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No. 03-21-00227-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

Roger Borgelt; Mark Pulliam; Jay Wiley,

Plaintiffs/Appellants,

Texas,

Intervenor-Plaintiff/Appellant,

v.

City of Austin; Marc A. Ott, in his official capacity as City Manager of Austin; and Austin Firefighters Association, Local 975,

Defendants/Appellees.

On Appeal from the
419th Judicial District Court, Travis County

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I. The Gift Clause test is a three-part, conjunctive test.

The Gift Clause requires that public expenditures: be (1) supported by adequate consideration and (2) directed toward *"predominant[ly]"* public purposes, as well as (3) that the government retain control over the expenditures to ensure that the government receives consideration and that the public purpose is accomplished. *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 Answering Brief, Defendants attempt to reduce this multi-factor test to a one-step inquiry, arguing that Gift Clause challenges can be resolved "on the basis of consideration alone." Appellees' Br. at 30. That does not comport with either the text of the Gift Clause or its purpose. And, if that novel theory were accepted, it would render the Gift Clause inert, nonsensical, and counterproductive.

To support their argument, Defendants cite to portions of *Walker v. City of Georgetown,* 86 S.W.3d 249 (Tex. App.—Austin 2002, pet. denied), claiming that *Walker* "relied solely on the presence of consideration, which rendered the lease non-gratuitous and, therefore, constitutional." Appellees' Br. at 31. But that is not what *Walker* said. While the court did evaluate consideration there, as this Court should here, it also ruled that "the Constitution does not bar an expenditure which incidentally benefits a private entity *if it is made for the accomplishment of a legitimate public purpose.*" *Walker*, 86 S.W.3d at 260 (emphasis added). In other words, the Court included a public purpose requirement as one of the several factors of the Gift Clause test.

Walker simply followed the Supreme Court's direction to apply a three-part, conjunctive test to Gift Clause cases. In the seminal Gift Clause case *Texas Municipal League*, 74 S.W.3d 377, that Court expressly treated the Gift Clause inquiry as a multi-part, *conjunctive* test. It examined the challenged transaction and concluded it was sufficient consideration, *id*. at 384–85—and then it *went on to examine* whether the arrangement "accomplish[ed] a legitimate public purpose" by testing it for both "predominant[ly] [public] purpose" and "control." *Id.* at 385. In other words, the Court applied all *three* prongs of the Gift Clause test.

If the Defendants were correct that Gift Clause cases could be resolved "on the basis of consideration alone," Appellees' Br. at 30, there would be no reason for the *Texas Municipal League* Court to test the expenditures at issue for a public purpose *after* it had already concluded that sufficient consideration existed.

Defendants argue that a "consideration only" test "has long been the explicit opinion of the Texas Attorney General as well." Appellees' Br. at 31. Nonsense. Defendants omit that in the very same Attorney General Opinion they cite, the Attorney General adopted the *three-part* test for Gift Clause claims explained above. *See* Tex. Att'y Gen. Op. GA-0664 (2008) ("[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.").

That was, of course, consistent with other Attorney General Opinions, including one in which the Attorney General found that a release time[1] policy that was

[1] The term "release time" and "Association Business Leave" (ABL) are used interchangeably herein.

far less offensive than the one under review here violated the Gift Clause.[2] Tex. Att'y Gen. Op. MW-89 (1979) (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." (emphasis added)).

Texas courts are not alone in requiring that public expenditures serve a public purpose. In fact, *every single state constitution* that includes an anti-subsidy provision—as nearly every state constitution does—requires that a public expenditure serve a public purpose.[3] The examples are numerous and consistently require that public funds must be spent for public purposes. *See, e.g., Kromko v. Ariz. Bd. of Regents*, 718 P.2d 478, 480 (Ariz. 1986) ("[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." (citation omitted)); *Bannon v. Port of Palm*

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[2] Despite its obvious relevance and application, the Defendants contend that this Attorney General Opinion is "inapposite" because it involved a policy instead of contract. Appellees' Br., at 31 n.14. But the focus of the Gift Clause is on public *expenditures,* whatever the form. *See Tex. Mun. League*, 74 S.W.3d 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.

[3] *See, e.g.,* Ala. Const. §§ 93, 94, 98; Ariz. Const. art. 9, § 7; Ark. Const. art. 12, § 5, art. 16, § 1; Cal. Const. art. 16, §§ 6, 17; Fla. Const. art. 7, § 10; Ga. Const. art. 3, § 6, ¶ 6; Haw. Const. art. 7, § 4; Ky. Const. §§ 177, 179; La. Const. art. 7, § 14; 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; Nev. Const. art. 8, §§ 9, 10; N.H. Const. pt. 2, art. 5; N.J. Const. art. 8, § 2, ¶ 1, § 3, ¶¶ 2–3; N.M. Const. art. 9, § 14; N.Y. Const. art. 7, § 8, art. 8, § 1; Tenn. Const. art. 2, §§ 29, 31; Utah Const. art. 6, § 29; Va. Const. art. 10, § 10; Wash. Const. art. 8, §§ 5, 7, art. 12, § 9.

Beach Dist., 246 So.2d 737, 741 (Fla. 1971) (The 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."); *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 579 A.2d 288, 298 (N.J. 1990) (all public expenditures must serve to "benefit … the community as a whole," and "at the same time is directly related to the function of government."); *City of Tacoma v. Taxpayers of City of Tacoma*, 743 P.2d 793, 801 (Wash. 1987) (Primary question under Washington's Gift Clause is whether the expenditure carries out a fundamental governmental purpose); *Opinion of the Justices*, 384 So.2d 1051, 1053 (Ala. 1980) (the public purpose test examines "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."). The list goes on.

That is, of course, 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. v. Perry*, 537 S.W.2d 89, 90 (Tex. Civ. App.—Houston 1976).

Defendants' interpretation (that "consideration alone" is sufficient) would render the Gift Clause inert, and even counter-productive or non-sensical. Under their reasoning, the City could give a private real estate developer $100 million in cash, and if the developer built a $100 million Ritz Carlton for the developer's ex-

clusive profit and benefit, that expenditure would not violate the Gift Clause, because there would still be "valid consideration," even though there is no public purpose. That would render the Gift Clause meaningless.

In short, the test for whether an expenditure is "gratuitous" is crucial in Gift Clause analysis, but it is only one part of that analysis.

The Defendants also argue—without citation to authority—that the Gift Clause does not apply at all in this case because it is purportedly "undisputed that the City has paid *no public funds* to the AFA whatsoever." Appellees' Br. at 29. On the contrary, that is very much in dispute. Taxpayers contend that public funds have been allocated to AFA's private use, via the device of ABL. That is the entire basis of Taxpayers' lawsuit. Nor is there any question that *public funds* are at issue here. As the Supreme Court made clear in *Williams v. Lara*, 52 S.W.3d 171, 183 (Tex. 2001), county funds are expended when government employees devote their time to unlawful purposes or programs. Just as in *Williams*—which found that public funds were at issue and that taxpayers had standing to sue to enjoin the misuse of county employees' time—this case involves the unlawful use of government employees' official time, and thus an unlawful expenditure of public funds.

The Defendants' attempt to avoid application of the Gift Clause fails. The Clause and its conjunctive, *three-part* test applies to the grant of public resources to AFA to use at it sees fit in this case.

II. The ABL provisions must be independently tested for legality, and do not represent compensation to all firefighters.

A. Like any other unlawful and severable contract provision, the ABL provisions must be tested independently for legality.

Defendants contend that the purported consideration provided by the AFA to the City for release time cannot be tested for legal sufficiency on their own, but rather that the CBA "must be considered as a whole." Appellees' Br. at 33. What they mean is that consideration must be evaluated ***not*** by comparing what the City is giving the AFA and what the AFA gives in return, but rather what the City is giving to *all firefighters employed by the City* and what *all firefighters* are giving in return. This is incorrect as both a legal and 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 CBA itself has a "savings clause" that expressly contemplates that certain provisions of the CBA—like the ABL provisions of Article 10—could be declared unlawful; it

says if that occurs, the lawful provisions remain intact.[4] Just like any other government contract that has discrete, illegal provisions, the discrete, illegal ABL provisions of this contract can and should be independently tested for legality and severed when found unlawful.

What's more, the Defendants' argument that consideration must be evaluated "underlying the contract as a whole," Appellees' Br. at 33,[5] also fails as a practical matter. Under Defendants' reasoning, any gift or subsidy is permissible so long as it is contained within a larger contract. If the City gave a $200,000 Ferrari to AFA's president as an outright gratuity, but did so as one provision in a 100 page contract, that would not be a gift under its theory. That is obviously wrong—and would contravene the purpose of the Gift Clause, which is "to prevent the application of public funds to private purposes." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (citation omitted). Instead, unlawful provisions within a larger agreement must be tested for both public purpose

[4] 7.R.R.86 ("If any provision of this Agreement is subsequently declared by legislative or judicial authority to be unlawful … all other provisions of this Agreement shall remain in full force and effect …").

[5] The Defendants contend that an Arizona case, *Cheatham v. DiCiccio*, 379 P.3d 211, 219 ¶ 35 (Ariz. 2016), supports their position regarding consideration. When evaluating the consideration prong of the Gift Clause in that case, the Arizona Supreme Court gave "deference to the decisions of elected officials," who made the same argument that Defendants are making here regarding consideration. *Id.* at 322 ¶ 30. But just last year, the Arizona Supreme Court "disapprove[d]" that statement, *Schires v. Carlat*, 480 P.3d 639, 646 ¶ 23 (Ariz. 2021), and in so doing, called into question the continuing vitality of the consideration analysis in *Cheatham*.

and consideration. An illegal gift hidden within a large contract is still an illegal gift.

B. ABL is not compensation to *all* firefighters; it is a gift to the AFA.

Perhaps the most glaring mistake Defendants make in their consideration analysis is that ABL is provided to the Union in exchange "for the terms of the fire fighters' CBA." Appellees' Br. at 36. In other words, Defendants argue that ABL is a benefit provided to *all* firefighters (whether they belong to the AFA or not) in exchange for all "fire protection services," just like "vacation and sick leave." *Id.* at 37. But ABL is *nothing* like vacation and sick leave, and is not provided to all firefighters like vacation and sick leave are.

By its own terms, ABL is not a benefit that runs to *individual* firefighters for services rendered. It is specifically earmarked and set aside for use *by the AFA*. Vacation leave, sick leave, and other fringe benefits, by contrast, do run directly to the individual employee for services rendered by the employee. ABL runs directly to the AFA, with no accountability or control. 4.RR.58:19-25; 59:9-12; 62:19-22. *See also* 7.RR.451 ¶¶ 24–25. It would be one thing if all City firefighters received a certain amount of leave time which they voluntarily donated to the AFA. (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.

The contention that ABL is a bank of hours available to all firefighters is most patently false with respect to AFA President Bob 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. 7.RR.24 (Joint Ex. 1, art. 10). Indeed, how could ABL possibly be "sufficient consideration" for the "performance of employment duties," Appellees' Br. at 35, since no other employee apart from Mr. Nicks can use *his* ABL? The answer is that ABL is not compensation to all employees for services rendered, for them to use as they see fit. It is instead given to the AFA for it to use and control as *it* sees fit.

For this same reason, Defendants' reliance on *Byrd v. City of Dallas*, 6 S.W.2d 738 (Tex. Comm'n App. 1928), is also mistaken. Appellees' Br. at 36. That century-old case upheld pension payments for public employees as "part of the compensation … for services rendered to the city." *Byrd*, 6 S.W.2d at 740. But ABL is not "part of compensation," as it is given to the Union for "Association business activities *consistent with the Association's purposes*." 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added).

In reality, of course, ABL does *not* pay for the "performance of employment duties." Appellees' Br. at 35. Instead, it pays for Mr. Nicks and other Union members to perform duties for the AFA—and the City does not properly monitor, supervise, direct, or control it in any meaningful way.

III. The ABL provisions fail every prong of the Gift Clause test.

A. The items identified by the Defendants as valuable consideration primarily benefit the AFA, and in any event, are disproportionate to the cost of ABL to taxpayers.

Defendants claim there are five contractual obligations that "directly bind the AFA," Appellees' Br. at 38, and that these constitute valuable consideration for purposes of the Gift Clause analysis. These 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).

None of these qualify as valuable consideration, and even if they did, they do not even remotely compare to the $1.2 million of taxpayer money spent to fund ABL.

First, it is telling that, except for grievances, there is no record of ABL being used *for any of these things*. And, as the record establishes, only an infinitesimally small part of ABL is used to process grievances. Under the existing CBA, only five hours out of a total of 8,714.50 hours—less than .06 percent!—of ABL was used by Authorized Association Representatives for grievance proceedings. 7.RR.113–15, 448.

Second, as a matter of law, none of these items counts as consideration, because the AFA is *already* obligated, under the CBA, to perform these activities. In *Pasadena Police Officers Association v. City of Pasadena*, 497 S.W.2d 388, 392–93 (Tex. App.—Houston [1st Dist.] 1973, writ ref. n.r.e.), 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.". 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 the AFA can enjoy the unique and valuable benefit of having the City automatically process private union dues deductions obviously inures to the AFA's own benefit. That is not a public service. Likewise, as Defendants admit, presentation to academy personnel serves as a valuable recruitment tool for the AFA. *See* Appellees' Br. at 22 ("ABL designated as 'cadet classes during cadet training' serves as a recruiting tool."). Filing grievances *against the City* is directly inimical to the City's interests. 2.SCR.511 at 37:8. 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 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."). The vagueness of these purported benefits do not provide a clear public benefit.

Finally, to the extent any of these alleged "benefits" count as consideration at all, they do not have any reasonably ascertainable objective fair market value, *Schires*, 480 P.3d 644 ¶ 14, that would come anywhere close to equaling a $1.2 million dollar benefit to the City. The value of these things, if any, is so "grossly disproportionate" to what the AFA receives in return that it violates the Gift Clause. *See Turken v. Gordon*, 224 P.3d 158, 164 (Ariz. 2010) ¶ 22.

B. ABL does not serve a public purpose because it *predominantly* benefits the AFA, a private organization.

Unable to establish a public purpose supporting the ABL provision at issue, the City focuses on a series of more general policy decisions, none of which are at issue in this case. First the City emphasizes the legal right of firefighters to engage in "collective bargaining." Appellees' Br. 41. But no one in this case has challenged that. Whatever benefits collective bargaining may have as a general matter are irrelevant to the question of whether the ABL provision challenged here passes constitutional muster.

Second, the City points to the fact that it "negotiat[ed] and publicly ratif[ied] the CBA" as proof that the City "determined that the CBA and its terms serve a public purpose." *Id.* But the City approved the CBA as a whole, not the specific and severable ABL provision at issue here. The City does not and cannot point to any legislative findings that the ABL provision furthers the public interest. And in any event, the Gift Clause limits the authority of both the Legislature and the City. *See, e.g.*, Tex. Const. art. III, § 52(a) ("[T]he *Legislature* shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money."). As for the City's approval of its own expenditure, if that proved the expenditure furthers a public purpose, then any expenditure would automatically pass Gift Clause muster—and there would be no reason for courts to inquire into an expenditure's purpose. The Supreme Court has never given cities leave to decide the constitutionality of their own acts, however.

They've instructed courts to analyze whether an 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).

That the Legislature may have some discretion in "[t]he determination of what constitutes a public purpose," *Bland v. City of Taylor*, 37 S.W.2d 291, 293 (Tex. Civ. App.—Austin 1931), does not establish that courts have no role to play in discerning whether a particular expenditure furthers such a purpose.

Third, the City cites the obvious benefits of "safe and efficient fire safety and emergency services." Appellees' Br. at 42. The City never argues, however, and cannot argue, that the ABL provision is necessary (or even helpful to) achieving this purpose. Not even the City contends that it cannot have a fire department without ABL.

When the City finally turns to the ABL provision itself, it seemingly concedes that the purpose of ABL is to further the interests of the AFA, a private organization. That is no surprise. The contract itself allows ABL to be used "for any lawful Association business activities *consistent with the Association's purposes*." 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added); *see also* Appellants' Br. 15.

Instead of trying to show how this is a public benefit, the City argues there's no problem with furthering the interests of the AFA because "[t]he mission[s] of the Austin Fire Department … [and] … AFA … overlap"[6] to some undefined extent.

[6] The record, of course, does not support this assertion. On the contrary, it shows several uses of AFA in which, according to the Assistant Fire Chief, the AFA uses ABL

Appellees' Br. 44. *See also* CR.4209 ¶ 9. But this Court is tasked with analyzing, not whether ABL might sometimes be used in a manner consistent with the public interest, but whether ABL's "predominant purpose is to accomplish a public purpose." *Tex. Mun. League*, 74 S.W.3d at 384.

Here, the predominant purpose is the one guaranteed by the contract: doing private union business, not the City's business. Even if the City is right that the public may sometimes receive incidental benefits from ABL, *see* Appellees' Br. 43–46, such incidental effects do not reveal a provision's *predominant* purpose. And it is plain from the text of the CBA that predominant purposes of release time are "the Association's purposes." 2.SCR.36; 7.RR.451 ¶ 17. If all the activities performed using ABL promoted public purposes, the City would not have had to create ABL at all. It could have simply assigned its employees to further those public purposes directly as part of their official duties. Instead, it found a way to pay the AFA public money to further its own purposes. The use of a complicated workaround, rather than the straightforward employer-employee relationship, itself reveals that ABL is not designed to further a public purpose.

C. The provisions at issue violate the Gift Clause because the City exercises insufficient control over the use of ABL.

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*, 74 S.W.3d at 384. Adequate control

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to file grievances against the City in which the City and the AFA are "diametrically opposed." 2.SCR.511 at 37:8.

is necessary to ensure that a public purpose is accomplished when public funds are expended as well as to prevent special interest abuse of taxpayer resources. *Roe v. Kervick*, 199 A.2d 834, 842 (N.J. 1964) ("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." (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 Defendants first contend that a "binding contract itself constitutes sufficient public control." Appellees' Br. at 47. But that is not the law. *Key v. Commissioners Court of Marion County* 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 667, 669 (Tex. App.—Texarkana 1987). *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 did not find 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, monitoring the performance of a public contract—not the mere

existence of a public contract—is necessary for adequate and continuing control over the use of public resources.

That makes sense, because if the mere existence of a contract proved that there is public control, the government could insulate even the most obviously invalid gifts from legal scrutiny. It could write a contract with the AFA which included a provision giving the AFA's president a $200,000 Ferrari as a gratuity, on the theory that because the contract itself exists, there's adequate public control over the Ferrari. That is plainly false.

No genuine public control exists regarding 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. Appellees' Br. at 48. 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's president,[7] 4.RR.57:11–13, cannot remove him as AFA president, 2.SCR.451 at 47:17–19, does not direct his activities, 4.RR.58:19–25, and does not monitor or otherwise supervise his performance. 4.RR.59:9–12; 62:19–22. 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. 4.RR.84:11–24; *see* 7.RR.453 ¶ 51. To the extent these "management rights" exist at all with respect to the use of ABL, the City has

[7] 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.

not exercised them; it has abdicated them, and in so doing, forfeited control over ABL. In short, a City employee on ABL is working for the AFA, not the City—and the lack of City control over such employees reflects that.

The City is thus left with three elements of what it characterizes as "control" over ABL: (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. Appellees' Br. at 49.

As a threshold matter, *none* of these 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. 7.RR.111. Moreover, Mr. Nicks does not need permission or prior approval from anyone in the Fire Department before he may use ABL. 4.RR.58:16–18. And the use of ABL has *never* been disapproved for Mr. Nicks. 4.RR.65:16–18.

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: (1) "he must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisor"; (2) he "is required to follow the City's Code of Conduct," and the City could terminate him from his employment with the City, (3) he engages in communications with other City employees, and (4) he is prohibited from "soliciting [political contributions] in uniform" or "delivering [political contribution] checks" while on ABL. Appellees' Br. at 53-55. The record,

again, contradicts the Defendants' claims that these are meaningful, indeed *any*, measures of control.

First, 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. 4.RR.64:1–4; 65:2–4. Indeed, he was not even required to return to duty when the City experienced its most devastating water crisis in years: the flooding of October 2018. *Id.* at 64:11–13.

Second, of course Mr. Nicks is "required to follow the City's Code of Conduct" and the City's personnel policies. Appellees' Br. at 53. 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 in Texas, because the City cannot hire him, remove him from his position, assign him duties, or monitor his performance. *See Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 263 (Tex. App.—Fort Worth 2003, pet. denied) (in determining whether someone is an employee under Texas law, courts will review whether the alleged employer "had the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule.").

And the record is abundantly clear that his daily employment activities are simply not monitored at all by the City. 4.RR.58:19–25; *see* 7.RR.451 ¶¶ 24–25. Whether Nicks can theoretically be fired by the City for a violation of policies that apply to every employee is immaterial, because unlike every other employee in the

City, Appellees' Br. at 55, *he cannot be fired if someone in the City was dissatisfied with his work performance*, assuming the City even knows what that performance is! 2:SCR.451 at 48:10–14.

Similarly, observing that Nicks may engage in voluntary communications with the City or take calls from City personnel, Appellees' Br. at 54, is not evidence of control. The Defendants are conflating *contact* with other employees with *control* by the City. Contact is not control. Indeed, such a proposition is absurd. This is tantamount to arguing that an attorney who has contact with opposing counsel, because they speak on the phone and have hearings and meetings together, controls the activities of the other lawyer. Or that the City controls the activities of a neighborhood association because it receives input from the association or goes to meetings with association members.

Finally, the "restrictions" on Nick's political activities, to the extent they exist at all, are hardly meaningful. Nicks purportedly cannot solicit political contributions in uniform or deliver campaign checks while on ABL. That's it! But he can, and does, meet with candidates, provide public endorsements for candidates, prepare political newsletters, make yard signs for political candidates, and lobby the City Council all while on paid ABL.[8] 4.RR.66:12–68:10. This is true even though City policy *expressly* prohibits the use of City resources for political activities.

[8] Defendants downplay the enormous dedication of taxpayer resources to the political activities of Nicks and the private organization he runs by contending that Nicks works "significantly more" than 40 hours a week and that his political activities are "volunteer" hours. Appellees' Br. at 19. Yet, this contention is contradicted

For example, the City of Austin Personnel Policies state, "All employees of the City shall refrain from using their influence publicly *in any way* regarding any candidate for elective City office." The policy goes on to prohibit supervisors from "participat[ing] or contribut[ing] money, labor, time, or other valuable thing to any person campaigning for a position on the City Council of the City of Austin." 7.RR.499–500. 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. Yet, as Chief Wolverton testified, Nicks is "excused" from the political activities policies that apply to every other employee because "a different standard" applies to Nicks. 4.RR.144:10–20.

The evidence plainly establishes that *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

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by Mr. Nicks'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." 2.SCR.469–70 at 120:16–121:8. By doing so, Nicks opined, " I think we [could] save the citizens a little bit of money." *Id.* 470 at 121:15–16. In any event, Nicks is on full-time release. That means all his hours are paid by taxpayers. And he plainly performs extensive political activities while on taxpayer-funded time. 4.RR.66:12–68:10. Mr. Nicks cannot just decide which hours are "work" hours and which are dedicated to politics. The reality is he is on the clock, receiving taxpayer-funded time, and engaging in extensive political activities. *Id.*

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. 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.

Use of ABL by "other Authorized Association Representatives" is "monitored by Nicks and members of the AFA's Executive Board." 7.RR.453 ¶ 51. During the time AFA members use ABL, Nicks and other AFA officers, rather than City management or other City personnel, "direct [their] activities." 2.SCR.456 at 68:1–9. Requests to use ABL are approved in the first instance by Nicks, and thereafter, the City approves 96.7 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 record thus 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 Gift Clause *requires* the City to 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. *Texas Mun. League*, 74 S.W.3d at 384 (government must maintain "public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment."). But that is not happening here.

IV. The Texas Citizens Participation Act Order Should Be Reversed.

This Court should reverse the district court's Order granting the AFA's Motion to Dismiss pursuant to the Texas Citizens Participation Act ("TCPA"). That order of dismissal is incompatible with the district court's later orders and with the AFA's intervention into the case after its own dismissal.

The TCPA was enacted to protect the exercise of First Amendment rights and "protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002.[9] The district court entered orders denying the City's Plea to the Jurisdiction, denying the City's Motion to Abate, and partially denying the City's and the AFA's Joint Motion for Summary Judgment, finding that a justiciable issue remained for trial on the merits. By doing so, the district court necessarily ruled that Pulliam and Wiley properly pled a *prima facie* Gift Clause claim against the City and that the State of Texas properly pled a *prima facie* Gift Clause claim against the City and against the AFA. Additionally, this Court held that the TCPA Order of Dismissal did not operate to dismiss Texas's claim against any party.

The text of the TCPA offers a moving party a single remedy: dismissal. Tex. Civ. Prac. & Rem. Code § 27.005(b). The AFA moved to be dismissed from the case and the district court granted its request. Then the AFA filed a Petition in Intervention in which it argued it was a necessary party to the case. (The district court disagreed by striking the AFA's intervention.) By later arguing its participation was

[9] Citations to the Texas Citizens Participation Act refer to the version of the Act in effect at the time of the referenced order of dismissal.

necessary for the case to proceed, the AFA waived the relief it sought and was granted by the district court. This Court should therefore reverse the TCPA order of dismissal and the associated sanctions and fee award.

A. Taxpayers Pulliam and Wiley properly pled a prima facie violation of the Gift Clause.

The TCPA provides that, a case can continue to be litigated if there is *prima facie* evidence for the claim, even if the defendant alleges that the case relates to its exercise of its statutorily-defined rights. Tex. Civ. Prac. & Rem. Code § 27.005(c).

After the AFA's TCPA motion was granted by the district court, Texas and Taxpayers appealed the order to this Court. CR.1404–06. On remand, the district court entered a clarifying order, stating that the TCPA dismissal order applied to *Taxpayer Plaintiffs* and was not intended to function as a ruling on Texas's Plea in Intervention. CR.1407–11. This Court then dismissed Taxpayers' appeal, effectively holding that Texas's claims against the AFA and the City were viable and Taxpayers' claims against the City were viable. In other words, there is a justiciable Gift Clause claim that remained.

The City then insisted that the AFA was a necessary party to the case, requesting the district court to "abate the action until such time as [Taxpayers] and [Texas] serve AFA with suit and name AFA as a party." CR.1900–06. The district court denied that motion, and by doing so, held that the AFA was not a necessary party, and that the case could continue to be litigated without the AFA's participation. CR.1942.

The City next proceeded to file a Plea to the Jurisdiction in which it claimed that collateral estoppel prevented Appellants from proceeding with their claims against the City. CR.1907–21. The district court denied the plea, once again ruling that Appellants could continue to litigate their claims. CR.1969.

Each of the aforementioned orders entered by the district court and this Court operate as implicit rulings that Taxpayers and Texas pled a *prima facie* case against the City and Texas pled a *prima facie* case against the City *and the AFA.* The law of the case principle applies when an appellate court has resolved a legal question in an earlier appeal, which will typically control the case throughout its later stages. *See, e.g., Transport Ins. Co. v. Employers Cas. Co*., 470 S.W.2d 757, 762 (Tex. Civ. App.—Dallas, 1971, writ ref. n.r.e.). Consequently, pursuant to the district court's and this Court's orders, Appellants stated a *prima facie* claim for violation of the Gift Clause and litigated that claim from commencement of the case to a trial on the merits.

B. AFA's intervention to defend against the same claim for which it sought dismissal operates as a waiver of its TCPA claim.

The AFA chose to intervene back into this lawsuit to defend the identical claim for which it earlier obtained dismissal as a party. CR.2236–42. In its Answer, the AFA ignores that Taxpayers and Texas challenge an identical provision in *this* contract as was challenged in the 2017 contract (because the 2017 contract expired and the City continued to engage in an unconstitutional expenditure of public funds). *See* CR.1412–1534, 1757–1882.

In its Amended Plea in Intervention, the AFA declared itself to be a "necessary and indispensable party" to the lawsuit and demanded to be a defendant. CR.2236–42. This position is irreconcilable claims in its TCPA Motion to Dismiss, that it was not a proper defendant and that being a defendant infringed upon its members' freedom of association. *See* CR.226–414. AFA's own intervention into the very lawsuit from which it had sought to be dismissed, demonstrates that its members' freedom of association was not inhibited by being a defendant.

The text of the TCPA provides that a court shall dismiss the "moving party" to a lawsuit if the "moving party" demonstrates to the court that the lawsuit is "based on or is in response to" the moving party defendant's exercise of its rights to free speech, the right to petition, or the right to association. Tex. Civ. Prac. & Rem. Code § 27.005(b). The unambiguous statutory language authorizes a single remedy: dismissal of the *moving party* from the case. It does not provide for dismissal of all claims in a lawsuit with multiple defendants, like this one.

Under the TCPA, the AFA must demonstrate by a preponderance of the evidence that it was sued in response to its exercise of its statutory rights. *Id.*; *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 845 (Tex. App.—Dallas 2015, pet. filed). But by joining the lawsuit voluntarily, the AFA has insisted that it is a "necessary and indispensable party," which cannot be simultaneously true if the AFA was named as retaliation for exercising rights protected by the TCPA. CR.2236–42.

The AFA's filings demonstrated that being a defendant did not infringe upon its members' rights. The district court and this Court necessarily found that Appellants pled a *prima facie* case. The identical claims at issue—that the AFA described

as meritless—went to trial on the merits. Therefore, this Court should reverse the erroneously granted TCPA Order of Dismissal.

C. The Sanctions Award was an Abuse of Discretion.

The TCPA's protections are specific to a moving party, not specific to claims. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b). Nevertheless, in its fee motion, the AFA argued that Taxpayers Pulliam and Wiley should be sanctioned to deter them from filing hypothetical lawsuits—cases they have not filed and that no evidence shows that they would or could file. *See* CR.2243–2415.

In its fee motion, the AFA directed the district court's attention to lawsuits filed by other people in other states to corroborate its request for sanctions. CR.2250–51. The AFA was not a party to any of those lawsuits, and neither were Appellants Pulliam or Wiley. Nor could they be, as Plaintiffs have standing in this case as Texas *taxpayers*. The TCPA allows a court to impose sanctions sufficient to "deter the party who brought the legal action from bringing similar actions described in this chapter." Tex. Civ. Prac. & Rem. Code § 27.009(a). Sanctions are thus inappropriate unless the record demonstrates that a specific party would subsequently file "similar" lawsuits. There is no evidence in the record that either Pulliam or Wiley will file any lawsuit against the AFA in the future. This Court should reverse the award of sanctions and fees or lower it to a nominal amount.

Conclusion

Based on the foregoing and for the reasons provided in Taxpayers' and Texas' Opening Brief, the trial court's decision should be reversed, including its award of attorney fees and sanctions under the TCPA against Taxpayers.

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