Trane US, Inc. v. Sublett*, 501 S.W.3d 783, 786 (Tex. App.—Amarillo 2016, no pet.); *Fleming & Assocs. v. Kirklin*, 479 S.W.3d 458, 460-61 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Schlumberger Ltd.*

v. Rutherford, 472 S.W.3d 881, 887 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see also Flynn v. Gorman*, No. 02-16-00131-CV, 2016 WL 4699198, at * 1 (Tex. App.—Fort Worth Sept. 8, 2016, no pet.) (mem. op.).

According to the movants, no final judgment has been signed by the trial court, and claims currently remain pending in the underlying case.[2] Because we do not have jurisdiction to consider the merits of the trial court's interlocutory decision to grant the AFA's motion to dismiss pursuant to the TCPA, we dismiss Pulliam and Wiley's appeal without prejudice to refiling once the trial court renders a final, appealable judgment.

It is ordered on April 14, 2017

Before Justices Pemberton, Field, and Bourland

[2] Under the appellate rules, this Court may abate a case to allow "an order that is not final to be made final and may allow the modified order and all proceedings relating to it to be included in a supplemental record." Tex. R. App. P. 27.2. Because the trial court proceedings are currently stayed pending resolution of the State of Texas's interlocutory appeal, *see* Tex. Civ. Prac. & Rem. Code § 51.014(b), and because our resolution of the State's appeal would not, in and of itself, result in a final, appealable judgment, we decline to abate this appeal. We deny the motion to abate. Pulliam and Wiley may file a separate notice of appeal when the trial court signs a final judgment or appealable order in the case and, upon proper motion, may request that the Clerk of the Court transfer any or all of the appellate record filed in this case to the new cause number. *See* Tex. R. App. P. 26.1 (time to perfect civil appeal calculated from date judgment or order is signed); *see also Trane US, Inc. v. Sublett*, 501 S.W.3d 783, 786 (Tex. App.—Amarillo 2016, no pet.) (refusing to abate premature appeal of trial court order granting motion to dismiss under TCPA).

Exhibit 3

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00131-CV

The State of Texas, Appellant

v.

City of Austin, Texas; Elaine Hart, in her official capacity as City Manager of the City of Austin; and Austin Firefighters Association, Local 975, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT NO. D-1-GN-16-004307, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

ORDER AND MEMORANDUM OPINION

PER CURIAM

Appellant the State of Texas seeks to appeal an interlocutory order signed by the trial court on February 7, 2017, granting a motion to dismiss filed by appellee Austin Firefighters Association, Local 975 (AFA) pursuant to the Texas Citizens Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code §§ 27.003, .005. The State appeals the February 7 order to the extent it operates as a denial of the State's plea to the jurisdiction, *see id.* § 51.014(a)(8) (providing for interlocutory appeal of order granting or denying plea to jurisdiction by governmental unit), but acknowledges that the order is unclear with respect to the trial court's intent. On our own motion, we will abate the appeal and remand the case to the trial court for clarification of the order.

BACKGROUND

The suit underlying this appeal was filed by two taxpayers, Mark Pulliam and Jay Wiley (collectively, "the Taxpayers"), against the City of Austin and AFA. In their petition, the Taxpayers complain that the City has been impermissibly granting firefighters paid "release time" to do political work for AFA, a firefighters' union. The State subsequently intervened in the suit to stop the practice of "release time," which in the State's view constitutes the "unconstitutional gifting of taxpayer money to a political union."

AFA filed a motion to dismiss the Taxpayers' and the State's claims under the TCPA. *See id.* §§ 27.003, .005. In response, the State filed a plea to the jurisdiction, making two arguments. First, the State asserted that it retained sovereign immunity and that, consequently, the trial court lacked subject-matter jurisdiction "over the TCPA claim against [the State]." Second, the State argued that the TCPA does not apply to the State's claim against AFA because the TCPA expressly states that it may not be used to dismiss the State's lawsuit, which according to the State was brought by the Attorney General in the name of Texas to enforce the Texas Constitution. *See id.* § 27.010.

On February 7, 2017, following a hearing on AFA's motion to dismiss and on the State's plea to the jurisdiction, the trial court signed an order stating that "[AFA's] Texas Citizens Participation Act Motion to Dismiss is GRANTED in all respects" and that "all claims of Plaintiffs against [AFA] are hereby DISMISSED with prejudice in their entirety. Plaintiffs shall take nothing from these claims."

ANALYSIS

The State filed a notice of appeal pursuant to section 51.014(a)(8) of the Texas Civil Practice and Remedies Code, which authorizes the interlocutory appeal of a trial court's ruling on a plea to the jurisdiction by a governmental unit. *See id.* § 51.014(a)(8). In its brief, the State asserts that the trial court erred to the extent it denied the State's plea to the jurisdiction when it granted AFA's motion and dismissed the State's claims. However, the State also asserts that, as a threshold matter, it is does not appear that this Court has jurisdiction to review the order. The State explains that although it filed its notice of appeal "[o]ut of an abundance of caution," the February 7 order on AFA's motion to dismiss does not operate as a ruling with respect to the State's plea to the jurisdiction because the order does not dismiss the State's claims. Specifically, the State points out that the February 7 order does not mention the State by name, use the term "intervenor," or mention the State's plea to the jurisdiction. Thus, according to the State, nothing from the face of the February 7 order suggests that the trial court, in fact, intended to reject the State's jurisdictional challenge and dismiss the State's claims against AFA. The State requests that this Court clarify that the order granting AFA's motion to dismiss does not apply to the State's claims and that, as a result, AFA's motion to dismiss was denied by operation of law. *See id.* § 27.005(a).

In response, AFA disputes the State's suggestion that the February 7 order is unclear with respect to the trial court's disposition of the State's claims. AFA argues that the phrase "in all respects" includes the State's claims and that because the State's claims parallel those of the plaintiffs, *i.e.* the Taxpayers, we should presume that the trial court intended to include the State when it used the term "Plaintiffs" in its order. *See In re Ford Motor Co.*, 442 S.W.3d 265, 275

(Tex. 2014) (explaining that intervenor seeking affirmative relief should be characterized as plaintiff). In addition, AFA argues that "despite the State's urgings, there is no requirement that a trial court rule directly or explicitly on a plea to the jurisdiction . . . [because] a court may implicitly deny challenges raised in a plea to the jurisdiction by ruling on the underlying matter." *See Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006) (explaining that trial court's ruling on merits constituted an implicit rejection of appellant's jurisdictional challenges); *see also* Tex. R. App. P. 33.1(a)(2)(A) (record must show that trial court ruled on request, objection, or motion, either expressly or implicitly). Thus, AFA reasons, the trial court unambiguously dismissed the State's claims and, in doing so, implicitly denied the State's plea to the jurisdiction. Alternatively, AFA requests that this Court abate the appeal to obtain clarification from the trial court.

Whether this Court has jurisdiction to consider this interlocutory appeal turns on whether the trial court rejected the State's jurisdictional challenge to AFA's motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). From the record before us, we are unable to discern whether the trial court intended to dismiss the State's claims against AFA and, in doing so, to deny the State's plea to the jurisdiction. Accordingly, we abate this appeal to permit clarification by the trial court. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (stating that appellate court can abate appeal to permit trial court to clarify intention of its order). If the trial court intended to dismiss the State's claims and to deny the State's plea to the jurisdiction, it shall modify the order to clearly evidence that intent. If the trial court did not intend to deny the State's plea to the jurisdiction and dismiss the State's claims, it shall certify this in writing. The trial court shall then

include the modified order or certification clarifying its intent in a supplemental clerk's record to be filed with the clerk of this Court on or before October 12, 2017.

It is so ordered on September 12, 2017.

Before Justices Puryear, Field, and Bourland

Abated and Remanded

Filed: September 12, 2017

FILE COPY

COURT OF APPEALS
FOR THE
THIRD DISTRICT OF TEXAS

P.O. BOX 12547, AUSTIN, TEXAS 78711-2547
(512) 463-1733

Date: Setptember 12, 2017

Appeal No.: 03-17-00131-CV
Trial Court No.: D-1-GN-16-004307

Style: The State of Texas v.
City of Austin, Texas; Elaine Hart, in her official capacity as City Manager of the City of Austin; and Austin Firefighters Association, Local 975

The enclosed opinion was sent this date to the following persons:

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Exhibit 4

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00131-CV

The State of Texas, Appellant

v.

City of Austin, Texas; Elaine Hart, in her official capacity as City Manager of the City of Austin; and Austin Firefighters Association, Local 975, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT NO. D-1-GN-16-004307, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant the State of Texas seeks to appeal an interlocutory order signed by the trial court on February 7, 2017, granting a motion to dismiss filed by appellee Austin Firefighters Association, Local 975 (AFA) pursuant to the Texas Citizens Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code §§ 27.003, .005. The State has appealed the February 7 order to the extent it operates as a denial of the State's plea to the jurisdiction. *See id.* § 51.014(a)(8) (providing for interlocutory appeal of order granting or denying plea to jurisdiction by governmental unit).

Upon review, we concluded that it was unclear from the face of the February 7 order whether "the trial court intended to dismiss the State's claims against AFA and, in doing so, to deny the State's plea to the jurisdiction." *State of Texas v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 8605, at *5 (Tex. App.—Austin Sept. 12, 2017) (mem. op.); *see Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006) (explaining that trial court's ruling on merits constituted an

implicit rejection of appellant's jurisdictional challenges). We therefore abated the appeal and remanded the case to the trial court for clarification. *City of Austin*, 2017 Tex. App. LEXIS 8605, at *6. Specifically, we asked the trial court to certify whether it intended to dismiss the State's claims and to deny the State's plea to the jurisdiction. *Id.*

Pursuant to our instructions, the district clerk has filed a supplemental clerk's record containing an "Order and Certification" clarifying the February 7 order. In its certification order, signed on September 27, 2017, the trial court states that it "did not rule on the State's Plea to the Jurisdiction and did not intend its February 7, 2017 Order to function either as an *explicit or implicit* denial of that motion." (Emphasis added.) Based on the language of the certification order, we conclude that the trial court did not rule on AFA's motion to dismiss with respect to the State's claims, and the February 7 order does not operate as an implicit denial of the State's plea to the jurisdiction. Consequently, we do not have jurisdiction to consider the interlocutory order under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code. Accordingly, we dismiss the appeal.

_____

Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Dismissed for Want of Jurisdiction

Filed: October 11, 2017