

No. 22-1149

---

**IN THE SUPREME COURT OF TEXAS**

---

ROGER BORGELT; MARK PULLIAM; JAY WILEY,  
*Petitioners,*

TEXAS,  
*Intervenor-Petitioner,*

v.

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

---

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

---

**REPLY IN SUPPORT OF PETITION FOR REVIEW**

---

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

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

*Attorneys for Plaintiffs/Taxpayer Petitioners*

## TABLE OF CONTENTS

	Page
Table of Contents .....	i
Index of Authorities .....	ii
I. The ABL provisions fail each test under the Gift Clause. ....	2
A. The City receives insufficient consideration for the \$1.25 million it spends on Release Time. ....	2
B. The Union’s use of release time predominantly benefits the Union. ..	5
C. The City exercises insufficient control over the use of release time. ..	7
II. The TCPA Order should be reversed. ....	9
Certificate of Compliance .....	12
Certificate of Service .....	12

## INDEX OF AUTHORITIES

### Cases

<i>Ariz. Ctr. Law in Pub. Int. v. Hassell</i> , 837 P.2d 158 (Ariz. App. 1991).....	5
<i>Bryant v. Cady</i> , 445 S.W.3d 815 (Tex. App.—Texarkana 2014) .....	5
<i>Edgewood Indep. Sch. Dist. v. Meno</i> , 917 S.W.2d 717 (Tex. 1995) .....	5
<i>Gilmore v. Gallego</i> , No. 1 CA-CV 22-0049, 2023 WL 2979302 (Ariz. App. Apr. 18, 2023) .....	10
<i>Hardin Cnty. v. Trunkline Gas Co.</i> , 330 F.2d 789 (5th Cir. 1964).....	1
<i>Janus v. AFSCME</i> , 138 S. Ct. 2448 (2018) .....	2, 3
<i>Schires v. Carlat</i> , 480 P.3d 639 (Ariz. 2021) .....	5
<i>Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n</i> , 74 S.W.3d 377 (Tex. 2002).....	1, 5, 6, 7, 9
<i>Wistuber v. Paradise Valley Unified Sch. Dist.</i> , 687 P.2d 354 (Ariz. 1984).....	10

### Statutes

Tex. Civ. Prac. & Rem. Code § 27.005(b).....	10
--	----

### Other Authorities

Jo Clifton, <i>Firefighters Say City Lawyers Unreasonably Stopped Arbitration</i> , Austin Monitor (Apr. 5, 2023).....	4
Nina Hernandez, <i>Contract Talks Getting Hot at AFD</i> , Austin Chron. (July 21, 2017) .....	3

The *legal* question in this case is whether the City can pay government employees full salaries out of taxpayer money to work full-time for a private labor organization. That's a "constitutional question[] of great ... import" on an issue of statewide significance, not just because of the \$1.25 million of public money being diverted to private use, but because the Constitution's prohibition on gifts of public funds "must be given full and vigorous support and application." *Hardin Cnty. v. Trunkline Gas Co.*, 330 F.2d 789, 791 (5th Cir. 1964).

The Respondents try to minimize the constitutional question and instead focus on portions of the factual record that are either undisputed or immaterial. The Constitution protects against this exact type of cronyism and taxpayer abuse, and the Court should grant review to provide clarity on the application of the Gift Clause to the subsidization of private union activities.

The Association Business Leave ("ABL" or "release time") provisions of the Collective Bargaining Agreement ("CBA") between the City and the Austin Firefighters' Association ("AFA" or "Union") fail all three prongs of the *conjunctive* test under the Gift Clause. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002) (setting out conjunctive test). The City does *not* receive sufficient, contractually obligatory consideration for the money it spends on release time; release time predominantly

benefits AFA, not City taxpayers; and the City exercises no meaningful control over the practice.

**I. The ABL provisions fail each test under the Gift Clause.**

**A. The City receives insufficient consideration for the \$1.25 million it spends on Release Time.**

Respondents argue that the City receives adequate consideration because the costs of release time are paid in exchange for the “performance of employment duties...provided [to the] public employer.” Opp’n at 18. This is incorrect.

First, as explained in the Petition, under the CBA’s plain terms, release time (unlike other forms of compensation) is not allocated to individual employee compensation in exchange for their services. Instead it’s earmarked and set aside for use by AFA, which can use these hours for “any lawful *[AFA] business* activities consistent with the *[AFA]’s purposes.*” 7.RR.24 (emphasis added). ABL employees are paid by the public, but don’t go about public business; they go about AFA business.

Second, as amici explain, release time also cannot be compensation to all Austin firefighters because, if it were, that would violate the First Amendment, because that would mean employees are being forced to fund AFA’s political and other expressive activities. That would contradict *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). If, as Respondents contend, Opp’n at 18, release time constitutes “benefits and other compensation” to firefighters, whether they belong

to the union or not, then the CBA is forcing nonunion employees to finance AFA's expressive activities out of their pay—without showing, as *Janus* requires, that those employees affirmatively consented to this beforehand. Release time therefore cannot (legally) be part of employee compensation.

For the CBA's release time provisions to be legal, therefore, they must be expenditures that satisfy the Gift Clause. But they aren't. They're a subsidy to AFA.

Respondents' sole remaining argument consists of a speculative list of indirect benefits that AFA supposedly provides the City in exchange for release time, such as “achieving and maintaining harmonious relations” and the “orderly adjustment of [employee] grievances.” Opp'n at 6. Those arguments fail for at least three reasons.

**First**, there's no evidence that the presence of taxpayer-funded union employees actually enhances “labor peace.” Indeed, the opposite may be true. For example, when this CBA was first negotiated, AFA's President, while on full-time release, accused the City of “bad faith bargaining” when negotiations nearly broke down. Nina Hernandez, *Contract Talks Getting Hot at AFD*, Austin Chron. (July 21, 2017)<sup>1</sup> At this very moment, the City and AFA negotiators, including AFA's

---

<sup>1</sup> <https://www.austinchronicle.com/news/2017-07-21/contract-talks-getting-hot-at-afd/>.

President, are *at an impasse* in attempting to ratify a successor CBA, and have been for nearly a year—even though release time has been operating throughout. Jo Clifton, *Firefighters Say City Lawyers Unreasonably Stopped Arbitration*, Austin Monitor (Apr. 5, 2023)<sup>2</sup>

Even more remarkably, AFA’s President used release time to represent *himself* when *he* was subject to a disciplinary investigation for making improper comments about City management. 7.RR.451 ¶ 31; 4:RR:102:7–16.

As for release time being used to “adjust grievances,” only *five hours* out of a total of 8,714.50—*less than 0.06 percent!*—of ABL time has been used by Authorized Association Representatives for that purpose. 7.RR.113–15, 448.

In short, if the City is supposed to be getting “labor peace” in exchange for release time, that doesn’t seem to be working.

**Second**, neither AFA, nor the released employees themselves, are *obligated* to perform *any* function for, or provide *any* service to, the City under the terms of the CBA or any other policy. Thus, the laundry list of “services” purportedly performed by AFA’s release time employees (such as participating in the “cadet hiring oversight committee,”<sup>3</sup> or “com[ing] together once a month [to] talk about issues,” Opp’n at 7–9), are not only unimpressive, but are simply not lawful

---

<sup>2</sup> <https://www.austinmonitor.com/stories/2023/04/firefighters-say-city-lawyers-unreasonably-stopped-arbitration/>.

<sup>3</sup> This also likely serves AFA’s private interest in recruitment.

consideration. *Texas Mun. League*, 74 S.W.3d at 383. Since AFA is not *obligated* to perform these functions, they aren't consideration. *See Bryant v. Cady*, 445 S.W.3d 815, 820 (Tex. App.—Texarkana 2014) (“Lack of consideration occurs when the contract ... does not impose obligations on both parties.”)..

In short, “labor peace” and “avoiding grievances” are the sort of speculative and indirect “benefits” that cannot count as consideration under the Gift Clause. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (To be constitutional, a transfer of public funds to a private entity must include some “clear public benefit received in return.”); *Schires v. Carlat*, 480 P.3d 639, 645 ¶ 16 (Ariz. 2021) (““Anticipated indirect benefit[s]” are “valueless” under the consideration prong of the Gift Clause test. (citation omitted)). Even if they did count as consideration, they do not remotely equate in value to the \$1.25 million the City spends to support Union activities on release time.

**B. The Union’s use of release time predominantly benefits the Union.**

Instead of trying to show discrete, concrete contractually obligatory consideration that AFA gives in exchange for release time, Respondents assert that “[t]he ‘missions of the [Austin Fire Department] and AFA overlap’” to some unspecified extent. Opp’n at 7 (citation omitted). But a court in a Gift Clause case is supposed to focus on “[t]he reality of the transaction.” *Ariz. Ctr. Law in Pub. Int. v. Hassell*, 837 P.2d 158, 170 (Ariz. App. 1991). And the reality of this transaction



is that AFA is a private organization that exists to pursue—indeed, its officers have a fiduciary duty to pursue—the *private* interests of its members, *not* the public interest.

To whatever extent AFA’s interests “overlap” with the City’s, those are incidental, not *predominant*, uses of release time. The Gift Clause requires that a government expenditure’s “*predominant purpose* is to accomplish a public purpose.” *Tex. Municipal League*, 74 S.W.3d at 384 (emphasis added). Yet the record shows not only that release time is primarily used for the Union’s own purposes, but that, according to the Assistant Fire Chief, it is frequently used for purposes with respect to which the City’s and AFA’s interests are “diametrically opposed.” 2.SCR:511 at 37:8. The question isn’t whether ABL *could* be, or is *sometimes* used in a manner consistent with the public interest. It’s whether ABL’s *predominant* purpose is to achieve a public purpose.

This Court need go no further than the contract itself to see that ABL’s predominant purpose is to advance AFA’s interests. That agreement actually mandates that ABL be used “for any lawful [Union] business activities *consistent with the [Union]’s purposes*.” 2.SCR.36; 7.RR.451 ¶ 17 (emphasis added). Thus, even if Respondents are right that the public may sometimes receive incidental benefits from ABL, *see* Opp’n at 7–9, those incidental effects don’t show that ABL’s *predominant* purpose is to serve the public’s purposes.

If 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 purposes directly as part of their official duties. The use of a complicated workaround, rather than the straightforward employer-employee relationship, reveals that ABL is *not* designed to further a public purpose.<sup>4</sup>

The record supports that conclusion. AFA's President, Bob Nicks, devotes "all" his time to working on behalf of AFA, not the City. 4.RR.57:17–20. For other union members using ABL, 96.4% of ABL time was spent for Union recruitment, attending Union meetings, and engaging in the undefined and unaccounted-for category of "other [Union] business." 7.RR.113–15, 448. Whatever vague, undefined other uses of ABL the AFA might make, it is clear that the *predominant* purpose of ABL is to benefit a private entity: AFA.

**C. The City exercises insufficient control over the use of release time.**

When the government gives a private entity taxpayer money, it must exercise sufficient public control over how that money is spent in order "to protect the public's investment." *Tex. Mun. League*, 74 S.W.3d at 384. That is not

---

<sup>4</sup> Respondents downplay the enormous dedication of taxpayer resources to the political activities of AFA President, Bob Nicks, and the private organization he runs by contending that he works "significantly more" than 40 hours a week. But Nicks cannot just decide which hours are "work" hours and which are dedicated to politics. In reality, he is on the clock, receiving taxpayer-funded time, and engaging in extensive political activities during that time. 4.RR.66:12–68:10.

occurring here. The City claims it exercises control over AFA's President's use of ABL because: (1) he "must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisors"; (2) he "is required to follow the City's Code of Conduct," and "personnel policies;" (3) the City could terminate him from employment, and (4) he engages in communications with other City employees. Opp'n at 10–12. But these are not meaningful or serious measures of control.

**First**, as to Nick reporting to the Fire Department when directed for an emergency or special project, that has *never happened* in his nearly ten years as AFA President. 4.RR.64:1–4; 65:2–4.

**Second**, obviously Nicks must follow the City's Code of Conduct and personnel policies. Opp'n at 10. He is, after all, 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. The City cannot hire him, remove him from his position, assign him duties, or monitor his performance. Whether he can theoretically be fired by the City for violating policies that apply to every employee is immaterial, because unlike every other employee in the City, *he cannot be fired if someone in the City is dissatisfied with his work performance*, assuming the City even knows what that performance is!

**Third**, the fact that Nicks may engage in voluntary communications with the City, or take calls from City personnel, is not evidence of control. Respondents are conflating *contact* with other employees with *control* by the City. Contact is not control. Such a proposition is tantamount to arguing that the City controls a neighborhood association’s activities because it receives input from the association or goes to meetings with association members. That is absurd.

The same absence of control exists with respect to “other Authorized Association Representatives,” who are monitored and directed by AFA officers, not by the City. 7.RR.453 ¶ 51; 2.SCR.456 at 68:1–9. Requests to use ABL are approved in the first instance by Nicks, and thereafter, the City approves 99 percent of all requests that are initially approved by AFA. 7.RR.452–53 ¶¶ 45–46; 2.SCR.546–68; 2.SCR.517 at 61:16–22.

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. *Texas Mun. League*, 74 S.W.3d at 384. That is not happening here.

## **II. The TCPA Order should be reversed.**

This Court should reverse the Order dismissing pursuant to the Texas Citizens Participation Act (“TCPA”) because that Order is incompatible with the

district court's later orders, *see* Petition at 16–17, and with AFA's intervention back into the case after its own dismissal.

The TCPA offers a moving party a single remedy: dismissal. Tex. Civ. Prac. & Rem. Code § 27.005(b). AFA moved to be dismissed from this case, and the district court granted that request. CR.1392. Then AFA filed a Petition in Intervention in which it argued it was a *necessary party* to the case.<sup>5</sup> CR.2225–31. By later arguing its participation was necessary for the case to proceed, AFA waived the relief it sought and was granted by the district court. It cannot claim to be wrongfully named as a defendant and also insist on participating as a defendant.

Petitioners explained (Pet. 15–18) why the TCPA Order was not only erroneous but also a threat to legitimate public-interest litigation. Weeks ago, an Arizona court put the point well. Such an award, it said:

would be contrary to public policy in this case because it would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials. Where aggrieved citizens, in good-faith, seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be awarded. Courts exist to hear such cases; we should encourage resolution of constitutional arguments in court rather than on the streets.

*Gilmore v. Gallego*, No. 1 CA-CV 22-0049, 2023 WL 2979302, at \*9 ¶ 43 (Ariz. App. Apr. 18, 2023) (quoting *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 358 (Ariz. 1984)).

---

<sup>5</sup> The district court disagreed by striking AFA's intervention. CR.3804.

The fact that the Texas Legislature later recognized the inherent problems with the TCPA by amending that law supports the position that this Court should reverse the TCPA Order of dismissal and the associated sanctions and fee award that serve as a direct threat to meritorious public interest litigation seeking to vindicate important constitutional rights.

/s/ Robert Henneke

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

/s/ Jonathan Riches

Jonathan Riches  
*Appearing Pro Hac Vice*  
litigation@goldwaterinstitute.org

*Attorneys for Plaintiffs/Taxpayer Petitioners*

## CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word-count limitations in Tex. R. App. P. 9.4(i)(2)(D) because it contains 2,393 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1).

/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 23rd day of May, 2023.

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

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

Matt Bachop, Esq.  
DEATS, DURST & OWEN, PLLC  
707 W. 34<sup>th</sup> St.  
Austin, Texas 78705  
cdeats@ddollaw.com  
mbachop@ddollaw.com  
*Attorneys for Defendant*  
*Austin Firefighters Assoc., Local 975*

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

/s/ Robert Henneke  
ROBERT HENNEKE



### Automated Certificate of eService

This automated certificate of service was created by the eFiling system.  
The filer served this document via email generated by the eFiling system  
on the date and to the persons listed below:

Robert Henneke on behalf of Robert Henneke  
Bar No. 24046058  
rhenneke@texaspolicy.com  
Envelope ID: 75911081  
Filing Code Description: Reply Brief  
Filing Description: Reply in Support of Petition for Review  
Status as of 5/23/2023 12:10 PM CST

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Robert Earl Henneke	24046058	rhenneke@texaspolicy.com	5/23/2023 12:04:54 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	5/23/2023 12:04:54 PM	SENT
Ari Cuenin		ari.cuenin@oag.texas.gov	5/23/2023 12:04:54 PM	SENT
Sara Baumgardner		sara.baumgardner@oag.texas.gov	5/23/2023 12:04:54 PM	SENT
Carrie Patino		carrie.patino@oag.texas.gov	5/23/2023 12:04:54 PM	SENT
Will Thompson		will.thompson@oag.texas.gov	5/23/2023 12:04:54 PM	SENT

Associated Case Party: Mark Pulliam

Name	BarNumber	Email	TimestampSubmitted	Status
Yvonne Simental		ysimental@texaspolicy.com	5/23/2023 12:04:54 PM	SENT
Paul Matula	13234354	paul.matula@austintexas.gov	5/23/2023 12:04:54 PM	SENT
Kelly Resech		kelly.resech@austintexas.gov	5/23/2023 12:04:54 PM	SENT
Jonathan Riches		jriches@goldwaterinstitute.org	5/23/2023 12:04:54 PM	SENT
John W. Stewart		jws@mnelaborlaw.com	5/23/2023 12:04:54 PM	SENT
Deidre Carter-Briscoe		deidre.carter-briscoe@austintexas.gov	5/23/2023 12:04:54 PM	SENT
Diana J. Nobile		djn@mnelaborlaw.com	5/23/2023 12:04:54 PM	SENT
B. Craig Deats		cdeats@ddollaw.com	5/23/2023 12:04:54 PM	SENT
Matt Bachop		mbachop@ddollaw.com	5/23/2023 12:04:54 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	5/23/2023 12:04:54 PM	SENT

Associated Case Party: Roger Borgelt

Name	BarNumber	Email	TimestampSubmitted	Status
Robert Henneke		rhenneke@texaspolicy.com	5/23/2023 12:04:54 PM	SENT

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system.  
The filer served this document via email generated by the eFiling system  
on the date and to the persons listed below:

Robert Henneke on behalf of Robert Henneke  
Bar No. 24046058  
rhenneke@texaspolicy.com  
Envelope ID: 75911081  
Filing Code Description: Reply Brief  
Filing Description: Reply in Support of Petition for Review  
Status as of 5/23/2023 12:10 PM CST

Associated Case Party: Roger Borgelt

Yvonne Simental		ysimental@texaspolicy.com	5/23/2023 12:04:54 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	5/23/2023 12:04:54 PM	SENT
Chance DWeldon		cweldon@texaspolicy.com	5/23/2023 12:04:54 PM	SENT

Associated Case Party: Jay Wiley

Name	BarNumber	Email	TimestampSubmitted	Status
Tony McDonald		tony@tonymcdonald.com	5/23/2023 12:04:54 PM	SENT

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

Name	BarNumber	Email	TimestampSubmitted	Status
David Watkins		d Watkins@jenkinswatkins.com	5/23/2023 12:04:54 PM	SENT
William Messenger		wlm@nrtw.org	5/23/2023 12:04:54 PM	SENT
David Watkins		d Watkins@jenkinswatkins.com	5/23/2023 12:04:54 PM	SENT
William L.Messenger		wlm@nrtw.org	5/23/2023 12:04:54 PM	SENT

Associated Case Party: Austin Firefighters Association

Name	BarNumber	Email	TimestampSubmitted	Status
John WStewart		jws@mnelaborlaw.com	5/23/2023 12:04:54 PM	SENT

Associated Case Party: City of Austin

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Matula		paul.matula@austintexas.gov	5/23/2023 12:04:54 PM	SENT

### **Automated Certificate of eService**

This automated certificate of service was created by the eFiling system.  
The filer served this document via email generated by the eFiling system  
on the date and to the persons listed below:

Robert Henneke on behalf of Robert Henneke  
Bar No. 24046058  
rhenneke@texaspolicy.com  
Envelope ID: 75911081  
Filing Code Description: Reply Brief  
Filing Description: Reply in Support of Petition for Review  
Status as of 5/23/2023 12:10 PM CST

Associated Case Party: Cato Institute

<b>Name</b>	<b>BarNumber</b>	<b>Email</b>	<b>TimestampSubmitted</b>	<b>Status</b>
Nicholas DeBenedetto		ndebenedetto@cato.org	5/23/2023 12:04:54 PM	SENT
Isaiah McKinney		imckinney@cato.org	5/23/2023 12:04:54 PM	SENT

Associated Case Party: Freedom Foundation

<b>Name</b>	<b>BarNumber</b>	<b>Email</b>	<b>TimestampSubmitted</b>	<b>Status</b>
Shella Alcabes		salcabes@freedomfoundation.com	5/23/2023 12:04:54 PM	SENT